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STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
(Markey, P.J.; Gleicher and M. J. Kelly, J.J.)

IN RE ESTATE OF HERMANN A. VON GREIFF

Carla J. Von Greiff,

Petitioner-Appellant,

v

Anne Jones-Von Greiff,

Respondent-Appellee.

Supreme Court No. 161535

Court of Appeals No. 347254

Marquette Probate Case No. 18-034046-DE

Hon. Cheryl L. Hill

BRIEF *AMICUS CURIAE* OF THE PROBATE AND ESTATE PLANNING SECTION OF THE STATE BAR OF MICHIGAN

ORAL ARGUMENT NOT REQUESTED

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Dated: September 15, 2021

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STATEMENT OF QUESTIONS ADDRESSED

Is the period of time during which a complaint for divorce is pending counted in determining whether a spouse was willfully absent from the decedent, within the meaning of MCL 700.2801(2)(e)(i), for the year preceding the decedent's death?

The Court of Appeals answered:	No
Petitioner-Appellant Anne Jones-Von Greiff answers:	No
Respondent-Appellee Carla J. Von Greiff answers:	Yes
Amicus Curiae answers:	Yes

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STATEMENT IDENTIFYING ORDER APPEALED FROM, RELIEF SOUGHT, JURISDICTION AND STANDARD OF REVIEW

1. **Order Appealed From**. The Probate and Estate Planning Section of the State Bar of Michigan ("Probate Section") files this Brief as A*micus Curiae* in *In re Von Greiff Estate*, 332 Mich App 251; 956 NW 2d 524 (2020) (Docket No. 347254) (*"In re Von Greiff Estate"*). The Court of Appeals issued its published opinion in this case on April 23, 2020. Petitioner-Appellant Carla Von Greiff filed an Application for Leave to Appeal on June 26, 2020. This Court granted Leave to Appeal on March 31, 2021 and invited the Probate Section to file a brief *amicus curiae*.

2. **Relief Sought**. The Majority in *In re Von Greiff Estate* held that the period during which a complaint for divorce is pending is not counted in determining whether a spouse was willfully absent from the decedent, within the meaning of MCL 700.2801(2)(e)(i), for the year preceding the decedent's death. The Probate Section asserts that this was in error and asks that this Court reverse as to that holding.

3. **Jurisdiction**. This Court has jurisdiction to review a decision of the Court of Appeals under MCR 7.303(B)(1). Grounds for review are found under MCR 7.305(B)(3) because the issue raised by the Probate Section involves legal principles of major significance to the State's jurisprudence.

4. **Standard of Review**. The only issue addressed by the Probate Section relates to the Court of Appeals' interpretation of MCL 700.2801(2)(e)(i). The interpretation and application of a statutory provision is a question of law that is reviewed de novo. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643, 646 (2002).

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INTRODUCTION AND STATEMENT OF INTEREST

The Probate Section is a voluntary association of members of the State Bar of Michigan. The Section is dedicated to the improvement of legal practice in the areas of estate planning and trusts and estates, including the administration of express trusts, decedents' estates, guardianships and conservatorships and legislation pertaining to these.

The ultimate issue in this case is whether Respondent-Appellee Anne Jones-Von Greiff is a "surviving spouse" within the meaning of the Estates and Protected Individuals Code, Public Act 386 of 1998 ("EPIC"). However, the sole issue addressed in this Brief is whether, for purposes of MCL 700.2801(2)(e)(i), the period during which a complaint for divorce is pending is or is not counted in determining whether a spouse was willfully absent from the decedent for the year preceding the decedent's death. In a published opinion, the Court of Appeals held that the period during which a complaint for divorce is pending is *not* counted. The Probate Section disagrees for the reasons set forth in the Dissent and herein.

To be clear, the Probate Section takes no position in the outcome of the Appeal regarding whether Respondent-Appellee Anne Jones-Von Greiff qualified as a "surviving spouse" under the provisions of EPIC.[1] While that is the ultimate issue on appeal, the Probate Section's concern is with the statement of law made in the majority opinion of the Court of Appeals, which statement is not dicta and is inconsistent with existing Michigan law.

[1] No attorney representing either Petitioner-Appellant or Respondent-Appellee participated in the preparation of this Brief or authored any portion of it or made any monetary contribution intended to fund its preparation or submission. MCR 7.312(H)(4).

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COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

Facts

The facts of this case are fully and fairly set out in the Order of the Marquette County Probate Court entered on December 26, 2018. The salient points relevant to the issue presented herein are these:

- Hermann and Anne were married for more than fifteen years.
- During an argument on May 16, 2017, Hermann ordered Anne to leave the marital home. Anne waited until Hermann's daughter arrived on May 18 to care for Hermann and then left. When Anne informed Hermann that she was leaving, he asked her to stay.
- Anne understood and believed that Hermann intended to file for divorce after his surgery. Anne consulted an attorney within a week. After discovering that the couple's joint bank accounts had been largely emptied, Anne directed her attorney to file the divorce action.
- A divorce action was filed by Anne on June 2, 2017, went through trial and was nearly completed when Hermann died on June 17, 2018. Following Hermann's death, the divorce action was dismissed without any appeal of that dismissal.
- Anne avowed that, after leaving on May 18, 2017, she never had any intention of returning to the marriage.
- Anne avowed that after she left the marital home, she and Hermann never again had any direct contact with each other.
- Anne avowed that she offered no emotional support to Hermann after May 31, 2017.

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Proceedings

Based upon the above recited findings of fact, the probate court ruled that by virtue of MCL 700.2801(2)(e)(i), Anne was not a "surviving spouse" of the decedent because she had intended to be, and had been, both physically and emotionally absent from Hermann during the entire year preceding his death. In so ruling, the probate court expressly relied on *In re Erwin Estate*, 503 Mich 1; 921 NW2d 308 (2018) ("*Erwin*"). The consequence of this ruling was to deprive Anne of priority for appointment as the Personal Representative of Hermann's estate, of the right to make Hermann's funeral arrangements and of the right to receive any spousal allowance or spousal share of Hermann's intestate estate. Anne appealed.

All three Court of Appeals Judges accepted the probate court's finding that Anne had been and had intended to be both physically and emotionally absent from Hermann for the relevant one-year period. All of them also indicated that the result reached by the probate court was unfair to Anne: the Dissent specifically characterized the result of what it took to be the rigor of MCL 700.2801(2)(e)(i) as "unjust" when applied to the facts of this case.

The Majority reversed the probate court, holding that because the time period described in MCL 700.2801(2)(e)(i) was effectively tolled while a divorce proceeding was pending. *In re Von Greiff Estate*, 332 Mich App 251, 257. The Dissent argued that there was no "pending divorce" exception in MCL 700.2801(2)(e)(i) and that the probate court's holding that Anne was not a surviving spouse should be affirmed even though the outcome was unfair—the unfairness, according to the Dissent, being legislative.

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In arriving at its ruling, the Majority observed that each of the subparagraphs of MCL 700.2801(2)(e), i.e., MCL 700.2801(2)(e)(i), (ii) and (iii), describes acts that bring about the domestic effects of divorce when the marriage has not been legally dissolved. From this, the Majority concluded that MCL 700.2801(2)(e)(i) does not apply to a surviving spouse who might otherwise be deprived of surviving-spouse status to the extent that during the year preceding the decedent's death, the surviving spouse is "follow[ing] the rules" of a formal dissolution process.

> Thus, MCL 700.2801(2)(e) generally stands for the proposition that when a spouse decides to *informally* dissolve a marriage by neglecting or deserting a partner or by withdrawing from that partner both physically and emotionally, that departing spouse loses the right to inherit from the spouse left behind…. A spouse who contrives an extralegal remedy for a failed marriage by desertion, neglect, or abandonment should not be afforded the rights available to those who follow the rules. *In re Von Greiff Estate*, 332 Mich App 251, 258.

The Majority offered three additional arguments in support of its conclusion. First, they argued that at common law, an abandoning spouse forfeited his or her inheritance rights whereas a divorcing spouse did not, stating at *In re Von Greiff Estate,* 332 Mich App 251, 260:

> The common law recognizes the distinction between a divorcing couple and a couple living separately due to one party's desertion. For example, in *In re Ehler's Estate*, 115 Cal App 403, 405-406; 1 P2d 546 (1931), the California Supreme Court found that a widow could not be automatically disinherited for abandonment because a divorce was pending at the time of the husband's death, and whether good cause existed for the separation could not be determined:
>
> Appellants contend that the widow voluntarily abandoned decedent, and that she thereby waived her right to claim any allowance from his estate. As a matter of fact, the record shows that she left him and instituted an action for divorce against him, which was pending at the date of his death. It was therefore never determined whether or not respondent left voluntarily or for good cause. In view of this we are of the opinion that there

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> was a total absence of any showing that respondent by her conduct lost her statutory rights as the widow of decedent.
>
> Applying statutory language similar to Michigan's, the Iowa Supreme Court held a surviving wife a widow entitled to inherit where she was living apart from her husband and pursing a divorce. *In re Quinn's Estate*, 243 Iowa 1271; 55 NW2d 175 (1952). FN3. See also *Born v Born*, 213 Ga 830, 831; 102 SE2d 170 (1958) ("A separation by mutual consent of the parties does not constitute desertion, and a libel for divorce by the husband on grounds other than desertion is equivalent to a separation by consent.").

(The Majority did not adduce any Michigan authority on this point, and, as discussed below, the foreign cases they did cite tend to refute rather than support their argument.)

Second, the Majority suggested that given that many divorcing couples separate both physically and emotionally during the divorce process, the expectation that MCL 700.2801(2)(e)(i) would apply if one of the divorcing parties should die while the divorce was pending could encourage a calculating elderly or ill party to temporize in order to disinherit his or her spouse. (That anyone would adopt such a scheme as a practical strategy seems, as is discussed below, doubtful to say the least.)

The Majority's third argument focused on a 2016 amendment to MCL 700.2801 providing (by the addition of MCL 700.2801(3)) that someone who is a party to a divorce or annulment proceeding with the decedent at the time of the decedent's death is not a surviving spouse for purposes of the privilege to make funeral arrangements provided in MCL 700.3206. The Majority reasoned that, by specifically depriving divorcing persons of surviving-spouse status for the narrow purpose of determining priority to make funerary decisions, the amendment indicated a legislative intention that a pending divorce should *not* deprive an individual from the status of surviving spouse for any other purpose governed by MCL 700.2801:

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> In adding MCL 700.2801(3), the Legislature carved out a new exception to the status of surviving spouse. A spouse who is a "party" to a divorce proceeding at the time of the other spouse's death may not have a say in the deceased's funeral arrangements. That's it—funeral arrangements. The Legislature did not identify "an individual who is a party to a divorce or annulment proceeding with the decedent at the time of the decedent's death" as otherwise excluded from the status of a surviving spouse.
>
> The United States Supreme Court has explained that "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other mode." [citations omitted.] This canon of construction, known as *expressio unius est exclusio alterius*, means that "the expression of one thing suggests the exclusion of all others." [citations omitted] The enactment of MCL 700.2801(3)(b) implies that divorcing spouses were not intended by the Legislature to fall within the categories of spouses excluded from inheriting under MCL 700.2801(2)(e). The Legislature specifically considered parties to an ongoing divorce in the context of spousal survivorship and limited only their ability to make funeral arrangements. It makes sense that no other limitation was intended. *In re Von Greiff Estate,* 332 Mich App 251, 264.

(As discussed below, the legislative history of the amendment that added MCL 700.2801(3) undermines the Majority's reliance on the maxim *expressio unius est exclusio alterius*.)

The Dissent, while agreeing that the outcome is unfair to Anne, argued that the statute is clearly written and must be followed, stating at *In re Von Greiff Estate* (M. J. KELLY, J., dissenting), 332 Mich App 251, ___; 956 NW 2d 524, 533:

> Rather than follow the majority's approach of disregarding the language of the statute and the *Erwin* Court's interpretation of it, I would instead affirm the probate court. That the judiciary is tasked with interpreting, and not rewriting, the laws enacted by the Legislature is a tenet firmly established in our jurisprudence.

Rejecting the Majority's argument based on common law, the Dissent said at *In re Von Greiff Estate* (M. J. KELLY, J., dissenting), 332 Mich App 251, ___; 956 NW 2d 524, 533:

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> In its effort to wiggle free from the constraints of the statutory language, the majority begins with a review of the common law. This is unwarranted. The Estates and Protected Individuals Code (EPIC), *MCL 700.1101 et seq.*, is a comprehensive statutory creation. As a result, it supersedes the common law. See *Hoerstman Gen. Contr., Inc. v. Hahn, 474 Mich 66, 74; 711 NW2d 340 (2006)* ("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.") (quotation marks and citation omitted). The majority's reliance on the common law—let alone the common law of foreign jurisdictions—is therefore unnecessary and inappropriate.

And the Dissent challenged the Majority's *expressio unius est exclusio alterius* argument, stating at *In re Von Greiff Estate* (M. J. KELLY, J., dissenting), 332 Mich App 251, ___; 956 NW 2d 524, 534-535:

> Furthermore, while it is true that *MCL 700.2801* was amended to add a third subsection dealing with funeral arrangements, this does not lend support to the argument that the Legislature meant something other than what the seven words they chose to put into *MCL 700.2801(2)(e)(i)* plainly say. If anything, it lends support to the opposite conclusion: that the Legislature considered the statute, noted that it needed amendment by way of *Subsection (3)*, and chose *not* to amend *Subsection (2)(e)(i)*. If the Legislature is reflective of society at large, then nearly half of its members have been through the unhappy process of divorce, and, even if they have not, it is hardly a secret that a divorce case often can linger for more than a year in court. Yet, even in amending the statute, the Legislature chose to leave *Subsection (2)(e)(i)* as it was. The simple truth is we do not know what their intent was when they enacted the statute, and this fact requires us to be agnostic on the question.

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ARGUMENT

The Court of Appeals erred in holding that for purposes of MCL 700.2801(2)(e)(i), the period of the pendency of a complaint for divorce is not counted in determining whether a spouse was willfully absent from the decedent for the year preceding the decedent's death. Each argument made in the *In re Von Greiff Estate* Majority Opinion in support of that holding has been challenged in the *In re Von Greiff Estate* Dissenting Opinion, as well as in the Application for Leave to Appeal and the Supplemental Brief filed by Petitioner-Appellant Carla J. Von Greiff, one or both of which indicate that:

- The language of MCL 700.2801(2)(e)(i) does not include or imply any exception for pending divorce.
- The effect of the Majority's ruling is to rewrite the statute, thereby usurping the legislative authority.
- The Court of Appeals' decision was at least partly driven by the Majority's belief that application of MCL 700.2801(2)(e)(i) results in "all or nothing" when a divorce is pending at the time of the decedent's death, but that is certainly not true in every case and it may not be true even in this case.
- The fact that the legislature, by adding MCL 700.2801(3), has specifically deprived a divorcing person of surviving-spouse status for purposes of determining priority to make funeral arrangements says nothing about the other rights and privileges governed by MCL 700.2801, all of which had been in place for many years before that addition.

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The Probate Section offers the following elaborations and additional reasons why the Majority's interpretation of MCL 700.2801(2)(e)(i) is wrong.

THE MAJORITY'S ARGUMENTS DO NOT SUPPORT ITS CONCLUSION THAT THE PERIOD DURING WHICH A DIVORCE IS PENDING IS DISREGARDED IN DETERMINING FOR HOW LONG A SPOUSE WAS WILLFULLY ABSENT FROM A DECEDENT.

The Majority offered four arguments for its conclusion that for purposes of MCL 700.2801(2)(e)(i), the period during which a complaint for divorce is pending is not counted in determining whether a spouse was willfully absent from the decedent for the year preceding the decedent's death:

- The legislative intention behind MCL 700.2801(2)(e) was to distinguish between an abandoning spouse and a divorcing spouse and apply the forfeitures upon the former but not the latter.
- The common law draws a distinction between an abandoning spouse and a divorcing spouse, according to which an abandoning spouse forfeits his or her rights to inherit from the person he or she abandoned, whereas a divorcing spouse does not.
- The expectation that MCL 700.2801(2)(e)(i) would apply if one of the divorcing parties should die while a divorce was pending could encourage a calculating elderly or ill party to a divorce proceeding to delay the proceeding in order to disinherit his or her spouse.
- By adding, in 2016, a new subsection (3) to MCL 700.2801 that narrowly deprives divorcing persons of surviving-spouse status for purposes of determining priority

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to make funerary decisions, the Michigan Legislature indicated, that it did *not* intend divorcing persons to be deprived of that status for any other purpose governed by MCL 700.2801.

A. There Is Nothing in The Language, Context or Legislative History of MCL 700.2801(2)(e)(i) That Indicates That the Period During Which a Divorce Is Pending Should Not Be Counted in Determining for How Long a Spouse Was "Willfully Absent" from the Decedent.

In arriving at its ruling, the Majority observed that each of the subparagraphs of MCL 700.2801(2)(e), i.e., MCL 700.2801(2)(e)(i), (ii) and (iii), describes acts that will mimic domestic effects of divorce when the marriage has not been legally dissolved. From this, the Majority concluded that MCL 700.2801(2)(e)(i) does not apply to a surviving spouse who might otherwise be deprived of surviving-spouse status to the extent that during the year preceding the decedent's death, the surviving spouse is "follow[ing] the rules" of a formal dissolution process. *In re Von Greiff Estate* (opinion of the Court), 332 Mich App 251, 258, quoted supra, page 4.

But given *Erwin*'s equation of "willful" behavior with "voluntary, deliberate, and intentional" behavior, there is nothing in the language of MCL 700.2801(2)(e)(i) that indicates that the provision applies only if no divorce action is pending in the relevant interval.

> The word "willful," whether or not used as a legal term of art, describes an act that is voluntary, deliberate, and intentional. But the intent to commit any act does not, by itself, render it "willful." Rather, a "willful" act is one that is taken with the intent to do something specific. (citations omitted). *In re Erwin Estate,* 503 Mich 1, 10; 921 NW2d 308 (2018).

And, neither MCL 700.2801(2)(e)(i)'s context within EPIC nor its legislative history supports the Majority's venturesome reading.

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The context within EPIC is that a person who qualifies as the "surviving spouse" of a decedent is financially protected in three major ways. First, the spouse has priority to be appointed as personal representative and funeral representative unless the decedent expressly provides otherwise. *See* MCL 700.3203(1), 700.3206(3). Second, the homestead allowance, family allowance and exempt property allowance reserve funds for the spouse ahead of creditor claims. *See id.* 700.2402–.2405. Third, the spouse is guaranteed a substantial portion of the decedent's remaining probate estate. *See, e.g., id.* 700.2102 (regarding intestate share), 700.2201–.2202 (regarding spouse's right to elect against decedent's will).

MCL 700.2801(2) describes situations other than those involving an effective divorce or annulment (the subjects of MCL 700.2801(1)) in which a surviving spouse is *not* entitled to the priorities and financial benefits just described:

> (2) For purposes of [the priorities and financial benefits in question], 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.
> >
> > (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.

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> (iii) Willfully neglected or refused to provide support for the decedent spouse if required to do so by law.

The relevant legislative history is that MCL 700.2801(1)–(2)(c) is substantially identical to its Uniform Probate Code ("UPC") counterpart, UPC section 2-802: to that extent, MCL 700.2801 conforms to the uniform law on which the whole of EPIC is based.[2] In contrast, the language of MCL 700.2801(2)(e) has no UPC counterpart and was carried over from MCL 700.290 of the Revised Probate Code, Public Act 642 of 1978, which stated in part:

> (1) A surviving spouse does not have a right of election against the will of the deceased spouse or a right under sections 285 to 288 [regarding homestead, family and exempt property allowances and right of occupancy][3] if the surviving spouse did any of the following for 1 year or more previous to the death of the deceased spouse:
>
> (a) Was wilfuly [sic] absent from the decedent spouse.
>
> (b) Deserted the decedent spouse.
>
> (c) Wilfuly [sic] neglected or refused to provide support for the decedent spouse if so required by law.

The legislative history comprised by the official Uniform Law Commission (ULC) Comment to UPC section 2-802[4] makes it clear that in carrying the provisions of MCL 700.2801(2)(e) over from the Revised Probate Code, the Michigan Legislature *rejected* the

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[2] The provisions of MCL 700.2801(1) and (2)(a)-(d) were carried over from MCL 700.141 of the Revised Probate Code.

[3] In importing MCL 700.290 from the Revised Probate Code into MCL 700.2801(2)(e), the legislature increased its scope; for unlike the latter provision, the former did not affect the spouse's intestate share.

[4] "[T]he Comments to any Uniform Act, may be relied on as a guide for interpretation." Unif. Trust Code § 106 cmt. (Unif. L. Comm'n 2010) (citing Acierno v. Worthy Bros. Pipeline Corp., 656 A.2d 1085, 1090 (Del. 1995) (interpreting Uniform Commercial Code) and Yale University v. Blumenthal, 621 A.2d 1304, 1307 (Conn. 1993) (interpreting Uniform Management of Institutional Funds Act)); *see also, e.g.*, Harry Wilmer Jones, *Statutory Doubts and Legislative Intention*, 40 Colum. L. Rev. 957, 970 (1940). For the proposition that decisions of foreign courts interpreting a given uniform act should be considered by courts in states that have enacted that act, see, e.g., Robert S. Summers, *Statutory Interpretation in the United States*, *in Interpreting Statutes: A Comparative Study* 407, 427–428 (D. Neil MacCormick & Robert S. Summers eds., 1991).

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ULC's express policy that, absent a definitive divorce or annulment, the basis for forfeiture of the spousal priorities and financial benefits should be some other "definitive legal act":

> Rationale. *Although some existing statutes bar the surviving spouse for desertion* or adultery, *the present section* [i.e., UPC section 2-802] *requires some definitive legal act to bar the surviving spouse*. Normally, this is divorce. Subsection (a) [the UPC counterpart of MCL 700.2801(1)] states an obvious proposition, but subsection (b) [the UPC counterpart of MCL 700.2801(2)(a)–(c)] deals with the difficult problem of invalid divorce or annulment, which is particularly frequent as to foreign divorce decrees but may arise as to a local decree where there is some defect in jurisdiction; the basic principle underlying these provisions is estoppel against the surviving spouse. Unif. Probate Code § 2-802 cmt. (Unif. L. Comm'n 2010) (emphasis added).

There is no reason to suppose that the Michigan Legislature was ignorant of the express "rationale" for the uniform law provision it was adapting for enactment as MCL 700.2801(2). Thus, we may suppose that by adding the provisions of MCL 700.2801(2)(e) to MCL 700.2801(2)'s UPC template, *viz.*, section 2-802(b), the Michigan Legislature purposefully expanded the bases for forfeiture of the relevant priorities and financial benefits to include conduct that the legislature specifically realized might *not* involve any "definitive legal act" (within the meaning of the ULC Comment).

In that context, it surely would have occurred to a legislator contemplating the addition of what is now MCL 700.2801(2)(e) to the provisions of UPC section 2-802(b) that the death of a party to a divorce proceeding during the pendency of that proceeding could prevent the pending divorce's becoming definitive. Therefore, if *Erwin*'s equation of "willful" behavior with " voluntary, deliberate, and intentional" behavior holds, we must conclude that having purposefully inserted into MCL 700.2801(2) a provision for forfeiture of spousal priorities and financial benefits that the legislature *recognized* referred to a period in which a divorce might be pending, the legislature purposefully chose *not* to limit the

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provision's application in the way imagined by the Majority; for there is nothing in MCL 700.2801(2)(e) to suggest that a surviving spouse's willful absence from the decedent should avoid the application of MCL 700.2801(2)(e)(i) when the absence was adjunct to a divorce proceeding.

B. There Was No Common Law Rule According to Which an Abandoning Spouse Forfeited His or Her Inheritance Rights whereas a Divorcing Spouse Did Not.

The Majority claims to find support in the common law, contending that at the common law, an abandoning spouse forfeits his or her inheritance rights whereas a divorcing spouse does not. *In re Von Greiff Estate* (opinion of the Court), 332 Mich App 251, 260. The Majority cites three foreign cases in support of this distinction; there is presumably no Michigan case that relies on it (or the Majority would have cited that case); the relevant ALR articles[5] show no evidence of it. And the cases relied upon by the Majority show only that the distinction has been recommended by litigants to courts that have rejected it.

The first case cited by the Majority on this point is *In re Ehler's Estate*, 115 Cal App 403; 1 P2d 546 (1931). In *Ehler's Estate*, the wife separated and started a divorce action but the husband died while the divorce was still pending. The Executor challenged the wife's right to family, homestead and exempt property allowances arguing, at *In re Ehler's Estate,* page 405, that:

[5]13 A.L.R.3d 446 (concerning abandonment, desertion, or refusal to support on part of surviving spouse as affecting marital rights in deceased spouse's estate); 31 A.L.R.4th 1190 (concerning attack on validity of marriage as barring attacker's claim to property *qua* surviving spouse); 48 A.L.R.4th 972 (concerning construction, application, and effect of statutes denying or qualifying surviving spouse's right to elect against deceased spouse's will).

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> [T]he use of the word 'family' in section 1466 of the Code of Civil Procedure gave rise to the implication that the allowances under that section were to be confined to cases where an actual family status existed at the date of the decedent's death.

The California Court of Appeals *rejected* this argument, relying upon caselaw which had held that the right to allowances was not conditioned upon living in a family relationship at the date of the decedent's death. The court did not discuss any decision holding that a divorcing spouse was treated differently than an abandoning spouse at common law.

The second case cited by the Majority on this point is *In re Quinn's Estate*, 243 Iowa 1271; 55 NE2d 175 (1952), of which the Majority says at *In re Von Greiff Estate* (opinion of the Court), 332 Mich App 251, 261:

> Applying statutory language similar to Michigan's, the Iowa Supreme Court held that a surviving wife was a widow who was entitled to inherit when she was living apart from her husband and pursuing a divorce at the time of her husband's death.

But the issue in *Quinn's Estate* was whether the widow had priority to select the executor. The appellant (the decedent's son) argued that because the widow had left the decedent's home and remained away for several years, the marriage relationship had been terminated for all practical purposes and the widow was, therefore, not entitled to be treated as a surviving spouse. While the appellant claimed common law support, the Iowa Court determined that the common law was to the opposite effect and that only a divorce decree took away the wife's right to administer her husband's estate. And there is nothing in the court's opinion to indicate that if there had not been a divorce pending at the time of the decedent's death, the surviving spouse would have been deprived of priority as the decedent's personal representative. Thus, by the

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Majority's own lights, the statutory language pertinent to *Quinn's Estate* cannot have been pertinently "similar to Michigan's."

The Majority also cited *Born v Born*, 213 GA 830; 102 SE2d 170 (1958). The issue in *Born* was whether the wife had been absent for more than one year, satisfying the Georgia requirement for divorce on the basis of desertion. The husband filed the divorce action less than one year after a prior divorce action had been dismissed. The wife argued that any period during which the prior divorce action was pending did not count because the law considered separation during a divorce action as consensual. The husband argued that after his offer of reconciliation during the prior proceeding, the separation had become nonconsensual. The *Born* court rejected the wife's contention, stating:

> Although, under some circumstances, the pendency of an application for divorce by the husband against the wife might compel the inference that the separation was consented to or was with sufficient cause, the pendency of such action is an evidentiary fact bearing upon the question of whether or not the separation during its pendency was willful and, like other evidence, may be outweighed and overcome.

The court held that:

> Whether the husband's offer was made in good faith, or the refusal of the wife to resume marital relations was justified under the circumstances, are questions for the determination of a jury. *Born*, 213 GA 830-832

The holding in *Born* leaves open the possibility that the prior divorce proceeding might bear upon the determination of whether the spouse's absence was willful, but that is consistent with *Erwin*, according to which a court must conduct "a factual inquiry based upon the totality of the circumstances" in determining willful absence. *In re Erwin Estate* (opinion of the Court), 503 Mich 1, 27. The *Born* court

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clearly rejected the idea that the pendency of a divorce action *entailed*, as a matter of common law, that separation during the action's pendency was consensual.

Thus, *Born*, like the other two cases cited by the Majority, does *not* support the Majority's claim that the common law recognizes, *as a matter of law*, a distinction between a divorcing couple and a couple living separately due to one party's desertion.

C. The Majority's Reliance on the Maxim *Expressio unius est exclusio alterius* Is Misplaced.

The Majority also sought to support its interpretation of MCL 700.2801(2)(e)(i) by applying the maxim *expressio unius est exclusio alterius* (express mention of one thing suggests the exclusion of all others) to a 2016 amendment to MCL 700.2801 that deprives a party to a divorce or annulment action pending at the time of the decedent's death of surviving-spouse status for the specific purpose of determining priority to make funeral arrangements. The Majority reasoned that by amending the statute so as expressly to deprive such a party of surviving-spouse status for that narrow purpose, the legislature had indicated that a party to a pending dissolution proceeding would *not be* deprived of surviving-spouse status for any other purpose governed by MCL 700.2801.

Like other canons of statutory construction, the maxim *expressio unius est exclusio alterius* is a rule of reason rather than a rule of law: "it is doubtful whether the maxim does any more than draw attention to a fairly obvious linguistic point, *viz.* that in many contexts the mention of some matters warrants an inference that other cognate matters were intentionally excluded." Rupert Cross, *Statutory*

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Interpretation 140 (John Bell & George Engle eds, 3d ed 2005). In this case, that inference is unwarranted.

The amendment that added MCL 700.2801(3) was part of Public Act 57 of 2016, which created the statutory privilege of formally designating a "funeral representative." The principal purpose of the Act was summarized in the 2015 Senate Bill 551, Enrolled Analysis:

> The Estates and Protected Individuals Code (EPIC) specifies an order of priority outlining who is entitled to make decisions about a decedent's funeral arrangements and the disposition of a decedent's body. Evidently, despite this statutory instruction, there often is confusion, disagreement, and controversy over who may make those decisions. *For instance, the legal authority to decide might fall to a person who is related to but estranged from the decedent or who is distantly related but has not been close to the person who died.* (*Emphasis added.*)

Thus, the legislative purpose for amending MCL 700.2801 to include the provisions of MCL 700.2801(3)(b) was to avoid an estranged spouse's having priority, *qua* spouse, to make funerary arrangements.

As originally enacted, MCL 700.2801(3), read as follows:

> (3) For purposes of section 3206, a surviving spouse does not include either of the following:
> (a) *An individual described in subsection (2).*
> (b) An individual who is a party to a divorce or annulment proceeding with the decedent at the time of the decedent's death. (*Emphasis added.*)

The subsection was amended within a year of enactment, by 2017 Public Act 20, and now reads:

> (3) For purposes of section 3206, a surviving spouse does not include either of the following:
> (a) An individual described in *subsection (2)(a) to (d).*

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> (b) An individual who is a party to a divorce or annulment proceeding with the decedent at the time of the decedent's death. (*Emphasis added.*)

This removal of subsection (3)(a)'s reference to subsection (2)(e) came mainly at the behest of funeral directors who argued that they should not be required to determine whether a surviving spouse had abandoned or deserted a decedent spouse.[6]

The language of MCL 700.2801(3) as it was first enacted, i.e., with its inclusive reference to MCL 700.2801(2)(e), appeared in 2015 Michigan Senate Bill 551 and was explained as follows in the 2015 Michigan Senate Bill 551, Enrolled Analysis at page 5:

> Surviving Spouse
>
> Currently, for certain purposes under EPIC, a surviving spouse does not include any of the following:
>
> -- 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 Michigan, unless they subsequently participate in a marriage ceremony purporting to marry each other or live together as husband and wife.
>
> -- 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.
>
> -- An individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.
>
> -- An individual who, at the time of the decedent's death, is living in a bigamous relationship with another individual.
>
> -- An individual who did any of the following for one year or more before the decedent's death: was willfully absent from the decedent spouse; deserted the decedent spouse; or willfully neglected or refused to provide support for the decedent spouse if required to do so by law.

[6] Senate Fiscal Agency Bill Analysis for Public Act 20 of 2017, dated 2/14/2017

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> *Under the bill, for purposes of section 3206, a surviving spouse would not include any of the individuals listed above or an individual who was a party to a divorce or annulment proceeding with the decedent at the time of the decedent's death.* (*Emphasis added.*)

Thus, there is nothing in the legislative history of Public Act 57 of 2016 (let alone in that of the subsequent, pragmatic amendment wrought, at the behest of funeral directors, by Public Act 20 of 2017) to suggest that the legislature gave any thought to how the pendency of a divorce or annulment proceeding (as described in MCL 700.2801(3)(b)) should affect any priority or right governed by MCL 700.2801 other than those concerning the making of funerary arrangements. In this case, the *expressio unius* is fully explained by the narrow object of the legislative amendment in question: all that can safely be inferred from the advent of MCL 700.2801(3)(b) is that the legislature correctly observed that someone could be a party to a divorce or annulment proceeding that was pending at the time of the death of a deceased party *without* necessarily falling within one of the descriptions under MCL 700.2801(2) (thereby being described in MCL 700.2801(3)(a)).

D. The Majority Exaggerates the Risks of Gamesmanship and of Injustice.

The Majority's interpretation of MCL 700.2801(2)(e)(i) is less helpful than the Majority imagined:

- The holding in *Erwin* already gives a court sufficient latitude to take a pending divorce into consideration in applying MCL 700.2801(2)(e)(i).

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- The idea that the reading of MCL 700.2801(2)(e)(i) rejected by the Majority could encourage a calculating elderly or ill party to a divorce proceeding to temporize in order to disinherit his or her spouse is deeply implausible.
- It should not be assumed that the reading of MCL 700.2801(2)(e)(i) rejected by the Majority will regularly result in injustice because, in the generality of cases, relatively few assets pass by probate.

Erwin calls for a broad examination of the individual circumstances of each case, stating at *In re Estate of Erwin*, 503 Mich 1, 27:

> We hold that an individual is not a surviving spouse for the purposes of MCL 700.2801(2)(e)(i) if he or she intended to be absent from his or her spouse for the year or more leading up to the spouse's death. Absence in this context presents a factual inquiry based on the totality of the circumstances, and courts should evaluate whether complete physical and emotional absence existed, resulting in an end to the marriage for practical purposes.

But on the Majority's interpretation of MCL 700.2801(2)(e)(i), the existence of a divorce action, when there is one, is the *only* consideration.

The Majority argues that the expectation that MCL 700.2801(2)(e)(i) would apply if one of the divorcing parties should die while a divorce was pending might tend to encourage an elderly or ill party to a divorce proceeding to delay the proceeding in order to disinherit his or her spouse. This argument is farfetched. No doubt delay and gamesmanship are common in divorce actions but planning to die after one year of separation but before a divorce judgment is entered seems an unlikely strategy.

Respondent-Appellee argues, and the Court of Appeals appears to have accepted, that application of MCL 700.2801(2)(e)(i) is always unjust whenever a divorce is pending

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because the surviving spouse receives neither the divorce settlement or the allowances and inheritance provided to a surviving spouse under EPIC. However, we cannot assume that application of MCL 700.2801(2)(e)(i) despite the pendency of a divorce at the time of the decedent's death will regularly result in injustice. The surviving spouse will still receive all of the assets that would have passed to him or her in the absence of the divorce action.

The interplay between divorce and inheritance is complex. For most married couples, the transfer of assets following the death of the first spouse occurs outside of probate, through joint ownership and beneficiary designations. A pending divorce action usually makes it more difficult for one spouse to disinherit the other during the divorce action. Often, asset transfers, beneficiary designations and joint accounts are frozen[7]. In most cases, ERISA accounts, such as a 401k or 403b plans, must pass to the surviving spouse unless the divorce is completed.[8] Thus, the surviving spouse may receive even more than would have been awarded in a divorce judgment.

CONCLUSION AND RELIEF REQUESTED

In what may have been an attempt to avoid an outcome that it regarded as unfair, the Court of Appeals devised a reading of MCL 700.2801(2)(e)(i) according to which the period during which a divorce was pending is disregarded in determining whether a spouse was willfully absent from the decedent for the year preceding the decedent's death. As interpreted in *Erwin*,

[7] In the present case, Hermann restored funds to the joint account and Anne received the remainder when Hermann died. We have no information regarding Hermann's life insurance or retirement benefits.
[8] 26 USC 401(a)(11) and 26 USC 417(c).

MCL 700.2801(2)(e)(i) does not support that reading, nor does any of the Majority's ancillary arguments. If "willful" means "voluntary, deliberate, and intentional" *In re Erwin Estate*, 503 Mich 1, 10, the application of MCL 700.2801(2)(e)(i) does not depend upon whether a divorce action was or was not pending at the time of the decedent's death.

Respectfully submitted,

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