

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of Gregory Ronald
Smith, Deceased

UNPUBLISHED
June 11, 1996

JEANINE LEA SMITH, personal representative
of the Estate of GREGORY RONALD SMITH,
deceased,

Petitioner-Appellant,

v

No. 177058
LC No. 88-45-SE

RONALD PAUL SMITH and, JOYCE M. SMITH,

Respondents-Appellees.

Before: Gribbs, and Hoekstra and C. H. Stark,* JJ.

PER CURIAM.

Petitioner appeals the amended judgment of the probate court. Petitioner, the widow of decedent Gregory Ronald Smith, requested that the estate be reopened because she allegedly discovered that additional assets in respondents' possession, worth approximately \$62,000, belonged to the estate. Respondents were decedent's parents. We affirm in part and reverse in part.

First, petitioner contends that decedent's assignment to respondent Ronald Paul Smith, of a certificate of title to a Peterbilt truck, was illusory and fraudulent. There is no merit to petitioner's claim that the uniform fraudulent conveyance act, MCL 566.11 et seq; MSA 26.881 et seq, applies in this case, because petitioner was not a creditor at the time decedent transferred title to the Peterbilt. We believe the proper inquiry is whether the Peterbilt was part of decedent's estate and we conclude that it was.

Contrary to the conclusion of the lower court, nothing in the record suggests that decedent intended to make an unconditional gift inter vivos. The evidence in this case revealed that decedent

* Circuit judge, sitting on the Court of Appeals by assignment.

transferred title to his father either to avoid petitioner's individual claim in future divorce proceedings, or to enable his father to obtain insurance on the truck because decedent's poor driving record made obtaining insurance difficult. Decedent continued to drive and live in the truck, and to pay for its fuel and expenses.

In addition, in making its determination, the probate court improperly considered evidence of an alleged oral agreement between petitioner and decedent that petitioner would accept payments on her car in exchange for a release of her rights to the Peterbilt. Even if petitioner were contemplating divorce at the time of decedent's death, they were not divorced and no divorce action was pending. Accordingly, petitioner was entitled to her intestate share of the entirety of the decedent's estate. *Clark v Castner*, 242 Mich 608, 611; 219 NW 675 (1928). Further, if decedent transferred the Peterbilt with the intent to defraud petitioner of her interest in marital property in the event she filed for divorce, the property would still have been properly included in the marital estate. *Thames v Thames*, 191 Mich App 299, 302; 477 NW2d 496 (1991). Thus, evidence of any alleged agreement was improperly admitted, and the trial court erred in its conclusion that the Peterbilt was not part of decedent's estate. In addition to the return of the Peterbilt, decedent's estate is also entitled to the depreciation value of the truck from respondents for the time respondents retained the property. *McCausey v Hoek*, 159 Mich 570, 578; 124 NW 570 (1910).

A Freightliner truck was also at issue. Decedent purchased the Freightliner from a friend prior to his death. Decedent made a \$12,000 down payment and secured a \$10,000 loan. The title to the Freightliner was never transferred to decedent. About a month after decedent died, without petitioner's knowledge, the friend transferred title to the Freightliner to respondents and respondents paid off the remaining \$8,923.33 balance on the loan. The probate court properly ruled that the Freightliner Truck was part of decedent's estate.

However, the probate court erred in its determination that decedent's Freightliner Truck would be returned to the estate only upon petitioner's payment to respondents of the \$8,923.33 loan payment, and that respondents could keep the truck if petitioner failed to pay the amount within a reasonable time. Petitioner argues that she was entitled to damages for respondents' retention of the Freightliner Truck, and we agree. The trial court's decision to return the truck to the estate was more in keeping with an action for replevin, or wrongful possession of the property, than of conversion. Because the probate court ordered the truck returned to decedent's estate, and petitioner does not challenge its return, the estate is also entitled to be paid by respondents the depreciation value for the time respondents retained the truck, less the \$8923.33 respondents paid on the loan. *McCausey*, Id.

Finally, petitioner contends that the trial court abused its discretion in granting respondents the option of retaining or paying for decedent's tools. Petitioner has abandoned this issue by her failure to argue in her appellate brief how or why the award was an abuse of discretion and contrary to law. *Froling v Carpenter*, 203 Mich App 368, 373; 512 NW2d 6 (1994).

The probate court's disposition of the Peterbilt truck is reversed and the truck is to be returned to decedent's estate for distribution. Decedent's estate is also entitled to the depreciation value of the Peterbilt truck from respondents for the time they retained the truck. The probate court's disposition of the Freightliner truck is modified and respondents are to return the truck to decedent's estate and to pay the estate the depreciation value for the time the property was retained, less the amount of the \$8923.33 loan. The probate court's disposition of decedent's tools is affirmed.

Affirmed in part, reversed in part, and remanded for entry of an order consistent with this opinion. We do not retain jurisdiction.

/s/ Roman S. Gibbs

/s/ Joel P. Hoekstra

/s/ Charles H. Stark