

STATE OF MICHIGAN
COURT OF APPEALS

BANK OF ALMA, Personal Representative of the
Estate of WILLIAM BARNES, SR., Deceased.

UNPUBLISHED
September 24, 1996

HUBERT G. BARNES, CHARLES J. SOULE,
JACK O. BARNES, MICHAEL J. BARNES, and
JANET O. BIDWELL,

Petitioners-Appellees,

v

No. 185503
LC No. 86-000093-SE

WILLIAM BARNES, JR.,

Respondent-Appellant.

Before: White, P.J., and Griffin and D. C. Kolenda,* JJ.

PER CURIAM.

Respondent appeals by right from an of the order of the probate court holding him liable for the conversion of estate assets. The lower court found that respondent had abused his fiduciary duty by misappropriating funds of the estate. After holding respondent liable to the estate for the misappropriated amount, the court applied MCL 700.171; MSA 27.5171 and doubled the damage award. We affirm in part and reverse in part.

On appeal, respondent first argues that the probate court clearly erred in finding that petitioners had rebutted the presumption under MCL 487.703; MSA 23.303 that deposits held in joint accounts with right of survivorship pass directly to the joint holders. We disagree. The probate court did not clearly err in finding decedent's codicil to be reasonably clear and persuasive proof of decedent's intent regarding the jointly held accounts. In the codicil, the decedent clearly stated that it was his intent in making these accounts that they would not be gifts, but were for convenience and that the accounts would be treated as assets of his estate to be distributed under the terms of his will. *In re Cullman Estate*, 169 Mich App 778, 786; 426 NW2d 811 (1988). Further, decedent had consulted an attorney regarding the drafting of the codicil prior to its formal execution. The evidence presented

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

below was sufficient to support the lower court's finding that the statutory presumption had been rebutted.

Respondent next argues that the burden of persuasion was improperly shifted to him because much of the evidence went to his inability to account for items that were his responsibility as his father's attorney in fact or representative. We disagree. Petitioners' evidence included decedent's financial records and the discrepancies contained therein. Based on the records and discrepancies, it was reasonable for the lower court to infer that respondent had mishandled the decedent's funds. The burden of persuasion was never shifted to respondent. Rather, respondent simply failed to rebut the evidence that he had not properly accounted for funds that he had handled as a fiduciary.

Finally, respondent argues that the probate court erred by doubling petitioners' damages pursuant to MCL 700.171; MSA 27.5171. We agree. The statute relied on by the lower court expressly states that it applies to embezzlement or wrongful conversion of "any moneys, goods, chattels, or effects of any deceased person before letters of authority are granted." However, in the present case, the court did not distinguish between actions occurring before decedent's death and those occurring during the relevant time period. Accordingly, the express language of the statute precludes its application to respondent's actions to the extent they did not involve the property of a "deceased person." *Frasier v Model Coverall Service, Inc*, 182 Mich App 741, 744; 453 NW2d 301 (1990).

Affirmed in part, reversed in part, and remanded for proper application of the statute. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Richard Allen Griffin
/s/ Dennis C. Kolenda