December 17, 2020 – January 6, 2021

Good afternoon,

Thank you for subscribing to MJI's IMPACT e-mail. For purposes of navigating this document, please use the bookmarks provided (typically appearing on the left side of the screen).

IMPACT contains summaries of recent court and legislative activity (as it becomes effective, not necessarily when it is passed or enacted) impacting trial court procedure and is separated into six global topics: Administrative, Civil, Criminal, Family, Probate, and Problem-Solving Courts. If a global topic does not contain any summaries, no activity will be listed.

Please note that while some legislation became effective between the dates of this edition of IMPACT, all of the year-end legislation effective December 17, 2020 to January 20, 2021 will be included in the next edition of IMPACT.

Podcast If you are interested in *listening* to IMPACT via podcast, please visit https://mjieducation.mi.gov/online-learning/podcasts to subscribe to the RSS feed(s) of your choice.

If you have any questions or would like to provide feedback regarding any technical or substantive issues, please e-mail the Michigan Judicial Institute at Michigan.Judicial.Institute@courts.mi.gov.

Administrative Topics

Coronavirus Disease 2019 (COVID-19) Response

Additional information about the judicial branch's response to the COVID-19 outbreak is available here.

Amendment of Order Regarding Priority Treatment and New Procedure for Landlord/Tenant Cases. On December 29, 2020, the Michigan Supreme Court entered ADM File No. 2020-08, amending Administrative Order No. 2020-17, *Priority Treatment and New Procedure for Landlord/Tenant Cases* to provide that for cases subject to the moratorium under the Centers for Disease Control and Prevention (CDC) order, a judgment issued shall allow defendant to pay or move within the statutory period set out in MCL 600.5744 or by the first day after the expiration of the CDC order, whichever date is later, and that the 56 day period in MCR 4.201(L)(4)(a) shall commence on the first day after the expiration of the CDC order. Additionally, each chief judge of a district court must hold a meeting before January 31, 2021, to evaluate the efficacy of the procedures set out in the order and discuss proposed changes that might improve the process, and submit a summary of the discussion and proposed recommendations to the regional

administrator within two weeks following the meeting. ADM File No. 2020-08 is effective until further order of the Court.

Court Form Revisions – Delay in Matters Submitted to Judge and Nepotism Waiver

The State Court Administrative Office (SCAO) has revised SCAO 27, *Delay in Matters Submitted to Judge*, and SCAO 75, *Nepotism Waiver*, "to update contact information for the regional administrators." See the January 5, 2021 SCAO Memorandum, Revised SCAO 27, Delay in Matters Submitted to Judge and Revised SCAO 75, Nepotism Waiver, for a brief explanation of the changes and a copy of the forms with the changes highlighted.

Court Rule Amendments – E-Filing Rules

Effective January 1, 2021, ADM File No. 2002-37 amended MCR 1.109, MCR 2.002, MCR 2.302, MCR 2.306, MCR 2.315, MCR 2.603, MCR 3.101, MCR 3.222, MCR 3.618, and MCR 8.119, "as part of the design and implementation of the statewide electronic-filing system." Staff Comment to ADM File No. 2002-37, issued October 28, 2020. "The amendment of MCR 2.603(A), which requires a clerk to enter a default if a party's failure to plead or otherwise defend becomes known to the clerk, is intended to return the rule to its former posture"—"[u]nder the rule's previous language, which was inadvertently deleted in making structural changes in the rule, the clerk was required to enter a default if a party's failure to plead or defend 'is made to appear by affidavit or otherwise'"—"[t]he same policy would apply under the language adopted by amendment in th[e] order." Staff Comment to ADM File No. 2002-37, issued October 28, 2020.

Civil Topics

Court Activity:

Court Form Revision – Small Claims Affidavit and Claim

The State Court Administrative Office (SCAO) has revised DC 84, *Affidavit and Claim, Small Claims*, "to update the claim amount [from $6,000 to $6,500] that may be filed as a small claim pursuant to MCL 600.8401(d)." See the January 4, 2021 SCAO Memorandum, Notice of Revisions to DC 84, Affidavit and Claim, Small Claims, for a brief explanation of the changes and a copy of the form with the changes highlighted.

Court of Claims Act (COCA) – Compliance When Claim Filed in Circuit Court and Governmental Immunity

"[C]ompliance with MCL 600.6431(1) both (1) does not implicate governmental immunity absent the Legislature conditioning its consent to be sued on compliance with the COCA and (2) is only necessary for claims proceeding in the Court of Claims." *Tyrrell v Univ of Mich*, ___ Mich App ___, ___ (2020). "In sum, absent the Legislature conditioning its consent to suit on compliance with the COCA, a plaintiff properly bringing a claim in circuit court against the state or a state defendant to which MCL 600.6431 applies is not required to comply with MCL 600.6431 for his or her claim to proceed in that court." *Tyrrell*, ___ Mich App at ___. Accordingly, where "[p]laintiff filed a complaint against defendants in circuit court alleging discrimination and retaliation in violation of Michigan's Persons with Disabilities Civil Rights Act," and "[d]efendants moved for summary disposition under [MCR 2.116(C)(7)]," "plaintiff's failure to comply with MCL 600.6431 did not implicate governmental immunity[.]" *Tyrrell*, ___ Mich App at ___.

No-Fault Insurance – Standing

"Statutory standing asks whether the Legislature authorized the injured party to sue the other party for the alleged statutory violation." *Sterling Hts Pain Mgt, PLC v Farm Bureau Gen Ins Co of Mich*, ___ Mich App ___, ___ n 3 (2020). Under the Michigan Limited Liability Company Act (MLLCA), "[t]he filing of the required

documents for incorporation was conclusive evidence that plaintiff [healthcare provider] met the conditions precedent for formation of a PLC, including the requirement that all members and managers be licensed persons," and "[o]nly the Attorney General has standing to bring claims alleging incorporation defects." *Id*. at ___. Accordingly, "defendant [insurance company] does not have statutory standing to challenge whether an entity is properly incorporated or organized under the MLLCA," and it is unnecessary to "reach the substantive issue of whether the alleged violation of the MLLCA rendered the treatment to [the insured] unlawful." *Id*. at ___.

Legislative Activity:

Legislative activity effective December 17, 2020 to January 20, 2021 will be summarized in the January 25, 2021 edition of IMPACT.

Criminal Topics

Court Activity:

Court Rule Amendment – Appointed Counsel for Parole Grant Appeal

Effective January 1, 2021, ADM File No. 2019-13 amended MCR 7.118 to "require[] counsel to be appointed to an indigent prisoner when an application for leave to appeal a grant of parole is filed by the prosecutor or victim"; "[t]he right to counsel also would be included on the notice to be provided the prisoner." Staff Comment to ADM File No. 2019-13, issued September 23, 2020.

Court Rule Amendments – Criminal Appellate Matters

Effective January 1, 2021, ADM File No. 2019-27 amended MCR 6.310, MCR 6.429, MCR 6.431, MCR 6.509, and MCR 7.205, and added MCR 6.126 to "clarify and simplify the rules regarding procedure in criminal appellate matters." Staff Comment to ADM File No. 2019-27, issued September 23, 2020.

Court Rule Amendments – Postjudgment Motions, Restoration of Judgment, and Presentence Investigation Report

Effective January 1, 2021, ADM File No. 2018-33, ADM File No. 2019-20, and ADM File No. 2019-38 amended MCR 6.425, MCR 6.428, MCR 7.208, and MCR 7.211 to "expand certain time periods within which to file and dispose of postjudgment motions (MCR 7.208 and 7.211), and reconfigure and expand the Reissuance of Judgment Rule (MCR 6.428) (renaming it Restoration of Judgment Rule)"; "the amendments of MCR 6.425 require a probation officer to give defendant's attorney notice and a reasonable opportunity to attend the presentence interview, require a probation agent to not only correct a report but certify the correction has been made and provide for additional requirements regarding use of and access to the presentence investigation report." Staff Comment to ADM File No. 2018-33, ADM File No. 2019-20, and ADM File No. 2019-38, issued September 30, 2020.

Due Process – Brady Violation and Newly Discovered Evidence

***Brady* Violation.** "To establish a *Brady* violation, a defendant must show that (1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) that is material." *People v Abcumby-Blair*, ___ Mich App ___, ___ (2020) (quotation marks and citation omitted). Where "[t]he present defendant argues on appeal that the prosecutor in his case should have disclosed the concession made on remand by the prosecutor in [a different case] that [a sheriff's deputy] had made a false statement in his search warrant affidavit," "it is not clear . . . that the prosecutor's statement [in the other case] was necessarily *Brady* material, especially since the trial court, after taking testimony from [the sheriff's deputy], determined that [part] of the affidavit was inaccurate, but that the deputy had not intended to make a false statement."

Abcumby-Blair, ___ Mich App at ___. However, "the prosecutor also had a duty under *Brady* to reveal that the trial court had found [the sheriff's deputy's] testimony in [a different case] not credible"; "[n]evertheless, although the prosecution violated its duty to disclose this evidence, [there is] no *Brady* violation because defendant has not established the materiality of the evidence with respect to the instant case." *Abcumby-Blair*, ___ Mich App at ___. Specifically, "[e]vidence that [the sheriff's deputy] made false statements regarding search warrants in prior cases generally impeaches his credibility, but it does not undermine the physical evidence connecting defendant to [a suspected drug house] or the testimony of [two other sheriff's deputies]"; "[g]iven the physical items, photographs, and the testimony of multiple witnesses that constituted case-specific evidence of defendant's guilt . . . suppression of evidence regarding [the sheriff's deputy's] untruthfulness in other cases [does not] undermine[] confidence in the verdict in this case." *Id*. at ___.

Newly Discovered Evidence. "To establish that newly discovered evidence requires a new trial, a defendant must show that (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *People v Abcumby-Blair*, ___ Mich App ___, ___ (2020) (quotation marks and citation omitted). While the Court of Appeals held in a different case that a statement made by a sheriff's deputy in part of his search warrant affidavit was objectively untrue, "defendant fails to make any connection between [the] holding regarding [the sheriff's deputy's] untruthfulness in [the other case] and the search warrant affidavit or trial testimony in this case." *Id*. at ___. Defendant has not "pointed to any specific portion of the affidavit potentially tainted by [the sheriff's deputy's] input, nor has he offered either evidence or argumentation" that would lead to the belief that the holding in the other case "makes it probable that the trial court would find the warrant invalid and suppress the evidence collected pursuant to the warrant." *Id*. at ___. "Nor, in light of the evidence presented at trial," would the holding in the other case "make a different outcome in defendant's trial probable." *Id.* at ___. "For these reasons . . . defendant has failed to establish that he is entitled to a new trial based on this newly discovered evidence." *Id*. at ___.

Evidence – Lease Not Hearsay

"Contractual documents with legal effect independent of the truth of any statements contained in the documents are admissible"; accordingly, "[t]o the extent the trial court deemed the lease inadmissible hearsay," "the trial court erred by excluding the lease." *People v Abcumby-Blair*, ___ Mich App ___, ___ (2020). However, "[t]he testimony defense counsel sought was minimally probative of whether defendant had an actual connection with the property and constructive possession of the drugs found in the kitchen," and "there was ample testimony and evidence linking defendant to [the property]." *Id*. at ___. In light of testimony regarding "defendant's registered address . . . and the physical and testimonial evidence linking him to [the property], defendant has failed to establish that omission of . . . testimony regarding whether defendant's name was on the lease for [the property] more probably than not resulted in a miscarriage of justice." *Id*. at ___.

Felony Sentencing – Guidelines Departure

"When reviewing a departure sentence for reasonableness, [the Court] examine[s] whether the trial court adequately explained why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been"; upward departure sentences have been affirmed "where the minimum sentencing guidelines did not adequately account for a defendant's prolific criminal history, recidivism, and poor prospects for rehabilitation." *People v Abcumby-Blair*, ___ Mich App ___, ___ (2020) (quotation marks and citation omitted). Here, "the court concluded that an upward departure of 32 months was reasonable and proportional to the offense and the offender considering that the advisory sentencing guidelines did not adequately account for the extensiveness of defendant's criminal record, the frequency and rate of defendant's recidivism, and defendant's apparent resistance to rehabilitation." *Id*. at ___. "In light of the trial court's decision not to exercise its authority to impose consecutive sentences, and considering the court's stated reasons for departing upward from the sentencing minimum guidelines range . . . the court's imposition of a sentence less than midway between the maximum of the minimum guidelines range and what it could have imposed through consecutive sentencing was not unwarranted." *Id*. at ___.

Fourth Amendment – Answering a Ringing Cell Phone Constitutes a Search

"[A]n arrestee has a reasonable expectation of privacy in his or her cell phone, and . . . the government's act of answering the phone without the arrestee's consent and without a warrant constitutes a search under the Fourth Amendment." *People v Abcumby-Blair*, ___ Mich App ___, ___ (2020). A sheriff's deputy violated defendant's "Fourth Amendment right to be free from unreasonable searches and seizures when he opened defendant's cell phone, answered it, and impersonated defendant to arrange a heroin transaction with the caller[.]" *Id*. at ___. "[R]egardless of the privacy interest defendant may or may not have had in the conversation that ensued when [the sheriff's deputy] answered the cell phone, he had a legitimate privacy interest in the fact that he received a call on his phone and in the identity of the caller"; "[t]his is particularly true given the intimate association of cell phones with individual users, who can keep track of a significant range and amount of private information on even the most basic of cell phones." *Id*. at ___. "Just monitoring and answering a 'flip-style' phone like defendant's reveals not only the defendant's contacts, but also information that a defendant might have added to his contacts, including a photograph, name, or other identifying information." *Id*. at ___. "Thus, simply answering defendant's phone gave [the sheriff's deputy] access to more than the caller, it provided him with private information that he did not have before." *Id*. at ___. "In light of the personal nature and significant capabilities of today's cell phones . . . [the sheriff's deputy's] answering defendant's ringing cell phone constituted a search under the Fourth Amendment." *Id*. at ___.

Fourth Amendment – Constructive Entry

"The constructive entry doctrine hinges on the notion that the 'security' promised by the Fourth Amendment is destroyed not only by a physical invasion of government actors, but also by official conduct calculated to compel the occupants of a home to submit to their own extraction." *People v Trapp*, ___ Mich App ___, ___ (2020). Where "the police conducted an illegal constructive entry of the trailer by ordering its occupants outside," "the actions of the police officers [did not] conform to the Fourth Amendment"; "absent a warrant . . . the police [were prohibited] from either entering the trailer or coercively forcing its inhabitants to abandon the security of the residence and expose themselves to a public arrest." *Id*. at ___. Further, where defendant "obeyed the officers' directions, made no threatening moves or gestures, and answered the officer's questions until he decided that unless the police had a warrant, he was finished with the discussion," the situation "devolved into an arrest lacking probable cause triggered [by defendant's] 'warrant' questions." *Id*. at ___. "The arrest of [defendant] that followed violated the Fourth Amendment because it was the product of an illegal constructive entry and because the police could not have arrested [defendant] for the misdemeanor offense of brandishing a firearm." *Id*. at ___. Defendant's "resistance to his arrest was justified under Michigan common law," requiring reversal of his conviction for resisting and obstructing an officer. *Id*. at ___.

Fourth Amendment – Search of Digital Cell-Phone Data

"[A] warrant to search a suspect's digital cell-phone data for evidence of one crime does not enable a search of that same data for evidence of another crime without obtaining a second warrant." *People v Hughes*, ___ Mich ___, ___ (2020). "[A] search of digital cell-phone data pursuant to a warrant must be reasonably directed at obtaining evidence relevant to the criminal activity alleged in *that* warrant"—"[a]ny search of digital cell-phone data that is not so directed, but instead is directed at uncovering evidence of criminal activity not identified in the warrant, is effectively a warrantless search that violates the Fourth Amendment absent some exception to the warrant requirement." *Id*. at ___. Where "the officer's review of defendant's cell-phone data for incriminating evidence relating to an armed robbery was not reasonably directed at obtaining evidence regarding drug trafficking—the criminal activity alleged in the warrant— . . . the search for that evidence was outside the purview of the warrant and thus violative of the Fourth Amendment." *Id*. at ___.

Insanity Defense – Sufficiency of the Evidence and Great Weight of the Evidence

Sufficiency of the Evidence. A defendant bears "the burden of proving [their] insanity defense by a preponderance of the evidence"; "[b]ecause the law presumes that a defendant is sane . . . [a defendant is]

required to come forward with evidence substantiating that more likely than not [they] [were] legally insane when [they] committed the crime." *People v Evans*, ___ Mich App ___, ___ (2020). "[V]iewed in the light most favorable to the prosecution, [defendant's] statements combined with the physical evidence could support that she deliberately killed [her mother]"—defendant "admitted that she hid a knife in preparation for attacking her mother and stabbed her repeatedly before administering the lethal strike." *Id*. at ___. "A jury could have found [defendant] guilty of first-degree murder if it determined that, beyond a reasonable doubt, she had committed a willful, deliberate, and premeditated killing"; defendant's "description of the crime allowed for time to take a second look." *Id*. at ___ (quotation marks and citations omitted). Moreover, "the prosecution's failure to put forward expert testimony did not render the evidence supporting [defendant's] sanity insufficient as a matter of law," and "[t]he absence of a prosecution expert did not compel the jury to accept [defendant's] experts' testimony as true"—"[a]ssuming that the jury found the [defense] experts incredible, sufficient evidence supported the verdict." *Id*. at ___.

Great Weight of the Evidence. "A verdict is against the great weight of the evidence and a new trial should be granted when the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Evans*, ___ Mich App ___, ___ (2020) (quotation marks and citation omitted). The defendant "insists that no reasonable juror could have concluded that she was sane in light of the unrebutted expert testimony"; however, "the jury was not compelled to believe the experts" and "[a]bsent their testimony, more than a shred of evidence of record supported that [defendant] planned the crime and attempted to conceal it afterwards." *Id*. at ___. "Accordingly, reasonable jurors could naturally and fairly come to different conclusions regarding whether [defendant] was legally insane and her great weight argument must fail." *Id*. at ___.

Michigan Medical Marihuana Act (MMMA) – Operating While Visibly Impaired (OWVI)

"[W]here a statute is inconsistent with the MMMA, the MMMA supersedes that statute"; however, "the MMMA does not supersede the OWVI statute," MCL 257.625(3), because the phrase *under the influence* as used in the MMMA, MCL 333.26427(b)(4), "is not limited in meaning to how that phrase is understood with regard to the OWI statute, MCL 257.625(1)." *People v Dupre*, ___ Mich App ___, ___ (2020). There appears to be "no intent within the MMMA to immunize the visibly impaired driver from prosecution," thus refuting the "[d]efendant's theory that the MMMA precludes registered patients from being convicted of OWVI[.]" *Id*. at ___. "A person may be considered under the influence of marijuana if it can be shown that consumption of marijuana had some effect on the person such that it weakened or reduced the defendant's ability to drive such that the defendant drove with less ability than would an ordinary, careful, and prudent driver." *Id*. at ___ (quotation marks and citations omitted). Accordingly, the trial court did not err when it determined that the MMMA "permits a defendant to be convicted of OWVI." *Id*. at ___.

Motion for New Trial – Newly Discovered Evidence

"[A] defendant who seeks a new trial based on newly discovered evidence must satisfy each of the following four conditions: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *People v Rogers*, ___ Mich App ___, ___ (2020) (quotation marks and citation omitted). "A criminal defendant bears a heavy burden when seeking a new trial based on newly discovered evidence," particularly "when the newly discovered evidence consists of recanting statements that are largely hearsay, and even more so when the recanting statements are themselves recanted." *Id*. at ___. "[W]hen evaluating a motion for new trial based on newly discovered evidence, the court must consider the evidence admitted at the original trial and *all* of the *record* evidence that has come to light to-date that could be used at the retrial." *Id.* at ___. In this case, a different result was probable on retrial where the witness recanted her statements that the defendant sexually assaulted her, explained she lied because she wanted defendant's family to help her, and after the original trial she admitted to falsely accusing different family members of sexual assault. *Id.* at ___. Because the newly discovered evidence—the victim's recantation—combined with the additional evidence that would be presented on retrial—the victim's false accusations of sexual assault against different family members—discredited the victim "to a significant extent," and "[t]he original

trial was a classic 'he said/she said' credibility contest between the victim and the defendant," defendant was entitled to a new trial. *Id*. at ___.

Prosecutorial Misconduct – Improper Cross-Examination

"Cross-examination is a powerful legal engine for discovering the truth," "[b]ut when it repeatedly transgresses well-established boundaries, an improper cross-examination denies a defendant a fair trial." *People v Evans*, ___ Mich App ___, ___ (2020). "The prosecutor's interrogation of one of the experts . . . crossed the line on multiple occasions"—"[t]he prosecutor likened [the expert witness] to a cartoon character, accused her of writing her report in crayon, baselessly accused her of withholding evidence, misrepresented her testimony, and badgered her relentlessly." *Id*. at ___. Where "much of the prosecutor's cross-examination of [the expert witness] was irrelevant, demeaning, and unfairly prejudicial," "[t]he pervasiveness of the improper questioning and its inflammatory nature" resulted in "prosecutorial misconduct [that] denied [defendant] a fair trial." *Id*. at ___. "The prosecutor's unprofessional and unethical conduct led to the first-degree murder conviction of a mentally ill 17-year-old, and a sentence of life imprisonment without parole"; "[w]hile that may ultimately prove a fair resolution, to safeguard the integrity of the process an untainted jury will have to determine [defendant's] guilt." *Id*. at ___.

Legislative Activity:

Legislative activity effective December 17, 2020 to January 20, 2021 will be summarized in the January 25, 2021 edition of IMPACT.

Family Topics

Court Activity:

Court Rule Amendments – Child Protective Proceedings Appeals

Effective January 1, 2021, ADM File No. 2015-21 amended MCR 3.971, MCR 3.972, MCR 3.973, MCR 3.977, MCR 3.993, MCR 7.202, and MCR 7.204 to "make the appeal process for child protective cases uniform (instead of having a separate process for cases involving termination of parental rights)," and to "make the appeal period uniform (21 days) for all child protection[] cases." Staff Comment to ADM File No. 2015-21, issued September 23, 2020.

Legislative Activity:

Legislative activity effective December 17, 2020 to January 20, 2021 will be summarized in the January 25, 2021 edition of IMPACT.

Probate Topics

Court Activity:

Estates and Protected Individuals Code (EPIC) – Protective Orders

Standard of Review. "After hearing, upon finding that a basis for a conservator's appointment or another protective order is established by *clear and convincing evidence*, the court shall make the appointment or other protective order"; "[e]vidence is clear and convincing when it produces a firm belief in the truth of the

allegations that a party is attempting to establish." *In re Schroeder Estate*, ___ Mich App ___, ___ (2020) (quotation marks and citation omitted).

MCL 700.5401(3)(a) – Capacity to Manage Property and Business Affairs Effectively. Petitioner #1 "alleged in his petition that his father had suffered a spinal cord injury and was unable to take care of himself" or "effectively manage his property and business affairs because of the spinal cord injury," and the court-appointed guardian ad litem (GAL) "concluded that [petitioner #1's father] was in need of a protective order because, in part, he could not 'make informed decisions'"; however, "[a]bsent the medical reports the probate court referenced, [the Court of Appeals was] unable to conclude whether clear and convincing evidence existed to establish that [petitioner #1's father] was unable to manage his property and business affairs due to a spinal cord injury." *In re Schroeder Estate*, ___ Mich App ___, ___ (2020). Petitioner #2 "alleged that her husband was diagnosed with dementia, Parkinson's disease, impaired mobility, and short-term memory impairment and that his medical diagnosis rendered him unable to effectively manage his property and business affairs," and the "court-appointed GAL opined, following an investigation, that [petitioner #2's husband] was unable to make informed decisions and required a protective order"; "[a] physician's report filed in the matter supported the GAL's conclusion." *Id*. at ___. "In light of the fact that the medical report and the GAL's assessment were unchallenged and indicated that [petitioner #2's husband] was unable to effectively handle his financial affairs due to his health issues . . . the probate court did not clearly err in determining that MCL 700.5401(3)(a) was satisfied[.]" *Schroeder Estate*, ___ Mich App at ___.

MCL 700.5401(3)(b) – Waste or Dissipation of Property Absent Proper Management and Money Needed for Support, Care, and Welfare. While "patient-pay amounts can be estimated before the submission of a Medicaid application and a Medicaid eligibility determination," "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." *In re Schroeder Estate*, ___ Mich App ___, ___ (2020). In both cases, the probate court "considered needs in the context of Medicaid-related circumstances even though [the protected individuals] were not receiving Medicaid benefits and were awaiting Medicaid eligibility determinations"; "[t]herefore, reversal is necessary." *Id*. at ___. Further, "when a probate court acts to transfer property upon satisfaction of the prerequisites in MCL 700.5401 relative to need, it is imperative for the court to identify the interests being transferred and the value of those interests"; "[a]lthough there is no specific language in EPIC demanding such information, when a court is examining the financial needs of spouses and orders asset transfers on the basis of those needs, a valuation of the assets or interests therein is an inescapable and necessary component of the analysis." *Schroeder Estate*, ___ Mich App at ___.

Legislative Activity:

Legislative activity effective December 17, 2020 to January 20, 2021 will be summarized in the January 25, 2021 edition of IMPACT.