

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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SHERI BETH WIENCEK, Personal Representative of  
the Estate of BILLY D. PENLAND, Deceased,

UNPUBLISHED  
July 25, 1997

Petitioner-Appellee,

v

No. 172070  
Wayne Probate Court  
LC No. 91-868989-SE

BARBARA JEAN WILLIS, JOHN WILLIS, SR.,  
MICHAEL WILLIS, LINDA THOMPSON and  
JERRY THOMPSON,

Respondents-Appellants.

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Before: Young, P.J., and Taylor and Livo\*, JJ.

PER CURIAM.

Respondents Barbara Jean Willis, John Willis, Sr., Michael Willis, Linda Thompson, and Jerry Thompson, appeal by right the probate court's judgment awarding petitioner damages and vesting title of an automobile and other items of personality with petitioner. Decedent, Billy Penland, committed suicide and died intestate. Petitioner and personal representative, Sheri Beth Wiencik, commenced this action to recover property and damages that she alleges were taken from her father's home by the respondent relatives after learning that Billy Penland had killed himself. We affirm in part, reverse in part and remand.

I. Factual Background

A. Parties

Decedent Billy Penland was survived by three children; Sheri Beth Wiencik, his personal representative, Kelly Penland and Mark Penland. He also left behind two sisters, respondents Barbara Jean Willis and Linda Thompson. Respondents John Willis, Sr. and Michael Willis are the husband and

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

son, respectively, of Barbara Jean Willis. Respondent Jerry Thompson is the husband of Linda Thompson.

## B. Decedent's Suicide

On December 17, 1991, Billy Penland committed suicide in his home. Later that night, decedent's neighbor witnessed approximately ten people removing various items from the home and then loading it into a truck and decedent's van. At trial, the neighbor testified that she saw a safe, golf clubs, a television, stereo, boxes, two shotguns, and a cradle or stroller being placed into decedent's van. Decedent's neighbor identified these individuals as decedent's siblings and their spouses. Decedent's neighbor testified that the group drove away with these items, decedent's van, and decedent's brand new Mercury Grand Marquis.

Decedent's daughter and personal representative, Sheri Beth Wiencik, reported that when she and her husband went through her father's home the next day, they discovered many missing items including the items listed above along with Franklin Mint pieces and a picture of her paternal grandmother. Wiencik contacted her aunts the following day and was able to recover some of the personalty, but there was a dispute concerning the title to the Marquis and the taking of other items.

## C. The Petition for Recovery of Decedent's Personalty

Although respondents returned various items the day after decedent's death, many items remained missing. To recover the items, Wiencik filed a petition alleging that respondents were liable for conversion and sought a determination of the rightful ownership of the Mercury Grand Marquis. The probate court held a bench trial on all issues, and later rendered a judgment in favor of petitioner.

Specifically, the court ordered that title to the Marquis belonged to the estate, and that respondents had converted the following items and were liable to petitioner for the value of those items as listed:

- (1) Franklin Mint Pieces – valued at \$1,100.00
- (2) Beretta Pistol – valued at \$200.00
- (3) Carbine Rifle – valued at \$300.00
- (4) Compound Bow – valued at \$125.00
- (5) Safe which included \$1100.00 in cash and Coins valued at \$500.00
- (6) Cash from wallet that included \$100.00
- (7) Deceased mother's picture – valued at \$50.00, but given sentimental value of \$500.00
- (8) Golf Clubs—One set of Palm Springs, valued at \$500.00, and a set of Lynx valued at \$1,000.00
- (9) Antique Cradle – valued at \$350.00, but given sentimental value of \$10,000.00
- (10) Rental value of Marquis while in possession of Willises' \$3,249.87.

These damages totaled \$19,483.87. The court further awarded double damages pursuant to MCL 700.171; MSA 27.5171 against respondents. The court excepted from this award the rental value of the Marquis, which it held was the sole responsibility of the Willises.

## II. Respondents' Appeal

Respondents challenge various findings and conclusions of the probate court. Respondents have challenged the court's findings regarding their culpability and the value assigned the alleged missing items. They also challenge the court's award of sentimental value and double damages. The Willises' argue that the Mercury Grand Marquis was a valid inter vivos gift to Barbara Jean Willis, decedent's sister, and alternatively, the award of rental value was improper.

The standard of review to be applied to findings of a probate court sitting without a jury is whether those findings are clearly erroneous. *In re Williams Estate*, 133 Mich App 1, 13; 349 NW2d 247 (1984); *In re Wojan Estate*, 126 Mich App 50, 337 NW2d 308 (1983). A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court, on the entire evidence, is left with the firm and definite conviction that a mistake has been committed. MCR 2.613(C); *McMillian v Vliet*, 422 Mich 570, 571, n 1; 374 NW2d 679 (1985); *Tuttle v Dep't of State Hwys*, 397 Mich 44, 46; 243 NW2d 244 (1976); *Wojan, supra* at 52.

## III. Challenges To The Court's Findings

Respondents first challenge the court's findings that they converted decedent's property. The Willises' argue that the evidence was insufficient to prove that the alleged converted items of personalty were owned by decedent's estate. The Thompsons contend that petitioner has not established that they had the requisite intent to convert decedent's property. We disagree.

Conversion is any distinct act of dominion wrongfully exerted over another's personal property and occurs at the point that such wrongful dominion is asserted. *Thoma v Tracy Motor Sales, Inc*, 360 Mich 434, 438; 104 NW2d 360 (1960); *Trail Clinic, PC v Bloch*, 114 Mich App 700, 705; 319 NW2d 638 (1982). Conversion does not necessarily imply a complete and absolute deprivation of property; there may be a deprivation which is only partial or temporary, and where the property of the owner remains in or is restored to him. *Even-Heat Co v Wade Elec Prods Co*, 336 Mich 564, 572; 58 NW2d 923 (1953). The Supreme Court has held that "[a] conversion may be committed by (a) intentionally dispossessing another of a chattel, . . . [or] (g) refusing to surrender a chattel on demand." *Thoma, supra* at 438. Although conversion is an intentional tort in that the defendant's action must be willful, one can commit the tort unwittingly if unaware of the owner's outstanding property interest. *Warren Tool Co v Stephenson*, 11 Mich App 274, 299; 161 NW2d 133 (1968); *Citizens Ins Co of America v Delcamp Truck Center, Inc*, 178 Mich App 570, 575; 444 NW2d 210 (1989).

First of all, petitioner presented sufficient evidence that the estate owned the missing items. Petitioner presented the testimony of the decedent's children, friends, neighbors, and physical evidence that corroborated her claim that the property belonged to decedent. For example, regarding the Franklin Mint figurines, petitioner not only introduced testimony of witnesses who had seen the figurines in the house but also submitted pamphlets or brochures that accompanied each figurine. These documents were found in the decedent's home after his death. Based on our review of the record, we conclude that the petitioner presented evidence to support the court's findings that each item was

owned or possessed by the decedent, and that after his death, the item was missing. Moreover, the evidence establishes that the Willises were seen removing items from the decedent's home on the night of his death. The probate court found their testimony denying involvement in the removal of the personalty lacking in credibility. As stated, conversion occurs *at the point* that dominion is wrongfully exercised over another's property. *Bloch, supra* at 705. Proof of the tortfeasor's direct possession of the converted item is not required. See *id.* at 708-709. The Court's findings are supported in the record.

Second, the Thompsons' argue that the trial court erred in holding them liable for conversion as there was no evidence of their intent to deprive the estate of its property. The Thompsons contend that they were simply securing the property for safety and that all the items removed from decedent's home were taken and retained by the Willises' the same evening. The police witnesses denied advising respondents that property in the home needed to be removed for security purposes. In addition, there was conflicting testimony regarding who transported items out of decedent's home and what items were taken. The Thompsons admitted being at the scene when items were removed from the decedent's house, and respondent Jerry Thompson admitted at trial that he removed a stereo and a speaker. In making its findings, the trial court rejected their testimony that their actions were merely in defense of property. As such, the court's resolution of this matter depended primarily upon its assessment of witness credibility. This Court gives special deference to the trial court's findings where they are based on the credibility of witnesses. *In re Fritz Estate*, 159 Mich App 69, 76, 406 NW2d 475 (1987). Having found no error, we will not disturb the trial court's findings. See *Stanton v Dachille*, 186 Mich App 247, 255; 463 NW2d 479 (1990).

#### IV. Whether the Marquis Was an Inter Vivos Gift

Regarding ownership of the decedent's vehicle, we hold that the court correctly held that it was part of the estate. To constitute a valid gift inter vivos, the donor must intend to pass title to the donee; there must be actual or constructive delivery; and the donee must accept the gift. *In re Mensinger Estate*, 201 Mich App 290, 291; 506 NW2d 238 (1993). The Willises' contend that decedent's decision to title the car in his sister's name was proof of his intent to gift the car to her. We disagree.

First, we note that legal title to an automobile does not conclusively determine ownership. *Ringwald v Bos*, 200 Mich App 131, 135; 503 NW2d 716 (1993); MCL 257.37; MSA 9.1837. Moreover, although there was conflicting testimony as to decedent's intentions regarding ownership of the car, again the court concluded that the Willises' testimony lacked credibility. On the other hand, several witnesses with no interest in the outcome testified that the decedent informed them that he titled the car in his sister's name solely for the purpose of taking advantage of a special discount. The salesperson, who sold the Marquis to decedent, testified that decedent explained that decedent wished to purchase the car for himself and that he was titling the car in his sister's name for six months to take advantage of a discount plan offered by the car's manufacturer for its employees. The auto insurance salesperson testified that decedent placed the Marquis on his own insurance policy and paid the premiums for the insurance.

We will not substitute our judgment for the trial court's concerning the credibility of the various witnesses that appeared before it. *Fritz Estate, supra*. Thus, we conclude that the trial court properly found that respondents had not established the first element of proof for inter vivos gift, i.e., an intent to pass title to the donee.

#### IV. Damages

Respondents argue that the court's award of damages was legally and factually erroneous. They contend that the court's award for sentimental value of decedent's mother's picture and the antique baby cradle are not proper in a conversion action. Next, they contend that the probate court misinterpreted the statute, which doubles the liability of a tortfeasor who converts property from an estate, and argue that doubling damages was error. Lastly, respondents contend that the proofs were insufficient to support the court's valuation of the missing items.

##### A. Award for Sentimental Value of Picture and Cradle

In its award, the probate court awarded \$500 as sentimental value for decedent's mother's picture and \$10,000 as sentimental value for the antique baby cradle. The Thompsons argue that a deceased person has no capacity for sentiment. On the other hand, the Willises' argue that the petitioner was not entitled to damages for sentimental value because petitioner failed to specifically plead sentimental value damages. See MCR 2.112(I); *Law Offices of Lawrence J Stockler, PC v Rose*, 174 Mich App 14, 45; 436 NW2d 70 (1989). The Willises' argument was not raised or addressed by the circuit court. In fact, the Willises' position below was that exemplary damages were inappropriate in this case. Issues not raised by the pleadings are treated as if they had been so raised if they are tried by the express or implied consent of the parties. MCR 2.118(c)(1). Nevertheless, for different reasons, we concur with respondents that damages for sentimental value were inappropriate in this case.

The measure of damages for the conversion of personal property is the value of the property at the time of the conversion, in the absence of any testimony establishing a peculiar value in the goods to the owner. *Hudson v Enichen*, 308 Mich 79, 85; 13 NW2d 215 (1944); *Maycroft v The Jennings Farms*, 209 Mich 187, 189; 176 NW 545 (1920). The question germane to this appeal is whether any testimony was presented to establish peculiar value in the goods to the *owner*. It is undisputed that the owner in this case was the Estate of Billy Penland. Although there was testimony that these items had sentimental value to decedent's family members, there was no testimony concerning the special or sentimental value of these damages to decedent himself. The law is well-established that in the *absence* of this testimony, damages for conversion of personal property is the value of the property at the time of the conversion. *Hudson, supra*. Accordingly, we reverse the award of damages awarded for sentimental value for the picture and the antique baby cradle.

##### B. Statutory Damages

The trial court doubled damages pursuant to MCL 700.171; MSA 27.5171. The statute provides:

If a person embezzles or wrongfully converts any of the moneys, goods, chattels, or effects of any deceased person before letters of authority are granted, that person shall stand chargeable and be liable to the action of the personal representative of the estate, for double the value of the property so embezzled or converted, to be recovered for the benefit of the estate. [*Id.*]

The Thompsons contend that the phrase “wrongfully converts” requires that a petitioner must prove *scienter* in addition to conversion before they are liable for double damages. In the alternative, they argue that the court erred in doubling the damages for sentimental value. We disagree.

The primary purpose of interpreting statutes is to discover and give effect to the intent of the Legislature. *State Treasurer v Wilson*, 423 Mich 138, 143; 377 NW2d 703 (1985). Where the statutory language is clear and unambiguous, no further interpretation is necessary. *Storey v Meijer, Inc*, 431 Mich 368, 429 NW2d 169 (1988). If the statutory language is ambiguous, or where reasonable minds may differ, a reasonable construction must be given in light of the purpose of the statute. *Wilson, supra* at 143. We conclude that the language of the statute is clear and unambiguous.

This statute imposes double liability for conversion of personal property from a deceased person *before* letters of authority are granted. From this language, we can infer that the Legislature intended to regard those who would take personal property from someone who recently died as more culpable than those who convert the personal property of the living. The statute’s evident purpose is to punish those with the audacity to steal from someone who had no means to protect their property. As such, the phrase “wrongfully converts” is consistent with this purpose and the proofs required to establish conversion, i.e., proof of the tortfeasor’s distinct act of dominion wrongfully exerted over another’s personal property. *Thoma, supra* at 438. As stated above, the trial court rejected respondents’ position that they only removed the property for the purpose of securing the property. Because the evidence supports the court’s conclusion that respondents had converted decedent’s property immediately after his death, their misconduct fell squarely within the statute’s language. Therefore, the court properly doubled the damages awarded.

Respondents’ alternative argument that the court erred in doubling damages related to the sentimental value of the property has been rendered moot by our holding that damages related to sentimental value were improper based on the absence of evidence concerning the peculiar value of these items to decedent.

### C. Valuation of Missing Items

Respondents lastly challenge the court’s findings concerning the valuation of missing personal property. After reviewing the evidence, we conclude that the court’s valuation of the personal property was supported by the evidence, and hence not clearly erroneous. Nevertheless, we provide additional discussion with respect to specific items.

### 1. *Grand Marquis*

The trial court ordered the Willises' to pay rental value for the Marquis for the period that they refused to return the vehicle to the estate. The Willises argue that this was improper and that petitioner was only entitled to the amount that was actually paid to rent a substitute automobile during that period, relying on *Lawrence C Young, Inc v Servair, Inc*, 33 Mich App 643; 190 NW2d 316 (1971). Their reliance on *Young* is misplaced as that case involved damages recoverable from defendant's negligence in damaging the plaintiff's airplane. This is a conversion action. As such, petitioner was entitled to the recover the replacement value of the property at the time of the conversion. *Gum v Fitzgerald*, 80 Mich App 234, 239; 262 NW2d 924 (1977) . Accordingly, the court properly ordered the Willises' to pay rental value of the Marquis during the period of their conversion of the car.

### 2. *Golf Clubs*

Respondents argue that the court's award as to the value of the golf clubs was not supported by the evidence. The value may be proven with evidence of replacement cost, the use to which it has been subjected, and its condition at the time of the conversion. *Id.* The court awarded \$1,000 for an eight year old set of Lynx golf clubs and \$809 for a new set of the Palm Springs golf clubs. The testimony concerning the clubs' value included the testimony of Mark Penland, decedent's son, and respondent Barbara Jean Willis. We affirm the court's award as it is within the range of the proofs adduced at trial and also involved assessing the credibility of witnesses which we will not disturb. *Fritz Estate, supra*.

### 3. *Cash*

The trial court awarded \$100 for the cash missing from decedent's wallet, and \$1100 for the cash missing from decedent's safe. Respondents contend that petitioner was not entitled to recovery of the cash in decedent's safe or wallet and alternatively, that there was no evidence supporting the award of cash in the safe or decedent's wallet. We disagree.

Petitioner was entitled to recovery of the money converted from the wallet and safe. If a defendant obtains money without the owner's consent, a debtor-creditor relationship is created and conversion is committed by the defendant's refusal to surrender the chattel on demand. *Delcamp, supra* at 575. It is evident that respondents took the wallet as it was later returned with \$9 to petitioner, and petitioner introduced evidence that decedent had been paid several days before his suicide and customarily had \$100 in his wallet. As to the safe, the evidence indicated that decedent had kept a safe in his basement for nearly twenty-five years. Petitioner introduced photographs of decedent's basement indicating where the safe had been kept. In addition, decedent's neighbor testified that she had seen the safe being removed from the home on the night of decedent's suicide. Based on this evidence, the trial court properly concluded that respondents converted the money in the wallet and safe.

We also reject respondent's argument that the amount of the court's award was not supported by the evidence. The petitioner's inability to ascertain the amount of damages was due to respondents' conversion of the money. Mathematical precision in the assessment of damages is not required, where



from the very nature of the circumstances precision is unattainable, particularly where the defendant's own act causes the imprecision. *Godwin v Ace Iron & Metal Co*, 376 Mich 360, 368; 137 NW2d 151 (1965); *Willis v Ed Hudson Towing, Inc.*, 109 Mich App 344, 350; 311 NW2d 776 (1981). When damages are not susceptible of precise calculation because of an act of the wrongdoer, the risk of giving more than fair compensation is cast upon the wrongdoer. *Willis, supra* at 350. Mary Penland, who was married to decedent for many years, testified that the decedent typically kept \$1,000 in the safe and \$100 to \$300 in his wallet. Because the court's award was supported by the evidence, we find no error.

#### 4. *Cradle*

Respondents also challenge the court's valuation of the antique cradle. They contend that petitioner's evidence was not competent as it was hearsay evidence obtained from an antique dealer who did not have firsthand observation of the cradle. We reject respondents' hearsay argument as the court sustained their objection at trial. Also, due to respondents' conversion of the cradle, petitioner could not obtain an assessment based on a dealer's firsthand observation of it. See *Willis, supra* at 350. Moreover, if we accept respondents' claim that they do not have the cradle, then we would conclude that their evidence was equally incompetent as they too had consulted antique dealers regarding the cradle's value. Instead, we conclude that the court's award was based on resolution of conflicting testimony regarding the cradle's value, and since the award was supported by the evidence adduced at trial, we find no error.

#### D. *Coin Collections*

Finally, respondents challenge the court's valuation of the coins, and argue that the coins were not part of the estate because they belonged to decedent's children. Although there was testimony that the safe included the decedent's children's coin collections, there was also evidence that decedent himself was a coin collector. The court did not clarify whether it included the children's coin collections in the judgment. Accordingly, remand is necessary for clarification regarding the court's valuation of the coin collections.

We affirm in part and reverse in part and remand for recalculation of the judgment in conformity with this opinion. We do not retain jurisdiction.

/s/ Robert P. Young, Jr.  
/s/ Clifford W. Taylor  
/s/ Robert C. Livo