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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

APPELLANT ESTATE OF JEROME E. SIZICK'S REPLY

TO MICHIGAN DEPARTMENT OF HEALTH & HUMAN SERVICES'

SUPPLEMENTAL BRIEF

Dated: April 9, 2025

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I. This Appeal is Not Moot Due to the Death of Jerome Sizick

When Jerome Sizick died 14 days after the application for leave to appeal was filed with this Court, Appellant-Petitioner opened an informal decedent probate case in Saginaw County Probate Court. Estate of Jerome E. Sizick, deceased, Case No.: 24-145794-DE. The nursing home where Jerome Sizick was a patient resident for over 3 years filed a Proof of Claim in excess of $125,000.00 in the decedent probate case. The Personal Representative of his estate is under a statutory duty to pay all legally enforceable creditor claims. MCL 700.3703, 700.3715; also see MCL 700.3801 et seq. If this Court grants the application for leave to appeal and Appellant prevails whereby this Court reinstates the protective orders issued by the Saginaw County Probate Court, then the Respondent will likely be responsible for all or part of healthcare costs reported on the Proof of Claim.

This is not a Medicaid benefits case

MDHHS has repeatedly argued that this is not "a Medicaid benefits case". While it is true that this appeal arises out of Court of Appeals' decisions that review protective orders issued under EPIC, it is wrong to suggest the Medicaid program has no bearing on these decisions. If the Medicaid program was not implicated by the protective orders, MDHHS and its counsel, the Michigan Department of Attorney General, would not have appeared as an interested party to advocate against issuance of the protective orders in June of 2021 and subsequently in October of 2022. Moreover, the Court of Appeals' decisions in both In re Estate of Sizick (Sizick I) unpublished opinion of Michigan Court of Appeals, May 26, 2022, Docket No.: 357785 and In re Estate of Sizick (Sizick II) unpublished opinion of Michigan Court of Appeals, January 18, 2024, Docket No.: 364321

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discussed how and why the protective orders issued by the Saginaw County Probate Court affected Jerome Sizick's eligibility for the Medicaid program. In both Sizick I and Sizick II, the Court of Appeals rejected the protective orders based on its finding that in "Medicaid-related circumstances" it was appropriate to impose the finding from In re Estate of Schroeder, 335 Mich App 107 (2020) that the determination of need for a protective order under EPIC must wait until after an individual's eligibility for Medicaid has been determined.

The Medicare Catastrophic Coverage Act of 1988 (MCCA) was enacted to protect community spouses from impoverishment while allowing married couples to seek assistance from the Medicaid program to cover the cost of long-term care services. MDHHS' policy and the federal law all recognize that courts can issue orders of spousal support. However, the Court of Appeals has created a "Catch 22" by requiring a protected individual to qualify for Medicaid before a protective order for spousal support can be sought. This effectively nullifies the benefit of a protective order to the citizens of Michigan. The Court of Appeals' interpretation of EPIC governing protective orders is effectively blocking married couples from obtaining a probate court order of spousal support to provide needed benefits for a dependent spouse. The Schroeder and Sizick decisions are restrictive interpretations of MCL 700.5401(3)(b) and rests on a misunderstanding of how the Medicaid program operates in Michigan and is not grounded on considerations contained in EPIC or Michigan case law. Yes, this court is not being asked to render a decision about a Medicaid benefit case. However, it is being requested to reinstate the rights of the citizens of Michigan to seek a spousal support order to avoid impoverishment of the community spouse.

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Reinstatement of Protective Orders

MDHHS has argued that if this court either denies the application or affirms the decision of the Michigan Court of Appeals in Sizick II, the case becomes moot. Appellant agrees. If the Michigan Supreme Court was to remand the case for further hearing at the probate court, due to the death of Jerome Sizick, it is likely that the case would also be moot. What the Appellant-Petitioner seeks is the reinstatement of the protective orders issued on June 21, 2021 and December 13, 2022. Reinstatement of these 2 protective orders will affect the pending administrative hearings before the Michigan Office of Administrative Hearings and Rules (MOAHR) challenging MDHHS' decisions to deny Medicaid benefits to Jerome Sizick. While these cases are not before this court, if the protective orders are reinstated, MOAHR will then decide the Department's eligibility decisions on Jerome's applications for Medicaid benefits. For the first time in this case's long history, an administrative agency will finally get an opportunity to make a decision based on the original protective orders issued by the Saginaw County Probate Court. The pending decision of MOAHR may result in the nursing home being reimbursed by the Medicaid program for Jerome's care. Regardless, this is not a case of mootness since there is an actual case and controversy between the parties in which relief can be granted if this court reverses the Michigan Court of Appeals and reinstates the protective orders.

II. The Exception to the Mootness Doctrine for issue of public significance that is likely to reoccur yet may evade judicial review is applicable in this case.

MDHHS has narrowly argued that 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)(b) is valid. MDHHS has asserted that the case is specific to the facts at issue

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here, and since no comparable petitions to the probate court for a protective order of spousal support will present the exact same facts—the issue is unlikely to occur.

To the contrary, this case has broad public significance. Michigan Medicaid policy governing the coverage of long-term care costs contains asset limits for married couples. That policy provides no administrative remedy for the spouse who continues to live in the community who needs additional financial resources to pay for day-to-day living needs. When Congress enacted MCCA, it created a set of intricate and interlocking Medicaid eligibility requirements for allocating a married couple's income and assets when one spouse applies for Medicaid to help pay the cost of long-term care services.

The legislative history of MCCA shows that Congress recognized that standard resources allowances would work an injustice in some cases:

> The committee recognizes that there will be some instances in which the rules set forth in the bill do not take adequate account of the special circumstances affecting a particular community spouse. The bill therefore provides [for court orders].

H.R. Conf. Rep. No 100-105 (II), reprinted in 1988 U.S.C.C.A.N. 892; accord H.R. Conf. Rep No. 100-661, reprinted in 1988 U.S.C.C.A.N. 1039, 1042. In 42 USC 1396r-5(d)(5) and (f)(3), Congress authorized a judicial mechanism for obtaining relief from the standard income and asset allowances. It directs state Medicaid agencies to accept them using the amount transferred under a court order if that amount is greater than the standard allowances.

This appeal has broad public significance because it challenges the ruling in Schroeder that this congressionally mandated provision governing eligibility for the Medicaid program is not available to Michigan citizens. By requiring everyone to qualify for Medicaid before seeking a protective order of spousal support, this enhanced benefit is

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forfeited because all applicants for Medicaid are forced to qualify under the standard resource allowances, thereby losing the ability to preserve assets for the support of a community spouse. Schroeder effectively nullifies the benefit of a protective order since resources would have to be spent down before qualifying for Medicaid. It effectively blocks Michigan married couples from exercising their rights under federal law and Michigan Medicaid policy to obtain a protective order for spousal support from a local probate court in order to provide needed benefits and additional resources for the dependent community spouse.

The roadblocks that are imposed by Schroeder were augmented by the state agency who intentionally manipulated the facts that were presented in its appeal of the protective order by not timely processing Jerome Sizick's application for Medicaid as mandated by federal regulations and the agency's own policy. This will likely happen again and again since all MDHHS has to do is refuse to process a Medicaid application to show that the spousal support provisions of the protective order caused the protected individual's healthcare and living needs to be unmet.

Again, the public significance of the Schroeder decision is barring Michigan citizens from exercising their rights as allowed by federal law and Michigan Medicaid policy. This case will continue to reoccur and evade judicial review given the roadblocks that have been imposed by the Schroeder decision as well as the manipulative actions of the state agency.

In typical fashion, MDHHS has asserted that the only public significance is for Medicaid planners and their clients who have too many assets to qualify. For almost 37 years, Congress has been adapting the Medicaid program to accommodate the needs and

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interest of decidedly non-poor spouses of individuals who need long-term care. The provisions at issue here are part of that system, and their use, as sought by the Appellant's community spouse, is well within the range of options Congress offered a community spouse. Congress' goal has always been to protect the community spouse, not to create a mechanism for family wealth transfers.

> 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…

James v Richman, 547 F3d 214, 219 (CA3, 208); In re Estate of Vansach, 324 Mich App 371, 391 footnote 10 (2018).

III. Reply to the Department's defense of the Schroeder decision.

On pages 18-19 of its brief, MDHHS discusses MCL 700.5401(3) and makes the observation that the "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 qualify of life." However, the agency overlooks the part of the statute that authorizes a protective order when money is needed for those entitled to the protected individual's support, and that protection is necessary to obtain or provide money. MCL 700.5401(3)(b).

The Department next states, "The statute does not seek the financial enrichment of family members." Janet Sizick's demonstrated need for support to meet her living needs is not "financial enrichment".

MDHHS asserts that EPIC does not control or make Medicaid decisions. The Appellant agrees. Medicaid decisions are under the exclusive jurisdiction of the Michigan Department of Health and Human Services. However, the fact that a more favorable

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Medicaid eligibility decision is available under federal Medicaid law and MDHHS policy for a married couple with a lawful protective order of spousal support under EPIC cannot be the reason for barring Michigan citizens from seeking that relief. Doing so negates the Medicaid law and policy that governs how MDHHS makes Medicaid decisions.

The Appellant also agrees with the Department's statement on page 19 of its brief that a protective order of spousal support is not a guarantee of Medicaid eligibility. However, such an order is a precondition of securing a higher amount of income and assets for the support of a spouse of a nursing home patient than is otherwise available in the Medicaid program.

On page 20 of its brief the Department describes the Court of Appeals decision in Vansach, 324 Mich App at 401-402 (2018) and its holding 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." Vansach answers the agency's unfounded complaint on pages 25-26 of its brief that 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." If Schroeder is overturned, the principles in the Vansach decision remain to guide probate judges in the exercise of their sound discretion to issue protective orders of spousal support. The difference would be that married couples would no longer be barred from asking a probate judge to consider transferring assets from the ownership of a nursing home spouse to a community spouse to meet the latter's needs. The other difference would be the part of federal Medicaid law

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and MDHHS Medicaid policy that accommodate the use of such support orders would no longer be nullified.

On pages 21-23 of its brief, the Department claims Schroeder follows "the intent of the Medicaid program". That is not true. Schroeder prevents ordinary citizens from using court orders of spousal support to set an amount of support for a community spouse of a nursing home patient that is more than is otherwise available in the Medicaid program. By doing so, Schroeder nullifies the benefits conferred by Congress in 42 USC 1396r-5(d)(5) and (f)(3) and in MDHHS Medicaid policy in Bridges Eligibility Manual (BEM) 402 and 546 that recognize court orders of spousal support as the standard for setting Medicaid income and asset allowances for a community spouse.

On page 24 of its brief, the Department mischaracterizes what the Estate and the Amici claim is "problematic" about Schroeder. It states: "...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 home instead of the individual themselves." First, it is not "a personal preference" that all Michigan citizens should be afforded the opportunity to present evidence in support of a petition for a protective order of spousal support under EPIC that shows the needs of both the protected individual and a spouse are met. Schroeder arbitrarily blocks citizens from making that showing unless the protected person has first qualified for Medicaid. Second, the Department paints these "over-asset or over-income" individuals as persons who are not needy. The agency fails to inform the Court that in 2025, a married couple with $300,000.00 in countable assets has a Medicaid protected spousal asset limit of

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$150,000.00 whereas a married couple with $50,000.00 has a Medicaid protected spousal asset limit of $31,584.00. BEM 402(9). While the community spouse in the couple with higher assets *may* be able to manage and meet her or his needs over the rest of a lifetime on $150,000.00, the couple with lower assets is more likely to need a protective order of spousal support to allow the community spouse to make ends meet for the rest of her/his lifetime. Third, the ability to qualify for Medicaid once a protective order of spousal support is secured is not "theoretical". A well drafted petition for protective order will inform the Court of how it will affect the protected person's qualification for Medicaid and provide copies of relevant MDHHS policies and the calculations that show why the protected person will qualify. If the Court is not satisfied that the information is sound and credible, the petition will be denied. This is no different from providing the probate court with documentation of how certain financial and real estate transactions for the protected person will affect his taxes. Finally, it is wrong to portray the goal of a petition for a protective order of spousal support as shifting the protected person's nursing home costs to the taxpayers. The goal is to obtain financial security for the community spouse of a nursing home patient and to avoid her/his impoverishment. In the end, it is the role of the probate court to adjudicate whether a petition for protective order is lawful and reasonable under the circumstances presented.

RELIEF REQUESTED

The issues presented in the application involve significant legal principles affecting how local probate courts may provide support for protected individual's spouse while facilitating his qualifications for Medicaid to pay for long-term care services. For reasons stated, Petitioner-Appellant respectfully requests that the Supreme Court grant the

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application for leave and peremptorily reverse the Court of Appeals' decisions issued on January 18, 2024 and May 26, 2022 by affirming and reinstating the protective orders issued by the Saginaw County Probate Court; or alternatively, grant further argument and/or briefing on the merits.

Respectfully submitted,

Dated: April 9, 2025

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Appellant's supplemental brief contains 2,893 countable words according to the Microsoft Word 10 program.

Respectfully submitted,

Dated: April 9, 2025

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