

This section reflects the legislative judgment that a parent is under no obligation to provide an inheritance for a child. Protection is given, however, by §2302 (subject to limitations in subsection (2)) to a child who is born or adopted after the parent made his or her will and who is omitted from the will. Even if there is such a child, the protected child takes only the same gift as made to other children. So, if children born or adopted before the will was signed take nothing, the protected child takes nothing. And if there is a devise to children living when the will was signed, that devise is reallocated among the devisees and the protected child under the rules in subsection (b).

If the testator did not have a living child when the will was signed, the after-born or after-adopted child takes an intestate share unless substantially all of the estate is given to the other parent of the protected child.

Section 2302(3) covers the unusual situation when the testator believed a child was dead when the will was signed. If such a child later appears alive and well, he or she is treated as an omitted after-born or after-adopted child.

Note that the provisions in RPC §127 for a child born or adopted before the execution of the will and omitted by mistake or accident have not been retained in EPIC. An omitted child born before the will was signed has no protection, i.e., is given no share, unless the limited scope of subsection (3) applies.

Part 4 **Exempt Property and Allowances**

700.2401 Applicable law

Sec. 2401. This part applies to the estate of a decedent who dies domiciled in this state. For a decedent who dies domiciled outside of this state, rights to homestead allowance, family allowance, and exempt property are governed by the law of the decedent's domicile at death.

Reporter's Comment

There is no comparable RPC section, but the rights of the surviving spouse and minor children to a homestead allowance, exempt property, and a family allowance in RPC §§285–287 were conditioned on the decedent's domicile in this state. Thus, this section reflects prior Michigan law relative to the availability of allowances.

This section is based on UPC §2-401.

700.2402 Homestead allowance

Sec. 2402. A decedent's surviving spouse is entitled to a homestead allowance of \$15,000.00, adjusted as provided in section 1210. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance equal to \$15,000.00, adjusted as provided in section 1210, divided by the number of the dece-

dent's minor and dependent children. The homestead allowance is exempt from and has priority over all claims against the estate, except administration costs and expenses and reasonable funeral and burial expenses. A homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent child by the will of the decedent, unless otherwise provided, by intestate succession, or by elective share.

As amended by 2000 PA 177 (eff. June 20, 2000).

Reporter's Comment

The homestead allowance in RPC §285 was \$10,000. EPIC increased the allowance to \$15,000 (subject to adjustment for inflation). If there is no surviving spouse, the homestead allowance is available to both minor and dependent children. This is an expansion from the RPC, which allowed only minor children to claim an exemption if there was no surviving spouse. In another change, the homestead allowance is no longer charged against the recipient's share of the estate, as it was under RPC §§285(2) and 289. Although the homestead allowance was given the highest priority for payment when EPIC was enacted, as the result of changes in 2000 PA 177 it now is paid only after satisfaction of administration expenses and reasonable funeral and burial expenses.

There is no statutory or court rule provision requiring the personal representative to give notice of the homestead allowance (or exempt property allowance) to the surviving spouse (or children if there is no surviving spouse). None is needed. These allowances are not elective. Subject to possible modification by the testator or spousal agreement (as explained below), they stand as statutorily mandated transfers of a portion of the decedent's property. The personal representative has a fiduciary obligation to see that they are paid. In accordance with MCL 700.2405(2), the personal representative may select assets to satisfy the homestead and exempt property allowances. The personal representative also may establish the family allowance at an amount up to the statutory maximum. All of these actions occur without court participation. Only if there is a dispute will one or more of them come before the court.

If the surviving spouse (or other recipient of the allowance) dies after the decedent and after satisfying the 120-hour survival period under MCL 700.2104, an unpaid allowance becomes payable to the surviving spouse's (or other recipient's) estate.

The phrase "unless otherwise provided" in the last sentence of §2402 permits a testator to stipulate that the allowance is to be treated as part of the share given by will to the spouse (or other recipient). The allowances in §§2402, 2403, and 2404, MCL 700.2403, .2404, are certainly intended to offer some economic protection to the surviving spouse and to children when they are eligible. May the decedent, however, stipulate in his or her will that one or more of the allowances not be paid? In other words, can a spouse or a child be omitted from coverage by these allowances? It seems clear that a spouse may not be denied these allowances through unilateral action by the decedent. Section 2205, MCL 700.2205, appears to state the only methods by which the spouse may be excluded from receiving the

allowances. All require consent of the spouse. Other provisions point to the fact that a decedent could omit a child not only from taking anything under the decedent's will but also from receiving allowances as well. These sections are MCL 700.2101(2) (permitting exclusion from receiving an intestate share), and §2302, MCL 700.2302 (providing no share for a child who is deliberately or inadvertently excluded from a will, except in very limited situations). The inclusion of dependent children in the coverage of §§2402 and 2403 arguably is based on a public policy of providing a minimal benefit in all events for the one or those who have an economic need. Because children who may take exempt property under §2404 need not be dependent children, their inclusion may be based on simple fairness, not economic necessity. Whatever the policy reason for including children within the coverage of these provisions, it is unclear whether the decedent may modify or eliminate these exemptions and allowances by will.

This section is based on UPC §2-402, but it is similar to RPC §285 except as noted above.

700.2403 Family allowance

Sec. 2403. (1) For their maintenance during the period of administration, a reasonable family allowance is payable to the decedent's surviving spouse and minor children whom the decedent was obligated to support, and children of the decedent or another who were in fact being supported by the decedent, which allowance shall not continue for longer than 1 year if the estate is inadequate to discharge allowed claims. The family allowance may be paid in a lump sum or in periodic installments. The family allowance is payable to the surviving spouse, if living, for the use of the surviving spouse and minor and dependent children; otherwise to the children or persons having their care and custody. If a minor child or dependent child is not living with the surviving spouse, the allowance may be paid partially to the child or to a fiduciary or other person having the child's care and custody, and partially to the spouse, as their needs may appear.

(2) The family allowance is exempt from and has priority over all claims except administration costs and expenses, reasonable funeral and burial expenses, and the homestead allowance. The family allowance is not chargeable against a benefit or share passing to the surviving spouse or children by the will of the decedent, unless otherwise provided, by intestate succession, or by way of elective share. The death of an individual entitled to family allowance terminates the right to allowances not yet paid.

As amended by 2000 PA 177 (eff. June 20, 2000).

Reporter's Comment

The Estates and Protected Individuals Code made several changes in the provisions for a family allowance. In addition to the surviving spouse and minor children, who were the permissible recipients under RPC §287, the family allowance

under §2403 also is payable to “children of the decedent or another who were in fact being supported by the decedent.”

There are other changes. Under RPC §287, the right to an allowance ceased when the recipient received his or her share of the estate. This limitation is not in §2403, but this section does stipulate that death terminates the right to receive unpaid amounts of the allowance. While RPC §287 treated allowances paid for more than one year as an advancement against the recipient's share of the estate, under §2403, the entire allowance, in general, is not chargeable against the recipient's share of the estate. The restriction in RPC §289, that remarriage ended the spouse's right to family allowance, is not retained in EPIC. Under §2403, the right ends only if the spouse dies before the family allowance period is over.

The family allowance is payable to a surviving spouse, to or for minor children the decedent was obligated to support, or to or for children (the decedent's or another person's) the decedent in fact was supporting. These should be read in the disjunctive, subject to the payment provisions in the third sentence of subsection (1).

See MCL 700.2405 for provisions regarding the determination of the family allowance and its source of payment. In terms of priority, as a result of 2000 PA 177, the family allowance is paid after satisfaction of administration expenses, reasonable funeral and burial expenses, and the homestead allowance.

See §2405(2) for the personal representative's authority to set the amount and payment terms for the family allowance. Under §2405(3) the court has broader authority over the amount and timing of payments than does the personal representative.

There is no provision parallel to RPC §288, which granted the surviving spouse the right to live in the decedent's dwelling for one year. It would seem that the value of continued possession of the home for a definite period could be established and be granted to the spouse as part of the family allowance.

Section 2403 is based on UPC §2-404.

Annotation

Seymour v Sallan (In re Estate of Seymour), 258 Mich App 249, 671 NW2d 109 (2003). The trial court abused its discretion by granting an \$8,000 per month family allowance to the surviving spouse of the decedent (who had unexpectedly died before divorce proceedings were finalized), because the court refused to consider factors other than the spouse's expenses in determining a reasonable allowance. The court of appeals concluded that the reasonableness requirement in the statute required the court to examine all relevant facts and circumstances, including the decedent's intent and the other resources available to the surviving spouse.

700.2404 Exempt property

Sec. 2404. (1) The decedent's surviving spouse is also entitled to household furniture, automobiles, furnishings, appliances, and personal effects from the estate up to a value not to exceed \$10,000.00 more than