

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
September 13, 2011

v

DAVID MICHAEL MCLEAN,  
Defendant-Appellant.

No. 294358  
St. Clair Circuit Court  
LC No. 07-001691-FH

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Before: WILDER, P.J., and SAAD and DONOFRIO, JJ.

WILDER, P.J., (*concurring in part, dissenting in part*).

I join in Sections I, II, IV, V, VI, VII and VIII of the majority opinion. I dissent from Section III and write separately because, although we are bound to follow this Court's decision in *People v Jamison*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 297154, issued April 26, 2011), regarding the scoring of OV 10, I disagree with *Jamison's* analysis and conclusion.

"Domestic relationship" is not defined in MCL 777.40, elsewhere in the sentencing guidelines, or in the Code of Criminal Procedure, and the unpublished opinions of this Court that have previously addressed this issue have reached different conclusions regarding the correct definition of the phrase.<sup>1</sup>

The primary goal of statutory interpretation is "to discern and give effect to the Legislature's intent." *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006), quoting

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<sup>1</sup> Cf. *People v Davis*, unpublished opinion per curiam of the Court of Appeals, issued April 14, 2009 (Docket No. 280547) (holding "the Legislature intended the phrase 'domestic relationship,' as used in MCL 777.40, to include [a spouse or former spouse, an individual with whom he or she has or has had a dating relationship, an individual with whom he or she has had a child in common, or a resident or former resident of his or her household as] listed in MCL 750.81(2)"), *People v Patrowic*, unpublished opinion per curiam of the Court of Appeals, issued March 6, 2007 (Docket No. 267864) (holding that a domestic relationship requires "a familial or cohabiting relationship"), and *People v Counts*, unpublished opinion per curiam of the Court of Appeals, issued May 20, 2004 (Docket No. 246717) (holding that a domestic relationship requires "a familial or cohabiting relationship").

*People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). “We begin by examining the plain language of the statute; where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed—no further judicial construction is required or permitted, and the statute must be enforced as written.” *Id.* If a statute is ambiguous, judicial construction is appropriate. *People v Gardner*, 482 Mich 41, 50; 753 NW2d 78 (2008). A statutory provision is ambiguous only if it irreconcilably conflicts with another provision or it is equally susceptible to more than a single meaning. *Id.* at 50 n 12.

In construing a statute, this Court “must give effect to every word, phrase, and clause . . . and must avoid an interpretation that would render any part of the statute surplusage or nugatory.” *People v Perkins*, 473 Mich 626, 638; 703 NW2d 448 (2005), citing *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). Provisions must be read in the context of the entire statute so as to produce a harmonious whole, *People v Couzens*, 480 Mich 240, 249; 747 NW2d 849 (2008), and identical language in various provisions of the same act should be construed identically, *People ex rel Simmons v Munising Twp*, 213 Mich 629, 633; 182 NW 118 (1921). This Court may consult a dictionary to discern the meaning of undefined terms. *People v Caban*, 275 Mich App 419, 422; 738 NW2d 297 (2007).

*Random House Webster’s College Dictionary* (1997) defines “domestic” as, “1. of or pertaining to the home, family, or household affairs. 2. devoted to home life.” It also defines “relationship” as “1. a connection, association, or involvement. 2. connection between persons by blood or marriage; kinship. 3. an emotional or other connection between people. 4. a romantic or sexual involvement.” Based on these definitions, defendant argues, and this Court in *Jamison* agrees, that “domestic relationship” should be interpreted to require a familial or cohabiting relationship as this Court concluded in *People v Patrowic*, unpublished opinion per curiam of the Court of Appeals, issued March 6, 2007 (Docket No. 267864), and *People v Counts*, unpublished opinion per curiam of the Court of Appeals, issued May 20, 2004 (Docket No. 246717).

The familial or cohabiting relationship interpretation would arguably fall in line with the Legislature’s historic use of the phrases “domestic violence” and “domestic assault” in the Code of Criminal Procedure at the time MCL 777.40 was enacted. For example, MCL 765.6b relied on the definition of “domestic violence” in MCL 400.1501, which had since 1978 limited victims to those “assaulted by or threatened by assault by his or her spouse or former spouse or an adult person or emancipated minor assaulted by an adult person of the opposite sex with whom the assaulted person cohabits or formerly cohabitated.” Likewise, MCL 777.16d set forth the category, class and statutory maximum sentence for a defendant convicted of domestic assault under MCL 750.81, which was limited to “[a]n individual who assault[ed] or assault[ed] and batter[ed] his or her spouse or former spouse, an individual with whom he or she has had a child in common, or a resident or former resident of his or her household . . . .”

However, I would conclude that the Legislature’s intent for the meaning of the phrase “domestic relationship” is equally susceptible to more than just the “familial or cohabiting relationship” meaning in light of the Legislature’s more contemporaneous adoption of the word “domestic” in other contexts in 1998 when MCL 777.40 was enacted. See *People v Hall*, 391 Mich 175, 191; 215 NW2d 166 (1974) (stating that courts may consider the history of times when the statute was passed and of the act itself to ascertain the meaning of the language in the

statute). In 1994, the Legislature amended MCL 600.2950 to allow a victim to file a personal protection order if the victim has or has had a dating relationship with an individual to be restrained or enjoined. 1994 PA 341, as amended by 1994 PA 402, MCL 600.2950. Moreover, upon the violation of a personal protection order and the investigation or intervention by a peace officer, the officer is required to prepare a domestic violence report. MCL 764.15c, 1998 PA 475. Michigan's "STANDARD DOMESTIC RELATIONSHIP INCIDENT REPORT" form was created to comply with MCL 764.15c, and it includes "Dating Relationship" among the applicable domestic relationships a victim could have with an offender.

Moreover, the Legislature added MCL 333.21072 to the Public Health Code in 1998, which provided:

(1) A health maintenance organization shall not rate, cancel coverage on, refuse to provide coverage for, or refuse to issue or renew a contract solely because an enrollee or applicant for enrollment is or has been a victim of domestic violence.

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(4) As used in this section, "domestic violence" means inflicting bodily injury, causing serious emotional injury or psychological trauma, or placing in fear of imminent physical harm by threat or force a person who is a spouse or former spouse of, has or has had a dating relationship with, resides or has resided with, or has a child in common with the person committing the violence.<sup>2</sup>

At the same time, in MCL 550.1401(3)(d) and MCL 500.3406j, the Legislature adopted a similarly broad definition of "domestic violence" to protect the insurance coverage of a person who has or has had a dating relationship with a person committing the violence.

I would find that the Legislature's broader application of the word "domestic" with respect to personal protection orders, and in MCL 333.21072, MCL 550.1401(3)(d), and MCL 500.3406j, which would include a person who: 1) is a spouse or former spouse of, 2) has or has had a dating relationship with, 3) resides or has resided with, or 4) has a child in common with the individual whose conduct is at issue in the statute, is more indicative of the Legislature's intended meaning of the phrase "domestic relationship" in MCL 777.40. Although the presumption that a statutory amendment reflects a change in meaning applies to the construction of the amendment and does not apply to construe the meaning of the original statutory language, I nevertheless note that the trend to broaden the application of the word "domestic" continued after the enactment of MCL 777.40. *In re Moukalled Est*, 269 Mich App 708, 718; 714 NW2d 400 (2006). In 2000, the definition of domestic violence in MCL 400.1501 was amended to apply to a person's enumerated acts against a family or household member, which by definition includes "[a]n individual with whom the person has or has had a dating relationship." 1978 PA 389, as amended by 2000 PA 84, MCL 400.1501. In 2001, MCL 750.81(2) was also amended to include an individual who assaults or assaults and batters an individual with whom he or she has

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<sup>2</sup> Part 210 of the Public Health Code was repealed by 2000 PA 252.

or has had a dating relationship. 2001 PA 189, as amended by 2001 PA 190, MCL 750.81(2). Finally, in 2006, MCL 768.27b and MCL 768.27c were enacted and address the admissibility of other acts of domestic violence and a statement by a declarant where the evidence is offered for an offense involving domestic violence. Both of these statutes likewise define domestic violence to apply to a person's enumerated acts against a family or household member, which again includes "[a]n individual with whom the person has or has had a dating relationship." MCL 768.27b(5) and MCL 768.27c(5).

A "dating relationship" is defined as "frequent, intimate associations primarily characterized by the expectation of affectional involvement." See 1994 PA 402, MCL 600.2950(26)(a); similarly, see 2001 PA 190, MCL 750.81(2). Here, Stocks and defendant became involved in a romantic, sexual relationship after their initial meeting. Although Stocks's expectations regarding their relationship apparently diminished over time, it is clear that defendant had discussions with Stocks about her moving to Tennessee with him around the same time that defendant committed larceny by false pretenses. As a result, Stocks purchased a substantial amount of furniture for the house that defendant said he was purchasing for them in Tennessee. In addition, Stocks said that although she did not see defendant very often because he was supposedly living in Tennessee, they "were still close" and "talked every day." As such, I would conclude that the trial court's finding that defendant and Stocks were in a dating relationship was not clear error, and as defendant does not contest the finding that he exploited that relationship, I would further conclude that the trial court properly scored 10 points for OV 10. *People v Witherspoon*, 257 Mich App 329, 335; 670 NW2d 434 (2003).

/s/ Kurtis T. Wilder