

STATE OF MICHIGAN
COURT OF APPEALS

IN RE ESTATE OF MARGERY K. NEWTON,
DECEASED.

DONNA NEWTON,

Petitioner-Appellee,

v

MAYNARD A. NEWTON, JR., Personal
Representative of the Estate of MARGERY K.
NEWTON, Deceased,

Respondent-Appellant.

UNPUBLISHED

May17, 2007

No. 266923

Emmet Probate Court

LC No. 03-011200-DE

Before: Schuette, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Respondent appeals as of right the order removing him as personal representative of his deceased wife's, Margery K. Newton, estate and determining title in personal property that she devised in a codicil to her will. We affirm.

Margery Newton died December 20, 2002, and her will was executed on November 7, 2001. It named respondent as personal representative. Because of a "bitter estrangement," it also disinherited her grandchildren Andrew and Ashley Newton, the children of her and respondent's deceased son John. Nevertheless, the same day that she executed the will, Margery wrote a "letter" bequeathing monogrammed silver flatware to her grandson Andrew and various pieces of jewelry to her granddaughter Ashley. Respondent filed the will with the probate court, but did not include the letter. He later claimed that he forgot it existed.

When counsel was finalizing a settlement for a wrongful death suit filed by Margery's estate in January 2005, a copy of the letter was found in the file and petitioner was notified. After respondent failed to distribute the property according to the codicil, petitioner filed a motion to compel distribution on behalf of her minor children. Respondent claimed initially that he could not find the property and then that his wife never owned the property. He also argued that the letter was not a valid codicil to the will. The probate court held that the handwritten letter was a valid codicil to Margery's will, and that respondent breached his fiduciary duties to the estate by secreting or disposing of the jewelry intended for Ashley. The court also held that

respondent committed a fraud on the estate and misrepresented the inventory. Consequently, the court removed respondent as the personal representative of the estate and surcharged respondent for the breach of his duties.

Respondent argues that the trial court erred when it denied his request to use the flatware and the jewelry to satisfy his various spousal exemptions and allowances. He first claims that he was statutorily entitled to the allowances, and second claims that the application of the unclean hands doctrine was improper. We review de novo a trial court's dispositional ruling on an equitable matter. *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005). Findings of fact of a probate court sitting without a jury are reviewed for clear error. *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003).

Respondent correctly argues that he was statutorily entitled to a homestead allowance of \$17,000, MCL 700.2402; a family allowance of up to \$20,000, MCL 700.2405; and a tangible personal property exemption of \$11,000 in household furnishings, appliances, vehicles, and personal effects, MCL 700.2404. However, "[i]f the estate is otherwise sufficient, property specifically devised shall not be used to satisfy rights to homestead allowance or exempt property." MCL 700.2405(1). Respondent argues that because his inventory valued the estate at no more than \$30,560, he is entitled to all of Margery's property, including the property that she specifically bequeathed. We disagree. Because the trial court expressly found that respondent undervalued the estate, his inventory is not a conclusive statement of the estate's assets or their value. *Porter v Long*, 124 Mich 584, 595-596; 83 NW 601 (1900). The probate court did not clearly err when it found that respondent's inventory was inaccurate, falsified, and understated. Respondent failed to account for his wife's bank account; he disposed of her property, including some jewelry, without accounting for it in the inventory; and he retained other valuable jewelry that he did not include in the estate. Respondent's own bad faith in providing the account resulted in a grossly underestimated inventory, so the trial court did not err by rejecting respondent's valuation of his wife's estate or by ruling that the jewelry should have been given to Ashley as the decedent intended. See *McFerren v B & B Investment Group*, 253 Mich App 517, 522-523; 655 NW2d 779 (2002).

Respondent also argues that application of the unclean hands doctrine was improper because the probate court was not acting in equity. We disagree. The probate court was authorized to order equitable relief, MCL 600.847, and it appropriately considered the equitable issues generated by respondent's behavior. *In re Williams Estate*, 164 Mich App 601, 608-609; 417 NW2d 556 (1987). Equitable relief may include barring an otherwise valid legal claim. *Id.* at 609-610. Even if we were persuaded that respondent did not act fraudulently, the evidence undeniably suggests that he wantonly failed to account for and preserve his wife's property. That failure is the source of the instant dispute. Therefore, the trial court did not err when it held him responsible for the consequences of his own inaction and denied his claim for relief. *McFerren*, *supra* at 523-524.

Respondent next argues that the probate court erred when it ruled that the flatware and jewelry were Margery's personal property to devise. He claims that the property was jointly owned with rights of survivorship and became his sole property when his wife died. He argues that, even if the jewelry was not jointly owned, the flatware was jointly owned because they received it as a wedding gift. We disagree. Unless a married couple intends and agrees to hold ordinary chattel property by the entireties, a spouse does not automatically have a right of

survivorship in marital property. See *Frank v Patton*, 251 Mich 557, 558-559; 232 NW 211 (1930). Respondent has presented no evidence of such an agreement covering the specific bequests at issue. Instead, the record is replete with contrary evidence. Respondent agreed during his deposition, and at the hearing on petitioner's motion to compel, that the jewelry and silver belonged to his wife and was hers to give to her grandchildren. He admitted that he witnessed his wife's signature on the codicil, leading to the reasonable inference that he understood its contents and submitted to his wife's intended disposition of the property. Under the unusual circumstances of this case, the reasoning found in *Frank* applies, and the trial court did not clearly err by finding that Margery had the right to bequeath the property to her grandchildren at her death.

Respondent next argues that the trial court erred when it found that he breached his fiduciary duties because the acts that caused the breach occurred before his appointment as personal representative. Respondent contends that on the day of his wife's death, when he asked his daughter to dispose of his wife's things, he had not yet been appointed as personal representative, so he did not have any fiduciary duties to breach. Although respondent is correct that a personal representative's duties "commence at appointment," MCL 700.3701, the actions underlying the trial court's finding did not occur exclusively on the day of his wife's death. Once respondent accepted the appointment as personal representative, he assumed a fiduciary duty to the devisees of his wife's will. MCL 700.1212. As a fiduciary of the estate, he was under a duty of care to act in the best interests of the estate and assumed the standard of care of a trustee. MCL 700.3703; MCL 700.7302; see also *McTaggart v Lindsey*, 202 Mich App 612, 617; 509 NW2d 881 (1993). A personal representative must prepare an inventory that includes all the property owned at the time of death, in reasonable detail, along with the fair market value and any encumbrances of each item. MCL 700.3706(1); *Wolfe-Haddad v Oakland Co*, 272 Mich App 323, 327 n 6; 725 NW2d 80 (2006). The duty to account continues, so if additional property is later discovered, then the personal representative must make a supplementary inventory. MCL 700.3708. The personal representative also has the duty to take possession and control of the decedent's property, and must protect and preserve the estate in the personal representative's possession. MCL 700.3709. If a personal representative or administrator of an estate has possession of assets and knows or should know that they belong to the estate, omitting them from the initial inventory does not excuse a later failure to account for them. *Grovier v Hall*, 23 Mich 7, 10 (1871). Therefore, even if respondent's daughter disposed of the jewelry intended for Ashley, respondent was still required to account for those items in his inventory of the estate.

Here, the evidence indicates that respondent either negligently disposed of the property he was supposed to safeguard or that he secreted it and committed a fraud on the court and the estate by falsifying the inventory. *Burnham v Kelley*, 299 Mich 452, 460; 300 NW 127 (1941). Respondent admitted that he took no steps to safeguard his wife's property for the estate, and he asked his daughter to dispose of most of her things without accounting for them. Respondent also admitted that he never looked for the jewelry devised to Ashley and never attempted to find substitute gifts. Despite promising to deliver at least some of the flatware to Andrew, he had not done so when petitioner filed her motion to compel. In short, respondent's request to his daughter to clear out the apartment on the day his wife died was not an isolated event and was not the only justification for finding that he breached his duties. Therefore, we are not persuaded

that the probate court clearly erred by finding that respondent breached his fiduciary duty to the estate and, accordingly, holding him liable for the breach. MCL 700.1308(1).

Respondent next argues that the probate court's decision to surcharge him personally was an abuse of discretion because he acted in good faith. We disagree. We review for abuse of discretion the probate court's decision to surcharge a fiduciary. *In re Thacker Estate*, 137 Mich App 253, 264; 358 NW2d 342 (1984). If a personal representative causes harm to an estate through negligence, the personal representative may be surcharged. *In re Tolfree's Estate*, 347 Mich 272, 288; 79 NW2d 629 (1956); *In re Green Charitable Trust*, 172 Mich App 298, 309; 431 NW2d 492 (1988). A good faith defense is not available if a fiduciary exceeds the limits of his or her powers or fails to act with prudence and diligence. See *In re Tolfree's Estate*, *supra* at 285-286.

After reviewing the record, we are not persuaded that the probate court erred when it rejected respondent's claim that he acted in good faith. Respondent seeks to minimize his breach by arguing that he is a forgetful 76-year-old man who made an honest mistake because he forgot about the codicil and did not realize the codicil devised the flatware and the jewelry. However, his testimony that he did not know what the codicil contained and that he "forgot" about the codicil created a question of credibility well within the purview of the probate court. In the end, the amount of surcharge ordered was reasonable under the circumstances, and the court generously relied upon respondent's own valuation of the silver to determine an appropriate replacement gift. The attorney fees were documented, reasonable, and would have been unnecessary if respondent had performed his statutory duties. Therefore, the trial court did not abuse its discretion by sanctioning respondent.

Respondent also argues that the probate court lacked jurisdiction to determine the value of the missing jewelry and the amount of surcharge. An appeal divests the probate court of jurisdiction to modify a final judgment. MCR 7.208(A); *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 315; 486 NW2d 351 (1992). Similarly, once an appellant files an appeal with this Court, all proceedings "in pursuance of" the appealed order must cease. MCL 600.867. However, a probate court may enforce an appealed order, *Bass v Combs*, 238 Mich App 16, 24; 604 NW2d 727 (1999), and it may generally determine an award of attorney fees, costs, or another amount consistent with enforcing the final judgment if the final judgment contemplates the award. *Lincoln v Gupta*, 142 Mich App 615, 630-631; 370 NW2d 312 (1985); *Wilson v General Motors Corp*, 183 Mich App 21, 41; 454 NW2d 405 (1990). In this case, the final judgment relied on by respondent for his appeal of right contemplates his sanction and an award for petitioner, but reserved the determination of the particulars for a later proceeding. The trial court did not revisit its judgment or otherwise interfere with our jurisdiction. Therefore, we reject respondent's argument that the trial court was precluded from deciding the amounts at issue. Respondent's final argument is that the case should be assigned to another judge on remand. Because we affirm the decision of the probate court, remand is unnecessary. The probate court's findings of fact and conclusions of law were well supported.

Affirmed.

/s/ Bill Schuette
/s/ Peter D. O'Connell
/s/ Alton T. Davis