STATE OF MICHIGAN

COURT OF APPEALS

In re ROBERT MORLEY.

LOU-ANNE MORLEY,

Appellee,

v

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Appellant.

UNPUBLISHED
December 17, 2020

No. 350535
Clare Probate Court
LC No. 19-017825-PO

Before: FORT HOOD, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

Appellant, Department of Health and Human Services (DHHS), appeals as of right a protective order entered by the probate court transferring Robert Morley's interest in assets to his wife, Lou-anne Morley.[1] The same order also required that all of Robert's income be paid to Lou-anne monthly and terminated Robert's rights to Lou-anne's estate. DHHS also appeals of right a separate order that held that DHHS, which administer Medicaid in Michigan, "lacked status as an interested person" "for the purposes of the Petition before the court." We vacate both probate court orders and remand for reconsideration of both spouses' needs in accordance with *In re Estate of Vansach*, 324 Mich App 371, 384-385; 922 NW2d 136 (2018).

In June 2019, Lou-anne filed a petition seeking a protective order under the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*, alleging that the cost of Robert's long-term care would deplete the marital estate and leave her with insufficient resources as Robert's

[1] The Morleys will be referred to by their first names in this opinion.

community spouse.[2] DHHS opposed the petition, alleging that the order Lou-anne had requested would leave Robert destitute and unable to pay his own expenses, solely for the purpose of maintaining Lou-anne's desired personal lifestyle. In response, Lou-anne argued that DHHS was not an interested party in the matter and that its response should be stricken.

Following a brief hearing on the matter, the court issued an order granting Lou-anne a protective order. The order transferred Robert's interest in assets he owned to Lou-anne for her support. The order also indicated that all rights or interests that Robert would otherwise have had in Lou-anne's estate, should she predecease him, were terminated. The order further required Robert to pay all his income to Lou-anne each month as spousal support. Concurrently with the protective order, the probate court also issued a separate order holding that DHHS was not an interested party in the proceedings. The probate court denied the DHHS's later motions for reconsideration and for a stay of proceedings. This appeal followed.

Probate court decisions are reviewed on the record, not de novo. *Vansach*, 324 Mich App at 385. The court's factual findings are reviewed for clear error, and its "dispositional rulings, including a decision to enter a protective order, are reviewed for an abuse of discretion." *Id*. Failing to operate within the correct legal framework is an abuse of discretion by the court. *Id*. at 385, 402. Additionally, this Court reviews a determination regarding whether a party is a real party in interest de novo. *In re Rottenberg Living Trust*, 300 Mich App 339, 354; 833 NW2d 384 (2013).

DHHS first argues that the trial court erred when it concluded that it was not an interested party in this matter. We agree.

MCR 5.125(C)(25) lists those persons interested in cases involving the petition for the appointment of a conservator or for a protective order as:

> (a) the individual to be protected if 14 years of age or older,
>
> (b) the presumptive heirs of the individual to be protected,
>
> (c) if known, a person named as attorney in fact under a durable power of attorney,
>
> (d) the nominated conservator,
>
> (e) a governmental agency paying benefits to the individual to be protected or before which an application for benefits is pending, and
>
> (f) if known by the petitioner or applicant, a guardian or conservator appointed by a court in another state to manage the protected individual's finances.

[2] "In the Medicaid context, . . . the term 'community spouse' refers to a spouse living at home, while the term 'institutionalized spouse' refers to a spouse who has been institutionalized, usually in a nursing home." In re *Vansach*, 324 Mich App at 376 n 2.

In this case, the probate court concluded that DHHS was not paying benefits to Robert and no application for benefits was pending at that time. Indeed, the probate court indicated that "the common definitions of pending would be something that's awaiting conclusion, confirmation, or fulfillment. And I find that that is not the situation here." The probate court also indicated that if the word "impending" had been used, the result would have been different. In reaching this conclusion, the probate court failed to recognize that other definitions of the word "pending" include "imminent" and "impending." *Merriam-Webster's Collegiate Dictionary* (11th ed), p 915. These definitions support a conclusion that DHHS was indeed an interested party.

In this case, there is no question that Robert's application for Medicaid benefits was imminent. The attachments to Lou-anne's petition repeatedly referenced Medicaid benefits and even included a calculation of Robert's patient-pay amount and Lou-anne's community spouse allowance. Moreover, during the probate court hearing, Lou-anne confirmed that she was planning on applying for Medicaid before the end of the month. She also acknowledged that the purpose of the court order was "for the purpose of applying for Medicaid." Given these facts, it is clear that Robert's application for benefits was impending, thereby making DHHS an interested party under the statute.

DHHS also argues that despite Robert's physical ailments, his mental state or mental abilities did not prevent him from participating in decisions about his finances. DHHS posits that if Robert was able to assist or have opinions about his financial affairs, the protective order was improper.

In relevant part, MCL 700.5401, allows the court to enter a "protective order for cause" when "[t]he individual is unable to manage property and business affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, . . . [and] 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." Before entering a protective order, the probate court is first required to determine by clear and convincing evidence that the protected individual meets these requirements. *Vansach*, 324 Mich App at 383-384.

It is undisputed that Robert had significant physical ailments; however, whether those ailments rendered him unable to manage his property or business affairs is unclear from this record. Indeed, Lou-anne testified that Robert was able to indicate his wishes cognitively. Additionally, it appears from the report of the guardian ad litem (GAL) appointed for Robert that the motivation behind the protective order was not that Robert was unable to manage his affairs, but rather that he did not want Lou-anne "to lose everything for which he has worked all of his life to attain . . . [and was] very concerned that the cost of his care because of his physical limitations and need for care will put her in a position that she will not be able to care for herself." In whole, it appears to this Court that the protective order was sought not because Robert could not manage his affairs, but because he would prefer not to burden Lou-anne with the cost of his care.

Next, DHHS argues that there was no evidence presented to support a finding by clear and convincing evidence that Lou-anne needed additional support from Robert. DHHS also argues that Robert's needs were not considered before he was left without any assets or income. We agree.

The interplay between protective orders allowing for the support of an incapacitated individual's dependents and Medicaid was discussed in detail in *Vansach*, 324 Mich App 371. *Vansach* clarifies that although "probate courts clearly have the authority to enter protective orders, including the authority to enter orders providing money for 'those entitled' to support from the incapacitated individual," *id*. at 383, quoting MCL 700.5401(3)(b), the probate court is first required to determine by clear and convincing evidence that the protected individual meets the requirements outlined in MCL 700.5401. *Id*. at 383-384. MCL 700.5401 states, in relevant part:

> (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.

If the statutory prerequisites are met, the level of support ordered should not impoverish one spouse while allowing the other spouse to maintain his or her prior standard of living. *Vansach*, 324 Mich App at 395. Indeed, in considering the issuance of a protective order, the court must consider the requesting spouse's needs and resources as well as the protected individual's needs and circumstances. *Id*. at 395-396. "The spouse requesting support must make a showing of need—not merely a desire to maintain a current standard of living without regard to the other spouse's circumstances." *Id*. at 396. The *Vansach* Court explained:

> Whether the community spouse is "entitled" to "support" will depend on all the facts and circumstances, including the incapacitated individual's financial means and ability to provide assistance. For instance, when crafting a protective order, the probate court should consider the protected individual's "foreseeable needs," the interests of the protected individual's creditors, and the interests of the protected individual's dependents. See MCL 700.5408. A probate court considering a protective order should also bear in mind that the protected individual has the right to acquire, enjoy, and dispose of his or her own property. [*In re Conservatorship of*] *Bittner*, 312 Mich App [227,] 242[; 879 NW2d 227 (2015)]. Weighing the various concerns will obviously depend on the facts of each case, but a protected individual's rights and interests can never be totally disregarded in an effort to provide for his or her spouse. In other words, a community spouse cannot make a showing of "need" and is not "entitled to the [incapacitated] individual's support" merely to maintain his or her current lifestyle when providing money to the spouse will leave the incapacitated individual entirely destitute and unable to meet his or her own needs.

> In 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. . . . Consequently, along with any other relevant facts and circumstances, probate courts must consider the [community-spouse monthly income allowance] CSMIA[3] and any other resources available to the community spouse, the community spouse's "need" for additional support beyond the CSMIA, and the institutionalized spouse's need for income to meet the patient-pay amount related to his or her medical care under Medicaid. Importantly, a probate court's consideration of the couple's circumstances in light of Medicaid cannot involve a fallacious assumption that the institutionalized spouse should receive 100% free medical care under Medicaid or an assumption that a community spouse is entitled to maintain his or her standard of living. In actuality, Medicaid is a need-based program, and a Medicaid recipient is obligated to contribute to his or her care. See *Mackey* [*v Dep't of Human Servs*], 289 Mich App [688,] 693[; 808 NW2d 484 (2010)]. The unfortunate reality is that medical costs and increased expenses related to illness may affect both spouses, see *Mathews v De Castro*, 429 US 181, 188; 97 S Ct 431; 50 L Ed 2d 389 (1976), and even with the enactment of the spousal-impoverishment provisions, Medicaid provides no guarantee that a community spouse will enjoy "the same standard of living—even if reasonable rather than lavish by some lights—that he or she enjoyed before the institutionalized spouse entered a nursing home." *Balzarini v Suffolk Co Dep't of Social Servs*, 16 NY3d 135, 144; 944 NE2d 1113 (2011). "The trade-off for a married couple, of course, is that the institutionalized spouse's costly nursing home care is heavily subsidized by the taxpayer. . . ." *Id*. Having made this trade-off, a community spouse is not entitled to have the probate court simply disregard Medicaid, ignore the institutionalized spouse's patient-pay amount, and impoverish the institutionalized spouse in order that the community spouse may maintain his or her standard of living without regard for the institutionalized spouse's needs and circumstances as they exist under Medicaid. Such a procedure is not contemplated by EPIC, and it is a gross misapplication of the probate court's authority to enter an order when money is "needed" for "those entitled to the [incapacitated] individual's support." See MCL 700.5401(3)(b) (emphasis added). Instead, the actual Medicaid-related realities facing the couple—all of Medicaid's pros and cons—become part of the facts and circumstances that the probate court must consider when deciding whether to enter a support order for a community spouse under MCL 700.5401(3)(b). Ultimately, when a community spouse's institutionalized spouse receives Medicaid benefits and has a patient-pay amount, the community spouse seeking a support order under EPIC must show by clear and convincing evidence that he or she needs money and is entitled to the

[3] Under Medicaid, the CSMIA is designed to ensure that a community spouse has sufficient income to meet their minimum monthly maintenance needs allowance (MMMNA). See *Vansach*, 324 Mich App at 381; 42 USC 1396r-5(d)(2).

> institutionalized spouse's support despite the CSMIA provided under Medicaid and the institutionalized individual's patient-pay amount under Medicaid. [*Vansach*, 324 Mich App at 397-399.]

The record is devoid of any evidence that the probate court considered Robert's needs. There was no reference to Robert's needs or personal obligations at the hearing, in the GAL's report, in the court's oral decision, or in the court's written order. And although a calculation was attached to the petition reflecting a patient-pay amount of $920.12 for Robert, there is no indication that this obligation was considered by the court. Accordingly, we conclude that in applying the principles outlined in *Vansach*[4] to this case, the probate court failed to operate within the correct legal framework, and therefore abused its discretion by entering an order that rendered Robert destitute without considering his needs. *Vansach*, 324 Mich App at 400-401.

Lastly, characterizing it as a Medicaid determination, DHHS takes issue with the portion of the probate court's order that states, "The resources of Robert Morley are ordered to be transferred to Lou-anne Morley for her support as the community spouse and shall not be counted in determining the community spouse resource allowance for Robert Morley's eligibility for government benefits, including Medicaid." More specifically, DHHS argues that it is the single state agency authorized to determine which resources are counted for Medicaid eligibility. However, DHHS appears to ignore its own written policies, which were submitted as exhibits by Lou-anne to the lower court. Section 402 of the Bridges Eligibility Manual explicitly allows those sums transferred under a court order to be excluded from the calculation of the community spouse allowance. In that regard, DHHS has not established how the court plainly erred by correctly stating that the transferred item would not be counted in DHHS's calculation.

In sum, we vacate both orders and remand to the trial court for further consideration. On remand, DHHS shall be allowed to participate as an interested party.

We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Deborah A. Servitto

[4] Notably, this case is distinguishable from *Vansach* in that an application for Medicaid had already been filed in that matter; however, as discussed above, given that the intent in this case was to apply for Medicaid for Robert in the immediate future, we conclude that the considerations identified in *Vansach* remain relevant to our analysis.