

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS

IN RE ESTATE OF HERMANN A. VON GREIFF.

_____ /	
CARLA J. VON GREIFF,	Supreme Court No. 161535
Petitioner-Appellant,	Court of Appeals No. 347254
v	Marquette Probate Court No.: 18-34046-DE
ANNE JONES-VON GREIFF,	
Respondent-Appellee.	
_____ /	

**BRIEF OF AMICUS CURIAE
THE FAMILY LAW SECTION OF THE STATE BAR OF MICHIGAN
IN SUPPORT OF GRANTING LEAVE TO APPEAL**

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STATEMENT OF JURISDICTION

This case is before this Court on the application for leave to appeal filed on June 26, 2020 by Appellant-Petitioner Carla J. Von Greiff from the April 23, 2020 Opinion of the Court of Appeals. Appellee-Respondent Anne Jones Von Greiff filed a Brief in Opposition to Appellant's Application for Leave to Appeal on July 10, 2020. This Court, in an Order dated March 31, 2021, requested supplemental briefs before scheduling oral argument on the application.

STATEMENT OF QUESTION INVOLVED

WHETHER THE PERIOD OF TIME AFTER THE FILING OF A DIVORCE SHOULD NOT BE COUNTED WHEN CONSIDERING WHETHER A SPOUSE WAS “WILLFULLY ABSENT” FROM THE DECEDENT FOR MORE THAN A YEAR BEFORE HIS OR HER DEATH UNDER MCL 700.2801(2)(e)(i) AND *IN RE ESTATE OF ERWIN*, 503 MICH 1; 921 NW2d 308 (2018)?

INTRODUCTION

The Family Law Section of the State Bar of Michigan (“the Section”) asserts that the Court of Appeals’ majority decision was correctly decided and that granting Appellant’s request for leave is unnecessary. Nevertheless, the Section would like to address this Court’s question contained in its March 31, 2021 Order, specifically, “whether the period of time after the filing of a complaint for divorce should be counted when considering whether a spouse was ‘willfully absent’ from the decedent for more than a year before his or her death” under MCL 700.2801(2)(e)(i) and *In re Estate of Erwin*, 503 Mich 1; 921 NW2d 308 (2018). With a limited exception, the simple answer is “no.”

The Section will offer an overview of case law that supports the Court of Appeals majority’s clear reading of MCL 700.2801(2)(e)(i) in view of other relevant divorce-related provisions in the Estates and Protected Individuals Code (“EPIC”), MCL 700.1101 *et seq.* EPIC recognizes a distinction in the context of an individual’s inheritance rights as a surviving spouse, namely, between persons whose marriages have been properly terminated by divorce or annulment or those who have contractually waived inheritance rights under a marital agreement, i.e., those who have undertaken antecedent legal action to determine property division and rights, versus persons who have resorted to “self-help” to unofficially end a marriage.

Once a marriage is legally terminated by divorce or annulment or certain surviving spousal rights have been contractually waived, statutory inheritance rights are likewise terminated under EPIC. *See* MCL 700.2807. Until a marriage is legally terminated with limited exception a divorcing surviving spouse whose final divorce judgment has not been entered should logically retain his or her surviving spouse status for inheritance purposes because a final property determination has not yet been adjudicated in the context of the divorce action.

Marriages are dissolved through Judgments of Divorce or Judgments of Annulment. MCL 552.1; MCL 552.2; MCL 552.3; MCL 552.4; MCL 552.6; MCL 552.9; MCL 552.9f; MCL 3.211(A); MCR 3.211(B). In divorce and annulment actions, property rights are adjudicated through a determination of asset and liability division between the parties. MCL 552.23; MCL 552.101; MCL 552.401. Unless expressly provided for in post-divorce judgment testamentary documents or transfer-on-death provisions executed post-judgment, a surviving ex-spouse may not inherit from the former spouse's estate. This is because the surviving ex-spouse has been awarded his or her judicially determined share of the marital estate and has shed the status of being the decedent's "spouse."

In divorce, in addition to an adjudication of property rights, other economic rights may also be determined such as an award of alimony and child support. In general, a "married-at-the-time-of-death" surviving spouse is generally still entitled to certain property rights under EPIC particularly where the parties' separation is condoned under temporary orders or injunctive relief. It is the Amicus' position that as a general rule, in the event of a spouse's death during a pending divorce action, the period of time consumed by the divorce alone should not count under MCL 700.2801(2)(e)(i) and the surviving spouse should retain "surviving spouse" status to assert his or her rights under EPIC. Amicus submits, however, that the surviving spouse's pre-divorce filing relationship with the deceased spouse may be taken into consideration and a divorce filing should not insulate a spouse from years of "willful absence."

A reversal of the Court of Appeals' decision could lead divorcing parties to engage in unwelcome behaviors to avoid the accusation of being "willfully absent" under MCL 700.2801(2)(e)(i). A reversal would likely give rise to gamesmanship in the form of manufactured delay in divorce proceedings especially with an ailing spouse. As is common in divorce, many

divorcing parties seek alternative living arrangements as soon as practical and limit their communications while the divorce action is pending to avoid conflict, abuse, and to begin the transition to a new chapter in life. Frequently, more complex divorces may exceed one year for one reason or another. A divorce that may take well over a year to resolve results in a division of property no matter the physical or emotional status of the parties. So long as both parties live through the entry of Judgment of Divorce, each will walk away from the marriage with property rights determined. As a general rule, even if a particular spouse is emotionally and physically absent for the twelve previous months, while a family court is likely to take that into account, it will not necessarily divest the absent party of his or her entire share of the marital estate.¹

As occurred in the instant case, divorce proceedings may be delayed through no fault of the parties. Yet the potential for just such delay may lead parties to make extraordinary efforts to avoid accusations of being “willfully absent” under MCL 700.2801(2)(e)(i). A reversal of the Court of Appeals may give rise to family law attorneys advising clients to not leave the marital home during the divorce despite a risk of domestic violence or emotional turmoil. It may also give rise to parties putting on a show of ongoing contact and ostensible “support” for no reason other than to avoid a potential forfeiture under MCL 700.2801(2)(e)(i). A divorcing party should not be required to engage in any more direct communication with his or her soon-to-be “ex” during a divorce proceeding beyond requirements inherent to the divorce process. Attorneys should not have to “coach” their clients in this regard. Parties should not have to put their personal safety in

¹ Michigan is an *equitable distribution* state which means that the trial court may award property to one or the other party in its discretion, based upon applicable statutes, as applied through a vast body of common law case law decisions. The pertinent property statutes are MCL 552.19; MCL 552.23; and MCL 552.401. No mathematical formula governs the division of property in a divorce action; the division need not be equal. See *McLain v McLain*, 108 Mich App 166; 310 NW2d 316 (1981). The primary question is “what is fair”? See *Wilkins v Wilkins*, 149 Mich App 779; 386 NW2d 677 (1985).

jeopardy by subjecting themselves to ongoing physical and/or emotional abuse or other controlling behaviors.

This Court should affirm the Court of Appeals' majority decision in *Von Greiff*: that the period of time after the filing of a complaint of divorce is not counted when considering whether a spouse was "willfully absent" from the decedent for more than one year before his or her death. But where a party was "willfully absent" for an extended period before a divorce proceeding was initiated, tacking may then be appropriate, depending upon the facts and circumstances presented. Anne Von Greiff failed to receive a formal adjudication of property and economic rights in the divorce action and in the subsequent probate proceedings. She and many others like her will otherwise be without adequate remedies if the Court of Appeals' decision is not affirmed.

STATEMENT OF INTEREST OF AMICUS CURIAE²

State Bar of Michigan Family Law Section

The Family Law Council (“the Council”) is the governing body of the Family Law Section (“the Section”) of the State Bar of Michigan. The Section is comprised of over 2,500 attorneys who practice family law. The Section members elect the members of the Council. Because of its members commitment to family law, and as part of the State Bar of Michigan, the Council has an interest in developing sound legal principles in family law.

The Council provides diverse services to its membership outside of participating in Amicus Curiae briefs. The Council provides training, publishes the Family Law Journal, and advocates and comments on proposed legislation relating to family law topics.

The instant case provides a unique opportunity to address a particular circumstance, the pre-judgment death of a spouse during a pending divorce action and the potential divestment of all marital property rights under MCL 700.7801(2)(e)(i). For reasons outlined in this brief, the Section supports the result of the Court of Appeals’ majority decision.

² Disclosure per MCR 7.312(H)(4): Neither counsel for either party authored this brief in whole or in part. Neither counsel for either party, nor either party, made a monetary contribution intended to fund the preparation or submission of the brief.

STATEMENT OF FACTS

The facts in this case are straightforward and an entire recitation is not necessary. Amicus Curiae rely on the facts and procedures as set out in the Court of Appeals' Opinion and Respondent-Appellee's Brief in Opposition to Appellant Carla Von Greiff's Application for Leave to Appeal.

STANDARD OF REVIEW

Because the issues presented relate to statutory interpretation, a *de novo* standard of review applies. *Potter v McLeary*, 484 Mich 397, 407; 774 NW2d 1 (2007); *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008); *Oakland Co Bd of Rd Comm'rs v Michigan Property & Casualty Guarantee Ass'n*, 456 Mich 590, 610; 575 NW 2d 751 (1998).

ARGUMENT

THE PERIOD OF TIME AFTER THE FILING OF A DIVORCE SHOULD NOT BE COUNTED WHEN CONSIDERING WHETHER A SPOUSE WAS “WILLFULLY ABSENT” FROM THE DECEDENT FOR MORE THAN A YEAR BEFORE HIS OR HER DEATH UNDER MCL 700.2801(2)(e)(i) AND *IN RE ESTATE OF ERWIN*, 503 MICH 1; 921 NW2d 308 (2018).

A. The Court of Appeals majority in Von Greiff correctly exempted divorce proceedings from the penalties of MCL 700.2801(2)(e)(i).

The Court of Appeals' majority in *Von Greiff* correctly concluded: “divorce is different” and held that the phrase “willfully absent” under MCL 700.2801(2)(e)(i) is inapposite to divorcing parties as a matter of law. *Von Greiff v Von Greiff*, 332 Mich App 251, 256; 956 NW2nd 524 (2020). In addition to dissolving a marriage, determining custody, and parenting time issues, divorce actions adjudicate property rights and various economic interests. The parties often have no control over the duration of these proceedings and frequently live apart to minimize conflict or improve one's safety in abusive relationships. Nevertheless, Amicus recognizes that, in looking at “the totality of circumstances,” as required by MCL 700.2801(2)(e)(i) under *In re Estate of Erwin*, the time of one being “willfully absent” before a divorce action is filed may potentially be considered by a probate court under MCL 700.2801(2)(e)(i).

A party's filing for divorce should not necessarily serve to shelter a party from potential consequences resulting from an extended absence that qualifies under MCL 700.2810(2)(e)(i) (for

one year or more) by one spouse before a divorce action is initiated. **As a general rule, however, the time consumed by divorce proceedings, the only avenue to dissolving a marriage, should not be counted under MCL 700.2801(2)(e)(i) to deny a litigant a property rights determination, a remedy otherwise available in either the divorce or probate proceedings. The Court of Appeals majority in *Von Greiff* correctly exempted divorce proceedings from the penalties of MCL 700.2801(2)(e)(i).** Amicus agrees with the Court of Appeals' majority decision in *Von Greiff* which provided several compelling reasons to exempt divorcing parties from the potentially draconian impact of MCL 700.2801(2)(e)(i).

The first significant reason is that an adjudication of property rights, which would otherwise have occurred through the divorce action no matter the length of the time of the divorce proceedings, could potentially be eliminated because of the death of one spouse. Similar to Appellee's predicament under the probate court's ruling, a spouse could lose what he or she would otherwise have received under a judgment of divorce through no fault of his or her own simply by following and being subject to divorce court orders. Examples of such orders would include civil mutual restraining orders and orders awarding one party exclusive possession of a marital home that, by their very nature, are designed to discourage contact. While being "ordered" to stay apart, a party to a divorce proceeding that exceeds the one-year mark could, if the probate court ruling is upheld, forfeit one's status as a surviving spouse upon the death of the other spouse simply by complying with a court order. These variables that frequently occur in divorce actions may ultimately result in an innocent spouse forfeiting his or her right to assert "surviving spouse" rights in probate proceedings. Paradoxically, so long as both parties live to see a Judgment of Divorce entered, even if the spouses had absolutely no contact and were physically and emotionally absent for over a year during what could be extended divorce proceedings, at the end, if they survive, the

parties' property rights will be adjudicated no matter the timetable to completion. In contrast, should one spouse die while the divorce is pending, the survivor of a "year-plus" divorce could well be out-of-luck under MCL 700.2801(2)(e)(i) if the probate court's ruling is upheld. This is a fundamentally inequitable result.

Second, the Court of Appeals majority did not believe that a party who sought to dissolve a marriage through the legal process should be penalized for doing so. The Court distinguished the party who seeks a legal termination to a marriage versus one who takes unilateral, extra-legal steps to unofficially end a marriage. The former should not be left remediless. The Court wrote:

The point is that by filing for divorce, Anne sought to bring about a *legal* end to her marriage. She did not intend to abandon or desert Hermann by consigning him to a marriage with none of the fundamental attributes of a marriage. Rather, Anne intended to exercise her legal right to seek a divorce decree and to enforce the rights due to her as a divorcing spouse. [*Id.* at 260 (emphasis in original).]

The majority observed that MCL 700.2801(2)(e)(i) was designed to address those who *informally* left a marriage. *Id.* at 260. The Court cited three foreign cases, *In re Ehler's Estate*, 115 Cal App 403, 405; 1 P2d 546 (1931), *In re Quinn's Estate*, 243 Iowa 1271; 55 NW2d 175 (1952), and *Born v Born*, 213 Ga 830, 831; 102 SE2d 170 (1958), for the proposition that other jurisdictions have addressed this question under common law and did not penalize the surviving spouse for invoking legal process to conclude a marriage. The surviving spouses were in the middle of seeking a divorce and, like the Von Greiff parties, in *Born, supra*, the parties' separation was by consent. *Born, supra* at 831. Frankly, while consent is an important factor, if the parties are separated by reason of participating in a divorce action, that alone is sufficient to remove a surviving spouse from the potential penalties of MCL 700.2801(2)(e)(i). A party should not be left without recourse for seeking a legal end to a marriage.

In contrast, in *Tkachik v Mandeville*, 487 Mich 38; 790 NW2d 260 (2010), the parties were married in 1975 and remained married up until the wife's death in 2002. The husband, Frank

Mandeville, was out of the country for “extended periods” and was absent for eighteen months preceding the wife’s death. *Id.* at 41. Neither party filed for divorce. Decedent’s sister, Personal Representative of her Estate, moved for summary disposition in probate court for the purpose of adjudicating him to not qualify as “surviving spouse.” *Id.* at 43. The probate court agreed and ruled that Mr. Mandeville was not a “surviving spouse” under MCL 700.2801(2). While the primary issue in *Tkachik* was that of the applicability of equitable contribution to entireties property, the facts of *Tkachik* illustrate the correct context for the application of MCL 700.2801(2)(e)(i): a non-judicial marital separation and where the “over-one-year” absentee spouse now re-appears to make a claim in probate. The probate court correctly applied MCL 700.2801(2)(e)(i) and denied Mr. Mandeville surviving spouse status.

A third reason for not imposing a forfeiture is “common sense.” The *Von Greiff* majority correctly recognized that parties commonly separate during a divorce and often leave each other “physically and emotionally.” *Id.* at 261. A divorce proceeding can be delayed for numerous reasons frequently beyond the control of the parties. If MCL 700.2801(2)(e)(i) were to apply to divorce actions, in certain cases, there would be great incentive to delay proceedings for more than one year, and on the one side, perhaps make contact very difficult, or, alternatively, force contact simply for show. Attorneys would be required to take measures to prevent the possibility of a claim for “willful absence”, thereby adding more stress and complications to divorce proceedings.

The Court of Appeals’ majority also recognized the element of conflict and abuse in a marriage that, for very good reason, requires physical separation. Appellee initially left the marital home after enduring a barrage of verbal epithets from Hermann Von Greiff who, on multiple occasions ordered Appellee to leave the marital home titled in his name. The Court

noted that despite Hermann's directive to leave, Appellee did not immediately leave the home, presumably because she was concerned about his well-being even under those difficult circumstances and instead waited for Hermann's daughter to arrive from Florida. *Von Greiff*, *supra* at 254. To remain in the home with an abusive partner for the sole purpose of preserving one's rights under EPIC is illogical and ultimately dangerous for the recipient of such abuse. Later, by mutual consent and pursuant to stipulated court order, appellee returned to the marital home while decedent lived in assisted living and then moved away to Florida during the divorce proceedings where he ultimately died. Parties should not be penalized for taking measures to avoid domestic violence from an abusive partner.³

B. In re Erwin Estate, supra and related case law supports the Court of Appeals' majority decision to bar forfeiture for a surviving spouse in the context of a spouse's death during a divorce action.

This Court's analysis in *In re Estate of Erwin*, 503 Mich 1, 921 NW2d 308 (2018), lends further support to appellee's position. Unlike the parties in *Von Greiff*, the spouses in *Erwin*, James Erwin and Maggie Erwin, who married in 1968, never filed for divorce. And while the Von Greiffs lived apart during their divorce proceedings for just a little over one year with Anne Von Greiff in the marital home pursuant to court order, in contrast, the Erwins lived apart for a period of thirty-six years, from 1976 to 2012, the year James died. Maggie Erwin established a separate residence

³ In 2019, 57,018 incidents of domestic violence were reported to Michigan police. Many others went unreported. (Michigan State Police Criminal Justice Information Center (2020). 2019 domestic violence information. Retrieved from https://www.michigan.gov/documents/msp/Domestic_Violence_2019_697030_7.pdf). In 2019, there were 44 reported domestic violence murders in Michigan. (Michigan State Police Criminal Justice Information Center (2020). 2019 murder non-negligent manslaughter. Retrieved from https://www.michigan.gov/documents/msp/Murder_2019_697008_7.pdf.) Over half of domestic violence homicides in Michigan are committed with guns. (Federal Bureau of Investigation, U.S. Department of Justice (2012). Supplemental Homicide Data. Retrieved from: <https://cdn.americanprogress.org/wpcontent/uploads/2014/10/CAP-DV-MI.pdf>.)

in 1976, and thereafter sought a court order for financial assistance. James consented to the court order of support for Maggie and their children. *Id.* at 4. In 2010, two years before James' death, Maggie and James jointly sued James' employer to have Maggie's health coverage reinstated. In that proceeding, James "[m]ade it clear that Maggie was still his wife and that they had an ongoing relationship." *Id.* at 7. Maggie was listed as James' surviving spouse on his death certificate.

In James' probate proceeding, James' children from his first marriage contested Maggie's status as his surviving spouse on the ground that she was "willfully absent" under MCL 700.2801(2)(e)(i). The probate court nevertheless ruled that Maggie was James' surviving spouse and the Court of Appeals affirmed the probate court ruling.

In writing for the majority, Justice Wilder explored whether the phrase "willfully absent" under MCL 700.2801(2)(e)(i) was defined exclusively by physical separation or whether it included consideration of emotional bonds and connections between spouses. *Id.* at 9. In parsing out "willfully absent," the Court examined dictionary definition of the words "willful" and "absent" and concluded that "willfully absent" under MCL 700.2801(2)(e)(i) encompassed a physical and emotional component, with the burden of proof on the challenging party. *Id.* at 21. The majority held that MCL 700.2801(2)(e)(i) was to be read in the following context:

[w]ilful absence requires consideration of the totality of the circumstances. It presents a factual question for the trial court to answer: whether a spouse's complete absence brought about a practical end to the marriage. [*Id.* at 15 (emphasis added).]

In the present case, as was noted by the *Von Greiff* Court of Appeals, Appellee's absence did not "[bring] about a practical end to the marriage." To the contrary, the marriage's dissolution was "brought about" by Hermann's constant verbal onslaught. Appellee simply "[s]ought to bring about a *legal* end to her marriage" and exercised her right to do so. *Von Greiff, supra* at 260 (emphasis in original). As stated above, Appellee remained in the marital home during most of

the divorce proceedings whereas Hermann was in assisted living and moved to Florida. Realistically and as a practical matter, considering the “totality of the circumstances,” no one’s “absence” in *Von Greiff* ended their marriage. The separation occurred in the context of the divorce proceedings.

Erwin favored preserving “surviving spouse” status. Justice Wilder encouraged courts to “[c]onclude that the marriage endured and [to] allow the remaining legal spouse to retain his or her ‘surviving spouse’ status.” *Id.* at 17. In a related footnote, the Court reminded that “[f]orfeitures are not favored in law.” *Id.* at n 10. Maggie Erwin, who physically lived apart from her husband for decades and presented no evidence of emotional connection to James during the last year of James’ life, nevertheless qualified as a “surviving spouse” and avoided the penalties of MCL 700.2801(2)(e)(i). It is hard to reconcile why Appellee, who separated from Hermann but remained in the marital home for the majority of the divorce action with Hermann’s consent and by way of stipulated court order, would not likewise qualify as a “surviving spouse” for probate purposes.

Erwin’s dissent viewed MCL 700.2801(2)(e)(i) phrase “willfully absent” far more narrowly and rejected any emotional abandonment component, limiting its application to “physical absence” only under its plain language. *Id.* at 30. Justice Viviano, writing for the dissent, concluded that in order for this forfeiture provision to apply, a spouse must be “[p]hysically absent from the decedent spouse as the result of his or her *unilateral* decision.” *Id.* at 29-30 (emphasis added).

The dissent’s perspective highlights the difference between a spouse who unilaterally leaves a marriage *without* resort to legal process as in *Tkachik, supra*, and Appellee who initiated a lawsuit to legally dissolve her marriage. As with the vast majority of divorce cases, parties agree

to live apart during the pendency of the divorce. A further consideration in the context of domestic violence: a party may leave his or her spouse to protect oneself and may be fearful about initiating a divorce. Domestic violence would certainly be a factor under *Erwin* when examining “the totality of the circumstances” that may or may not give rise to a forfeiture under MCL 700.2801(2)(e)(i). See *Erwin* at 15.

Two other published Michigan cases shed light on this issue. The first, *In re Harris*, 151 Mich App 780; 391 NW2d 487 (1986), was decided under the predecessor statute to the EPIC, the Revised Probate Code. However, the key language, whether a spouse was “willfully absent” was included under MCL 700.290. *Id.* at 783. The decedent wife had filed for divorce at the time of her death, but the divorce was not concluded because of her death. Testimony revealed that the husband lived intermittently in the marital home in the year preceding the wife’s death and had not contributed financially when his wife was ill. The Court of Appeals first noted that “[t]he physical abandonment or desertion must be continuous for at least one year.” *Id.* at 786. *Harris* further recognized that forfeitures were disfavored in law. *Id.* The Court observed that physical presence in the marital home constituted “strong evidence” that the party “remain[ed] involved in the marriage.” The Court concluded that husband’s actions did not give rise to a finding of “willfully abandoned” under the Revised Probate Code.⁴

⁴ *In re Jaques*, unpublished per curiam of the Court of Appeals, issued March 26, 2002, has striking similarities to the present case. The surviving spouse wife had filed for divorce against her adulterous and abusive husband. His continued harassment forced her to move into a second marital home that was in close proximity to the first. Her husband died during the divorce action and before a judgment of divorce was entered. In the subsequent probate proceedings, the surviving spouse made claims for the homestead allowance, the exempt property allowance, and the family allowance. *Id.* at p 2. The Special Fiduciary asserted that the surviving spouse wife was “willfully absent” under MCL 700.290, the predecessor to MCL 700.2801(2)(e)(i) under the Revised Probate Code. *Jaques* cited *In re Estate of Harris, supra*, for the proposition that “[p]hysical presence in the marital home is strong evidence that the party remains involved in the marriage to some degree and has not intentionally given up any rights thereof.” *Id.* at 787. In

The facts contained in the more recent case of *Lovett v Peterson*, 315 Mich App 423; 889 NW2d 753 (2016), offer parallels to *Von Greiff*. The husband in *Peterson* engaged in extramarital affairs and moved out of the marital home years before he died. The wife continued to live in the marital home and, the evidence demonstrated that the wife remained committed to the marriage. *Id.* at 434. The decedent husband's daughter sought to strip the wife of surviving spouse status under MCL 700.2801(2)(e)(i) as being "willfully absent" from her husband for one year or more. While neither party in *Peterson* ever filed for divorce, they lived separately for more than one year, in fact many years. The Court noted:

It is true that the evidence demonstrated that Arbutus did not contact or visit Lyle during the last year of his life, but it was also undisputed that she did not do so because Lyle did not want her involved with his extramarital life. Nothing within the statute requires an innocent spouse to repeatedly attempt to reconcile or maintain physical proximity to his or her spouse against his or her spouse's wishes. [*Id.* at 435.]

The Court identified the husband as the "abandoning party" and did not require the wife to take affirmative steps to maintain contact under those circumstances.

In the present case, it would be highly unfair to require appellee to make attempts to remain in touch with Hermann who made it very clear he wanted nothing to do with her, who verbally abused appellee and, similar to *Peterson*, moved from the marital home.

C. The Estates and Protected Individuals Code ("EPIC"), MCL 700.1101 et seq., when read as a whole, recognizes the distinction between persons who leave a marriage without legal process and those who seek a legal dissolution to their marriage through divorce or annulment.

The Estates and Protected Individuals Code ("EPIC") contains specific references to marriages terminated by divorce or annulment or where certain marital rights have been waived.

Jaques, the Court of Appeals held that the probate court had not erred in concluding that the statutory exclusion was inapplicable. *Id.* at 5. Although not precedential, unpublished cases may be instructive. See MCR 7.215(C).

MCL 700.2801; MCL 700.2807. These sections specifically provide that persons who have been divorced, or had a marriage annulled, or contractually waived certain property rights no longer qualify as “surviving spouse.” MCL 700.2807(2) also provides four categories of persons who through certain actions are disqualified from being a “surviving spouse.” A 2016 amendment to MCL 700.2801 included a reference to “divorcing parties” - preventing such persons from serving as a funeral representative for the deceased spouse. Yet, there is no other mention of “divorcing parties” as precluding a surviving spouse from participating in estate proceedings for one’s deceased spouse.

Statutes which relate to the same subject or share a common purpose are considered *in pari materia* and must be read together as one law even if they contain no reference to one another and were enacted on different dates. *Michigan Humane Soc v Natural Resources Com*, 158 Mich App 393, 401; 404 NW2d 757 (1987). In construing a particular statute, or in interpreting its provisions, all statutes relating to the same subject, or having the same general purpose, should be read together as constituting one law, although enacted at different times and containing no reference to one another. *Id.* Each must be given effect if such can be done without repugnancy, absurdity, or unreasonableness. *Id.* (citing *State Bar of Michigan v Galloway*, 124 Mich 271, 277; 335 NW2d 475 (1983), *aff’d* 422 Mich 188; 369 NW2d 839 (1985)).

Reading EPIC as a whole, the Legislature recognized the impact and finality of divorce and annulment, and upon entry of a judgment of divorce or annulment, eliminated rights that would otherwise be conferred on a “surviving spouse.” This dissolution or annulment of a marriage has distinct consequences for purposes of inheritance rights. Unless included in a judgment of divorce or annulment or contractually provided for post-judgment or by virtue of being a creditor, the divorced spouse is properly removed from the inheritance equation.

Turning first to MCL 700.2801 which provides as follows:

- (1) An individual who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, he or she is married to the decedent at the time of death. A decree of separation that does not terminate the status of married couple is not a divorce for purposes of this section.

* * *

This initial section under .2801 clearly eliminates a divorced spouse or one who has had his or her marriage annulled from qualifying as a “surviving spouse.” Notably, one who is a party to a “decree of separation” otherwise known as a separate maintenance agreement remains married so could potentially qualify as a “surviving spouse.” Thus, the Legislature identified three categories of persons, the first two are barred from “surviving spouse” status and a third category, persons who obtained a decree of separation, who continue to remain married and thus potentially eligible as a “surviving spouse.”

Subsection 2 of .2801 sets forth a list of four additional categories that, if applicable, would disqualify an individual from being a “surviving spouse.” This subsection provides:

- (2) For purposes of parts 1 to 4 of this article and of section 3203, a surviving spouse does not include any of the following:
 - (a) An individual who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree or judgment is not recognized as valid in this state, unless they subsequently participate in a marriage ceremony purporting to marry each to the other or live together as a married couple.
 - (b) An individual who, following an invalid decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a third individual.
 - (c) An individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

- (d) An individual who, at the time of the decedent's death, is living in a bigamous relationship with another individual.

Subsections (2)(a)-(d) set forth the criteria that disqualify one as a surviving spouse: a person who believes he or she is divorced with an invalid divorce or annulment decree; a person with an invalid divorce or annulment decree who remarried; a person who is a party to a proceeding that results in an order purporting to terminate all marital property rights; a person living in a bigamous relationship at the time of the decedent's death. These are four examples persons who either took legal yet incomplete or flawed steps to be divorced or chose to live in a live in a bigamous relationship, a felony. MCL 750.439.⁵

MCL 700.2801(2)(e)(i) adds three more categories of individuals who would not qualify as a "surviving spouse":

- (e) An individual who did any of the following for 1 year or more before the death of the deceased person:

- (i) Was *willfully absent* from the decedent spouse.
- (ii) Deserted the decedent spouse.
- (iii) Willfully neglected or refused to provide support for the decedent spouse if required to do so by law. [Emphasis added]

* * *

⁵ MCL 750.439 provides: Polygamy—Any person who has a former husband or wife living, who shall marry another person, or shall continue to cohabit with such second husband or wife, in this state, he or she shall, except in the cases mentioned herein, be guilty of the crime of polygamy, a felony.

The provisions of this section shall not extend to any person whose husband or wife shall have voluntarily remained beyond the sea, or shall have voluntarily withdrawn from the other and remained absent for the space of five years next preceding such marriage, the party marrying again, not knowing the other to be living within that time, nor to any person who shall have good reason to believe such husband or wife to be dead, nor to any person who has been legally divorced from the bonds of matrimony.

These persons are those who, for a year before the decedent's death, were (i) willfully absent from the decedent; (ii) deserted the decedent spouse; or (iii) willfully neglected or failed to provide support for deceased spouse if required to do so by law. These three categories illustrate instances of what may be described as self-help or extrajudicial divorce. In these instances, the abandoning surviving spouse is stripped of his or her "spousal" status despite remaining married at the time of the deceased's spouse death.

A related statute, MCL 700.2807, which specifically addresses "divorce and annulment" as well as the contractual waiver of spousal rights, enumerates several rights that would otherwise be available to an individual as a "surviving spouse" that are, instead, severed upon divorce, annulment, or by contract under MCL 700.2807. The rights eliminated under this section include:

- The disposition or appointment of property in a governing instrument;
- The disposition or appointment created by law or in a governing instrument;
- The conferring of a power of appointment;
- The barring of exercising a power under MCL 700.3206(1);
- The nomination of a fiduciary position in the former spouse's estate plan;
- The severing of joint tenancy with survivorship rights and transforming those estates to tenancies in common;
- The right of the former spouse to make funeral arrangements under section MCL 700.3206;

Subsection (1) of MCL 700.2807 includes a provision that the above-listed rights that are otherwise terminated by divorce or annulment would be revived upon remarriage or the nullification of the divorce or annulment. MCL 700.2807(4).

Read together, MCL 700.2801(1) and MCL 700.2807 reflect the Legislature's understanding that individuals who have pursued a legal conclusion to their now dissolved marriage have presumably benefitted from a legal re-apportionment of property rights, assets and

liabilities as provided in a judgment of divorce or annulment. Any property claims arising by virtue of the marriage should have been addressed (absent potential creditor claim or post judgment obligations) and, accordingly, have no place in probate because this individual is no longer a “surviving spouse” by operation of law. Section 2807 highlights “divorce” and “annulment” and includes no mention of rights forfeited while participating in a divorce action.

In 2016, MCL 700.2801 was amended to add subsection (3) which specifically provided:

* * *

(3) for purposes section 3206, a surviving spouse does not include either of the following:

(a) An individual described in subsection (2)(a) to (d).

(b) An individual who is a party to a divorce or annulment proceeding with the decedent at the time of the decedent’s death.

MCL 700.3206 permits certain family members to make funeral arrangements. MCL 700.3206(3)(c) confers priority on a “surviving spouse” to serve as a funeral representative unless the decedent designated a different funeral representative under MCL 700.3206(2). By amending MCL 700.2801, the Legislature eliminated a divorcing party from qualifying as a surviving spouse under MCL 700.3602 as the only instance where a divorcing party loses the status of “surviving spouse.” *Von Greiff, supra* at 263-264. The Legislature placed no other limitations on a surviving spouse in the context of MCL 700.2801 thereby giving support to the implication that the Legislature, by preventing divorcing parties from making funeral arrangements without any other restriction under MCL 700.2801, intended that to be the extent of its limitations on divorcing parties.

The familiar legal maxim, “*expressio unius est exclusio alterius*,” the expression of one thing is the exclusion of another is applicable to the 2016 amendment to MCL 700.2801. See

Hoerstman Gen Constr Inc v Hahn, 474 Mich 66, 74; NW2d 340 (2006). When applied to MCL 700.2801, the Legislature’s decision to bar divorcing parties from participating in funeral arrangements *only* without any further restrictions suggests that this was the outer limits of legislative restrictions under this section for divorcing parties. The Court of Appeals’ extrapolation of the amendment to MCL 700.2801 illustrates the Legislature’s awareness of “divorcing parties,” and its choice to bar divorcing parties from serving as funeral representatives only-no other restrictions.

D. *MCL 700.2801(2)(e)(i) use of the phrase “willfully absent” does not apply to divorce proceedings.*

Taking a closer look at the phrase “willfully absent,” it is clear that this phrase refers to non-divorce, extra-legal unilateral behaviors of one spouse-not behaviors in the context of a divorce action. Neither “willfully” nor “absent” are defined in MCL 700.2801. “Undefined words are to be given meaning as understood in common language, considering the text and the subject matter in which they are used.” *People v Lanzo Constr Co*, 272 Mich App 470; 726 NW2d 746 (2006). Black’s Law Dictionary (9th ed) defines willful” as “[voluntary and intentional, but not necessarily malicious.” [W]illful involves design and purpose and means intentional,” *Jennings v Southwood*, 446 Mich 125, 139-140; 521 NW2d 230 (1994). “[W]hen a statute prohibits the willful doing of an act, the act must be done with the specific intent to bring about the particular result the statute seeks to prohibit.” *People v Janes*, 302 App 34, 41; 836 NW2d 883 (2013) (quotation marks and citation omitted). Merriam Webster defines “absent” as (1) “not present at a usual or expected place: missing”; (2) “not existing: LACKING”; (3) “showing lack of attention to what is happening or being said: not attentive.” *Merriam Webster* online dictionary <https://www.merriam-webster.com/dictionary/absent>.

Courts give the words of a statute their plain and ordinary meaning, looking outside the statute to ascertain the Legislature's intent only if the statutory language is ambiguous. *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995); MCL 8.3a. Where language of a statute is unambiguous, Court are to "[p]resume that the Legislature intended the meaning clearly expressed-no further judicial construction is required or permitted, and the statute must be enforced as written." *DiBenedetto v West Shore Hosp*, 416 Mich 394, 402; 605 NW2d 300 (2000); MCL 8.3. Furthermore, whenever a court interprets a statute, it is to attempt to ascertain and fulfill the Legislature's intent in passing it. *Marquis v Hartford Accident & Indem*, 444 Mich 638; 513 NW2d 799 (1994). A court is to construe a statute's provision not in isolation but in context. *Sun Valley Foods Co v Ward*, 460 Mich 230; 596 NW2d 119 (1999).

Examining the phrase "willfully absent" in MCL 700.2801(2)(e)(i), it is abundantly clear that the dictionary definition of this phrase has no application to divorce proceedings. *Erwin* stated that the phrase "willfully absent" is to be interpreted consistently within the meaning of the two other subrules, desertion and neglect and that these three are "inherently fault-based and rest on intentional spousal misconduct." *Von Greiff* at 257-258. *Erwin* noted that the adjoining subsection of MCL 700.2801(2)(e), namely (ii) "desertion" and (iii) "willful neglect":

[d]escribe acts on behalf of a surviving spouse that for all intents and purposes are inconsistent with the very existence of a legal marriage. This is either by a spouse refusing to provide required support or by simply abandoning the other without an intent to return. In other words, MCL 700.2801(2)(e)(ii) and (iii) involve intentional acts that bring about a situation of divorce in practice, even when the legal marriage has not been formally dissolved. MCL 700.2801(2)(e)(i) should be interpreted with this context in mind. [*Erwin* at 15.]

In *Von Greiff*, appellee's actions were quite the opposite of "willfully absent." Rather, she was very present, living in the parties' marital home with the *consent* of her estranged and abusive husband who moved thousands of miles away. Later, appellee resided in the marital home pursuant to a stipulated court order for exclusive possession. As is typical in divorce actions, the

parties communicated through counsel and the parties participated in court proceedings through their attorneys. Appellee did not disappear, leave Marquette, or fail to participate in the divorce action. Appellee did not move abroad and cut off ties with Hermann. Rather, she pursued a court process available to her that, by its very nature, required communication with the other party through counsel, court filings and court hearings. The phrase “willfully absent” under MCL 700.2801(2)(e)(i), when read in context, refers to the party who departs a marriage without the formalities of court processes.

CONCLUSION AND RELIEF

In *Von Griefff*, it is hard to reach any conclusion other than Hermann effectively abandoned Appellee. It was Hermann who had been abusive during the marriage, engaged in multiple affairs, admitted to adultery, and ordered Appellee to leave the marital home that was solely titled in his name. He also withdrew almost all assets from their joint accounts, leaving Appellee with no practical alternative but to file for divorce. To treat Appellee as having “willfully abandoned” Hermann would leave her without an adequate remedy. She “followed the rules,” went to court and obtained exclusive possession of the marital home by mutual consent that was sanctioned by the court through its order. She communicated with her husband during the divorce proceedings through counsel, court filings, and court hearings. The Court of Appeals’ decision should be affirmed. The extreme penalty of forfeiture under MCL 700.2801(2)(e)(i) should have no bearing on a surviving spouse who is a party in the process of obtaining a divorce when the other spouse dies.

Respectfully submitted,

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Dated: November 8, 2021