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STATE OF MICHIGAN

IN THE SUPREME COURT

In re ESTATE OF JEROME E. SIZICK.

JULIE K. GRIES, Personal Representative of the ESTATE OF JEROME E. SIZICK,
Petitioner-Appellant,

v

DEPARTMENT OF HEALTH & HUMAN SERVICES,
Respondent-Appellee.
_____/

SC: 166921
COA: 364321
Saginaw PC: 21-141789-PO

SUPPLEMENTAL BRIEF OF *AMICUS CURIAE*
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 RESPONSE TO THE COURT'S JANUARY 24, 2025 ORDER

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Michigan Medicaid policy in the Bridges Eligibility Manual (BEM) and the Bridges Administrative Manual (BAM) is posted online at: https://dhhs.michigan.gov.olmweb.ex/html/.

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STATEMENT OF QUESTIONS INVOLVED

In its January 24, 2025 order, the Court invited the amici curiae who appeared at the application stage to file a supplemental brief that answers three questions. The scope of this supplemental brief is limited to answering the three questions.

(1) Whether this appeal has been rendered moot as a result of the death of Jerome E. Sizick?

Based on the supplemental briefs filed on October 11, 2024,

The Appellant and the amici curiae say "No".

The Appellee says "Yes".

(2) If so, whether an exception to the mootness doctrine is applicable here?

Based on the supplemental briefs filed on October 11, 2024,

The Appellant and the amici curiae say "Yes".

The Appellee did not answer this question.

(3) If the appeal is not moot or if a mootness exception applies, whether *In re Estate of Schroeder*, 335 Mich App 107 (2020), wrongly held that a probate court, in evaluating a petition for a protective order of spousal support under MCL 700.5401, cannot consider whether Medicaid benefits will be available to a protected individual in measuring his or her needs prior to a Medicaid eligibility determination?

Based on the brief in support of its application for leave to appeal dated April 10, 2024, the Appellant says "Yes."

Based on the brief filed by the amici curiae on May 22, 2024 in support of their motion to file a brief in support of the application for leave to appeal, they say "Yes."

This question has not been addressed in the briefs filed to date by the Appellee.

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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ARGUMENT

I. The death of Jerome E. Sizick does not render this appeal moot.

A. Background

The Saginaw County Probate Court first issued a protective order in this case on June 21, 2021. It directed that all of Jerome Sizick's assets and $2,318 of his monthly income to be transferred to his spouse, Janet Sizick.[1]

The Appellee, Michigan Department of Health and Human Services ("MDHHS", "the Department" or "the agency"), filed an appearance and participated in the protective order proceeding.[2] It did not seek a stay of the protective order from the probate court.[3]

On July 12, 2021, the Department filed an appeal of the protective order in the Michigan Court of Appeals. It did not seek a stay of the probate court protective order from the Court of Appeals.[4]

After the protective order was issued, Jerome Sizick transferred his assets to his spouse, Janet Sizick. On August 6, 2021, he applied for Medicaid. The application sought Medicaid coverage of Jerome's nursing home costs at St. Francis Nursing Home of Saginaw starting June 1, 2021.[5]

MDHHS policy in Bridges Administrative Manual (BAM) 115, page 15 and the federal

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[1] Appendix 4 of Appellant's Application for Leave to Appeal.

[2] Appellant's Application for Leave to Appeal, page 5.

[3] Appellant's Application for Leave to Appeal, page 6.

[4] Michigan Court of Appeals Online Case Information for Case Number 357785, *In Re Estate of Jerome E. Sizick*.

[5] Exhibit 18 in the remand hearing before the Saginaw County Probate Court ordered in *Sizick I*.

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Medicaid regulation at 42 CFR 435.912(c)(3)(ii) require the agency to make an eligibility determination within 45 days of the date a Medicaid application is filed. At the direction of the agency's Bureau of Legal Affairs, the local eligibility specialist at the Saginaw County Department of Health and Human Services ("SCDHHS") was instructed to put the processing of Jerome's Medicaid application on hold because it would "mess up our appeal".[6]

The Court of Appeals decided the Department's appeal in *In Re Estate of Jerome E. Sizick*, *(Sizick I)* unpublished opinion of the Michigan Court of Appeals, issued May 26, 2022 (Docket No. 357785).

The SCDHHS then denied Jerome's Medicaid application on June 8, 2022 -- more than 260 days after the deadline in the agency's policy and the governing federal regulations for making a decision on the application.[7]

Jerome Sizick filed two requests for hearing with the MDHHS to challenge the agency's denial of his Medicaid application. The Michigan Office of Administrative Hearings and Rules (MOAHR), the state agency responsible for conducting administrative hearings for the MDHHS, has consolidated those cases[8] and is holding them in abeyance pending the outcome of this appeal before the Court.

Jerome E. Sizick died on April 21, 2024.

A probate estate was started in the Saginaw County Probate Court on May 2, 2024 and was assigned Case Number 24-145794-DE. Julie Gries was named personal representative of the estate.

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[6] APPENDIX 13 of Appellant's Application for Leave to Appeal.

[7] Appellant's Application for Leave to Appeal, page 7.

[8] MOAHR Docket Nos. 22-004133 and 23-001743.

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On June 5, 2024, this Court issued an order granting a motion to substitute Julie K. Gries, Personal Representative of the Estate of Jerome E. Sizick, as the named petitioner-appellant in this appeal.

Julie K. Gries, in her capacity as personal representative, is representing the estate of Jerome E. Sizick in the administrative hearings pending before MOAHR.

B. Michigan case law on mootness.

"A moot case 'seeks to get a judgment on a pretended controversy, when in reality there is none, . . . or a judgement upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy.'" *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 580 (2020) quoting *Amway v Grand Rapids R Co*, 211 Mich 592, 610 (1920). A case is moot when it involves "nothing but abstract questions of law, which do not rest upon existing facts or rights." *Gildemeister v Linsday*, 212 Mich 299, 302 (1920). "It is well established that a court will not decide moot issues". *People v Richmond*, 486 Mich 29, 34 (2010). "[T]he burden of demonstrating mootness is a 'heavy one.'" *MGM Grand Detroit, LLC v Community Coalition for Empowerment, Inc*, 465 Mich 303, 306 (2001), quoting *Los Angeles v David*, 440 US 625, 631 (1979).

C. Analysis

The issue in this appeal is the propriety of the Michigan Court of Appeals decision to vacate to protective order of the Saginaw Probate Court which transferred part of Jerome Sizick's income and all of his assets to his spouse, Janet Sizick, for her support. That decision affects Jerome's eligibility for Medicaid to help pay for the cost of his nursing home care at the St. Francis Nursing Home of Saginaw. If this Court reverses the Court of Appeals decision and reinstates the protective order, that will affect MOAHR's adjudication of the requests for hearing

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now before it. It may mean the Medicaid program is responsible for paying part of Jerome's nursing home costs starting in June 2021. This is a live controversy that rests on the existing facts and the assertion of Jerome's rights under EPIC, federal Medicaid law and state Medicaid policy.

If the protective order is reinstated and MOAHR decides the Department's eligibility decisions on Jerome's Medicaid application are wrong that will affect MOAHR's decision on whether and how Medicaid must reimburse St. Francis Nursing Home of Saginaw for the cost of Jerome's care. It will also affect Janet because she had to pay her own money for some of Jerome's nursing home expenses during the time MDHHS unlawfully refused to process his Medicaid application. If the result of the pending administrative hearing before MOAHR is that St. Francis is reimbursed by Medicaid for Jerome's care costs, the nursing home will then reimburse Janet for the funds she should have been able to retain as part of her Medicaid community spouse resource allowance if Jerome's Medicaid application had been processed timely and accurately.

To be clear, the Court should not venture into making a determination of Jerome's eligibility for Medicaid. Instead, it should render judgment on whether the protective order issued by the Saginaw County probate Court should be reinstated. That, together with the Department's Medicaid eligibility policies and federal Medicaid law will provide MOAHR the information it needs in the consolidated administrative hearings to determine whether Jerome qualified for Medicaid coverage of part of his nursing home costs.

II. The exception to the mootness doctrine for an issue of public significance that is likely to recur, yet may evade judicial review is applicable here.

If the Court finds this case is moot, an exception to the general rule that courts do not review moot cases is applicable to this appeal. That exception is when an issue "is one of public

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significance that is likely to recur, yet may evade judicial review." *Richmond*, 486 Mich at 37.

The issue presented in this appeal is of public significance because it affects married couples in Michigan with a spouse who is over 65 or is an adult under age 65 with a disability. The decision in *Schroeder* impinges on their ability to use the Department's policy and federal law to qualify for the Medicaid program to help pay for long term care services. Federal Medicaid law requires state Medicaid agencies to honor a court order of support in evaluating the amount of assets a couple may retain and qualify for Medicaid. The Court of Appeals decisions in *Sizick I*, and *In Re Estate of Jerome E. Sizick, (Sizick II)*, unpublished opinion of the Court of Appeals, issued January 18,2024 (Docket No. 364321) rely on *Schroeder* for the proposition that a probate court may not issue a protective order of spousal support until *after* an institutionalized spouse ("IS") qualifies for Medicaid. The practical effect of these decisions is to block Michiganders from exercising their right under 42 USC 1396r-5(f)(2)(A)(iv) and (f)(3) and the Department's policy in BEM 402, page 10, to seek a protective order of spousal support from a local probate court to increase the amount of assets that may be retained by an IS's spouse (the "community spouse" of "CS") to meet her or his demonstrated living needs. Because *Schroeder* bars probate courts from considering a petition for a protective order until after an IS applies for Medicaid and qualifies, a married couple has no choice but to spend down their financial resources to the default amount specified in the Departments's policy -- even if it can be shown with convincing evidence that amount of resources does not meet the living needs of the community spouse. Once those resources are spent down, seeking a protective order is pointless. There is no way to preserve them for the support of the community spouse because they are gone. As a result, the policy in the Department's BEM 402, page 10 which acknowledges that a court order of support supercedes the agency's normal Medicaid asset allowance for a couple is

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nullified. The federal law's express instruction at 42 USC 1396r-5(f)(2)(A)(iv) and (f)(3) that the amount of court ordered support replaces the community spouse resource allowance described elsewhere in the statute is abrogated. Michiganders lose the benefit of these provisions of federal Medicaid law and the Department's Medicaid policy.

This issue is also of public significance because the Court of Appeals has established a standard that is binding on local probate courts. It effectively precludes Michigan citizens from exercising their rights under 42 USC 1396r-5(f)(2)(A)(iv) and (f)(3) and BEM 402, page 10 to seek a protective order of spousal support from the probate court to avoid impoverishment of a community spouse. This makes no sense when one considers that avoidance of spousal impoverishment was one of Congress's goals in enacting the Medicare Catastrophic Coverage Act of 1988[9] of which the federal statute is a part.

This issue is likely to recur because every day, scores of married couples in Michigan are confronted with the need of one spouse for care in a nursing home. Most people do not have long term care insurance to pay this cost. Coverage under Medicare is limited to a maximum of 100 days. Most people pay privately for a period of time, but that is very expensive. According to the Department, the average cost of nursing home care in 2025 is $11,842 per month.[10] At that rate, these costs wipe out the average person's life savings very quickly.

The other option available for paying for these costs is the Medicaid program. Medicaid is the primary payer of long term care in Michigan and in the United States. As the amici curiae can attest, when married couples face the real prospect of one spouse needing nursing home care, some seek the counsel of an elder law attorney to learn their lawful options for securing the

[9] 42 USC 1396r-5.

[10] BEM 405, page 15.

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financial security of the community spouse while allowing the spouse in need of institutional care to qualify for Medicaid. Unfortunately, the decisions in *Sizick I*, *Sizick II* and *Schroeder* arbitrarily prevent these couples from meeting their goals. Even if they can present compelling evidence to a probate court that there is a legitimate need for a protective order that allows an amount of spousal support that exceeds what is otherwise available under Medicaid law and policy, the couple will be counseled that even though the Department's policy and federal law directs the Department to honor a probate court order of spousal support, the Court of Appeals has prohibited probate courts from issuing such an order before a person qualifies for Medicaid. This means a married couple is stuck with the protected spousal amount of assets set by the Department's Medicaid policy -- even though it can be proven with convincing evidence it is inadequate to meet the living needs of the community spouse. This issue will evade judicial review because most clients are not willing to invest in a strategy for qualifying of Medicaid they know will not work and will require time and resources to pursue in litigation. *Schroeder* tells the public even if federal law and MDHHS policy grant a married couple the right to seek a court order as an alternative remedy for preserving enough of their assets to provide needed support for the community spouse, the probate court is closed for business when it comes to filing a petition for protective order to secure that remedy. Because *Schroeder* conditions the issuance of a protective order on a married couple first having applied and qualified for Medicaid, no one will seek a protective order because doing so cannot yield any benefit. Once a couple's financial resources are spent down to qualify for Medicaid, they are lost forever and cannot be preserved for the support of the community spouse. All the married couples who could derive benefit from the rights conferred by 42 USC 1396r-5(f)(2)(A)(iv) and (f)(3) the Department's Medicaid policy in BEM 402, page 10, will never exercise them and this issue will forever evade judicial review.

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III. *Schroeder* wrongly held that a probate court, in evaluating a petition for a protective order of spousal support under MCL 700.5401, cannot consider whether Medicaid benefits will be available to a protected individual in measuring his or her needs prior to a Medicaid eligibility determination.

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 *Schroeder*. 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 Catastrophic Coverage Act of 1988 and in Michigan's Medicaid policy designed to provide the community spouse the means to continue living at home. Without that benefit the IS 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 living needs of the CS is spent down. That does not serve the best interests of the IS and it causes the loss of marital financial resources that otherwise would be preserved and used to enable the community spouse to continue living at home.

It is worth noting that the case information on the Michigan Court of Appeals website for *Schroeder* shows that both of the appellees in that consolidated appeal were self-represented. Neither of them submitted briefs to the court. The Court's sole exposition to the facts and the law before it was through the briefs filed by the Department of Attorney General on behalf of the Michigan Department of Health and Human Services. That Court was not informed by the analysis in this brief of how EPIC, the *Vansach* decision and Medicaid law and policy intersect. The absence of that perspective may have contributed to how the Court decided those cases.

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A. Background

Sizick II wholly relied on the *Schroeder* decision to support its conclusion that it is an abuse of discretion for a probate court to issue a protective order of spousal support under MCL 700.5401 that transfers assets owned by an IS for the support of a CS before the IS qualifies for Medicaid.

In both *Sizick* and *Schroeder*, the Court of Appeals based their analyses and conclusions on the *Vansach* decision. However, *Vansach* was different. It involved a protective order that affected that amount of an IS's income that should be transferred to a CS for her support *after* the IS had already qualified for Medicaid. In footnote 13 of that decision the Court said, in pertinent part:

> "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 § 13964-5(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 . . . what is needed for support, or other attempts to use protective proceedings, before the initial Medicaid determination for Medicaid-planning purposes . . . In the circumstances before us, Medicaid determinations had already been made and the petitions involved request for additional 'support.'".

There is an important difference between a court order that prescribes how an IS's income is to be used for the support of a community spouse and a court order that transfers the marital assets for the support of a community spouse. The former is not time sensitive. Regardless of whether a CS petitions the probate court for a protective order of income support before a Medicaid application is filed or after the IS qualifies for Medicaid, federal Medicaid law and Michigan Medicaid policy require the Department to adjust the community spouse income allowance when the protective order is presented to the agency.

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In contrast, a court order that transfers marital assets for the support of a community spouse is time sensitive. It must be issued before a protected individual applies for Medicaid or during the Medicaid application process to affect the community spouse resource allowance.[11] Otherwise, the protected individual's Medicaid eligibility will be determined according to the default asset limit in Michigan Medicaid policy. A couple ends up spending down marital assets that otherwise could have been preserved for the support of the CS by a protective order.

Both *Sizick* and *Schroeder* 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* an IS qualifies for the Medicaid program. The bright line those cases 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 affecting 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 practical effect of those rulings is to divest the probate court of jurisdiction to issue protective orders that transfer assets from an IS for the support of a CS if the IS has not yet qualified for Medicaid. That result does not comport with the observation in footnote 9 of the *Vansach* decision in which the Court said:

> "To be clear, the probate court's authority in this context extends to entering support orders under EPIC . . . the practical implications of entering a support

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

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> order of support under EPIC in favor of a community spouse do not divest a probate court of jurisdiction to consider a request for a protective order under MCL 700.5402. Indeed, as discussed, § 1396r-5(d)(5) contemplates the use of court support orders for calculation of the CSMIA."[12]

Likewise, 42 USC 1396r-5(f)(2)(A)(iv) and (f)(3) and MDHHS policy in BEM 402, page 10 contemplate the use of court orders of support for calculation of the community spouse resource allowance.

The *Schroeder* decision arbitrarily bars 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, page 10 which require the amount of resources transferred under a court order of support to be used as the protected spousal amount in the eligibility determination. For the Sizicks, this meant the lack of a protective order caused more than $100,000 of their marital assets that should have been set aside for the CS's support to be counted by the Department in the Jerome's Medicaid eligibility determination. That resulted in his disqualification from Medicaid.

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

Schroeder and *Sizick* reached their conclusion it is an abuse of discretion for a probate court to issue an order of spousal support unless an IS has first qualified for the Medicaid program based on the *Schroeder* panel's interpretation of *Vansach*. However, neither *Sizick* nor *Schroeder* considered 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 CS's efforts to use such an order to obtain a higher

[12] The "CSMIA" is the community spouse monthly income allowance.

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community spouse income allowance from MDHHS. 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 *Schroeder*, i.e., that 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 an IS has first qualified for Medicaid.

In *Vansach*, the Department's second challenge to the probate court's jurisdiction to issue a protective order of spousal support in the context of Medicaid eligibility 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 §1396r-5." *Vansach*, 324 Mich App at 390. The Court found no merit in this argument. 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

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> 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.

Vansach does not supports the premise of *Schroeder,* i.e., that 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 addition, there is nothing in the spousal impoverishment provisions in federal Medicaid law or in Michigan's Medicaid policy limiting the application of protective orders of spousal support to scenarios in which an IS has already qualified for Medicaid.

C. *Schroeder's* finding that 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 is erroneous.

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." *Schroeder,* 335 Mich App at 122.

Why is that "problematic"?

> "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 circumstance, there must actually be Medicaid determinations regarding eligibility and patient-pay amounts." *Schroeder,* 335 Mich App at 123.

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." *Schroeder,* 335 Mich App at 123.

These excerpts from *Schroeder* reveal the Court's misunderstanding of how Medicaid works.

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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 IS's income to be used for the support of the CS and the amount of the marital assets to be transferred for the support of the CS are the same numbers the Department uses to determine eligibility. Once a probate court evaluates the evidence in the protective order proceeding, weighs the needs of both spouses and issues an order setting the amount of support to be provided by the IS to the CS, it knows the numbers in the order will be used by MDHHS to establish Medicaid income and asset eligibility for the married couple 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 "on the basis of Medicaid-related circumstances". The needs and circumstances of both spouses as they actually exist under Medicaid are known by the court when the protective order is issued.

The following example illustrates why it is appropriate for a probate court to entertain a petition for a protective order of spousal support before an IS qualifies for Medicaid:

- Two married couples live in their respective homes in Lansing, Michigan.
- One couple is Betty and Bill. The other couple is Jane and John.
- Betty and Bill own assets of $300,000. Jane and John own assets of $100,000.
- Both couples have roughly the same amount of monthly income and household expenses.
- Bill and John enter nursing home care in February 2025.
- Betty and Jane each consult with an elder law attorney to learn their options for paying for their spouses' nursing home care.
- Betty's attorney advises her that based on the $300,000 in assets the couple owned as of the day Bill entered nursing home care Medicaid will allow her a community spouse resource allowance of $150,000. That is the default protected spousal amount in MDHHS policy in BEM 402, page 9. In addition, Bill will have an asset allowance of $9,660 per BEM 400, page 8. Their combined asset allowance is $159,660. The

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remaining $140,340 must be spent down before Bill can qualify for Medicaid. Betty decides that the combination of her monthly income together with the $150,000 is enough to pay her living needs at home. She is satisfied with how Medicaid will provide Bill coverage of his nursing home costs.

- Jane's attorney advises her that based on the $100,000 in assets the couple owned as of the day John entered nursing home care, Medicaid will allow her a community spouse resource allowance of $50,000. This is the default protected spousal amount in MDHHS policy in BEM 402, page 9. In addition, Bill will have an asset allowance of $9,660 per BEM 400, page 8. Their combined asset allowance is $59,660. The remaining $40,340 must be spent down before John can qualify for Medicaid. Jane decides that the combination of her monthly income and the $50,000 in assets she may retain will not be enough to pay her living needs at home far enough into the future. She is not satisfied with how Medicaid will provide coverage of John's nursing home costs.

Under *Schroeder*, Jane is blocked from seeking a protective order from the probate court before John applies for Medicaid that would allow more of the couple's assets to be transferred to her for her support so that like Betty, she has sufficient financial resources to continue paying for her living needs at home. *Schroeder's* conclusion that a probate court cannot consider Jane's circumstances until John has qualified for Medicaid makes no sense. By that time it is too late to provide any relief and is useless. It needlessly deprives Jane of the protections against spousal impoverishment in MDHHS policy and federal Medicaid law that she needs.

Schroeder states:

> "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.

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 an IS 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 wrong. As noted above,

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Vansach expressed no opinion on protective proceedings used in the Medicaid context before an initial Medicaid determination.

The "Medicaid-related circumstances" in *Vansach* were different from the ones in *Schroeder*. In the former, the Court was presented with patient pay amounts which were already established by MDHHS for the institutionalized 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 IS and the needs of the CS would be met by the protective order. *Vansach* was also different from *Schroeder* because the institutionalized spouses 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 *Schroeder* were petitions for protective orders submitted to the probate courts to facilitate Medicaid eligibility for the institutionalized 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 significant portion of the couple's countable assets. The loss of those assets would compromise the ability of the community spouses to meet their future living needs.

Because the support the petitioners sought in *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*. *Schroeder* was wrongly decided because it arbitrarily precludes 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

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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.

The Court's misunderstanding of Medicaid in *Schroeder* creates a Gordian knot. On the one hand the reason a CS 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 meet the CS's living needs 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 after the nursing home spouse qualifies for Medicaid, thereby precluding Michigan residents from acquiring the benefits conferred on them by federal Medicaid law and MDHHS Medicaid policy.

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.

What *Schroeder* failed to recognize is the reversal of the protective order in that case caused the very problem the Court identifies. Because the institutionalized spouses did not have protective orders to support their applications for Medicaid, they did not qualify and had to "pay considerably more money 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

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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 before a Medicaid application is filed to secure a larger community spouse resource allowance for the benefit of the CS thereby facilitating Medicaid eligibility for the IS. In *Schroeder*, the protective order was the mechanism which enables the horse to pull the cart over the finish line of Medicaid eligibility. Without one, there's no point in hitching the horse to the cart in the first place because you're going nowhere.

D. Summary and conclusion.

According to the most recent U.S. Census Bureau statistics, 19.2% of Michigan's population or just more than 1.9 million Michiganders are over age 65. 10.3% of the state's population is under age 65 with a disability or just more than one million Michiganders.[13] Increased age and disability correlate with a higher dependence on long-term care services. For those married couples in which one spouse is unable to manage his or her 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 the other spouse's support. Probate court orders of spousal support in these proceedings are also a means by which these individuals who need long term care services 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

[13] U.S. Census Bureau, QuickFacts for Michigan, July 1, 2024 estimates at *https://www.census.gov/quickfacts/fact/table/MI,US/PST045224.*

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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 into 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. As the example of Betty and Bill and Jane and John shows, they are clearly erroneous because they rest on the false premise that a probate court cannot determine the respective needs of a protected individual in nursing home care and the CS until the IS qualifies for Medicaid. Both decisions cause material injustice by blocking married Michiganders from using protective order proceedings as a lawful means of achieving their financial security.

IV. Relief.

The ELDRS and MI-NAELA respectfully request that this Court issue an order:

1. Finding that the issue in this case is not moot.
2. If the Court finds the issue in this case is moot, find the exception to the mootness doctrine for an issue of public significance that is likely to recur, yet may evade judicial review is applicable here.
3. Find that *Schroeder* was wrongly decided and reverse that case's ruling that the qualification of an IS for Medicaid is a precondition for a probate court to issue a protective order of spousal support.

4. Grant the Appellant's application for leave to appeal and the relief requested therein.

Amici Curiae
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