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STATE OF MICHIGAN

IN THE SUPREME COURT

IN RE: ESTATE OF HERMANN VON-GREIFF

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

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APPELLEE ANNE JONES-VON GREIFF'S SUPPLEMENTAL BRIEF

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APPELLEE ANNE JONES-VON GREIFF'S REQUESTED SUPPLEMENTAL BRIEF

In compliance with the March 31, 2021 Order, Appellee will not merely restate arguments expressed in her Brief In Opposition to Application for Leave. Appellee does believe, however, that it is necessary to reiterate some of her positions in response to Appellant's Supplemental Brief.

IDENTIFICATION OF THE ISSUE

Appellee's position is that the statute at issue, MCL 700.2801(2)(e), is a statute of forfeiture, and the first question to be asked is "What behavior is intended to be punished by this statute?"

This Court's decision in ***In Re Erwin Estate***, 503 Mich 1; 921 NW2d 308 (2018), provides the answer. This statute is intended to punish a spouse whose actions bring about an end to the marriage only in a practical manner, without actually ending the relationship legally.

> 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.
>
> ***In Re Erwin Estate***, supra, p.14 (*emphasis supplied)*

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Erwin further explained the purpose of MCL 700.2801(2)(e)(i) by reviewing the other, nearby, provisions of the statute:

> For the reasons stated, we conclude that, in this context, "absent" is most reasonably defined as referring to complete physical and emotional absence from the deceased spouse. This definition is consistent with the statutory scheme as a whole, which contemplates that one only loses his or her status as a "surviving spouse" if he or she takes action that is *akin* to a complete repudiation of the marriage.
>
> ***In Re Erwin Estate***, supra, p.21 (*emphasis supplied)*

Notice the deliberate use of the word *akin*. Very clearly, the majority in **Erwin**, supra, was not discussing a factual situation where a surviving spouse lost his or her status under MCL 700.2801(e)(i) by taking ***legal*** action that completely repudiates the marriage. Yet that is exactly the undisputed factual situation before us in this case. Appellee Anne Jones Von Greiff took ***legal*** action to end her marriage to Hermann Von Greiff. In fact, the action she took represents the only remedy available to her in Michigan in order to terminate her contract of marriage with Hermann.

Appellant goes to some length to give examples of factual situations where it is claimed the forfeiture provisions (protections offered by MCL 700.2801(2)(e)) would be defeated by the tolling of the one-year period under that statute. What Appellant does not mention is that either party to a marriage in Michigan can secure a divorce on demand. And that a divorce proceeding itself is the protection needed by an aggrieved spouse, whether deserted, abandoned or abused, to force an equitable, unbiased division of marital assets.

Thus, in the example described by Appellant on page 1 of her brief, the dying wife is not dependent on her husband seeking the protection of the courts to end her marriage, but can herself file for divorce, and, once the divorce has been granted, she will then have the right to deal with her assets in any way she pleases, because she will no longer be married to the uncaring lout.

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Appellee is prepared to concede that the description of the remedy fashioned by the majority opinion of the Court of Appeals may have slightly overstepped what was necessary to solve the problem before the panel. Given the facts of this case, and the virtually immediate filing of the divorce action by Anne once it became clear to her that her marriage was over, the language used by the majority was perhaps broader than needed. The majority decision in this case below stated:

> "Considering a combination of common sense, the common law, and a venerable canon of statutory construction: *expressio unius est exclusio alterius*, it is clear that the Legislature did not intend to disinherit a spouse whose divorce was in progress but not yet finalized when the other spouse dies."
>
> ***In re Von Greiff Estate*** 332 Mich App 251, 257; 956 NW2d 524 (2020)

This statement by Judge Gleicher could conceivably be read as prohibiting the application of MCL 700.2801(2)(e) to a situation where a divorce action was filed by either spouse more than one year after a spouse had "absented" from the marriage and was still pending. Appellee submits that the more limited inquiry into the factual problem presented by this case, and the issue on which this Court's March 31, 2021 Order requested additional briefing, is:

IS TIME DURING THE PENDENCY OF A DIVORCE ACTION BETWEEN THE PARTIES TO A MARRIAGE TO BE CONSIDERED IN DETERMINING WHETHER A SPOUSE WAS "WILLFULLY ABSENT" UNDER MCL 700.2810(2)(e)?

Appellant answers YES
Appellee answers NO.
The Probate Court did not address this issue.
The Court of Appeals majority answered NO

ARGUMENT

Stating the issue as above eliminates the extreme possibilities being described in Appellant's Supplemental Brief on page 11-13 and does the least violence to both the no-fault divorce statute and MCL 700.2801(2)(e).

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Appellant's arguments that the small differences in the timing of the commencement of divorce proceeding would create arbitrary and inconsistent outcomes ignores the reality that the one-year period set forth in the forfeiture statute itself is completely arbitrary. The risk that a death will occur less than a year after the parties separate, for whatever reason, is just as arbitrary, and yet that is exactly how MCL 700.2801(2)(e) is designed to operate. If the death of either of the parties happens one day less than one year after the "absenting" occurs, MCL 700.2801(2)(e) is out of the picture completely.

The protection of the "abandoned" spouse, which Appellant holds so dear, is not to wait out 365 days (one day longer in leap years) with bated breath, hoping not to die, but to initiate a divorce to end the marriage legally. Taking this action also leads to an equitable, impartial division of marital assets, in which division, the presiding judge can take into consideration all of the terrible actions of the "absenting" spouse and adjust the allocation of marital assets accordingly, exactly as the no-fault divorce scheme is intended to work. Alternatively, if the "abandoned" spouse chooses not to participate in that impartial, equitable division of marital assets, he or she can roll the dice and risk dying before the one-year period specified in MCL 700.2801(2)(e) expires, leaving that "undeserving" "absenting" spouse able to claim a portion of the "abandoned" spouse's estate.

Of course, there are other benefits to an "abandoned" spouse seeking a divorce. By having a court divide the marital assets equitably during his or lifetime, the "abandoned" spouse can ensure that his or her carefully crafted estate planning will not be disrupted by an unexpected demise before the one-year period established by MCL 700.2801(2)(e) runs. Initiating a divorce action also protects the "abandoned" spouse from the hideous prospects raised by Appellant in Section C of her Supplemental Brief (pp. 14-16), that a "vacating" spouse, even one determined to be subject to forfeiture under MCL 700.2801(2)(e), might still receive the benefit of non-probate assets, i.e., jointly owned assets, retirement

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account and pensions. Those non-probate assets are all marital assets, to be divided equitably by the circuit court in a divorce.

A serious conflict exists between MCL 700.2801(2)(e) and the concept that a marriage can only be terminated in Michigan by a court action. Appellant argues that this Court is powerless to resolve that conflict. Appellee contends that resolving a conflict between two statutes in the least disruptive manner is one of this Court's most critical functions.

Tolling the period to be considered under the forfeiture statute only during the pendency of a divorce action still leaves the prospect that the "vacating" spouse will be subject to the forfeiture if more than one year had elapsed between the date of "vacating" and the commencement of a divorce action by either party. Thus, an "absenting" spouse who waited more than one year to initiate divorce proceeding would still be subject to the possibility of the forfeiture under MCL 700.2801(2)(e)(i).

Anne Jones Von Greiff had the **right** to end her marriage to Hermann. That **right** was granted by the Michigan Legislature in 1971 when no-fault divorce became the law of the state. To now assert that MCL 700.2801(2)(e)(i) can be used to punish Anne for exercising her **right** to end her marriage makes the provisions of the no-fault divorce statute meaningless. A **right** that carries with it the risk that exercising that right could result in a forfeiture of the ability to participate in a spouse's estate is no **right** at all. Is this what the legislature intended?

Here, the failure of the court system to be able to process a divorce to final judgment within one year of its commencement is the only reason this forfeiture statute is even in question. That timing was not within Appellee's control. Had the court proceedings resulted in a final divorce judgment before Hermann's death, the marital assets would have been equitably divided between the parties. To impose this complete forfeiture on Appellee who pursued a legal end to her marriage is unconscionable.

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CONCLUSION

The Court of Appeals' majority was correct in excluding time during the pendency of a divorce action between parties to a marriage from the time period required under MCL 700.2801(2)(e)(i).

RELIEF REQUESTED

For the reasons set forth in this Supplemental Brief, this Court should deny leave to appeal the Court of Appeals' decision. In the alternative, Appellee requests the Court to affirm the Court of Appeals' majority decision in this case and declare that the time period during the pendency of a divorce proceeding between spouses is not to be considered in determining whether a spouse will be determined to not be a surviving spouse under MCL 700.2801(2)(e)(i).

Respectfully submitted,

Dated: September 2, 2021

/s/_____

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