IN THE SUPREME COURT OF MISSOURI

Case No. SC93606

In the matter of Lonnie Brockmire, Deceased

Ronald W. Brockmire, Appellant

v.

Sherri R. Gikovate, Joetta K. Giles & Bella L. Gikovate, Respondents

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Appeal from the Circuit Court of Cape Girardeau County, Missouri
Thirty-Second Judicial Circuit, Probate Division
Hon. Scott A. Lipke

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This case is an appeal of a September 24, 2012 Order for Partial Distribution entered in the Probate Division of the Circuit Court of Cape Girardeau County, 32nd Judicial Circuit of Missouri, by the Honorable Scott A. Lipke. Appellant Brockmire filed his Notice of Appeal in the Missouri Court of Appeals on October 12, 2012. (LF 40)

The Court of Appeals issued its opinion reversing the Order for Partial Distribution and remanding the case to the Probate Division on June 11, 2013. Respondents moved the Court of Appeals for its order transferring the case to this Court on June 26, 2013, and said motion was denied on July 24, 2013. Respondents filed an application with this Court for transfer on August 8, 2013, which was sustained on October 1, 2013.

An appeal from the September 24, 2012 order is permitted under RSMo § 472.160 (2000), in that it makes a distribution from the estate and purports to determine heirship.

The Supreme Court of Missouri has jurisdiction over this appeal pursuant under its appellate jurisdiction set forth in Mo. Const. Art. V § 10.

STANDARD OF REVIEW

The standard of review in a court-tried case is contained in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). Under that case, the Supreme Court should overturn the Probate Court's judgment if it is unsupported by substantial evidence, against the weight of the evidence or erroneously declares or applies the law.

To the extent that this case involves issues of statutory construction, this Court's review is *de novo. In re Estate of Haden*, 258 S.W.3d 505, 508 (Mo. App. E.D. 2008).

This Court reviews the cause herein "the same as on original appeal." Mo. Const. Art. V § 10.

STATEMENT OF FACTS

The material facts of this case are not in dispute. Lonnie Lee Brockmire died intestate on July 18, 2011. (LF 9) He had no surviving spouse at his death and his parents predeceased him. He was, however, survived by one brother, Ronald W. Brockmire. (LF 14) He was also survived by one biological daughter, Sherri Renee Lewis Gikovate and her daughter, Bella Lewis Gikovate. (LF 13) The Decedent's biological daughter, however, had been adopted, as an adult, by her stepfather on January 9, 2008. (LF 13)

On June 6, 2012, the co-personal representatives of Mr. Brockmire's estate, Joetta K. Giles and Sherri Renee Lewis Gikovate filed a Petition for Partial Distribution requesting that $25,000 from the estate be distributed to Bella Lewis Gikovate. (LF 9-12) On June 21, 2012, Ronald W. Brockmire filed his Answer and Objections to Petition for Partial Distribution. (LF 13-16) After a hearing on August 9, 2012, the Honorable Scott A. Lipke of the Probate Division of the Circuit Court of Cape Girardeau County entered an order on September 24, 2012 finding Bella Lewis Gikovate to be an heir of Lonnie Lee Brockmire and granting the personal representatives' request for a partial distribution in the amount of $25,000.00. (LF 38-39)

POINTS RELIED ON

I. The Probate Court erred by erroneously declaring and applying the law in making a finding that Bella Lewis Gikovate was an heir of Decedent Lonnie Brockmire because she was not a descendant of the decedent's child in that the adoption of Decedent's natural daughter, Sherri Renee Lewis Gikovate, by her stepfather severed her relationship to the decedent.

- RSMo § 474.010 (2000)
- RSMo § 474.060 (2000)
- *Wass v. Hammontree*, 77 S.W.2d 1006 (Mo. 1934)

II. The Probate Court erred by erroneously declaring and applying the law in ordering a partial distribution of $25,000.00 to Bella Lewis Gikovate because she was not entitled to a distribution in that she was not an heir.

- RSMo § 473.613 (2000)

ARGUMENT

I. The Probate Court erred by erroneously declaring and applying the law in making a finding that Bella Lewis Gikovate was an heir of Decedent Lonnie Brockmire because she was not a descendant of the decedent's child in that the adoption of Decedent's natural daughter, Sherri Renee Lewis Gikovate, by her stepfather severed her relationship to the decedent.

Overview

In Point I, Appellant challenges the ruling of the Probate Court which finds that Bella Lewis Gikovate ("Bella") is an heir of the decedent, Lonnie Brockmire ("Lonnie"). Appellant does not dispute that Bella is the natural granddaughter of Lonnie. However, the rules on intestate succession do not recognize a biological grandfather-granddaughter relationship as a basis for heirship. Instead, RSMo § 474.010 provides that when there is no surviving spouse:

> All property as to which any decedent dies intestate shall descend and be distributed, subject to the payment of claims, as follows… To the *decedent's children, or their descendants*, in equal parts…[and] If there are no children, or their descendants, then to the decedent's father, mother, brothers and sisters or their descendants in equal parts. (emphasis added)

Therefore, Bella can only inherit from Lonnie's estate if the Probate Court finds that she was a descendant of a person who was Lonnie's "child" at the time of his death. Under Missouri's Probate Code, the term "child" includes "an adopted child and a child born out of wedlock, but does not include a grandchild or other more remote

descendants." RSMo § 472.010 (2000) The term "descendant" is not defined by the Probate Code.

This case presents a rare situation because Lonnie's biological daughter, Sherri Renee Lewis Gikovate ("Sherri"), who is Bella's mother, was adopted by her stepfather on January 9, 2008. By way of this adoption, Sherri became the child of her adopted father and not of her natural father, Lonnie. The Missouri legislature enacted a statute to address the heirship implications of this situation. RSMo § 474.060 (2000) states that:

> If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person, an adopted person is the child of an adopting parent and not of the natural parents, except that adoption of a child by the spouse of a natural parent has no effect on the relationship between the child and such natural parent. (emphasis added)

By applying the plain language of this statute to the facts at bar, Sherri was a child of her mother and her stepfather on the date of Lonnie's death, and was no longer a child of Lonnie. Bella's right to inherit as a descendant of Lonnie's child depends on the existence of a legal parent-child relationship between Lonnie and Sherri on the date of Lonnie's death. *See* RSMo § 474.010 (2000). The January 9, 2008 adoption ended that legal relationship. As of that date, Bella was no longer the descendant of a child of Lonnie. She lost her ability to inherit from him, but simultaneously gained the ability to adopt from or through her new adoptive family.

Under the Probate Court's ruling, Bella would be permitted to inherit from or through Sherri's biological family as well as her adoptive family. The purpose of RSMo § 474.060 is clear on its face: it supplants the biological family of an adoptee and the adoptee's descendants with the adoptive family. The Probate Court's ruling violates this principle and would place Bella in a position to potentially receive a double inheritance – through both her biological and adoptive families.

Under the rules of intestate succession, as quoted above from RSMo § 474.010, where the decedent has no spouse, children or descendants of children at his death, the estate is distributed to the parents and siblings of the decedent. Because Lonnie left no surviving spouse, was predeceased by his parents, and had no children, his one surviving sibling, Appellant Ronald Brockmire, is entitled to the estate.

Despite the fact that this situation can be addressed solely by reference to the Probate Code, the Respondents have propounded a number of theories as to why Bella is entitled to inherit from Lonnie's estate. First, Respondents claim that Bella's due process rights would be affected if her mother's adoption could terminate her right to intestate succession. Second, Respondents claim that Bella qualifies as "issue" of Lonnie and therefore is entitled to inherit. Appellant addresses these arguments below.

Bella had no vested right to her legal relationship with Lonnie.

Respondents contend that severing Bella's status as Lonnie's grandchild without notice and a hearing would violate due process protections afforded under the Missouri Constitution or United States Constitution. Due process considerations, however, only apply where a party has a vested right. *See State Bd. of Registration for Healing Arts v.*

Boston, 72 S.W.3d 260, 265 (Mo. App. W.D. 2002). A vested right is "a title, legal or equitable, to the present or future enjoyment of a demand." *Id.* The term "vested" means "fixed, accrued, settled or absolute." *Id.*

No statutory or common law basis exists to support the position that Bella had a vested right to remain a lawful lineal descendant of Lonnie. Nor did Bella possess a vested right to be Lonnie's heir at law prior to his death. Missouri law has long held that the determination of heirship occurs at death, not before. The case of *Wass v. Hammontree*, 77 S.W.2d 1006 (Mo. 1934) is instructive. There, this Court held that

> [N]o one is an heir to the living and…the living have no heirs in a legal sense. Heirs apparent or expectant heirs of a living person have no fixed or vested interest in the property of such person….It is not until the death of the owner that his property becomes subject to the laws of descent and distribution or that the persons designated as heirs have any interest therein.

Id. at 1010.

Before Lonnie's death, Bella was merely an "expectant heir." This status, however, confers no "fixed, accrued, settled or absolute" right. Lonnie could have executed a Last Will and Testament devising his estate to some third party. In so doing, Bella's expectation of heirship could have been extinguished with the stroke of a pen. In this case, however, Bella's expectation of heirship was extinguished by Sherri's voluntary decision to be adopted by her stepfather as an adult.

Inheritance is a creature of statute, not a common law or natural right. *Morris v. Ulbright*, 558 S.W.2d 660, 663 (Mo. banc 1997). Accordingly, Bella has no fixed right

to inherit, as the legislature has always retained the authority to amend the laws of intestate succession and change the distribution of an intestate's estate. This Court has held that "the relationship of one person as an 'heir of the body' of another is a legal relationship which is established by statute." *Id.* By statute, Bella's legal relationship with Lonnie was severed upon her mother's adoption.

The term "issue" is irrelevant in the case at bar.

Respondents also claim that Bella is an heir because she qualifies as Lonnie's "issue" as defined in the Probate Code and set forth in the intestate succession statute, RSMo § 474.010 (2000). The relevant portion reads:

> All property as to which any decedent dies intestate shall descend and be distributed, subject to the payment of claims, as follows:
>
> (1) The surviving spouse shall receive:
>
> (a) The entire intestate estate if there is no surviving issue of the decedent;
>
> (b) The first twenty thousand dollars in value of the intestate estate, plus one-half of the balance of the intestate estate, if there are surviving issue, all of whom are also issue of the surviving spouse;
>
> (c) One-half of the intestate estate if there are surviving issue, one or more of whom are not issue of the surviving spouse;
>
> (2) The part not distributable to the surviving spouse, or the entire intestate property, if there is no surviving spouse, shall descend and be distributed as follows:

(a) To the decedent's children, or their descendants, in equal parts;

(b) If there are no children, or their descendants, then to the decedent's father, mother, brothers and sisters or their descendants in equal parts; (emphasis added)

It is worth noting that part (1) above governs to the distribution of property where there is a surviving spouse, and part (2) discusses the portion of the estate not distributed to the surviving spouse, or if there is no surviving spouse. Respondents claim that Bella qualifies as "issue" and the use of that term in part (1) means that Bella is still entitled to inherit. In support of that idea, they point out that "issue" is defined in RSMo § 472.010 (2000) as "adopted children and all lawful lineal descendants, except those who are the lineal descendants of living lineal descendants of the intestate."

This argument should fail on three accounts. First, part (1) of the intestate succession statute is irrelevant here because Lonnie left no surviving spouse. Neither Bella nor Ronald could ever take an intestate share under part (1). Instead, intestate succession in this case comes from part (2), which distributes the estate where the decedent leaves no surviving spouse. The term "issue" is not even mentioned in part (2), under which either Bella or Ronald would take. The legislature instead uses the same language, "children, or their descendants," twice in part (2) – once in subpart (a) and once in subpart (b). The repetition of this phrase would be unlikely if, as the Respondents contend, the legislature truly intended to use the term "issue" instead.

Second, the statute does not distribute any property to "issue." Even if Bella qualifies as "issue," part (1) of the statute only distributes property to the surviving

spouse. Part (2), which makes no mention of the term "issue," distributes property to relatives other than a surviving spouse. In that part, the legislature chose to distribute property to "the decedent's children, or their descendants." No property is distributed to "issue" under RSMo § 474.010.

The Court should construe the plain language of § 474.010 so as "to give effect to the legislative intent as reflected in the plain language of the statute at issue." *Parktown Imports, Inc. v. Audi of America, Inc.*, 278 S.W.3d 670, 672 (Mo. banc 2009). The plain language of the statute demonstrates that the legislature intended to distribute property to "the decedent's children, or their descendants" and not to "issue."

Third, even if § 474.010 could be read to distribute property to "issue" in this situation, Bella would not fall into the definition of "issue." Under § 472.010.16, "issue" includes "adopted children and all *lawful* lineal descendants, except those who are the lineal descendants of living lineal descendants of the intestate." (emphasis added) Bella remains a biological lineal descendant of Lonnie, but is no longer a "lawful" lineal descendant following the adoption. *See* RSMo § 474.060.

Conclusion

The Probate Court erroneously applied the law by making the finding in paragraph one of its September 24th "Judgment and Order of Partial Distribution" that "Bella Lewis Gikovate, is the natural grandchild of the decedent, Lonnie Lee Brockmire, and is therefore an heir." Because Missouri's intestate succession statute does not make a "natural grandchild" an heir, the Supreme Court should reverse the Probate Court's judgment.

II. The Probate Court erred by erroneously declaring and applying the law in ordering a partial distribution of $25,000.00 to Bella Lewis Gikovate because she was not entitled to a distribution in that she was not an heir.

Overview

In Point II, Appellant challenges the Probate Court's partial distribution of $25,000.00 to Bella. While RSMo § 473.613 (2000) permits a personal representative to petition the court for a partial distribution, the distribution here was in error because Bella is not an heir and therefore is not a rightful distributee. Under Missouri's Probate Code, a "distributee" is "those persons who are entitled to the real and personal property of a decedent under his will, under the statutes of intestate succession or who take as surviving spouse under section 474.160, upon election to take against the will." RSMo § 472.010.9.

Therefore, the propriety of the partial distribution turns on whether Bella qualifies as an heir under the intestate succession statute, RSMo § 474.010. Appellant will not reargue this point, but instead incorporates by reference his argument set forth above for Point I.

Conclusion

The Probate Court erroneously applied the law by permitting a partial distribution in its September 24th "Judgment and Order of Partial Distribution." Because Bella is not entitled to receive an intestate share of Lonnie's estate, she is not a rightful distributee under RSMo § 473.613. The Supreme Court should reverse the Probate Court's order making a partial distribution.

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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned hereby states and certifies:

(1) That this brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 2,938 words, excluding the cover and this certification as determined by Microsoft Word 2010;

(2) That a copy of this brief has been served upon all counsel of record through the Court's electronic filing notification system.

on this 22nd day of October, 2013.

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