STATE OF MICHIGAN

COURT OF APPEALS

In Re Estate of CORRINE HOLMES DU VALL,
a/k/a CORRINE HOLMES DE VAULL, Deceased.

UNPUBLISHED
August 17, 2001

PENNY DE VAULL and ROBERT DE VAULL,

Petitioners-Appellants,

V

No. 222289
Wayne Probate Court
LC No. 96-569035-SE

LOUIE HOLMES PORTER,

Respondent-Appellee.

Before: Jansen, P.J., and Collins and Cooper, JJ.

PER CURIAM.

Petitioners appeal as of right from an order granting involuntary dismissal to respondent, pursuant to MCR 2.504(B)(2), in this action affirming the validity of a divorce decree. We affirm.

Petitioners are heirs to the estate of William De Vaull, deceased. At one time, William De Vaull was married to Corrine De Vaull,[1] who predeceased him by approximately six months. In September 1956, Corrine De Vaull obtained a divorce decree but continued to reside in the same house with William De Vaull. Friends and relatives were unaware of the divorce for many years and some individuals were unaware of the divorce until after the death of the De Vaulls. Corrine De Vaull authored a holographic will in 1986. The will left William De Vaull access to her home for the sum of $2,000 a year. The remainder of her estate was left to her relatives. William De Vaull's heirs contest the validity of the 1956 divorce decree; or, in the alternative, contend that a common-law marriage was reestablished between September 1956 and January 1, 1957, when common-law marriages became invalid in Michigan.

[1] The record suggests three spellings of the decedent's last name – De Vaull, Du Vall, and Du Vaull. For consistency, we use De Vaull here.

Petitioners first contend that the divorce decree was invalid because the return of service listed the place of service as Detroit, rather than any specific address. This Court reviews the findings of a probate court sitting without a jury for clear error. *In re Estes Estate*, 207 Mich App 194, 208; 523 NW2d 863 (1994). "A finding is clear error when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Id*.

The statutory method for service of process during 1956 provided:

> Writs of summons at law and in chancery, shall be served by showing the original writ to the defendant, and delivering to him a copy thereof; and on the return of the writ personally served, the defendant shall be considered in court, and may be proceeded against accordingly. [MCL 613.21, repealed by 1961 PA 236, § 9901, effective January 1, 1963.]
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> All civil process at law, or in equity, issued from any court of record, except process requiring the arrest of any person, or the seizure of property, may be served by any person of suitable age and discretion, and proof of service shall be made by the affidavit of the person making such service, except when such service is made by an officer of the court authorized to serve process, when his certificate of service shall be sufficient proof thereof. [MCL 613.22, repealed by 1961 PA 236, § 9901, effective January 1, 1963.]

These statutes did not require a description of the place of service by address. Therefore, petitioners' claim of invalidity fails on its face. In addition, petitioners presented no convincing proof or corroborating evidence to impeach the service of process. *Delph v Smith*, 354 Mich 12, 16-18; 91 NW2d 854 (1958).

Moreover, equity demands that petitioners' claim be rejected. Michigan case law supports the conclusion that a divorce decree cannot be attacked after the death of one of the parties thereto where there has been considerable delay in the attack on jurisdiction and the purpose of the attack is the disposition of property. *Hardy v Hardy*, 326 Mich 415; 40 NW2d 207 (1949); *Livingston v Livingston*, 276 Mich 399; 267 NW 636 (1936); *Zoellner v Zoellner*, 46 Mich 511; 9 NW 831 (1881). In each of these cases, the Court held that the sole motive for vacating the divorce decree was to allow the surviving ex-spouse to inherit, and denied the requests to set aside the decrees. *Hardy*, *supra* at 418; *Livingston*, *supra*, at 402-403; and *Zoellner*, *supra* at 514. In this case, both parties are deceased and heirs seek to set aside the divorce decree. Even if the divorce were invalid for lack of personal jurisdiction over William De Vaull, this claim, brought more than forty years after entry of the divorce decree and after the deaths of both parties to the divorce, is barred by laches or the doctrine of equitable estoppel. *Hardy*, *supra* at 418. Therefore, the probate court's decision regarding the validity of the divorce decree is not clearly erroneous.

Petitioners next contend that even if the divorce decree was valid, a common law marriage was subsequently reestablished between the De Vaulls. We disagree. The divorce decree was filed on September 11, 1956. On January 1, 1957, the Legislature abolished

common-law marriages in Michigan. MCL 551.2. Therefore, a common-law marriage needed to be established between September 11, 1956 and December 31, 1956.

The establishment of a common-law marriage required a present agreement between the parties to take each other as husband and wife. *Hannigan v Hannigan*, 328 Mich 378, 381; 43 NW2d 895 (1950). This agreement was essential. However, petitioners present no evidence of an agreement between the parties to take each other as husband and wife during the four-month time period from September 1956 to January 1957. Any evidence presented after this time period is irrelevant for purposes of re-establishing a common law marriage because Michigan no longer recognized the validity of common law marriages after January 1, 1957. Therefore, the probate court's finding, that petitioners failed to establish the existence of a common law marriage between Corrine and William De Vaull, was not clearly erroneous.

Finally, petitioners contend that the probate court erred in reopening Corrine De Vaull's estate pursuant to a holographic will that petitioners' claim was not timely filed. Because the record does not contain the evidence on which the probate court based its decision to reopen, review of the lower court's decision is both impossible and inappropriate. *Nye v Gable, Nelson & Murphy*, 169 Mich App 411, 413; 425 NW2d 797 (1988).

Affirmed.

/s/ Kathleen Jansen
/s/ Jeffrey G. Collins
/s/ Jessica R. Cooper