IN THE MICHIGAN SUPREME COURT
Appeal from the Michigan Court of Appeals

In re Joseph & Sally Grablick Trust.

Supreme Court: 163981; 163982
Court of Appeals: 353951; 353955

Katelyn Banaszak,
Appellant,

vs.

Lower Court No. 19-213790-TC;
19-212796-DA
Genesee Probate Court

Dorothy Grablick and Judith Almasy,
Appellees,

and

[in file no. 163981:] Jeffrey Grablick, Craig L. White, Trustee of the Joseph & Sally Grablick Trust, Sally Grablick, J.M. David Hickmott, Louis T. Stefanko, Nancy Hickmott, James Hickmott, and Stephanie Atchison,

Other Parties.

[in file no. 163982:] Jeffrey Grablick, Craig L. White, Trustee of the Joseph & Sally Grablick Trust, Sally Grablick, J.M. David Hickmott, Louis T. Stefanko, Nancy Hickmott, James Hickmott, and Stephanie Atchison,

Other Parties.

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

Submitted by:
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ORAL ARGUMENT REQUESTED

This brief reflects the position of the majority of the Family Law Section of the State Bar of Michigan, taken in accordance with its bylaws regarding the following identified matters. The position taken does not necessarily represent the policy position of the State Bar of Michigan.

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STATEMENT OF INTEREST OF AMICUS CURIAE (FLS)[1]

The Family Law Council ("Council") is the governing body of the Family Law Section of the State Bar of Michigan. The Section is comprised of over 2600 lawyers in Michigan practicing in, and committed to, the area of family law.

The Section members elect the members of the Council. The Council provides services to its membership in the form of educational seminars, monthly Family Law Journals (an academic and practical publication reporting new cases and analyzing decisions and trends in family law), advocating and commenting on proposed legislation relating to family law topics, and filing Amicus Curiae briefs in selected cases in the Michigan Courts.

Because of its active and exclusive involvement in the field of family law, and as part of the State Bar of Michigan, the Council has an interest in the development of sound legal principles in the area of family law.

The instant case calls for the review of statutes and caselaw concerning the effect of a divorce upon relationships derived from marriage, which is a topic of interest to the Family Law Section. The Family Law Section presents its position on the issues as invited by this Court in its June 2, 2022, Order.

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

STATEMENT OF BASIS OF JURISDICTION

MCR 7.303(B)(1) vests the Michigan Supreme Court with discretion to exercise (or decline to exercise) jurisdiction to review a case after it has been decided by the Court of Appeals. The Court of Appeals issued a published decision on December 16, 2021.[2]

On January 26, 2022, Petitioner-Appellant Katelyn Banaszak filed an application for leave to appeal per MCR 7.305. On June 2, 2022, this Court issued an Order for oral argument on the application for leave, inviting the Family Law Section and the Probate and Estate Planning Section of the State Bar of Michigan to file amicus briefs.

QUESTION INVOLVED

1. Whether divorce terminates a relationship by "affinity" under MCL 700.2806(e), thus causing "a disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse" to be revoked under MCL 700.2807(1)(a)(i).

Appellant answers:	No.
Appellees answer:	Yes.
Trial court answered:	Yes.
Court of Appeals answered:	Yes.
Family Law Section answers:	Yes.

[2] *Banaszak v Grablick* (In re Trust of Grablick) __ Mich App __ (2021) (Docket Nos. 353951 and 353955).

SUMMARY

The Family Law Section concurs with the conclusion and legal analysis contained within the amicus brief filed by the Probate & Estate Planning Section of the State Bar of Michigan, the Appellee's briefs, and the published opinion of the Michigan Court of Appeals. This case does not present a case of major significance to Michigan's jurisprudence and leave should be denied.

In light of this concurrence, and to avoid redundancy, this brief does not re-analyze the two cases that take center-stage of every other brief in this matter, those being the 1931 opinion of this Court in *Shippee v Shippee's Estate*,[3] and the Washington Supreme Court's 1950 opinion in *In the Matter of the Estate of Bordeaux*.[4] Instead, this brief focuses on the practical application of the statutes in question under both parties' proposed definitions of "affinity."

For ease of reference the statutes in question are reproduced in full, along with the Black's Law Dictionary definition of "affinity," in the appendix to this brief.

[3] *Shippee v Shippee's Estate,* 255 Mich 35; 237 NW 37 (1931).
[4] *In the Matter of the Estate of Bordeaux*, 37 Wash2d 561; 225 P2d 433 (1950).

STATEMENT OF MATERIAL FACTS[5]

While Appellee's factual recitation appears to align with that of the underlying Court of Appeals opinion, amicus is unable to discern whether the multitude of additional facts within Appellant's briefs are consistent with the record below due to the lack of citations thereto. Yet while there is great disparity in the recitation of facts between the parties, the core facts necessary for evaluating this Court's specific question for supplemental briefing that appear to be undisputed are:

1. Appellant Katelyn Banaszak is the daughter of Sally Grablick and Jeff Wecker, who divorced when Katelyn was young.
2. Joseph and Sally Grablick were married in 1993, when Katelyn was still a minor.
3. Katelyn enjoyed a close fatherly relationship with her stepfather Joseph, but she also visited with, and received child support from, her legal father (Mr. Wecker).[6]
4. Joseph treated Katelyn like a daughter, but he did not adopt her.
5. In 2005, during his marriage to Sally, Joseph executed a will referring to Katelyn as his step-child. Per the will, his assets were to be distributed pursuant to a joint trust created with Sally. The joint trust provided that all of Joseph's assets would go to Sally upon his death and then, upon her death, the assets would flow to Appellant "as the only living child of the settlors." The trust did not contain a savings clause to ensure that any planned distributions to Katelyn would survive a future divorce. It did, however, include a default provision for the estate to pass to Joseph's mother and sister.[7]
6. Joseph and Sally divorced, with a Judgment entering on April 3, 2019. The Judgment contained a provision specifically preserving a life insurance distribution to Katelyn but did not specifically preserve the pre-divorce trust distribution to her.
7. Post-divorce, Joseph updated his life insurance beneficiary designations.

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[5] The recitation of facts herein are drawn from the lower court opinion and the briefs of the parties.

[6] See *Appellee's Supplemental Brief*, filed October 01, 2022, at 7, citing the Deposition transcript of Katelyn Banaszak, which is included at Exhibit E of Tab C, at page 89 of *Appellant's Supplemental Appendix* filed September 26, 2022.

[7] *Banaszak v Grablick* (In re Trust of Grablick) __ Mich App __ (2021), slip op at 2-3 (Docket Nos. 353951 and 353955).

8. Joseph died on July 2, 2019. He had no biological or adopted children at the time of his death (as defined by MCL 700.1103(f), which specifically excludes stepchildren from the definition of "child.")

9. Joseph was survived by his mother and sister: Dorothy Grablick and Judith Almasy. There is no known blood ties between Joseph and Katelyn or their relatives, and there are no known marital ties that would link Katelyn to Joseph's family.

10. After Joseph's death, Katelyn petitioned the Genesee County Probate Court to revoke all distributions from Joseph's estate to her mother and other ex-in-laws of Joseph on the basis of MCL 700.2807 and 2806. Katelyn specifically argued that MCL 700.2807 and 2806 resulted in the automatic revocation of distributions in Joseph's will to his former spouse and his former in-laws. Simultaneously, she argued that *her* portion should not be revoked because she arguably maintained a close relationship with Joseph post-divorce, which is the primary basis of her application to this Court.

11. On a motion for summary disposition filed by Joseph's sister and mother, the Genesee County Probate Court found that, just like other relatives of Sally, the relationship of affinity between Joseph and Katelyn terminated at the time of divorce. As a result, all prior dispositions to Katelyn were revoked per MCL 700.2806 and MCL 700.2807.

12. Katelyn's appeal of the probate court's decision resulted in a published decision of the Court of Appeals that affirmed the probate court's decision, stating:

> Here, appellant and the decedent were not related by marriage after the decedent and Sally divorced. Appellant is a blood relative of the divorced individual's former spouse and, after the divorce, is not related to the divorced individual because the affinal relationship no longer existed. Accordingly, appellant's disposition was revoked by the divorce. See MCL 700.2807(1)(a)(i).[8]

On application to this Court, this case explores the meaning and parameters of the term "affinity" found in MCL 700.2807 (which automatically revokes a decedent's pre-divorce bequests to relatives of a former spouse upon divorce), and MCL 700.2806(e) (which exempts individuals who are related to both the decedent and the former spouse from the automatic revocation in MCL 700.2807).

[8] *Banaszak v Grablick* (In re Trust of Grablick) __ Mich App __ (2021), slip op at 12-13 (Docket Nos. 353951 and 353955).

ARGUMENT

I. The inadvertence of one testator does not create a compelling State interest to justify granting leave in this case.

If Katelyn and Joseph's relationship was as strong as it is described in Appellant's briefs, then the automatic revocation of distributions to her due to Sally and Joseph's divorce is an unfortunate result. However, the automatic-revocation provision of MCL 700.2807 would have had no effect had the joint trust between Joseph and Sally Grablick included a savings clause stating that the distribution to Katelyn would survive any future divorce. Had Joseph created a new trust, or amended the prior joint trust, the distributions would have survived the automatic-revocation rule. Had Joseph and Sally's Judgment of Divorce included an express provision preserving the pre-divorce intended distributions to Katelyn—instead of, or in addition to, the provision preserving her right to receive insurance distributions—then the automatic-revocation provision of MCL 700.2807 would have no effect. Had Joseph, in the three months between the divorce and his death, prepared a handwritten letter explaining that he still wanted Katelyn to inherit despite the divorce, or even just typed out a note in a phone app to that effect,[9] then this would be an entirely different case.

But Joseph did not do any of those things. Despite being represented by counsel during the divorce, and despite knowing enough about beneficiary designations and the like to re-name Katelyn for other types of distributions, [10] Joseph did not satisfy the requirements of exempting his former stepdaughter from the automatic revocation rule.

This case is not about an overbroad law that presents a question of significant public interest. It is a case about one man's failure to be specific in his testamentary documents, and a singular disappointed former trust beneficiary who does not want decedent's property to pass to legally recognized family members.

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[9] See *In re Estate of Horton*, 325 Mich App 325; 925 NW2d 207 (2018) (note left on an "Evernote" app on the decedent's phone was sufficient to show testamentary intent upon death).

[10] The standard divorce closing letter contains a check list of post-judgment "to-dos" that typically advises clients, inter alia, to update their estate plan. Further, not infrequently, Consent Judgments of Divorce or Marital Settlement Agreements include language providing for the other spouse to continue as beneficiary under an insurance policy owned by the other spouse. Also included would be the necessary post-judgment executory provisions the parties will follow. Likewise, Consent Judgments and Settlement Agreements may also include language addressing a party's estate plan and any required post-judgment updates.

Disappointed potential devisees bringing suit due to a testator's inattention is not a new phenomenon justifying Supreme Court review. The 1953 opinion of this Court, in *Prudential Ins. Co. of America v Irvine*, tells the tale of decedent Charles and his former spouse, Marie.[11] During their marriage, Charles obtained a life insurance policy, naming Marie as beneficiary, a designation that he did not change after the divorce. After their divorce, Charles and Marie remained close, even during his marriage to a subsequent wife. At some point during his second marriage, Charles even resumed living in Marie's home and they had "a rather close friendship."[12] Before his death, in front of multiple witnesses, Charles physically handed Marie the policy certificates, saying "I want you to have this, Marie" and that if "something should happen" to him then "I want you to fight for it, and be sure to hang onto it."[13]

Of course, neither Charles's verbal assurances to his former spouse nor his close-continuing relationship with her complied with the methods delineated in the insurance policy. His assurances were insufficient to justify deviation from the rule of revocation upon divorce. In denying Marie's attempt to have the Court deem her the appropriate beneficiary—which would have resulted in the deprivation of Charles' surviving spouse's benefit under the plan—this Court explained:

> To hold that, without substantial compliance with the provisions of the policy relative to change of beneficiary, an insured by his will alone, could change such beneficiary, would open the door to possible fraud and irregularities and would create uncertainty tending to interfere with the customary practice of prompt payment. We are convinced that in the absence of a showing of substantial compliance with the policy's requirements, the will of the insured, standing alone, should not effect a change of beneficiary.[14]

Although the potential beneficiary in *Prudential* was a former spouse, and Katelyn is a former stepchild, the logic of this Court's holding in *Prudential* applies to the case at hand. As explored throughout this brief, accepting Appellant's proposed definition of "affinity," as measured by way of an emotional bond rather than marital status, "would

[11] *Prudential Ins Co of Am v Irvine*, 338 Mich 18, 20; 61 NW2d 14 (1953).
[12] *Id.* at 20-21.
[13] *Id.* at 22.
[14] *Id.* at 28.

open the door to possible fraud and irregularities and would create uncertainty tending to interfere with the customary practice of prompt payment"[15] in addition to an anticipated increase in trust and estate contests.

II. Judicial review of legislative rules of descent should not be based upon subjective perceptions of fairness.

Before the enactment of the Estates and Protected Individuals Code in 2000 ("EPIC"),[16] the now-revoked MCL 700.106 prevented "laughing heirs" from sharing in an intestate estate by limiting distributions to direct descendants of the decedent, their parents, or their grandparents before having the estate escheat to the State. In the 1988 published case of *Matter of the Estate of Jurek,*[17] descendants of a decedent's great-grandparents unsuccessfully argued that the statute "violates this state's equal protection clause because relatives descending from great-grandparents and beyond are not allowed to inherit even though they may be the same or closer in degree of kinship than relatives descending from decedent's grandparents."[18]

To illustrate the degree-of-kinship argument advanced by the appellants in *Jurek*, a consanguinity table that shows the numeric degrees of blood relations between a decedent/subject and their relatives—and also kinship relationships—is included on the following page. The table is based on the method of computing degrees of relation per this Court's 1889 decision in *Van Cleve v Van Fossen*,[19] and on standard consanguinity tables that appear in other jurisdictions.[20]

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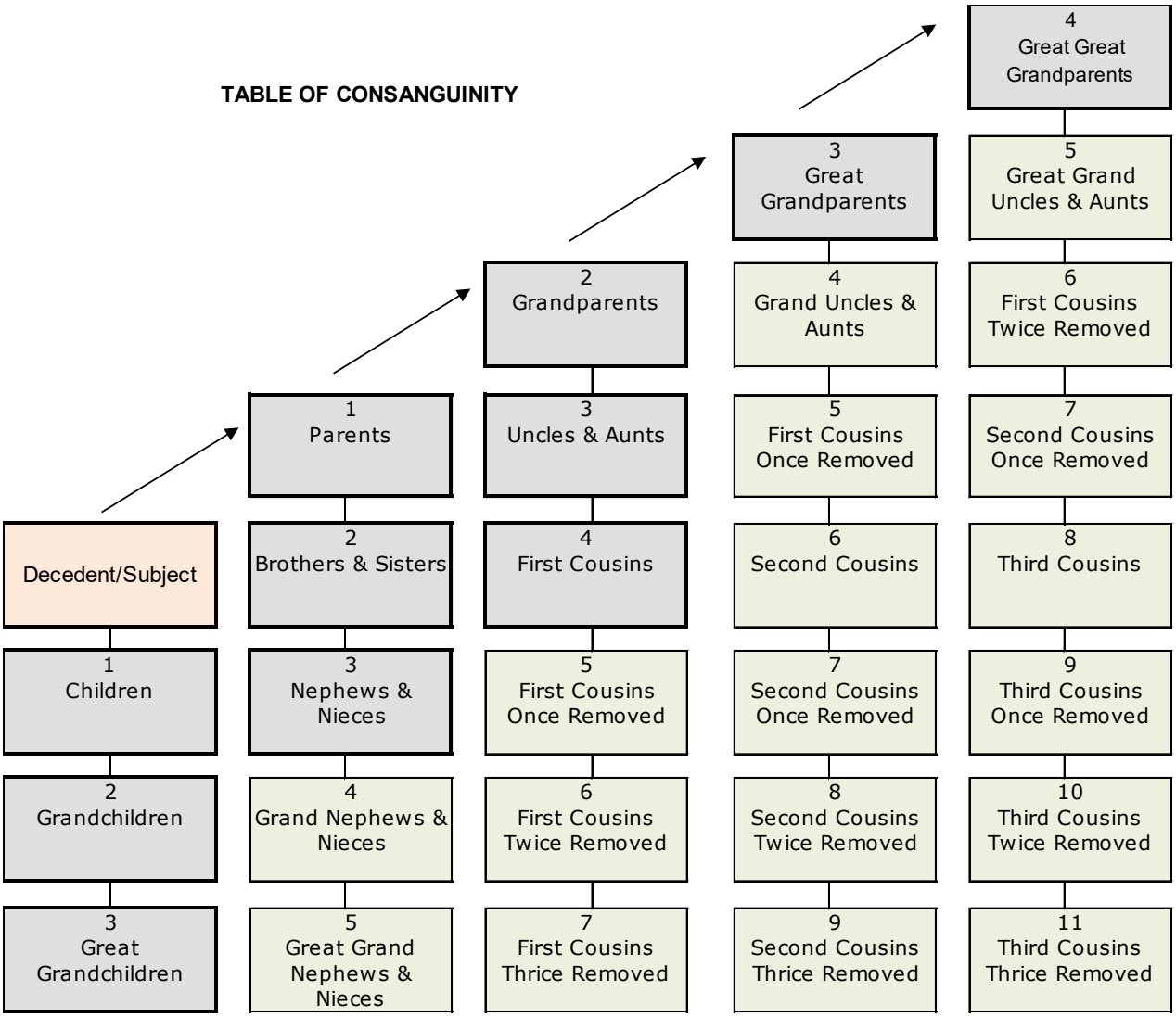
[15] See *Prudential Ins*, 338 Mich at 28.
[16] MCL 700.1101 et seq.
[17] *In the Matter of the Estate of Jurek,* 170 Mich App 778, 781; 428 NW2d 774 (1988).
[18] *Id.*
[19] *Van Cleve v Van Fossen*, 73 Mich 342, 345; 41 NW2d 258 (1889): "The method of computing degrees of consanguinity by the civil law is to begin at either of the persons claiming relationship, and count up to the common ancestor, and then downwards, to the other person, in the lineal course, calling it a degree for each person, both ascending and descending, and the degrees they stand from each other is the degree in which they are related."
[20] See *Consanguinity/Affinity Chart,* State of Nevada Commission on Ethics, 03/26/2015, https://www.leg.state.nv.us/Session/78th2015/Exhibits/Assembly/JUD/AJUD599G.pdf.
In the table, the "kinship" relationship is noted by terms (such as "second cousins") and the degrees-of-relation are noted by numbers at the top of each box in the table (i.e. the number 6 in the second cousins box indicates that second cousins are six-degrees from the subject).



The appellants in *Jurek*, and those here, did not question the State's "ability to enact statutes governing descent and distribution."[21] Instead, appellants in both *Jurek* and this case base their arguments on questions of overall fairness. Similar to the "bond" argument presented by Appellant in this case, the appellants in *Jurek* argued that it did not make sense, under the statutory provision in existence at that time, for a third cousin to be excluded by rules of succession despite being of the same generation as the decedent (and thus having a greater likelihood of having a bond with the decedent) as compared to a second-cousin twice-removed.

[21] *Jurek,* 170 Mich App at 784 (1988).

In rejecting the closeness-of-relationship arguments, the *Jurek* court strongly stated "we will not sit as a super-Legislature and determine that distributing by degree of kinship might be fairer."[22] A corollary of such restraint is the recognition that crafting laws of descent is a one-size-fits-most, not a one-size-fits-all, exercise meant to meet the general public's need of limiting frivolous litigation in will contests, minimizing administrative problems caused by having overly-inclusive laws that cause procedural nightmares, and promoting predictability. No statewide law can please everyone. All laws result in uncomfortable outcomes for the families who have unique circumstances but choose not take advantage of rules allowing for the particularization of their wants.

But the discomfort of generally-applied laws of descent to a unique family structure is not a reason to revise (or creatively interpret) them. This Court must, instead, rely upon established rules of statutory interpretation, such as using a dictionary to determine the plain meaning of statutory terms.[23] There are a number of examples in published case law upholding seemingly unfair application of statutes enacted with general public policy in mind, and thereby honoring Michigan's Constitutional structure.[24] For instance, in the 2012 felony-nonsupport case of *People v Likine*, this Court upheld the application of an "exacting" statutory standard "to demonstrate a genuine impossibility defense" despite arguments that the impossibility standard "offends traditional notices of fairness and common sense."[25] As explained by this Court in 2010, in *Woodman ex rel. Woodman v Kera, LLC*, easy-to-apply laws are "preferred over a chaotic, ad hoc alternative."[26]

As explained in the next section, Appellant's proposed definition of affinity is a chaotic alternative that would certainly lead to ad hoc, unpredictable determinations by local courts. A chaotic, subjective interpretation that would undercut the purpose of the recently enacted Financial Exploitation Prevention Act, which attempts to minimize the financial exploitation of vulnerable adults[27] who are unable to recognize signs of exploitation, such as elders with former stepchildren who seek to maximize the likelihood

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[22] *Jurek,* 170 Mich App at 784.
[23] *In re Estate of Erwin*, 503 Mich 1, 10 (2018), as mod on reh (Oct. 5, 2018).
[24] See, e.g., *Malone v Malone*, 279 Mich App 280; 761 NW2d 102 (2008) (regarding prohibition on retroactive modification of support obligations).
[25] *People v Likine*, 492 Mich 367, 416; 823 NW2d 50 (2012).
[26] *Woodman ex rel Woodman v Kera LLC,* 486 Mich 228, 252; 785 NW2d 1 (2010).
[27] 2020 PA 344, MCL 487.2081 et seq.

of receiving an inheritance (at the expense of other beneficiaries). While the facts of this particular case do not suggest elder exploitation, it does not take a great stretch of the imagination to see how accepting Appellant's suggested interpretation of affinity would widely open the door to those who seek to isolate, alienate, and then exploit the affections of vulnerable adults for financial gain.

III. The potential chaos that would result from Appellant's proposed interpretation of "affinity" would erode the function of the statute.

Appellant proposes an emotional/relationship definition of affinity. Yet, there is no standard for measuring affection between relatives. Is it measured by length of marriage? Is it measured by the time between the divorce and death? Is it measured by how young the child was at the time of marriage? How is it differentiated from a friendship? Does a card on a birthday count? What about phone calls?

Even in cases where terms of endearment were used, how can a trial court determine whether they were uttered out of social custom/kindness, out of an intent to avoid conflict, or out of an intent for something more? What about decedents with special needs who might express their familial affection in a nontraditional manner? Would former stepchildren of decedents who were openly affectionate be more able to meet the exception compared to former stepchildren of "strong, silent types" of decedents cannot?

And, importantly, what if the affinal relation is not of a parent/child nature? Though it is easy to understand how one might treat someone like one's own child – by living with them, providing financial support, guidance, discipline, and parental comfort — how does one treat someone like an uncle? After all, there is no normal or ideal standard for uncle behavior in our common law. If affinity is defined as "treating like family", then how would the language of a will differentiate an uncle-by-blood from an uncle-by-affinity?

The chaotic litigation that would follow an acceptance of Appellant's interpretation of affinity would abrogate the function of the statute. This is not like a child custody matter, where the Legislature has provided a set of twelve distinct factual considerations to increase the objectivity of a judicial view into the realm of family. There are no such legislatively enumerated factors for a probate court to consider. Without such guidance, no court would be able to make an objective decision as to the existence of a "close bond,"

and the exclusionary rule of MCL 700.2807 would be swallowed by ad hoc decision-making that is contrary to the goal of EPIC to "simplify and clarify the law concerning the affairs of decedents" and "promote a speedy and efficient system for liquidating a decedent's estate and making distribution to the decedent's successors."[28]

IV. Appellant's position is inconsistent with EPIC's departure from prior laws that allowed for case-by-case determinations.

Back in 1893, in *Lansing v Hayes*, the first known case in Michigan concerning the automatic revocation of a pre-divorce bequests to a spouse in a will due to divorce, this Court explained that "[b]y the decree of divorce in this case, the parties became as strangers to each other, and neither owed to the other any obligation or duty thereafter."[29] The *Lansing* court decided that the presumption of revocation-upon-divorce was rebuttable, allowing for a different result in circumstances "unusual and contrary to the common experience."

Later caselaw held that "divorce coupled with a property settlement creates a presumption of revocation which cannot be rebutted by the acts or declarations of the divorced parties."[30] The irrebuttable presumption approach to revocation upon divorce was then rejected by this Court in the 1974 decision *In re Blanchard's Estate*. There, the testator had married, divorced, then remarried his former spouse. Despite the re-marriage lasting until death, the testator's children sought to revoke their mother's share based on an argument that the testator did not reaffirm the distributions to his wife after their remarriage. This Court rejected the concept of an irrebuttable presumption and, instead, held that the determination as to whether divorce revokes a designation in a will is to be determined on a case-by-case basis.[31]

This, it would seem, would support Appellant's position in this case. But it does not, because *Blanchard* interpreted the now-revoked MCL 702.9 within the Probate Code

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[28] See MCL 700.1201(a) and (c).
[29] *Lansing v Haynes,* 95 Mich 16, 20; 54 NW2d 699 (1893).
[30] *In re Blanchard's Estate,* 391 Mich 644, 651-652; 218 NW2d 37 (1974), *discussing Wirth v Wirth,* 149 Mich 687; 113 NW 306 (1907) *and In re McGraw's Estate,* 228 Mich 1; 199 NW 686 (1924)*; overruled by In re Blanchard's Estate,* 391 Mich 644, 654; 218 NW2d 37, 40 (1974) (this case was overruled by the two previous cases).
[31] *Id.* at 654.

of 1939, which referenced "revocation implied by law from subsequent changes in the condition or circumstances of the testator."[32] In the statute at issue in *Blanchard*, there was "no mention of divorce and property settlement as acts of revocation."[33] By contrast, MCL 700.2807 more than mentions divorce, it is expressly devoted to it.

There is no question that the Legislature chose to remove and replace statutory language which allowed for case-by-case determinations of descent. Allowing "affinity" to be extended on a case-by-case basis is not simply an interpretation of a single statutory provision, it is a deviation from the framework of EPIC as a whole.

V. Appellant's interpretation is inconsistent other provisions within EPIC.

When defining "affinity" in the context of MCL 700.2806, this Court must consider that the statute applies to both probate and non-probate transfers. It applies to dispositions in governing instruments (such as pre-divorce wills and trusts), and also to dispositions "created by law." [34] As such, the definition selected by this Court must make sense not just in cases with pre-divorce governing instruments, but also in cases of intestate succession. The language of MCL 700.2806 must be read *in pari materia* with other provisions within EPIC as a comprehensive whole to avoid inconsistencies.

It is thus notable that there is a clear intent to exclude affinal relatives within other provisions within EPIC relating to relatives other than those by blood or adoption. For instance, MCL 700.2707(1), which pertains to class gifts, states:

> An adopted individual or an individual born out of wedlock, and his or her respective descendants if appropriate to the class, are included in class gifts and other terms of relationship in accordance with the rules for intestate succession. **Terms of relationship that do not differentiate relationships by blood from those by affinity, such as "uncles", "aunts", "nieces", or "nephews", are construed to exclude relatives by affinity**. Terms of relationship that do not differentiate relationships by the half blood from those by the whole blood, such as "brothers", "sisters", "nieces", or "nephews", are construed to include both types of relationships.
>
> *[Emphasis added.]*

[32] *In re Blanchard's Estate,* 391 Mich 644, 653 (1974).
[33] *Id.*
[34] MCL 700.2807(1)(a)(i).

Given that emotional relationships can change overnight, using Appellant's definition of affinity with regard to a class distribution would render the application of MCL 700.2707(1) extraordinarily challenging for lawyers who prepare testamentary documents and the judges who must interpret them in contested matters. In this instance, the simplicity of using the "by existing marriage" definition of affinity is clear. The bolded language in the excerpt, above, would exclude an uncle-in-law from receiving a distribution to the class of "uncles" unless there is a specific provision in a testamentary document to the contrary, such as "my residual estate shall go to my uncles, both by affinity or by blood, regardless of whether my marriage ends in divorce." By contrast, if Appellant's definition of affinity were to be accepted, then it is unclear what language could be used to capture the essence of friendships which, as we all know, sometimes involve arguments or lapses in communication.

With regard to stepchildren, multiple provisions in EPIC differentiate their relationship to a decedent by specifically excluding them from the definition of "child" and also by defining their relationship to a decedent solely by way of the decedent's marriage to the child's parent. They would not be included in any class within MCL 700.2707, discussed on the preceding page, which begins with "an adopted individual or an individual born out of wedlock." Further:

1. MCL 700.1103(f)[35] provides that "'child' includes, but is not limited to, an individual entitled to take as a child under this act by intestate succession from the parent whose relationship is involved. **Child does not include an individual who is only a stepchild,** a foster child, or a grandchild or more remote descendant."

2. MCL 700.1106(j)[36] provides that ""Parent" includes, but is not limited to, an individual entitled to take, or who would be entitled to take, as a parent under this act by intestate succession from a child who dies without a will and whose relationship is in question. **Parent does not include an individual who is only a stepparent**, foster parent, or grandparent."

[35] MCL 700.1103 is found within Article I of EPIC, "Definitions, General Provisions, and Court Jurisdiction", Part 1 "Short Title and Definitions," and is titled "Definitions; A to D."
[36] MCL 700.1106 is found within Article I of EPIC, "Definitions, General Provisions, and Court Jurisdiction", Part 1 "Short Title and Definitions," and is titled "Definitions; E to H."

3. MCL 700.2114,[37] carefully defines the parent-child relationship in a manner that excludes stepchildren.

4. MCL 700.2601(e)[38] defines "stepchild" as "a child of the surviving, deceased, or former spouse of the testator or of the donor of a power of appointment, who is not the testator's or donor's child."

5. MCL 700.2708(e)[39] defines "stepchild" as "a child of the decedent's surviving, deceased, or former spouse, and not of the decedent."

Not only are stepchildren differentiated from the "child" class by definition, but there are no provisions within EPIC that specifically provide for a distribution to a stepchild.[40] The only provision which arguably benefits stepchildren is MCL 700.2403, regarding the calculation of a family allowance based upon minor dependents present in the home with a decedent's surviving spouse at the time of the testator's death.[41] But even that is distributed to a surviving spouse, and not to stepchild.

Appellant argues for an interpretation of "affinity" that would expand its term past the termination of the marriage, by which the affinal relationship arose, if "the individuals continue to treat one another as family."[42] From Appellant's argument, the measure of "treating one another as family" appears to be measured by whether the decedent "loved and cared for" the individual and the "closeness" of the relationship.[43]

"Love," however, appears only four times in EPIC. Three of those appearances are in the guardianship section, and the fourth concerns trustees with insurable interests under

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[37] MCL 700.2114 is found within Article II of EPIC, "Intestacy, Wills, and Donative Transfers," at Part 1 "Intestate Succession."

[38] MCL 700.2601 is found within Article II of EPIC, "Intestacy, Wills, and Donative Transfers," at Part 6 "Rules of Construction Applicable Only to Wills," and is titled "Definitions."

[39] MCL 700.2708 is found within Article II of EPIC, "Intestacy, Wills, and Donative Transfers, at Part 7, "Rules of Construction Applicable to Donative Dispositions in Wills and Other Governing Instruments," and is titled "Definitions regarding beneficiary designations."

[40] Using a keyword search of "stepchild," the term only appears six times in EPIC: **(1)** MCL 700.1103(f)(to exclude stepchildren from the definition of child); **(2)** MCL 700.2601(e)(defining stepchild by way of their relationship to their natural parent's relationship to the decedent); **(3)** MCL 700.2603(1) (antilapse rules regarding substitute gifts to descendants of stepchildren that did not survive the testator), which notably differentiating stepchildren from "relatives"); **(4)** MCL 700.2708(e)(defining stepchild by way of their relation to their natural parent's relationship to the decedent); **(5)** MCL 700.2709(1) (antilapse rules regarding substitute gifts to descendants of stepchildren that did not survive the testator) **(6)** MCL 700.7114 (regarding insurable interests under a life insurance policy).

[41] See MCL 700.2403 (family allowance would allow for an allowance to be paid for a stepchild who was being supported by the decedent).

[42] *Appellant's Supplemental Brief,* 09/26/2022, at 6.

[43] *Appellant's Supplemental Brief,* 09/26/2022, at 10.

life insurance policies.[44] The term "emotion" appears only twice, the term "affection" appears only four times, and "like family" does not appear at all. All inclusions of "love," "emotion," and "affection" are in provisions unrelated to the distributive transfers at issue in this case.

Accepting a definition of affinity that allows an affinal relationship to exist after a divorce, which breaks the bonds of matrimony that created the relationship in the first place, is a departure from the clear intent of the Legislature to have objective measures of degrees of relation and a simplified manner of administering estates.

VI. This Court must reject Appellant's argument that the dictionary-definition of "affinity" would render the final clause of MCL 700.2806(e) nugatory.

Under MCL 700.2806(e), pre-divorce bequests from an individual to a relative of their spouse are not revoked per MCL 700.2807(a) if the former-spouse's relative is still related to the individual by blood, adoption, or affinity after the divorce. Appellant repeatedly argues that the Probate Court and Court of Appeals' acceptance of the Black's Law Dictionary definition of affinity[45] renders this last segment of MCL 700.2806(e) "effectively nugatory, removing nearly all situations in which it would apply."[46]

There are ample examples of dual-relations, dating back to biblical times where Isaac, son of the patriarch Abraham, married Rebekah, who was the daughter of Abraham's nephew Bethuel.[47] As a result of the marriage to Abraham's son, Rebekah was related to Abraham by blood *and* by affinity. A more modern example of a dual-relationship, where the dual relation is that of dual affinity, was publicized on a February 2022 segment of the Today show about identical twins Briana and Brittany, who married identical twins Josh and Jeremy.[48] If Briana divorced Josh, then she would still have a "relationship by marriage" with Jeremy by way of her sister Brittany's marriage to him. Under MCL 700.2806(e), though Jeremy is a blood-relative of Josh, a pre-divorce testamentary

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[44] *See* MCL 700.5101(a), MCL 700.5209(2)(c), and MCL 700.7114(b)(ii).
[45] Black's Law Dictionary, Seventh Edition, definition of "affinity", at 27, herein.
[46] Appellant's Application for Leave to Appeal, January 26, 2022, at 10, 12; Appellant's Supplemental Brief, September 26, 2022, at 13.
[47] Genesis 24:15-24:61 (Etz Hayim: Torah and Commentary, The Jewish Publication Society, 2001); Genesis 24:15-67 (The Holy Bible, New King James Version, Thomas Nelson, Inc. 1982).
[48] https://www.today.com/parents/babies/identical-twins-babies-cousins-brothers-rcna17270.

bequest from Briana to Jeremy would not be revoked by MCL 700.2807(a) because of Jeremy's continued affinal ties to Briana that is independent of his relationship to Josh.

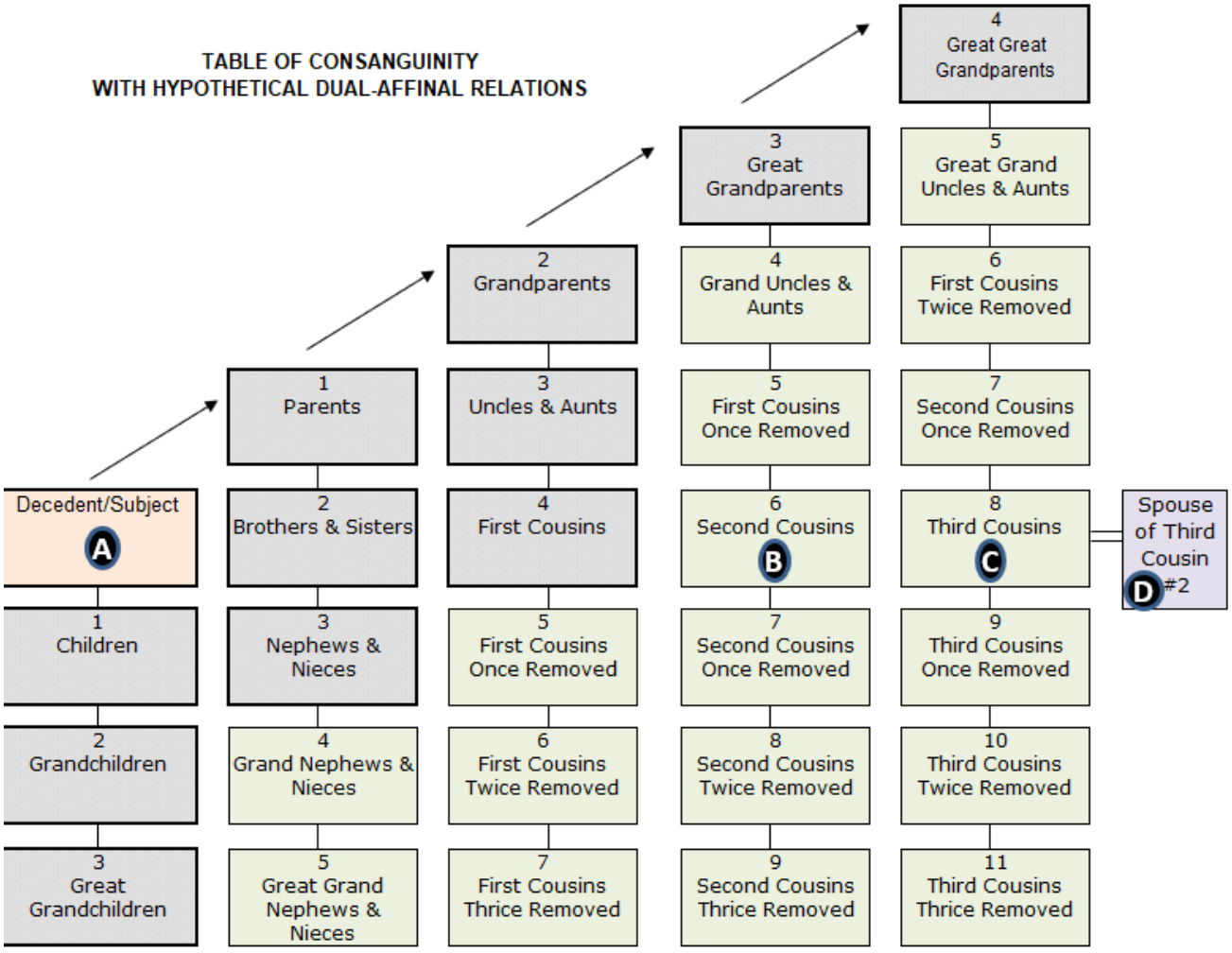
The concept of having a genetic link to a distant relative is not far from the public consciousness given the popularity of genetic testing kits such as 23andMe and online articles about spouses discovering that they are, technically, distant cousins.[49] So while quarternary[50] marriages are admittedly rare, the likelihood of having a dual affinal relationship as a result of marrying a distant cousin is not, as detailed on the table, above, which is included to demonstrate the function of the dual-relation savings clause of MCL 700.2806(e).

A table on the following page shows degrees of blood relations between a decedent/subject and their relatives with a sample dual-affinal relation. In the table presume the subject/individual (marked as "A") married one of their second cousins (a relation to the sixth degree, marked as "B"). One of the individual's third cousins is marked as "C", and C's spouse is marked as "D." Using the dictionary-definition of affinity, the relations in the above table would be:

- A is related to B by bloodline (second cousins)
- A is related to C by bloodline (third cousins);
- A is related to D by affinity due to D's marriage to A's third cousin, C;
- B is related to C by bloodline (first cousin);
- B is related to D by affinity due to D's marriage to B's first cousin, C;
- During the marriage of A and B, they are related by affinity;
- During the marriage of A and B, A is related to C by affinity because A's spouse (B) is C's first cousin; and
- During the marriage of A and B, A is related to D by affinity because A's spouse (B) is the first cousin of D's spouse.

[49] For example, see Buckholtz, "My Husband is My Cousin and Other Crazy Stuff 23andMe Told Me," *Kveller.com,* Jan 10, 2019. https://www.kveller.com/my-husband-is-my-cousin-and-other-crazy-stuff-23andme-told-me/ (accessed 11/04/2022).

[50] A quarternary marriage is where one set of twins marries another set of twins.



Essentially, in the event of A and B's divorce, all of A's relatives (by affinity or otherwise) are still relatives of B (by affinity or otherwise), and vice-versa. As such, in this example and in any situation where a person marries a relative, the dual-affinal relationship in MCL 700.2806 is far from nugatory.

In considering this argument, it is important to note that MCL 551.3[51] permits marriage to all the kinship classes in green on the preceding table, and, per MCL 700.2707, there is no limitation on intestate succession by class-degree.[52] If, for instance, each member in each class on the above chart had only two children, the subject A would have a total of 1,389 blood relatives, all but fifty-three of which the subject could legally marry in Michigan. That is about five and a half percent of the total population of thirty counties in

[51] See MCL 551.3. "A man shall not marry his mother, sister, grandmother, daughter, granddaughter, stepmother, grandfather's wife, son's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, brother's daughter, sister's daughter, father's sister, mother's sister, or cousin of the first degree, or another man."
[52] See MCL 700.2707.

Michigan.[53] If every member of the consanguinity table above had three children, then A would have 10,591 blood relatives, two-hundred and sixteen of which would be marriageable third cousins.

As is evident from the above, the possibility of a dual-affinal relation is hardly remote. Using the dictionary-definition of affinity when construing MCL 700.2806(e) certainly does not render it nugatory.

CONCLUSION & REQUESTED RELIEF

This Court must consider the chilling effect on divorces that would certainly occur if a relative of a former spouse could inherit based upon maintenance of a familial bond. There are many imaginable situations where parties may be motivated to attend the barbeques and birthday parties of their former in-laws, especially in longer divorces, but who otherwise might expect closure on the legalities that arose from their marriage.

Expanding the parameter of an affinal relationship past divorce on the basis of a subjective "bond" will encourage parties in a divorce, especially in silver divorces, to cut off or be rude to the other party's relatives for fear that their doing otherwise might be misinterpreted as 'maintaining a close familial bond' in the absence of a formal, post-judgment estate plan update. We need less reason for animosity in divorce matters.

Ultimately, this case is a cautionary tale for estate planning attorneys to include a specific "upon divorce" savings clause if preparing estate plans for blended families with bequests to affinal beneficiaries that are meant to survive a divorce. It is a cautionary tale for family law attorneys to provide detailed closing letters with reminders to their clientele about the effects of divorce and the need to update their estate plans. It is not a case of significant public interest, nor one involving a legal principle of major significance to this State's jurisprudence. For the foregoing reasons, the Family Law Section respectfully requests that this Court deny leave to appeal and affirm the well-reasoned opinion of the Court of Appeals.

[53] https://www.michigan-demographics.com/counties_by_population.

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CERTIFICATE OF COMPLIANCE

There are 8,405 total words in this document, 1016 of which are in the appendix. There are 6,555 countable words in the brief, inclusive of tables. The font is 12 point Arial.

APPENDIX TO
THE AMICUS BRIEF OF THE
FAMILY LAW SECTION OF THE STATE BAR OF MICHIGAN

MCL 700.2806 DEFINITIONS RELATING TO REVOCATION OF PROBATE AND NONPROBATE TRANSFERS BY DIVORCE; REVOCATION BY OTHER CHANGES OF CIRCUMSTANCES.

As used in this section and sections 2807 to 2809:

(a) "Disposition or appointment of property" includes, but is not limited to, a transfer of an item of property or another benefit to a beneficiary designated in a governing instrument.

(b) "Divorce or annulment" means a divorce or annulment, or a dissolution or declaration of invalidity of a marriage, that would exclude the spouse as a surviving spouse within the meaning of section 2801. A decree of separation that does not terminate the status of husband and wife is not a divorce for purposes of this section and sections 2807 to 2809.

(c) "Divorced individual" includes, but is not limited to, an individual whose marriage has been annulled.

(d) "Governing instrument" means a governing instrument executed by a divorced individual before the divorce from, or annulment of his or her marriage to, his or her former spouse.

(e) "Relative of the divorced individual's former spouse" means an individual who is related to the divorced individual's former spouse by blood, adoption, or affinity and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption, or affinity.

(f) "Revocable" means, with respect to a disposition, appointment, provision, or nomination, one under which the divorced individual, at the time of the divorce or annulment, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of his or her former spouse or former spouse's relative, whether or not the divorced individual was then empowered to designate himself or herself in place of his or her former spouse or in place of his or her former spouse's relative and whether or not the divorced individual then had the capacity to exercise the power.

History: 1998, Act 386, Eff. Apr. 1, 2000
Popular Name: EPIC

MCL 700.2807 REVOCATION UPON DIVORCE; REVOCATION BY OTHER CHANGES OF CIRCUMSTANCES.

(1) Except as provided by the express terms of a governing instrument, court order, or contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage does all of the following:

(a) Revokes all of the following that are revocable:

(i) A disposition or appointment of property made by a divorced individual to his or her former spouse in a governing instrument and a disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse.

(ii) A provision in a governing instrument conferring a general or nongeneral power of appointment on the divorced individual's former spouse or on a relative of the divorced individual's former spouse.

(iii) A nomination in a governing instrument, nominating a divorced individual's former spouse or a relative of the divorced individual's former spouse to serve in a fiduciary or representative capacity, including, but not limited to, a personal representative, executor, funeral representative, trustee, conservator, agent, or guardian.

(b) Severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship, transforming the interests of the former spouses into tenancies in common.

(c) Bars the former spouse from exercising a power under section 3206(1).

(2) A severance under subsection (1)(b) does not affect a third-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the survivor of the former spouses unless a writing declaring the severance has been noted, registered, filed, or recorded in records appropriate to the kind and location of the property that are relied on, in the ordinary course of transactions involving that type of property, as evidence of ownership.

(3) Each provision of a governing instrument is given effect as if the former spouse and relatives of the former spouse disclaimed all provisions revoked by this section or, for a revoked nomination in a fiduciary or representative capacity, as if the former spouse and relatives of the former spouse died immediately before the divorce or annulment.

(4) Each provision revoked solely by this section is revived by the divorced individual's remarriage to the former spouse or by a nullification of the divorce or annulment.

(5) No change of circumstances other than as described in this section and in sections 2803 to 2805, 2808, and 2809 causes a revocation.

History: 1998, Act 386, Eff. Apr. 1, 2000 ;-- Am. 2000, Act 54, Eff. Apr. 1, 2000 ;-- Am. 2016, Act 57, Eff. June 27, 2016

Popular Name: EPIC

BLACK'S LAW DICTIONARY, 59 (7TH DELUXE ED, 1999)

The full and complete definition of affinity within the seventh deluxe edition of Black's Law Dictionary, with examples included therein, is as follows:

* * * * *

affinity (ə-**fin**-ə-tee) **1.** A close agreement. **2.** The relation that one spouse has to the blood relatives of the other spouse; relationship by marriage. **3.** Any familial relation resulting from a marriage. Cf. CONSANGUINITY.

> "There is no affinity between the blood relatives of one spouse and the blood relatives of the other. A husband is related by affinity to his wife's brother. There is no affinity between the husband's brother and the wife's sister; this is called affinitas affinitatis." 2 Charles E. Torcia, *Wharton's Criminal Law* § 242 at 573 (15th ed. 1994).

collateral affinity. The relationship of a spouse's relatives to the other spouse's relatives. • An example is a wife's brother and her husband's sister.

direct affinity. The relationship of a spouse to the other spouse's blood relatives. • An example is a wife and her husband's brother.

quasi-affinity. *Civil law.* The affinity existing between two persons, one of whom has been engaged to a relative of the other.

secondary affinity. The relationship of a spouse to the other spouse's marital relatives. • An example is a wife and her husband's sister-in-law.

* * * * *