

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of JOSEPH G. BERG, JR., Deceased.

LUCILLE WOLCOTT and LAWRENCE BERG,

Petitioners-Appellants,

v

ROBERT G. BERG, Personal Representative of
the Estate of JOSEPH J. BERG, JR.,

Respondent-Appellee.

UNPUBLISHED

March 13, 2007

No. 272255

Bay County Probate Court

LC No. 05-045334-DE

Before: Fort Hood, P.J., and Smolenski and Murray, JJ.

MURRAY, J., (*concurring in part, dissenting in part*).

I concur with the majority's decision to affirm the probate court's opinion and order granting in part respondent's motion for summary disposition pursuant to MCR 2.116(C)(10). However, to the extent that the majority vacated part of the probate court's final order¹ based on its granting the entire motion after an evidentiary hearing, I respectfully dissent. First, petitioners (who never made a jury demand) have not, in this Court, challenged the trial court's procedure of holding an evidentiary hearing on the disputed issues. It is therefore beyond our scope of review. Second, although the probate court cited the wrong court rule in support of its decision, it was nonetheless permissible for the trial court to resolve any outstanding factual issues through a bench trial since petitioners waived their right to have a jury resolve any outstanding factual issues. MCR 2.509(B).

Here, it is undisputed that petitioners waived their right to have a jury trial by failing to timely demand one, MCR 2.508; MCR 5.151; MCR 5.158; *Charles Reinhart Co v Winiemko*, 444 Mich 579, 606; 513 NW2d 773 (1994), and by agreeing on the record to have the probate court hear testimony and decide the factual disputes, MCR 2.509(A)(1). The record establishes that without objection the probate court proceeded to conduct a trial and decide on the merits the

¹ That portion of the order dealt with the Chemical Bank account ending in 5430, Credit Union account, farm equipment, guns, coins and cash purportedly stored in Joseph's café.

outstanding claims that it could not resolve through the motion. Although this fact-finding was not properly performed under MCR 2.116(C)(10) or MCR 2.116(I), it was nonetheless permissible under the court's general authority to conduct a bench trial on any disputed issues. See MCR 2.509(B). Although petitioners claim on appeal that there are factual disputes, petitioners "cannot now be heard to complain about the lack of a jury trial on the issue...when by [their] own unequivocal conduct [they] waived this right." *Marshall Lasser PC v George*, 252 Mich App 104, 109; 651 NW2d 158 (2002).

Quite simply, the only error the trial court committed was relying on the wrong court rule, but in most cases that is not enough to warrant reversal. See, eg., *Bengston v Delta County*, 266 Mich App 612, 614 n 1; 703 NW2d 122 (2005); *Wickings v. Arctic Enterprises, Inc*, 244 Mich App 125, 147; 624 NW2d 197 (2000) (holding that when a trial court cites to an incorrect rule to support its decision, this Court will review the holding under the correct rule).

I would affirm the probate court's order in full.

/s/ Christopher M. Murray