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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

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent-Appellee.

Supreme Court No. 166921

Court of Appeals No. 364321

Saginaw County Probate Court No. 21-141789-PO

MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES' SUPPLEMENTAL BRIEF

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COUNTER- STATEMENT OF QUESTIONS PRESENTED

1. An issue becomes moot upon an event that renders it impossible for a court to grant relief or if a judgment cannot have a practical legal effect on the existing controversy. After the Michigan Court of Appeals vacated the probate court's protective order of spousal support that is the basis for this application for leave to appeal, Jerome E. Sizick died, leaving no mechanism for his wife to obtain a spousal support order or otherwise seek redress in any state court. Did Jerome's death render this appeal moot?

   Petitioner-Appellant's answer: No.

   Respondent-Appellee's answer: Yes.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: Did not answer.

2. There may be an exception to the mootness doctrine if the case presents an issue of public significance that is likely to reoccur and likely to evade judicial review. The issue in Appellant's Application for Leave to Appeal is whether the protective order of spousal support meets the requirements of MCL 700.5401(3), to be a valid order. The issue is limited to the application of facts in this matter making it unlikely to reoccur. Does the issue that is before the Court meet the exception to the mootness doctrine?

   Petitioner-Appellant's answer: Yes.

   Respondent-Appellee's answer: No.

   Trial court's answer: Did not answer.

   Court of Appeals' answer: Did not answer.

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3. *In re Estate of Schroeder*, 335, Mich App 107 (2020), 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. *Schroeder* is part of a body of case law that includes *In re Estate of Vansach*, 324 Mich App 371, 400 (2018), and that prevents the impoverishment of an institutionalized spouse as a loophole to qualify for Medicaid benefits. Should *Schroeder* be overturned?

Petitioner-Appellant's answer:	Yes.
Respondent-Appellee's answer:	No.
Trial court's answer:	Did not answer.
Court of Appeals' answer:	No.

Controlling authority: MCL 700.5401(3)*; Barrow v City of Detroit Election Comm,* 305 Mich App 649, 659 (2014); *In re Estate of Vansach*, 324 Mich App 371, 400 (2018); and *In re Estate of Schroeder*, 335 Mich App 107, 117 (2020).

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STATUTES INVOLVED

MCL 700.5401 – Protective proceedings

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

***

(3) The court may appoint a conservator or make another protective order in relation to an individual's estate and affairs if the court determines both of the following:

(a) The individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance.

(b) The individual has property that will be wasted or dissipated unless proper management is provided, or money is needed for the individual's support, care, and welfare or for those entitled to the individual's support and that protection is necessary to obtain or provide money.

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

MCL 700.1106(y) – Definitions; M to P

As used in this act:

***

(y) "Protected individual" means a minor or other individual for whom a conservator has been appointed or other protective order has been made as provided in part 4 of article V.

MCL 700.1102 – Applicability of definitions.

The definitions contained in this part apply throughout this act unless the context requires otherwise or unless a term defined elsewhere in this act is applicable to a specific article, part, or section.

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INTRODUCTION

Despite Petitioner-Appellant's, the Estate[1] of Jerome E. Sizick's, repeated attempts to argue that this case is a Medicaid benefits case, the single issue on appeal is whether the Probate Protective Order of Spousal Support meets the requirements of the Estates and Protective Individuals Code (EPIC), at MCL 700.5401(3), to be a valid order. The Michigan Court of Appeals determined that it did not and vacated the order.

This Court now poses three questions to the parties: (1) whether this appeal has been rendered moot as a result of the death of Jerome E. Sizick[2]; (2) if so, whether an exception to the mootness doctrine is applicable here; and (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(3), cannot consider whether Medicaid benefits will be available to a protected individual in measuring his or her needs prior to a Medicaid eligibility determination.

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[1] The Department hereinafter refers to Jerome Sizick's personal representative, Julie Gries, and surviving spouse, Janet, as "the Estate" for ease of reference.

[2] The Department interprets the Court's use of the term "appeal" to include not only a decision on the application, but also any implications on the lower court proceedings on remand—all of which have practical legal effects on whether there is an existing controversy. The Department acknowledges that this Court's decision on the application is not immediately moot based on Jerome Sizick's death, but rather, it is the subsequent proceedings in the appeal on remand to the probate court that ultimately render this appeal moot.

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Answering the first question, the appeal is moot. But due to the complex procedural posture of this case, a nuanced analysis is required. If this Court denies the application or grants the application and affirms the decision of the Michigan Court of Appeals, the appeal is rendered moot on remand to the probate court. This is because Jerome Sizick has now passed, and his surviving spouse, Janet Sizick, cannot obtain a spousal support order under MCL 700.5401(3). Alternatively, if this Court grants the application and reverses the decision of the Michigan Court of Appeals, the Estate would be left with a spousal support order that has no legal effect and any argument that it does is improper.

As to the second question, no mootness exception applies here. There is no public significance, as the issue before the Court is narrow: whether the protective order of spousal support entered under MCL 700.5401(3) is valid. This case is specific to the facts at issue here, and since no couple petitions the probate court for a protective order of spousal support with the exact same facts – the issue is unlikely to reoccur. The Estate can only argue that this case has significance to Medicaid planners and their clients with too many assets to qualify, and for whom Congress did not intend Medicaid benefits.

As to the third question, the decision in this case was correct and in accord with all the other cases directly on point for this issue, including the published *Schroeder* case. The jurisprudence of the Court of Appeals regarding protective orders of spousal support, including *Schroeder*, is in line with federal law. At bottom, Medicaid is a program for low-income individuals, and there are specific

federal requirements for income and asset limits in order to qualify. Overturning *Schroeder* would essentially allow individuals with any income level, including millionaires, to potentially obtain a protective order of spousal support and let the taxpayers pay the nursing home bill. Here, the Estate continues to argue that an order should enter completely impoverishing Jerome Sizick's Estate so that the Estate does not have to pay the nursing home bill – the taxpayers should be the ones responsible to pay it.

This Court should deny the application for leave to appeal.

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COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

The protected person in this case, Jerome Sizick, was born March 23, 1939. Janet Sizick was his community spouse and had a power of attorney dated 5/10/2021. Jerome resided at St. Francis nursing home.

On January 18, 2024, the Michigan Court of Appeals issued its second decision in this matter. See *In re Estate of Sizick,* unpublished per curiam opinion of the Michigan Court of Appeals, issued May 26, 2022 (Docket No. 357785) (*Sizick I*) (Appellee's Answer, App'x 2 at 020-026); *In re Est of Sizick,* unpublished per curiam opinion of the Michigan Court of Appeals, issued January 18, 2024 (Docket No. 364321) (*Sizick II*) (Appellee's Answer, App'x 1 at 010-016). *Sizick II* affirmed *Sizick I* relating to MCL 700.5401(3)(a) and again held that the probate court abused its discretion by applying the wrong legal framework to MCL 700.5401(3)(b) in issuing a protective order of spousal support. *Sizick II* also held that the court abused its discretion in a nunc pro tunc order dating back to 2021. (*Sizick II*, App'x 1 at 010-016.) The *Sizick II* court vacated those portions of the probate court's orders and remanded the case for further proceedings. (*Sizick II,* App'x 1 at 019.)

An application for leave to appeal to the Michigan Supreme Court does not by itself stay the decision of the Michigan Court of Appeals or the probate court. However, MCR 7.215(F)(1)(a) prevents the Michigan Court of Appeals' judgment from becoming effective pending the disposition of the instant application.[3] Thus,

[3] In this case, a stay was not separately entered by the Michigan Court of Appeals pursuant to MCR 7.209(E)(4).

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the Michigan Court of Appeals' decision and judgment vacating and remanding for further proceedings would not become effective until the instant application is decided. *See id.*

On April 10, 2024, Jerome Sizick filed his application for leave to appeal in this Court. (Appellant's App.) On May 8, 2024, the Department filed its answer. (Appellee's Ans.) On May 29, 2024, counsel for Sizick filed a motion for substitution, informing the Court that Jerome Sizick died on April 21, 2024, and seeking to substitute Julie Gries, personal representative of Jerome Sizick's Estate, as the appellant in this matter. (Mot at 2-3.) On June 5, 2024, this Court granted the motion. (6/5/2024 Order at 1.)

On September 13, 2024, this Court directed the parties to provide supplemental briefing on the issue of whether the appeal has been rendered moot as a result of Jerome Sizick's death. (9/13/2024 Order at 1.) On January 24, 2025, this Court directed the parties to provide additional supplemental briefs requesting that the parties answer: (1) whether the case is moot; (2) whether an exception to the mootness doctrine is applicable; and (3) if the holding of *In re Estate of Schroeder*, 335 Mich App 107 (2020), was proper. (01/24/2025 Order at 1.) The Estate's application for leave to appeal remains pending.

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STANDARD OF REVIEW

A probate court's factual findings are reviewed for clear error and its "dispositional rulings, including a decision to enter a protective order of spousal support, are reviewed for an abuse of discretion." *In re Est of Vansach*, 324 Mich App 371, 385 (2018). Questions of statutory interpretation are reviewed de novo. *In re Guardianship of Redd*, 321 Mich App 398, 404 (2017). The Court also reviews de novo questions of law, such as mootness. *TM v MZ*, 501 Mich 312, 315 (2018).

ARGUMENT

I. Not only does Jerome Sizick's death render this appeal moot upon remand to the probate court, but the ultimate relief sought by the Estate is so speculative that a live controversy no longer exists.

The Michigan Court of Appeals has twice remanded this case to the probate court to correct the probate court's repetitive error in applying MCL 700.5401(3)(b). The death of Jerome Sizick during the pendency of his application for leave to appeal in this Court raises the question whether his death renders the appeal moot. The answer is yes, but the rationale turns on how this Court decides the application.

The Department maintains that leave to appeal should be denied because the probate court abused its discretion in granting the motion for a protective order of spousal support, and the Michigan Court of Appeals did not clearly err in reversing that decision.

On the issue of mootness, if this Court denies the application or grants the application but affirms the Michigan Court of Appeals' decision—vacating the

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probate court's protective orders of spousal support and remanding to the probate court—the appeal is moot on remand because the probate court cannot issue a protective order of spousal support regarding Jerome Sizick after his death. Now that Jerome Sizick has passed, under the plain language of MCL 700.5401(3)(b), he is no longer an individual who requires protection, and his surviving spouse, Janet, cannot obtain a protective order of spousal support based on the assets of his estate. See MCL 700.5401(3) (applies only to an "individual" needing protection, not a deceased person); *Detroit v Redford Twp*, 253 Mich 453, 456 (1931) ("Express mention in a statute of one thing implies the exclusion of other similar things.").

On the other hand, if this Court grants the application for leave to appeal and reverses the Michigan Court of Appeals' decision, the previously issued protective order of spousal support would be deemed valid. However, even if the spousal support order was valid, the order as issued by the probate court does not *guarantee* that Jerome Sizick would be eligible for Medicaid, which is the goal of the Estate through this appeal. The Estate's Medicaid eligibility matters are separate from the instant issue regarding the application of MCL 700.5401(3)(b) to Janet Sizick's request for a spousal support order. The valid protective order of spousal support is different than the relief ultimately sought in the Medicaid eligibility determination hearings. Thus, issuing a decision in advance here about a particular right regarding Medicaid Eligibility before it is actually asserted or contested cannot have any practical effect on an existing controversy. As a result, there is no live controversy, and the appeal is moot.

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A. The appeal is moot if this Court denies the application *or* grants the application and affirms the decision of the Michigan Court of Appeals because, now that Jerome Sizick has passed, the Estate can no longer obtain a protective order of spousal support.

If the application for leave to appeal is denied, or alternatively, the application is granted and the Michigan Court of Appeals' decision is ultimately affirmed by this Court, the protective orders of spousal support that were previously entered while Jerome Sizick was alive would be vacated and the proceedings would be remanded to the probate court.

An issue is deemed moot when an event occurs that renders it impossible for a reviewing court to grant relief. See *Barrow,* 305 Mich App at 659; *League of Women Voters*, 506 Mich at 580. Here, upon remand to the probate court, the appeal becomes moot. This is because even applying the proper standard under MCL 700.5401(3)(b), the probate court cannot issue a spousal support order for a deceased person or the estate's assets.

Under MCL 700.5401(3), a court may determine that financial support is necessary for a spouse from an individual that "is unable to manage property and business affairs" and "has property that will be wasted." This inquiry requires not only consideration of the requesting spouse's needs and resources, but the *individual's* needs and circumstances as well. See MCL 700.5408; *Vansach*, 324 Mich App at 395–396. Accordingly, protective orders of spousal support are designed for individuals that need protection while they are alive. Under MCL 700.5401(3), the probate court is required to make a distinct finding as to whether the individual is unable to manage property because of a variety of listed

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conditions/afflictions. Such a determination cannot logically be made as to a deceased person. Thus, since Jerome Sizick's death, he is no longer an "individual" needing protection under the plain language of MCL 700.5401(3).

The plain language of the meaning of "individual" must be applied here. Provisions of a statute must be read in the context of the entire statute to produce a harmonious and consistent whole. *Weems v Chrysler Corp,* 448 Mich 679, 699–700 (1995). Further, the omission of a provision in one part of a statute, which is included elsewhere in the statute, should be construed as intentional. *Farrington v Total Petroleum, Inc,* 442 Mich 201, 210 (1993); *Detroit*, 253 Mich at 456 ("Express mention in a statute of one thing implies the exclusion of other similar things"); *Donajkowski v Alpena Power Co*, 460 Mich 243, 261 (1999) ("Michigan courts determine the Legislature's intent from its *words*, not from its silence."). A court's role in construing statutory language is to discern the Legislature's intent, which may reasonably be inferred from the statute's words. *Sanford v Michigan*, 506 Mich 10, 14-15 (2020). This Court's analysis must focus on the express language of the statute because it offers the most reliable evidence of legislative intent. *Id.* at 15. "When the statutory language is clear and unambiguous, judicial construction is limited to enforcement of the statute as written." *Id.*

Further, a "[p]rotected individual" is specifically defined in the Estates and EPIC as "a minor or other individual for whom a conservator has been appointed or other protective order has been made as provided in part 4 of article V." MCL 700.1106(y); MCL 700.1102 (applicability of EPIC definitions to the entire Act).

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Had the Legislature intended a deceased person, like Jerome Sizick, to be included as a protected individual, it certainly could have expressly set forth its intent, as it did elsewhere in the statute. See c.f. MCL 700.3101 *et seq.*; (Article III, Probate of Wills and Administration); MCL 700.1104(b) (elsewhere in EPIC defining estate as "property of the decedent, trust or other person whose affairs are subject to this act as the property is originally constituted and as it exists throughout administration"). But it did not, and instead, explicitly used the term protected individual.

Here, without more, EPIC's limitation that a protective order of spousal support may be issued only as to an individual and not as a deceased person or an estate, is clearly an exclusive or exhaustive list. There is no basis for applying this statute to Jerome now that he has passed. The Estate is bound by—and in this case limited by— the statute's plain meaning.

This analysis makes even more sense when one considers the implications regarding the analysis required under MCL 700.5401(3)(b). Not only is a protective order of spousal support unavailable for a deceased person, but the relevant inquiry under MCL 700.5401(3)(b) is impossible upon Jerome Sizick's death. In its most recent decision, the Michigan Court of Appeals explicitly instructed the probate court to use *current* information about the value of Jerome Sizick's assets and his interest in those assets in considering whether a protective order of spousal support should be issued. See *Sizick II*; (App'x 1 at 010-016). But because Jerome is now deceased, there is no such information regarding his assets. Rather, all that exists

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is Jerome Sizick's *estate*; he does not have any current assets, and the estate must be administered by the personal representative, not through his surviving spouse in a protective order of spousal support. (Motion for Substitution, Register's Statement); see MCL 700.5431 ("Upon termination [of a conservatorship], title to the estate property passes to the formerly protected individual or to successors subject to the provision in the order for expenses of administration and to directions for the conservator to execute appropriate instruments to evidence the transfer."). This renders any analysis under MCL 700.5401(3)(b) entirely unworkable.

Said another way, Jerome Sizick has no assets; his assets have now passed to the estate to be administered by his personal representative. Requiring such an inquiry would involve delving into the estate administration post-death, which is not the aim of MCL 700.5401(3)(b)—particularly when MCL 700.5401(3)(b) does not provide for such circumstances and there are separate statutes dedicated to estate administration and estate recovery. To find otherwise would make a protective order of spousal support less a matter of transferring assets and instead convert the inquiry into guesswork as to future estate administration.

The Estate does not address the issue of mootness if the case is remanded to the probate court, likely because it cannot argue around the plain language provided for in EPIC as outlined above. The Estate focuses only on the possibility that the Court of Appeals' decision in *Sizick II* is overturned. Furthermore, the Estate's failure to brief the mootness issue as to a possible remand constitutes an abandonment of that argument. See *Mich Environmental Council v Mich PSC (In*

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re Detroit Edison Co), 311 Mich App 204, 213 (2015), citing *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 626 – 627 (2008) ("An appellant's failure to properly address the merits of an argument constitutes the abandonment of an issue.").

At bottom, since there is no meaningful relief that any court can provide (because even if this case is remanded to the probate court, a protective order of spousal support can no longer be considered, let alone issue), the relief sought is impossible. See *Barrow,* 305 Mich App at 659; *League of Women Voters*, 506 Mich at 580. Thus, the case is moot.

B. Even if this Court grants the application and reverses the Michigan Court of Appeals' decision, the ultimate relief sought by the Estate is entirely speculative.

The next question is whether the appeal is also moot if this Court reverses the Michigan Court of Appeals' decision and upholds the probate court's orders. The answer is also yes—not necessarily because of Jerome Sizick's passing but based on the speculative relief sought by the Estate as to a Medicaid eligibility determination.

"An issue is moot if an event has occurred that renders it impossible for the court to grant relief. An issue is also moot when a judgment, if entered, cannot for any reason have a practical legal effect on the existing controversy." *Barrow v City of Detroit Election Comm,* 305 Mich App 649, 659 (2014) (quotation marks and citation omitted); see also *League of Women Voters of Mich v Secretary of State*, 506 Mich 561, 580 (2020) (quotation marks and citation omitted), quoting *Amway v Grand Rapids R Co*, 211 Mich 592, 610 (1920). *League of Women Voters*, 506 Mich 561, held that the case was moot because issuing a decision in advance about a

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particular right before it was actually asserted or contested cannot have any practical effect on an existing controversy. *Id.* at 582. The Court further reasoned that any decision would only instruct possible outcomes in the future and that there was nothing at stake in the present controversy. *Id.* at 582- 583.

The underlying issue in the Application for Leave to Appeal in this matter is a narrow one — whether the Michigan Court of Appeals properly vacated the protective order of spousal support because the probate court failed to apply the appropriate legal framework to MCL 700.5401(3)(b). As pointed out above in Argument I.A., since Jerome Sizick passed away, he is no longer in need of a protective order as defined under EPIC. See MCL 700.5401(3). Therefore, if the Court grants the application and leave to appeal and ultimately overturns the decision of the Court of Appeals, then Jerome Sizick's Estate would be left with a protective order of spousal support that has no practical legal effect on the existing controversy, making the case moot. See *Barrow,* 305 Mich App at 659; *League of Women Voters*, 506 Mich at 580 – 584.

The Estate argues in its supplemental brief that the appeal is not moot because the decision here may affect Jerome Sizick's eligibility for Medicaid. (Appellant's Supp Br, pp 2-3.) That argument fails because of the holding and reasoning in *League of Women Voters*, 506 Mich 561. This instant case involves the same scenario as found in the *League of Women Voters* where the case was moot because the Court found that issuing a decision in advance about a particular right before it was actually asserted or contested cannot have any practical effect on an

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existing controversy. *Id.* at 582. What the Estate is actually requesting here is that this Court make a finding about Jerome Sizick's Medicaid eligibility which is a request for the Court to determine a particular right before it is actually contested. This is not a Medicaid case, as there is no Medicaid eligibility decision at issue here. The Estate has two Medicaid eligibility cases pending with the Michigan Office of Administrative Hearings and Rules (MOAHR) regarding the Estate's eligibility for Medicaid. See MOAHR Docket Nos. 22-004133 and 23-001743. Those matters are separate from the instant issue regarding the application of MCL 700.5401(3)(b) to Janet Sizick's request for a spousal support order. It should not be lost in the Estate's attempted conflation of the issues that the valid protective order of spousal support is different than the relief ultimately sought through the MOAHR proceedings: a Medicaid eligibility determination. Since the Estate is asking this Court to make a decision regarding Medicaid Eligibility, an issue that cannot be asserted here, the case is moot because there is no live controversy.

To put this another way, even if the Estate obtains all the relief it seeks in its application for leave to appeal, at *most* all that the Estate can offer is the remote *possibility* of a certain outcome in the future based on an entirely separate determination of Medicaid eligibility held in an entirely separate case. A live controversy is not demonstrated by speculative concerns that *may* arise from one party's *possible* relief available at some point in the future. See *League of Women Voters,* 506 Mich at 584. Even assuming for the sake of argument that the claim of error regarding the Michigan Court of Appeals is meritorious, that issue presents

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nothing but abstract questions of law and fact that are entirely separate from the parties' existing legal rights pertaining to the validity of the probate court's protective order of spousal support.

Thus, this appeal is moot, and this Court should decline to consider it further.

II. There is no applicable exception to the mootness doctrine here.

The only exception to the mootness doctrine that the Estate asserts in its supplemental brief is that this case presents an issue of public significance that is likely to reoccur and also likely to evade judicial review. (Appellant's Supp Br, pp 5-7.) Although public significance and likelihood of recurrence but evading review create an exception to mootness, see *Contesti v Attorney General,* 164 Mich App 271, 278 (1987) (citations omitted), that exception is not applicable here.

This case does not have broad public significance. Although the Estate would have this Court believe there is a wider issue at play here, this is a case about whether there is a legal, statutory, or factual basis to show whether the Estate met the statutory requirements of MCL 700.5401(3)(b). The *Sizick II* opinion did not rule on a Medicaid issue. Rather, the opinion is the Court's thorough explanation of its exhaustive review of the specific facts and the record in this case to ultimately find that the record demonstrates that the needs and circumstance of *both* spouses had not been considered as required by MCL 700.5401(3). The spousal support petition here was filed by one couple, and any decision by appellate courts in this matter relates only to whether this couple met their burden to establish all the elements of MCL 700.5401(3).

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What the Estate, as well as Amici, are actually arguing is that this is a case of public significance because it is of interest to the Medicaid planners and their clients that have too many assets to qualify for public benefits. But Congress did not intend for individuals with income and assets over the established thresholds to qualify for Medicaid. See *Hegadorn v Dept of Human Servs Dir*, 503 Mich 231, 249 (2019). The Estate and Amici would like for probate courts to write protective orders of spousal support, without review of needs and regardless of how much money petitioners have, in order for individuals to more easily get around Medicaid eligibility requirements.

However, Medicaid is intended for the truly needy who would otherwise go without medical care. *Harris v McRae*, 448 US 297, 301 (1980). Congress has already protected community spouses in the Medicare Catastrophic Coverage Act of 1988 (codified at 42 USC 1396r-5). *Wis Dep't of Health & Family Servs v Blumer*, 534 US 473, 480 (2002). Currently, a community spouse is permitted to keep up to $154,140.00 in countable assets, as well as the homestead, a vehicle, all personal and household items, prepaid funeral and burial plans, and certain insurance policies including annuities of any value. Department Bridges Eligibility Manual 402 - Special MA Asset Rules. The community spouse can also keep all of his or her own income and a portion of the institutionalized spouse's income, to raise the community spouse's income to $3,853.50 per month. Thus, the Estate and Amici's argument that this is a case of public significance—because they would like a different outcome—is misplaced.

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The Estate also argues that this case is an issue of public significance because *Sizick I* and *Sizick II* relied on *Schroeder* in its reasoning. (Appellant's Supp Br, p 6.) But, as argued in detail below, *Schroeder* is based in law and follows precedent established by the Michigan Court of Appeals, and its holding is sound and should not be overturned. The cases interpreting MCL 700.5401(3) does not stop a community spouse from petitioning for a protective order of spousal support either before or after an institutionalized spouse applies for Medicaid. All the jurisprudence does is require that the plain language of MCL 700.5401(3) is followed – and that the needs of both spouses are considered before an order is issued.

Not only is this not a case of public significance, but this issue is also unlikely to reoccur. Each individual who petitions for a protective order of spousal support will avail themselves to the probate court with different facts regarding assets, income, and needs. Those specific facts regarding each couple will be applied in each case to MCL 700.5401(3). It is unlikely that any case will have the same facts as the case here. Furthermore, just because another petitioner *may* bring insufficient evidence to the hearing regarding the needs of the protective spouse like what occurred in *Sizick I* and *Sizick II*, "a possibility that an issue will recur is not sufficient." *T&V Assoc v Dir of HHS*, ___ Mich ___, *4 (November 1, 2024) (finding that a possibility that an issue will reoccur will not suffice when analyzing the mootness exception).

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Lastly, this case does not meet the mootness exception because it is unlikely that future cases will evade judicial review – future petitioners will have the same path to appeal as in this case, and any such appeals will be based on the specific facts of their case as applied to MCL 700.5401(3).

Since no mootness exception applies here, this Court should decline to grant the Estate's Application for Leave to Appeal.

III. The holding of *In re Estate of Schroeder*, 335 Mich App 107 (2020) should be upheld.

In re Estate of Schroeder should be upheld because it is part of a well-reasoned line of published cases that interpret MCL 700.5401(3) and fits within the point of state and federal Medicaid law and policy—to provide benefits to low-income individuals. S*chroder* is consistent with both the statutory framework and the jurisprudence regarding MCL 700.5401(3), and the Estate's arguments for why *Schroeder* should be overturned fail.

A. The statutory framework and jurisprudence regarding MCL 700.5401(3) confirm the *Schroeder* holding was proper.

To provide context to the *Schroeder* decision, MCL 700.5401(3) is part of EPIC. EPIC is a comprehensive and long-standing body of law that, among other things, controls the management, protection, and distribution of estates for those who cannot manage their own financial affairs. MCL 700.1201; MCL 700.1302. EPIC governs issues related to the administration of estates of decedents and protected persons, like the protective order of spousal support in this case. MCL 700.1201; MCL 700.1302. The probate court has exclusive jurisdiction over these matters. MCL 700.1302.

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The language of MCL 700.5401 *et seq*. is clear: it is intended to assist individuals in need of the court's protection and to safeguard their interests. Although the Legislature has provided some security for other family members, the goal and central purpose of the statute is to help individuals in need of protection to preserve their property for their own needs and to enhance *their* quality of life. MCL 700.5407(1). The statute does not seek the financial enrichment of family members.

Even though EPIC provides for a protective order of spousal support, EPIC does *not* control or make Medicaid decisions. Nowhere in EPIC is Medicaid even mentioned, although certain financial arrangements—including some made under EPIC statutes, like the protective order of spousal support at issue in this case—may be considered by the Department when making a Medicaid eligibility determination.

Furthermore, the protective order of spousal support provided for in MCL 700.5401(3) is not a guarantee of Medicaid eligibility. Instead, Title XIX of the Social Security Act (SSA), otherwise known as the Medicaid Act, provides for how Medicaid eligibility is determined. 42 USC § 1396r-5 gives clear directives for calculations of assets and income for eligibility and benefits. Medicaid is means-tested, and there are certain income limits and values of assets that an individual needs to have in order to qualify. *Id*. The SSA fashioned two separate sections to provide guidance on calculations for support orders such as the protective order of spousal support at issue here. 42 USC § 1396r-5(f)(3), for asset eligibility, uses "the

amount transferred pursuant to such order." The applicant must report and document the amounts transferred before the Department can calculate the Protected Spousal Amount (PSA) to determine asset eligibility. The income calculation, however, uses the specific amount of monthly income as ordered by the court in the order, but only if it is higher than the amount otherwise calculated under policy. 42 USC § 1396r-5(d)(5). Thus, although it is possible under 42 USC 1395r-5 to increase the PSA by the amount of assets transferred by the institutionalized spouse to the community spouse or increase the community spouse's income pursuant to court order, it is not a guarantee of Medicaid eligibility.

The Court of Appeals first addressed MCL 700.5401(3) in the seminal case *In re Estate of Vansach*, 324 Mich App 371 (2018). In *Vansach*, the Court of Appeals addressed two different probate court orders that awarded the community spouse 100% of the institutionalized spouse's monthly income, leaving the institutionalized spouse destitute. *Id*. at 399. The court noted that "Medicaid, 'with all of its complicated rules and regulations, has also become a legal quagmire that has resulted in the use of several 'loopholes' taken advantage of by wealthier individuals to obtain government-paid long-term care they otherwise could afford." *Id*. at 379, quoting *Mackey v Dep't of Human Servs*, 289 Mich App 688, 693—694 (2010). The court ultimately held that "EPIC does not give probate courts unfettered discretion to enter an order allowing the community spouse to maintain his or her current lifestyle without regard to the institutionalized spouse's needs and patient-pay obligations." *Id*. at 401-402. The holding requires the needs of both the petitioner

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and the institutionalized spouse to be evaluated when a protective order of spousal support issues. *Id.*

Schroeder applied that holding of *Vansach* when reviewing two protective orders of spousal support issued under MCL 700.5401(3). 335 Mich App at 123. In *Schroeder*, unlike in *Vansach*, the petitions for the support orders were filed before applications for Medicaid were submitted for the institutionalized spouse. *Id.* at 112. The *Schroeder* Court reviewed orders from the probate court that assumed that the institutionalized spouses would qualify for Medicaid and their needs could be met through potentially obtaining those benefits. *Id.* at 121-122. *Schroeder* found that, "in assessing the "need" for money for a person's support and care under MCL 700.5401(3)(b) on the basis of Medicaid-related circumstances, there must actually be Medicaid determinations regarding eligibility and patient pay amounts." *Id.* at 123. Thus, "*Schroeder* … stands for the rather unremarkable proposition that, when assessing an institutionalized spouse's needs related to MCL 700.5401(3)(b), the probate court must consider those needs as they are." *Sizick II* (App'x 1 at 010-013). The *Schroeder* Court continued the jurisprudence that the institutionalized spouse's needs must be considered when entering a protective order of spousal support.

The holding of *Vansach* and *Schroeder* follow the plain language of MCL 700.5401 and the intent of the Medicaid program. First, both cases align with the meaning of MCL 700.5401. As noted above, the language of EPIC is clear that it is intended to assist individuals in need of the court's protection and to safeguard

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their interests. The goal and central purpose of the statute is to help institutionalized individuals in need of protection to preserve their property for their own needs and to enhance *their* quality of life. MCL 700.5407(1) (emphasis added). In both *Vansach* and *Schroeder* the institutionalized spouses were impoverished by the protective order of spousal support entered by the probate courts, but both Courts found the impoverishment was improper since the needs of the institutionalized spouse had not been considered pursuant to MCL 700.5401. The purpose of EPIC in MCL 700.5407(1) was met by *Vansach* and *Schroeder*; in both cases, the institutional spouse's interests were considered and protected instead of simply impoverishing them in order to qualify the institutionalized spouse for Medicaid.

Second, the holdings of *Vansach* and *Schroeder* follow the purpose and intent of the Medicaid system. Again, Medicaid is intended for the truly needy who would otherwise go without medical care. *Harris*, 448 US at 301 (1980). There are income and asset limits that apply to individuals who qualify for Medicaid. 42 USC § 1396r-5 gives clear directives for calculations of those limited assets and income for eligibility and benefits. As noted above, Congress has already protected community spouses by permitting community spouses to retain assets up to a certain limit when there is an institutionalized spouse. The holdings of *Vansach* and *Schroeder* ensure that individuals are not impoverished only for the purpose of qualifying the institutional spouse for Medicaid when they otherwise could afford their care.

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

The *Sizick II* Court correctly concluded that the probate court abused its discretion by applying the wrong legal framework. In the petition for an amended protective order, Janet Sizick sought transfers of 100% of the couple's marital assets and to grant Janet Sizick spousal income from Jerome Sizick of $2,318.00 monthly. *Id*. (Appellee's Answer App'x 8 at 055.) *Sizick II* held that despite holding two evidentiary hearings, the probate court's record did not contain any evidence identifying Jerome Sizick's needs. *Id*. (App'x 1 at 014.) Finally, *Sizick II* held that, based on established caselaw, "the probate court must identify the *current* interest being transferred and the *current* value of those interests," which it again failed to do. *Id.* (Emphasis added). (App'x 1 at 016-018.)

The holdings in *Vansach, Schroeder, Sizick I,* and *Sizick II* are all in alignment: it is improper for the probate court to issue a protective order of spousal

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support unless the needs of the institutional spouse are considered pursuant to MCR 700.54103. Thus, the *Schroeder* and the *Sizick* decision should be upheld.

B. The Estate has no legal basis to request that this Court overturn *Schroeder*.

The Estate, which incorporates Amici's arguments regarding *Schroeder*, asserts two main arguments for why *Schroeder* should be overturned. Both arguments fail.

First, the Estate and Amici argue that the *Schroeder* and *Sizick* decisions were incorrect because the probate court "has jurisdiction to enter orders of support in the Medicaid context." (Appellant's Supp Br, pp 8-9, Amicus Supp Br, pp 12-13.) But the jurisdiction of the Court is not at issue in *Schroeder*. The probate court did have jurisdiction and authority to enter a protective order of spousal support, but the probate court simply failed to consider—at the time of the actual petition for the support order—what the needs of the institutionalized spouse were pursuant to MCL 700.5401(3) and the holding of *Vansach*.

The Estate and Amici also claim that *Schroeder's* holding (that the needs of the institutionalized spouse must be considered at the time of the actual petition and not based on the possibility of qualifying for Medicaid) is "problematic." (Appellant's Supp Br, pp 9-11, Amicus Supp Br, pp 14-18.) But the Estate and Amici offer no support for that proposition in law or fact; they merely assert their personal preference that individuals who are over-asset or over-income should be able to obtain a protective order of spousal support based on a theoretical qualification for Medicaid to allow the taxpayers to pay the bill for the nursing

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home instead of the individual themselves. (See Amici Supp Br, pp 15-16.) A mere statement without authority is insufficient to bring an issue before this Court. *Wilson v Taylor*, 457 Mich 232, 243 (1998). "A party may not announce a position and then leave it to this Court to discover and rationalize the basis for the claim, or elaborate the party's arguments, and then search for authority to either sustain or defeat that position." *Id.* Thus, the Estate and Amici have not demonstrated that Schroeder is "problematic."

Furthermore, the Estate and Amici's "preference" that entry of protective orders of spousal support be based on theoretical benefits that are yet to be awarded, does not align with the purpose of the Medicaid program. As stated above, Medicaid is a program for low-income individuals, and it is intended for the truly needy who would otherwise go without medical care. *Harris*, 448 US at 301. Congress has also provided for clear directives for calculations of assets and income for eligibility and benefits and provided exemptions to protect income and assets for a community spouse. See 42 USC § 1396r-5. Overturning *Schroeder* would essentially allow individuals with any income level, including millionaires, to potentially obtain a protective order of spousal support and let the taxpayers pay the nursing home bill. That premise does not align with the purpose of MCL 700.5401(3)—to protect vulnerable individuals and the intent of the Medicaid program by ensuring that only those who actually qualify for the program receive the benefits. Overturning *Schroeder* and potentially allowing over-asset and income individuals to be impoverish by ignoring their current needs would strain a system

that already has a finite number of resources to distribute to those who actually qualify for Medicaid services. "The Medicaid program would be at fiscal risk if individuals were permitted to preserve assets for their heirs while receiving Medicaid benefits from the states." *Ronney v Dep't of Social Servs*, 210 Mich App 312, 319 (1995).

Schroeder correctly held that the current needs of the protected individual should be evaluated at the time of the petition for a protective order of spousal support. *Schroeder* should be upheld.

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CONCLUSION AND RELIEF REQUESTED

On remand to the probate court, the death of Jerome Sizick renders the appeal moot. And even if this Court grants the application and reverses the Michigan Court of Appeals' decision, the appeal is still moot based on the speculative relief sought. There is no exception to the mootness doctrine that applies here. Furthermore, *Schroeder* should be upheld as it is consistent with MCL 700.5401(3)'s plain language and the jurisprudence regarding that provision.

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

Respectfully submitted,

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