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**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

In re: ESTATE OF
HERMANN A VON GREIFF

Michigan Supreme Court Case No: 161535
Court of Appeals No: 347254
Marquette Probate Court No: 18-34046-DE

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CARLA J. VON GREIFF,

Petitioner-Appellant,

v

ANNE JONES-VON GREIFF,

Respondent-Appellee.

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# APPELLANT CARLA VON GREIFF'S SUPPLEMENTAL BRIEF

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Dated: August 16, 2021

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## ORDER APPEALED FROM AND RELIEF SOUGHT

Appellant Carla J. Von Greiff seeks leave to appeal the Court of Appeals' 2-1 published opinion dated April 23, 2020 reversing the Marquette County Probate Court's opinion and order dated December 26, 2018 and creating a common law exception to the unambiguous language of MCL 700.2801(2)(e).

On March 31, 2021, this Court entered an Order requesting the filing of Supplemental Briefs on the issue of, "whether the period of time after the filing of a complaint for divorce is counted when considering whether a spouse was 'willfully absent' from the decedent for more than a year before his or her death."

Appellant respectfully requests that this Honorable Court grant leave to appeal, reverse the Court of Appeals' decision and affirm the Marquette County Probate Court's decision, or, in the alternative, peremptorily reverse the Court of Appeals majority for the reasons set forth in the Court of Appeals dissent.

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## STATEMENT OF QUESTION PRESENTED FOR REVIEW

1. Should the period of time after the filing of a complaint for divorce be counted when considering whether a spouse was 'willfully absent' from the decedent for more than a year before his or her death?

The Court of Appeals majority answers no.
The Court of Appeals dissent answers yes.
Appellant answers yes.
Appellee answers no.
The Probate Court did not reach this issue.

RECEIVED by MSC 8/17/2021 1:23:06 PM

## TABLE OF CONTENTS

INDEX OF AUTHORITIES……..…….v

INTRODUCTION…….……..1

ADDITIONAL PROCEDURAL FACTS AND BACKGROUND……..……..5

ARGUMENT……..……...……..9

I. Under Michigan Law, the Time Period After the Filing of a Divorce Action is Properly Counted When Considering Whether a Spouse is "Willfully Absent" from a Decedent……...……..…….…..9

a. In Creating a Common Law Exception to MCL 700.2801(2)(e)(i) for Divorcing Couples, the Court of Appeals Created a Poorly Reasoned and Arbitrary Rule of Law……..……....10

b. Under *Erwin Estate*, Courts Already have Discretion to Deem Absences Willful or Unwilful Whether in the Context of Divorce or Otherwise, and a Blanket Rule that All Absences During a Divorce are Unwilful is Bad Public Policy……...……1
2

c. The Panel Majority Erred in Conflating a Divorcing Spouse's Property Rights with a Surviving Spouse's Property Rights Under Parts 1 through 4 of Article II of EPIC…….……...…….15

d. The Court of Appeals May Not Create an Equitable, Common Law Tolling Period of a Timeframe Established by the Legislature……16

CONCLUSION…….……...…..17

RECEIVED by MSC 8/17/2021 1:23:06 PM

## INDEX OF AUTHORITIES

### Cases

*In re Conservatorship of Brody*, 321 Mich App 332; 909 NW2d 849 (2017)……6
*Buzzitta v Larizza Industries, Inc*, 465 Mich 975; 641 NW2d 593 (2002)……10
*In re Erwin Estate*, 503 Mich 1; 921 NW2d 308 (2018).....*passim*
*Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66; 711 NW2d 340 (2006)…….....17
*Millross v Plum Hollow Golf Club*, 429 Mich 178; 413 NW2d 17 (1987)……...17
*People v Conat*, 238 Mich App 134; 605 NW2d 49 (1999)……..10
*People v Gioglio*, 292 Mich App 173; 807 NW2d 372 (2011)……..…..11, 12
*People v Gioglio*, 490 Mich 868; 802 NW2d 612 (2011)……..11
*Robertson v Daimlerchrysler Corp*, 465 Mich 732; 641 NW2d 567 (2002)……..….10, 12
*Trentadue v Bucker Lawn Sprinkler*, 479 Mich 378; 738 NW2d 664 (2007)…….....16, 17
*Van v Zahorik*, 460 Mich 320; 597 NW2d 15 (1999)……...……...……..14
*In re Von Greiff Estate* 332 Mich App 251; 956 NW2d 524 (2020)……...2

### Statutes

MCL 487.703…….4, 16
MCL 700.2801(2)(e)……...……...….*passim*
MCL 700.2801(2)(e)(i)…….……..*passim*
MCL 700.6101……...4, 16

### Treatises

2A Sands, Sutherland Statutory Construction (4th ed.)…….17

RECEIVED by MSC 8/17/2021 1:23:06 PM

## INTRODUCTION

The Court requested supplemental briefs addressing, "whether the period of time after the filing of a complaint for divorce is counted when considering whether a spouse was 'willfully absent' from the decedent for more than a year before his or her death." This question springs from a 2-1 split decision by the Michigan Court of Appeals, in which the panel majority concluded that "willful absence" cannot exist in the context of divorce. Appellant's answer is that the period of time during divorce proceedings may or may not be counted – not based upon the pending divorce proceedings themselves, but rather upon the circumstances of each particular case pursuant to existing Michigan case law established by this Court.

However, the panel majority was incorrect in ruling that divorce constitutes a *per se* exception to MCL 700.2801(2)(e)(i). Courts may not create judicial exceptions to statutes; such exceptions should only be created by the Legislature after carefully weighing the equities on all sides of an issue. Further, **as already ruled by this Court in *In re Erwin Estate*** (discussed, *infra*), the facts of each instance of willful absence must be reviewed when making a determination under MCL 700.2801(2)(e)(i). Divorce should not, in and of itself, constitute a blanket exception to that statute for the reasons set forth, *infra*.

Consider, for instance, a wife who becomes ill with cancer and seeks treatment away from her home. Upon returning, she finds the locks to her marital home changed and her husband living there with his mistress. The husband cuts off all contact with his dying wife, seemingly too enveloped in his new romance to care about the well-being of his long-time spouse. Eleven months after their last contact, the husband initiates divorce proceedings. Two months after her husband filing for divorce, and having had no contact with him for over a year, the wife succumbs to cancer. The husband, who was only going to receive a portion of his wife's separate assets through divorce,

RECEIVED by MSC 8/17/2021 1:23:06 PM

now inherits everything – even retaining the right to elect against her will if she took the affirmative step of excluding him after she was abandoned. This deeply inequitable result is only made possible by the rule of law created by the majority in *In re Von Greiff Estate* 332 Mich App 251; 956 NW2d 524 (2020), which provided safe harbor to the husband by virtue of the divorce proceedings being filed 11 months after the couples' last contact[1].

Prior to that ruling, courts would have had the discretion to determine if the husband had been "willfully absent" from his wife and, if so, to deem him ineligible to inherit from her estate. However, by virtue of the *Von Greiff* decision, that discretion was ripped from the court's hands simply because divorce proceedings were initiated by the husband 11 months after abandoning his marriage, which remained pending at the time of the wife's death. For the abandoned, ill wife, the fact that her husband filed for divorce was of no solace or comfort. On the contrary, it ensured that he would always inherit from her, even if she changed her estate plan to exclude him. The protections she was afforded by MCL 700.2801(2)(e)(i)[2] were eviscerated by the panel majority's decision.

Appellant Carla Von Greiff's ("Appellant") position is that MCL 700.2801(2)(e)(i) is unambiguous, and the Court of Appeals impermissibly modified the statute by creating a common-law exception for cases where divorces are pending. The panel majority overreached its authority by ignoring established precedent and the plain language of the statute, and its ruling is faulty in several, independent respects.

[1] Far from a single, abstract concept, the same ruling would result if the wife, rather than having cancer, left the home because of abuse.

[2] The Court of Appeals arguably extended its ruling beyond "willful absence" under MCL 700.2801(2)(e)(i), finding that the entirety of, "MCL 700.2801(2)(e) does not apply as a matter of law" when divorce proceedings are pending. *See* Appendix, COA Majority Opinion, p AT003. This expansive decision, which impacts all future cases of this nature, was based upon the panel majority's subjective view of the equities in a single case before it. A primary problem with creating a sweeping rule of law based upon the interpretation of narrow set of facts is that it does not account for other circumstances that may arise in future case, as addressed herein.

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First, the panel majority's creation of a judicial exception to MCL 700.2801(2)(e)(i) for divorcing spouses is improper, as exceptions to statutes must be created by the Legislature, which will carefully consider all viewpoints and weigh the equities, accordingly. Here, the Court of Appeals' actions illustrate the danger of creating a broad, judicial exception to a statute based upon a single, narrow set of facts. While the panel majority may have believed it reached a just result under the particular facts of *In re Von Greiff Estate*, it takes little imagination to envision how its opinion would result in great injustice under different circumstances, eliminating protections to abandoned spouses and providing protections to those who should rightfully be divested of spousal interests under MCL 700.2801(2)(e)(i).

Second, the panel majority's decision deviates from established precedent. This Court already provided a thoughtful interpretation of MCL 700.2801(2)(e)(i) in *In re Erwin Estate*, 503 Mich 1; 921 NW2d 308 (2018), which allows courts to review, "the totality of the circumstances" in determining if a spouse has been willfully absent, whether during a divorce or in any other context. *Id* at 17. However, the Court of Appeals' decision removes the discretion bestowed in *In re Erwin Estate*. This Court ruled that courts should determine what constitutes *willful* absence on a case-by-case basis (whether within the context of divorce or otherwise), but the Court of Appeals erroneously contradicted that ruling and replaced the discretion given by this Court with a blanket rule that willful absence can *never* occur when divorce proceedings are pending at the time of one spouse's death. *Erwin Estate*, 503 Mich at 17; *See* Appendix, COA Majority Opinion, p AT003.

Third, the panel majority erred in conflating Appellee's *potential* property rights as a divorcing spouse with Appellee's property rights under Parts 1 through 4 of Article II of

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Michigan's Estates and Protected Individuals Code ("EPIC") as a surviving spouse[3]. The property interests of divorcing spouses and willfully absent surviving spouses differ greatly. Yet, the Court of Appeals speculated as to what Appellee did not receive as a result of her divorce from Hermann not being finalized, and then attempted to counterbalance that *perceived* loss by granting Appellee surviving spouse status contrary to MCL 700.2801(2)(e)(i). Setting aside the panel majority's problematic conjecture, the opinion incorrectly implies that Appellee was unable to inherit from Hermann in any manner as a result of being deemed not a surviving spouse pursuant to MCL 700.2801(2)(e)(i). On the contrary, Appellee still received, as matter of legal right, all joint marital assets, as well as any pensions, government benefits, and other non-probate transfers held with or by Hermann at the time of his death. MCL 700.6101. Further, Appellee was able to retain all her own individual assets, rather than having those divided in the divorce action. Consequently, there is no patent unfairness in deeming an abandoning spouse "willfully absent" in the context of divorce proceedings, as MCL 700.2801(2)(e) only precludes willfully absent spouses from inheriting under limited circumstances, and does not equate to a loss of all property that a spouse would have received through a judgment of divorce. MCL 700.2801(2).

Finally, the panel majority's decision amounts to the equitable tolling of the 1-year time period established by MCL 700.7801(2)(e)(i) for cases where divorce proceedings are pending. Michigan law does not permit equitable tolling, and any such rule established by the panel majority's decision is contrary to long-standing precedent.

[3] MCL 700.2801(2)(e)(i) is of limited scope and impacts a spouse's right to inherit under certain circumstances. MCL 700.2801 ("**For purposes of parts 1 to 4 of this article and of section 3203**, a surviving spouse does not include any of the following:…") (emphasis added). Regardless of willful abandonment, a spouse may still inherit through a devise in a will or bequest in a trust, or through non-probate transfers on death, including, by way of example and not limitation, joint financial accounts, policies of life insurance, pensions, etc. *Id*; MCL 700.6101; MCL 487.703.

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For these reasons, as addressed in detail, *infra*, the panel majority should be reversed, and the opinion of the Court of Appeals dissent should be adopted.

## ADDITIONAL PROCEDURAL FACTS AND BACKGROUND

While detailed background and procedural histories were provided in prior filings, the question raised by this Court calls for a review of the Court of Appeals' findings and prevailing attitudes with respect to the case at hand. The panel majority was frank in its subjective beliefs about this case and exhibited a clear bias in favor of Appellee. This fact underscores the dangers of courts rewriting statutes based upon the facts – or perceived facts – of a single case. This danger is especially hightened when courts create bright-line exceptions to laws that already have established framework with which to review cases based upon their individual circumstances.

On the record at oral arguments, the Court of Appeals described the matter as, "an extremely unfortunate case" and a "very horrible anomaly.[4]" Further, the Court of Appeals pejoratively stated that it found Appellant's arguments, "just astonishing.[5]" The Court of Appeals further called for, "empathy" for the, "injustice" suffered by Appellee, declaring that, "[MCL 700.2801(2)(e)(i)] isn't very well constructed.[6]" The Court of Appeals characterized facts that favored Appellant – facts to which Appellee, herself, testified as true and accurate – as speculative. For example, Appellee herself testified that Hermann Von Greiff ("Decedent" or "Hermann") asked her to stay before she left their home never to see him again[7], yet the panel majority editorialized that undisputed fact, stating that Hermann's request that Appellee not leave him was only, "supposedly" made[8]. Appellee, the Court of Appeals lamented, "fell into [a] little crack" in

[4] Appendix, COA Oral Arguments Transcript, pp AT026-AT027.
[5] Appendix, COA Oral Arguments Transcript, p AT027.
[6] Appendix, COA Oral Arguments Transcript, pp AT028-AT029.
[7] Appendix, Probate Court Opinion, p AT015.
[8] Appendix, COA Oral Arguments Transcript, p AT031.

RECEIVED by MSC 8/17/2021 1:23:06 PM

the law, from which the panel majority was determined to rescue her[9]. These were the subjective views and interpretations the panel majority brought to the case.

In an effort to support its views in its ultimate ruling, the panel majority went out of its way to reach its own factual findings, many of which conflicted with the factual findings of the trial court. By way of example, the panel majority wrote that Hermann was, "bipolar.[10]" However, in actuality, the record reflects that it was merely Appellee's opinion that Hermann was bipolar, and that she was unaware of any formal diagnosis[11].

The panel majority also universally accepted Appellee's testimony as true, and disregarded any conflicting testimony offered at trial. By way of further example, Appellee testified that she did not want Hermann to undergo surgery because of the "risks,[12]" while Appellant testified that Appellee was against Hermann's surgery because his recovery was going to, "ruin her summer[13]" due to the fact that Hermann would need a great deal of post-surgery care. The panel majority's naked acceptance of Appellee's statements and apparent rejection of Appellant's testimony is problematic, because the Marquette County Probate Court (the "Probate Court") cast doubt on Appellee's credibility, finding she contradicted herself at times, and portrayed herself in a disingenuous manner at trial[14,15].

Regarding the actual facts of the case, the Probate Court conducted a multi-day hearing, accepted numerous exhibits into evidence and heard hours of testimony by Appellee and other

[9] Appendix, COA Oral Arguments Transcript, p AT028.
[10] Appendix, COA Majority Opinion, p AT002.
[11] Appendix, 11/7/18 Probate Hearing Transcript (Part 1), p AT038.
[12] Appendix, COA Majority Opinion, p AT002.
[13] Appendix, 11/7/18 Probate Hearing Transcript (Part 2), p AT043-AT044.
[14] Appendix, Probate Court Opinion, pp AT020-AT021.
[15] The Court of Appeals was required to defer to the Probate Court on matters of credibility and should have viewed Appellee's statements with the same skepticism as the lower court. *In re Conservatorship of Brody*, 321 Mich App 332, 336; 909 NW2d 849 (2017).

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witnesses. Ultimately, with the benefit of sitting as the trier of fact, the Probate Court determined Appellee was willfully absent from Hermann[16].

Among the exhibits offered by Appellee and admitted by the Probate Court were a series of transcript excerpts from the divorce proceedings Appellee had initiated against Hermann[17]. Hermann was recovering from spinal surgery in a hospital – where he remained for three weeks, including a period in intensive care – when Appellee initiated divorce proceedings against him[18]. Additionally, the Court admitted several filings from those divorce proceedings. Each and every statement Appellee sought to have admitted from the divorce trial was admitted into evidence[19]. In sum, Appellee was given every opportunity to present a full and complete portrayal of her story, yet the Probate Court still found her absence to be "willful."

Regarding the proofs presented to the Probate Court, the Court of Appeals stated that, "[t]he evidentiary hearing in this case was unnecessary and the probate court's findings irrelevant, because MCL 700.2801(2)(e) does not apply as a matter of law." However, the panel majority went on to contradict its position by making a series of factual findings to support its own rationale, many of which went against the clear-cut findings of the Probate Court or were simply unsupported by the record.

By way of example, and not limitation, the panel majority found, "[Appellee] did not intend to abandon or desert Hermann by consigning him to a marriage with none of the fundamental attributes of a marriage.[20]" Conversely, the Probate Court found:

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[16] Appendix, Probate Court Opinion, p AT023.
[17] Appendix, Probate Court Order, pp AT048-AT055
[18] Appendix, 11/7/18 Probate Hearing Transcript (Part 2), p AT045-AT046.
[19] At oral arguments before the Court of Appeals, Appellee's counsel disingenuously stated that discussion of the divorce was, "verboten" before the Probate Court and that he, "attempted to bring [the divorce matter] in [before the Probate Court], [that] it was objected, and it was very small parts of the divorce proceeding [that were admitted]." *See* Appendix, COA Oral Arguments Transcript, p AT034. This is untruthful. In fact, every portion of the divorce record Appellee requested be admitted was admitted. *See* Appendix, Probate Court Order, pp AT048-AT055.
[20] Appendix, COA Majority Opinion, p AT005.

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> [Appellee] agreed that for all intents and purposes, that [*sic*] she and Hermann lived as a divorced couple from May 18, 2017 until his death on June 17, 2018.
>
> * * *
>
> There was no indication from [Appellee] that at any time from May 2017 until Hermann's death [Appellee] felt that she and Hermann were still husband and wife. There was no testimony or evidence showing an emotional connection between Hermann and [Appellee]. There was no evidence of the couple's continuing relationship for the one year preceding the death of [Hermann][21].

The abandonment detailed by the Probate Court all occurred while Appellee and Hermann remained married. The Court of Appeals dissent further contrasted the panel majority's findings, commenting at oral arguments that, "[t]here's continued efforts, and there's absolutely no efforts, which is what we have here – which is in fact a renunciation [of the marriage by Appellee].[22]" Even the Court of Appeals panel hearing this case disagreed on the quality and effect of the contact (or lack thereof) by Appellee, which further underscores the danger of modifying a statute based upon the subjective views of a single judge or judicial panel.

The panel majority further found that, "[Appellee]'s absence during the period that the divorce remained pending did not 'bring about' the end of the Von Greiff marriage.[23]" This, too, is contradictory to the findings of the Probate Court, which found:

> Upon delivering [Appellant] to the marital home, [Appellee] collected her bags and the dog and left the home.
>
> [Appellee] admitted that before leaving the home, Hermann asked her to stay. [Appellee] left the home despite Hermann's request that she stay.
>
> *** * ***
>
> [Appellant] texted [Appellee] on at least two occasions asking her to come to the hospital to speak with Hermann [following his spinal surgery]. [Appellee] did not think it was a good idea to go to the hospital and therefore, she did not.

[21] Appendix, Probate Court Opinion, pp AT018, AT022-AT023.
[22] Appendix, COA Oral Arguments Transcript, p AT032.
[23] Appendix, COA Majority Opinion, p 006.

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* * *

> There was no indication from [Appellee] that at any time from May 2017 until Hermann's death [Appellee] felt that she and Hermann were still husband and wife[24].

The Probate Court determined that it was, indeed, Appellee's absence from the marriage and refusal to engage with Hermann, despite his expressed desire to work matters out, that brought about the end of the marriage.

The discrepancies between the panel majority's "factual" justifications for its opinion, compared to the findings of the Probate Court and the Court of Appeals dissent highlight the subjective basis from which the panel majority's decision springs. Appellant is not asking this Court to determine which of the competing views is correct or equitable. Rather, the point of reciting the factual discrepancies is to draw attention to the considerable danger in creating a sweeping rule of law – let alone a judicial exception to an unambiguous statute – based upon policy preferences for a particular outcome in a single case. Unintended consequences can and will follow such decisions, and the panel majority's subjective ruling should be reversed.

## ARGUMENT

### I. Under Michigan Law, the Time Period After the Filing of a Divorce Action is Properly Counted When Considering Whether a Spouse is "Willfully Absent" from a Decedent

In enacting MCL 700.2801(2)(e), the Michigan Legislature created a law that is, if nothing else, evenhanded regardless of circumstances. Critical to an analysis of that statute is to consider who the statute protects: abandoned spouses. While there are instances when willful absence should not count against an absent spouse, this Court has already provided for such contingencies in *In re Erwin Estate* (as addressed in detail, *infra*). However, to grant quarter from MCL 700.2801(2)(e)(i) to **all** *willfully absent spouses* on the simple basis of pending divorce

[24] Appendix, Probate Court Opinion, pp AT015-AT016, AT018.

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proceedings would result in great harm to those persons the law was enacted to protect in the first place: *abandoned spouses*. Contrary to the intent of the law, the panel majority reached a legally unjustifiable decision that protects the willfully absent spouses, and it should be reversed.

### A. In Creating a Common Law Exception to MCL 700.2801(2)(e)(i) for Divorcing Couples, the Court of Appeals Created a Poorly Reasoned and Arbitrary Rule of Law

The panel majority created a judicial exception MCL 700.2801(2)(e)(i) in cases where divorce proceedings are pending. Such a change in statutory requirements should not be made by a court. Michigan's legislators, not its judges, are the appropriate individuals to decide whether to amend the provisions of EPIC. *People v Conat*, 238 Mich App 134, 146; 605 NW2d 49 (1999) ("No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in [the Michigan Constitution]." "[T]he evil to be avoided [by the separation of powers] is the accumulation in one branch of the powers belonging to another.").

To the extent the Court of Appeals' decision calls for this Court to analyze and weigh public policy as it pertains to divorcing, willfully absent spouses, the Court should defer to the plain language of the Legislature, as it is not the task of the judiciary to use public policy to preempt the statutory framework of our State. *Buzzitta v Larizza Industries, Inc*, 465 Mich 975, 976; 641 NW2d 593 (2002) (CORRIGAN, J., concurring) ("This Court lacks authority to rewrite statutes to conform to our view of sound public policy. Indeed, we must apply statutory text even where we view the result as 'absurd' or 'unjust.'"); see also *Robertson v Daimlerchrysler Corp*, 465 Mich 732, 758; 641 NW2d 567 (2002) (it is the "constitutional duty" of Michigan Courts "not to substitute our own policy preferences in order to make the law less 'illogical'").

Regardless of the panel majority's policy preferences, divorce proceedings simply cannot abrogate MCL 700.2801(2)(e)(i) under the plain language of the statute. This single factor cannot

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be determinative of willful absence and there are certainly instances in which spouses engaged in divorce proceedings have also willfully absented themselves from their marriages. Divorce proceedings should not insulate those willfully absent spouses from the ramifications of their actions. Regardless of divorce proceedings, the impact of a spouse's willful absence is the same on the abandoned spouse, and it is the abandoned spouse – not the abandoning spouse – whom MCL 700.2801(2)(e)(i) is intended to protect. The only person who benefits from the panel majority's rule is the willfully absent spouse, which is contrary to the intent of the statute.

Moreover, "[a]pplication of …[a] rule of law… [should not] result in inconsistent outcomes in every case. The rule of law should not depend on the idiosyncrasies of a particular Court of Appeals panel." *People v Gioglio*, 292 Mich App 173, 237; 807 NW2d 372 (2011) (KIRSTEN FRANK KELLY, J., dissenting), rev'd *People v Gioglio*, 490 Mich 868; 802 NW2d 612 (2011). In this instance, the panel majority's rule would unfairly and arbitrarily be applied based upon nothing more than the date divorce proceedings are initiated.

If the time that divorce proceedings are pending is not counted toward the period of willful absence, an arbitrary day or two could be determinative as to whether the abandoning spouse would retain surviving spouse privileges. If a spouse is abandoned, and divorce proceedings are initiated 11 months and 29 days later, and the abandoned spouse unexpectedly dies thereafter, the abandoning spouse would retain surviving spouse privileges under the panel majority's ruling. However, had the divorce proceedings been initiated a mere 48 hours later, the abandoning spouse would be subject to the plain language of MCL 700.2801(2)(e)(i). The willful absence continued, unabated, in both cases, for the same amount of time before the abandoned spouse's death, yet in one instance the abandoning spouse retains surviving spouse status, while in the other that status

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is forfeited based upon a filing date difference of two days. These are the inconsistent and arbitrary outcomes the Court should endeavor to avoid. *Gioglio, supra*.

Again, to the abandoned spouse – the person MCL 700.2801(2)(e)(i) was enacted to protect – the divorce proceedings filed two days apart has no practical effect, and the willfully absent spouse should not be arbitrarily afforded a benefit based upon nothing more than a small difference in filing dates, or the filing of a divorce action at all.

There are countless scenarios in which an abandoned spouse would be harmed by the panel majority's ruling. This divergence of potential outcomes under the panel majority's ruling highlights the danger of courts creating judicial exceptions to statutes based upon their subjective interpretation of a single set of facts in one particular case. The panel majority's inaccurate perception of the parties in this case led to the creation of an improper and bad exception to MCL 700.2801(2)(e)(i). The equities and public policy ramifications of modifying or abrogating a statute must be considered by the Legislature, which is tasked with examining the societal impact of the statutes it enacts. Courts simply lack the authority to manufacture common law exceptions to unambiguous statutes, regardless of its public policy motivations. *Robertson*, *supra*.

### B. Under *Erwin Estate*, Courts Already have Discretion to Deem Absences Willful or Unwilful Whether in the Context of Divorce or Otherwise, and a Blanket Rule that All Absences During a Divorce are Unwilful is Bad Public Policy

Courts already have discretion to determine if a spouse's absence is willful – whether in the context of divorce or otherwise. As ruled by this Court, not all absences, no matter how absolute, are willful, and any absence that is not found to be "willful" will fall outside the strictures of MCL 700.2801(2)(e)(i), *to wit*:

> willful 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.

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*Erwin Estate*, 503 Mich at 17 (emphasis added). This exact standard was applied and upheld by the Probate Court in reaching is decision[25]. The guideposts established by this Court are clear: the trial court must review the "totality of the circumstances" in determining if there was *complete* emotional and physical absence resulting in the "practical end to the marriage." *Id*. In cases of abuse, for example, a lack of contact would not only be appropriate, but that the totality of such circumstances would certainly vitiate application of MCL 700.2801(2)(e)(i) against an abused spouse who was willfully absent. In that same case, however, the abuser would justifiably be subject to divestment under MCL 700.2801(2)(e)(i). However, under the Court of Appeals ruling, both the abused and abuser would be treated the same under MCL 700.2801(2)(e)(i) if divorce proceedings were pending between them[26].

Rather than recognizing that this Court already determined that willful absence concerns a question of fact, and then deferring to the factual findings of the Probate Court, the panel majority declared, "MCL 700.2801(2)(e) does not apply as a matter of law" when divorce proceedings are pending[27]. As noted, *supra*, the panel majority ignored several the Probate Court's findings and reached factual determinations of its own. The panel majority believed it was righting a wrong not considered by the Legislature[28], but in actuality created a rule that is unbendingly inequitable in certain situations and strips trial courts of the discretion to address the specific facts of the cases before them.

[25] Appendix, Probate Court Opinion, p AT019 ("The issue before the Court is whether **given the totality of the circumstances**, [Appellee] intended to be physically and emotionally absent from [Hermann]…") (emphasis added).
[26] Appendix, COA Majority Opinion, p AT001 ("[MCL 700.2801(2)(e)(i)] is inapplicable to the period of time consumed by divorce proceedings.").
[27] Appendix, COA Majority Opinion, p AT003.
[28] Appendix, COA Oral Arguments, p AT029.

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Consider again the hypothetical husband and wife discussed, *supra*. Whether the husband cut off contact with his dying wife for more than one year, then filed for divorce, or if he had filed for divorce eleven months after abandoning the marriage, his willful absence would be the same, his lack of support to his dying wife would be the same and the effective end of the marriage would be the same. Yet, the panel majority's decision would treat him differently under those two situations. Prior to *In re Von Greiff Estate*, the trial court had the discretion to review the facts of the case and reach the same conclusion in both scenarios. This fact-intensive, case-by-case approach far better serves the public interest than the panel majority's one-size-fits-all blanket rule to every instance of willful absence that involves a divorcing couple. Indeed, even if the panel majority's new rule was preferrable, it remains the Legislature's province to balance the potential equities of modify the statute. *Van v Zahorik*, 460 Mich 320, 327; 597 NW2d 15 (1999).

Divorce proceedings, alone, should not dictate whether MCL 700.2801(2)(e) applies as a matter of law. Divorce proceedings, like determinations of willful absence, are highly factual, and a single blanket rule cannot effectively cover all such cases that arise. This Court should reverse the Court of Appeals in favor of the factual inquiry approach it already adopted in *In re Erwin Estate*. *Erwin Estate*, 503 Mich at 17.

### C. The Panel Majority Erred in Conflating a Divorcing Spouse's Property Rights with a Surviving Spouse's Property Rights Under Parts 1 through 4 of Article II of EPIC

At oral arguments, the Court of Appeals made the erroneous comment that Appellee was rendered, "not an heir in any respect to a marriage and to the assets of the estate...[29]" The Court of Appeals incorrectly assumed that willfully absent spouses who are in the process of a divorce would receive less – possibly nothing – from their marriages if they were deemed willfully absent.

[29] Appendix, COA Oral Arguments, p AT026.

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That characterization is inaccurate. Despite the panel majority's statement, MCL 700.2801(2)(e)(i) does not completely prevent a willfully absent spouse from inheriting marital or spousal assets under EPIC.

MCL 700.2801(2)(e) is limited in scope, and only precludes a willfully absent spouse from inheriting under certain circumstances, such as electing against a will, or (as in this case) from receiving a share of a deceased spouse's *intestate* estate. However, the statute's reach falls short of preventing a surviving spouse from receiving non-probate transfers on death (*e.g.*, jointly held assets, policies of insurance, pensions, retirement or financial accounts on which the spouse is designated as beneficiary, etc.) or inheriting as a devisee under a will or a trust. MCL 700.2801(2).

In reaching its decision, the panel majority summarily stated that, "…[Appellee] would have been entitled to spousal support and, presumably, a fair share of the marital property [had the divorce concluded][30]." The Court of Appeals was attempting to make up for some perceived loss suffered by Appellee by virtue of her having not received "spousal support" or "marital property" through a judgment of divorce. Such a view is incorrect. The Court of Appeals ignored the legal reality that, by virtue of the divorce not being finalized, all joint marital assets held between Hermann and Appellee immediately passed to Appellee as a matter of law, and Appellee remained legally entitled to receive Hermann's pension and social security benefits as a matter of law. MCL 700.6101; MCL 487.703. Appellee also retained all property in her own name. Had a judgment of divorce been entered, Hermann and Appellee would have split the jointly held marital assets and, perhaps, Hermann would have received some share of Appellee's individual assets[31].

[30] Appendix, COA Majority Opinion, p AT008.
[31] In the instant matter, the only asset in Hermann's estate was a single house in his name. Appellee also maintained a house in her name, separate from Hermann, during the marriage. *See* Appendix, 11/7/18 Probate Hearing Transcript (Part 1), pp 38-39.

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Moreover, Appellee would not have been Hermann's surviving spouse and may not have received Hermann's pension and/or social security benefits.

Indeed, it is possible that a spouse (perhaps even Appellee) would receive less through a judgment of divorce action than from inheriting all assets jointly held with a deceased spouse, regardless of any assets received pursuant to Parts 1 through 4 of Article II of EPIC. Yet, the panel majority ignored this possibility, focusing instead on their subjective view that Appellee had suffered an injustice and been denied her fair share of property[32].

The narrow factual lens through which the panel majority reached its decision highlights the danger in creating a sweeping rule of law based upon a single set of facts. Even if the Court of Appeals' statement were true, it remains an unsound basis upon which to overturn MCL 700.2801(2)(e)(i), because it assumes that, "a fair share of the marital property" equates to a surviving spouse's property interests under Parts 1 through 4 of Article II of EPIC. The rationale of the panel majority was faulty, and its decision should be reversed.

### D. The Court of Appeals May Not Create an Equitable, Common Law Tolling Period of a Timeframe Established by the Legislature

If a spouse is willfully absent from the other spouse for at least *one year*, the absent spouse loses surviving spouse status under Parts 1 through 4 of Article II of EPIC. MCL 700.2801(2). The panel majority's ruling tolls that period in cases of divorce, extending the one-year period by any length of time divorce proceedings are pending. The Court of Appeals' decision was an improper judicial, equitable tolling of the statute. In Michigan, equitable tolling does not exist except as provided by statute. *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 389-392; 738 NW2d 664 (2007).

[32] Appendix, COA Majority Opinion, p AT008.

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As articulated by this Court:

> In general, where comprehensive legislation prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions, the Legislature will be found to have intended that the statute supersede and replace the common law dealing with the subject matter.

*Hoerstman Gen Contracting, Inc v Hahn*, 474 Mich 66, 74; 711 NW2d 340 (2006), quoting *Millross v Plum Hollow Golf Club*, 429 Mich 178, 183; 413 NW2d 17 (1987), citing 2A Sands, Sutherland Statutory Construction (4th ed.), § 50.05, pp 440-441.

MCL 700.2801(2)(e) clearly sets forth a one-year limitation period of willful absence, after which spouses forfeit certain rights under EPIC. There are no statutory exceptions to that statute relating to divorce. Yet, the panel majority created a common law exception to MCL 700.2801(2)(e), which tolls the one-year period for any amount of time that divorce proceedings are pending. The Court of Appeals cannot create an extrastatutory tolling period for an unambiguous timeframe established by the Legislature and for which the Legislature created no such tolling period. *Trentadue, supra*; *Hoerstman Gen Contracting, Inc, supra*. There is no statutory authority that would allow a tolling of the one-year period in instances of divorce and, accordingly, the panel majority reached its decision in error, and should be reversed.

## CONCLUSION

For the reasons set forth, *supra*, this Court should grant leave to appeal to reverse the Court of Appeals' decision and affirm the probate court's ruling in favor of Appellant. In the alternative, Appellant requests the Court peremptorily reverse for both the reasons stated in the Court of Appeals dissent and the reasons presented by Appellant.

Respectfully Submitted,

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