

Court of Appeals, State of Michigan

ORDER

Daniel E Galeski v Mark Wajda

Docket No. 260878

LC No. 03-341464

Brian K. Zahra
Presiding Judge

Mark J. Cavanagh

Donald S. Owens
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued August 23, 2005, is hereby VACATED. A new opinion is attached to this order.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

DEC 01 2005
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

DANIEL E. GALESKI, Personal Representative of
the Estate of Barbara L. Hall, Deceased,

Plaintiff-Appellee,

v

MARK WAJDA and HELEN WAJDA,

Defendants,

and

JUDY STEMPIEN

Intervening Plaintiff-Appellant.

UNPUBLISHED
December 1, 2005

No. 260878
Wayne Circuit Court
LC No. 03-341464-NI

ON RECONSIDERATION

Before: Zahra, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Intervener Stempien appeals by leave granted from an order summarily dismissing her claim for a share of the proceeds from a wrongful death action. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

William and Barbara Hall died simultaneously in an automobile accident. Plaintiff filed this wrongful death action on behalf of Barbara Hall's estate. Plaintiff and defendants settled the case and sought court approval of the settlement. Stempien, William's daughter and Barbara's stepdaughter, intervened, claiming a right to a share of the proceeds under MCL 600.2922(3)(b). The trial court ruled that Stempien did not qualify for benefits under the statute and granted plaintiff's motion for summary disposition. This appeal followed.

We review a trial court's ruling on a motion for summary disposition de novo. *Kefgen v Davidson*, 241 Mich App 611, 616; 617 NW2d 351 (2000). Statutory interpretation is a question of law that we also review de novo. *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

The persons who may be entitled to damages in a wrongful death action are identified by MCL 600.2922(3), which provides in part:

(a) The deceased's spouse, children, descendants, parents, grandparents, brothers and sisters, and, if none of these persons survive the deceased, then those persons to whom the estate of the deceased would pass under the laws of intestate succession determined as of the date of death of the deceased.

(b) The children of the deceased's spouse.

The trial court declared that Stempien was not a person entitled to damages under MCL 600.2922(3)(b), on the ground that she was not a child of Barbara's spouse because William was presumed to have predeceased Barbara under MCL 700.2104, § 2104 of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.* By its own terms, MCL 700.2104 creates a presumption that a person who would otherwise have been an heir predeceased a decedent if the person did not survive the decedent by 120 hours; it applies only to homestead allowance, exempt property, and intestate succession. However, intestate succession only affects those entitled to damages under the last category in MCL 600.2922(3)(a).

(3) Subject to sections 2802 to 2805 of the estates and protected individuals code, 1998 PA 386, MCL 700.2802 to 700.2805, the person or persons who may be entitled to damages under this section shall be limited to any of the following who suffer damages and survive the deceased:

(a) The deceased's spouse, children, descendants, parents, grandparents, brothers and sisters, and, if none of these persons survive the deceased, then *those persons to whom the estate of the deceased would pass under the laws of intestate succession determined as of the date of death of the deceased.* [Emphasis added.]

Generally, in issues of statutory interpretation, a modifying clause applies only to the last antecedent. *Dessart v Burak*, 470 Mich 37, 41; 678 NW2d 615 (2004). Therefore, the laws of intestate succession govern those who may recover damages under MCL 600.2922(3)(a), other than the deceased's spouse, children, descendants, parents, grandparents, brothers or sisters who survive the deceased. Thus, MCL 700.2104 clearly does not apply to William, the deceased's spouse. Since it does not apply, there is no presumption that William predeceased Barbara.

Regardless, Stempien's claim is premised on MCL 600.2922(3)(b), which provides in relevant part "the person or persons who may be entitled to damages under this section shall be limited to any of the following who suffer damages and survive the deceased . . . (b) The children of the deceased's spouse." MCL 600.2922(3)(b) contains no reference to intestate succession and, indeed, cannot refer to intestate succession because the laws of intestate succession, MCL 700.2101 to MCL 700.2114, do not provide a stepchild the right to inherit a portion of a stepparent's intestate estate, and MCL 700.1103 provides that a person entitled to take as a child does not include an individual who is only a stepchild. Because an omission of a provision in one part of a statute should be construed as intentional when the provision is included in another part of the statute, *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993), we conclude that MCL 700.2104 does not apply to Stempien's right to recover under MCL 600.2922(3)(b).

Citing *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 531; 676 NW2d 616 (2004), our dissenting colleague notes, "William cannot be 'the deceased's spouse' for purposes of one

provision of the statute and not another provision of the same statute.” In *Twichel*, *supra* at 530-532, the Supreme Court indicated that the language used by the Legislature in two separate statutes was virtually identical and, thus, required identical interpretation by the courts. Here, the dissent focuses on the term “the deceased’s spouse,” and concludes that William could not recover under the wrongful death statute because he did not survive his wife; hence, William was not the deceased’s spouse, and Stempien was also barred from recovery. While we agree that William could not recover damages for his wife’s wrongful death, we do so because he did not survive his wife, not because he was presumed to have predeceased her. William was the deceased’s spouse at the time of her death, and certainly at the time the wrongful death action accrued.

“[U]nder the wrongful death act a cause of action accrues at the time of infliction of the fatal injury, rather than the time of death (*Hawkins [v Regional Med Labs*, 415 Mich 420, 437; 329 NW2d 729 (1982)]) . . . even where the death is immediate, the act and injury causing death still must logically precede the death itself and thus the action accrues prior to and survives death.” [*Hardy v Maxheimer*, 429 Mich 422, 440; 416 NW2d 299 (1987).]

Therefore, a wrongful death action accrues at the time of the infliction of the fatal injury, which precedes death. And a marriage does not legally terminate until the death of a spouse. *In re Combs Estate*, 257 Mich App 622, 625 n 6, 669 NW2d 313 (2003), citing *Byington v Byington*, 224 Mich App 103, 109; 568 NW2d 141 (1997). Since they died simultaneously, they were married at the instant of their deaths. Furthermore, nothing in MCL 700.2104 affects the marital status of the parties at the time of death; the provision merely provides a consistent means of determining survivorship for the purpose of efficient distribution of a decedent’s estate. See MCL 700.1201. Thus, while William did not survive Barbara for the purpose of intestate succession, he was still her spouse for the purpose of a wrongful death action at the time the action accrued and up to and including the instant of her death.

There is nothing in the plain language of the statute itself that makes Stempien’s entitlement to recovery contingent on William’s right to inherit by intestate succession. Had the Legislature intended the result urged by the dissent in this case, it could easily have done so. This Court should not incorporate in a statute a provision that the Legislature did not expressly include. *Polkton Twp v Pellegrom*, 265 Mich App 88, 103; 693 NW2d 170 (2005). Here, the Legislature merely conditioned recovery on Stempien’s father not predeceasing his wife and Stempien herself surviving the deceased and establishing damages. MCL 600.2922(3). Because there is no question that William did not predecease Barbara (they died simultaneously) and that Stempien survived the deceased, summary disposition was inappropriate.

Reversed and remanded. We do not retain jurisdiction.

/s/ Brian K. Zahra

/s/ Donald S. Owens