STATE OF MICHIGAN

IN THE SUPREME COURT

In re ESTATE OF IDA E.
SPRENKLE-HILL

Supreme Court No.

COA Docket No. 248783

Trial Court No. 2002-023531-DA

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RESPONSE TO PETITIONER'S
APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTION PRESENTED

I. MAY A PRETERMITTED SPOUSE ELECT AGAINST HIS DECEASED SPOUSE'S WILL UNDER MCL 700.2202?

Barry County Probate Court answered, "No."
Petitioner/Appellant answers, "No."
Respondent/Appellee answers, "Yes."
The Court of Appeals answered, "Yes."

ORDER APPEALED FROM

Appellant seeks leave to appeal the February 22, 2005 Opinion of the Michigan Court of Appeals (See attached Exhibit 1, Opinion of the Michigan Court of Appeals dated February 22, 2005).

This case has an unusual appellate history. Respondent/Appellee George H. Hill had previously sought leave to appeal the October 26, 2004 Opinion of the Michigan Court of Appeals requesting the Michigan Supreme Court to grant leave to appeal and on appeal, to reverse the opinion of the Michigan Court of Appeals and the Barry County Probate Court.

However, prior to the Michigan Supreme Court granting Respondent/Appellee George H. Hill's Application for Leave to Appeal, the Michigan Court of Appeals, on its own motion, ***vacated*** its October 26, 2004, and entered the February 22, 2005 Opinion (which the current application for leave now addresses) in George H. Hill's favor . Thereafter, George H. Hill withdrew his Application for Leave to Appeal to this Court.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

The decedent Ida E. Sprenkle-Hill executed her Revocable Trust Agreement and Pour-Over Will, dated July 12, 1999. The decedent and Appellant, George Homer Hill, were thereafter married on May 12, 2001. Ida E. Sprenkle-Hill died on October 29, 2001 survived by her spouse, George Homer Hill, and two (2) children, the Appellees, John J. Flint and Leslie R. Flint. These two children were born before the decedent married George Homer Hill and were not the children of George Homer Hill. The decedent did not fund her Trust, and died owning all of the subject estate property in her name alone. Pursuant to the Pour-Over Will, all of the decedent's property would be placed into her Trust. The decedent's Trust provided that her two (2) children would each receive one-half (1/2) of the remainder of the estate. George Homer Hill derived no property from the decedent except as might be allocated to him pursuant to his Elections as set forth below. On December 6, 2002, George Homer Hill timely filed his Spousal Election pursuant to MCL 700.2202.

The above statements of fact are not contested and enumerated in the Trial Court Opinion and Order dated May 6, 2003. The Trial Court determined that the Appellant, a pretermitted spouse, was not entitled to an elective share of Ida E. Sprenkle-Hill's estate based on MCL 700.2301. After a timely appeal, the Michigan Court of Appeals affirmed the decision of the Trial Court.

Respondent/Appellee George H. Hill timely sought leave to appeal to the Michigan Supreme Court. Before being granted leave, the Michigan Court of Appeals, on its own Motion, vacated its October 26, 2004 opinion and on February 22, 2005 published an opinion reversing the Barry County Trial Court in favor of George H. Hill.

It is from the February 22, 2005 opinion of the Michigan Court of Appeals that Petitioner/Appellant now seeks relief.

ARGUMENT

The standard of review on appeal in non-jury Probate Court cases is whether the court's findings are clearly erroneous. *In Re Williams Estate*, 133 Mich App 1, 13; 349 NW2d 247 (1984). A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding. *In re Wojan Estate*, 126 Mich App 50, 52; 337 NW2d 308 (1983).

I. A pretermitted surviving spouse has a right to an elective share of his deceased spouse's estate pursuant to MCL 700.2202.

In its February 22, 2005 opinion, the Michigan Court of Appeals stated in pertinent part:

> "Give the absence of ambiguity in the statutory language of §2202 and §2301 and the lack of any statutory language to the contrary elsewhere in EPIC, we conclude that a surviving spouse who married the testator after the will was executed is not barred from claiming an elective share under the terms of §2202. This construction is consistent with the reporter's comment to §2301, which indicates that a pretermitted spouse is eligible to choose an elective share of the estate under §2202. It is also consistent with the operation of the analogous provisions of the Uniform Probate Code, on which EPIC is modeled. Further when this Court construed the analogous provisions of Michigan's previous probate code, it held that spouse could take an elective share without waiving the remedy provide for the pretermited spouses, which implies that the two provisions were not considered mutually exclusive. *In re Estate of Ida Sprenkle-Hill*, COA No. 248783, February 22, 2005, p. 4.

Respondent/Appellee agrees with the Michigan Court of Appeals that the Spousal Election in MCL 700.2202 is unaffected by MCL 700.2301, and therefore, Respondent/Appellee has a right to his Spousal Election under MCL 700.2202(2)(b). In its prior Application for Leave to Appeal to this Court, the Respondent/Appellee made the following arguments:

First, the elective share of a surviving spouse is governed by Part 2 of Article II of the Estates and Protected Individuals Code (EPIC), titled "Elective Share of Surviving Spouse." MCL 700.2201 being the first section thereof, states as follows: "Subject to sections 2203 and 2205, upon an individual's death, the individual's surviving spouse has the right described by section 2202." As neither MCL 700.2201 nor any other section of Part 2 of Article II of EPIC make any reference to being subject to MCL 700.2301, Respondent/Appellee's Spousal Election herein is not subject to MCL 700.2301.

It should be noted that MCL 700.2203 applies to the timeliness of filing an election and MCL 700.2205 applies to a waiver of spousal rights by a written agreement, and thus do not affect Respondent/Appellee's election.

Second, according to the Reporter's Commentary to MCL 700.2301, "if this §2301 intestate share is less than the spouse's elective share under §2201, it is part of (counts against) the elective share. If this §2301 intestate share is greater than the elective share, the spouse will receive this intestate share even if the spouse elects to abide by the terms of the will." (See attached Exhibit 1, MCL 700.2301 with Reporter's Comment). It is clear from the Reporter's Commentary to MCL 700.2301 that this section exists independently of MCL 700.2202 and does not take away the Spousal Election under MCL 700.2202. In the present case, Respondent/Appellee's intestate share under MCL 700.2301 is less than his Spousal Elective share under MCL 700.2202. Therefore, according to the Reporter's Commentary, his intestate share under MCL 700.2301 becomes part of his spousal elective share under MCL 700.2202, and he is entitled to his full Spousal Elective share pursuant to MCL 700.2202(2)(b).

Third, a decision that MCL 700.2301 takes away a surviving spouse's elective share under MCL 700.2202 would contravene public policy and the legislature's intent to provide for the surviving spouse. If MCL 700.2301 could be used to completely eliminate the spousal elective share in MCL 700.2202, individuals could effectively eliminate their spouses from taking any assets from the estate. They would merely have to execute a will before the marriage devising all of their assets to their children and leave the future spouse out of the will altogether. Such an outcome is clearly against public policy and the intent of the legislature as previously reflected by MCL 700.291 (Revised Probate Code) and currently by MCL 700.2205 (EPIC) which require a written contract or agreement by a spouse to effect waiver of the spouse's rights to an estate.

Fourth, Respondent/Appellee's anticipates that the Appellant's may use the case *In re: Estate of John Smith Bennett*, 255 Mich App 545; 662 NW2d 772 (2003) in support of their position. Respondent/Appellee argues that this case is not relevant to the present case because it does not address the matter of a spouse's election under MCL 700.2202. *Bennett* deals strictly with the application of MCL 700.2301. That case does not address elective share rights pursuant to MCL 700.2202, and has nothing whatsoever to do with a spouse's elective share rights.

RELIEF REQUESTED

For the above reasons, Respondent/Appellee requests the Court deny the Petition for leave to appeal from the February 22, 2005 opinion of the Michigan Court of Appeals.

Dated: April 19, 2005

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