

RENDERED: FEBRUARY 17, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001475-MR

CLARA VANOVER

APPELLANT

v.

APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE JEFFREY BURDETTE, JUDGE
ACTION NO. 00-CI-00781

SAMUEL VANOVER and
NORMA VANOVER

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: MINTON AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: Clara Vanover appeals from a summary decision of the Pulaski Circuit Court that certain transfers of funds by her husband shortly before his death did not constitute fraud on her dower interest in that property. Because we are convinced that the undisputed facts of this case fall within the purview of well-established caselaw holding that such transfers

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

raise a rebuttable presumption of a fraud on the survivor's marital rights, we reverse the judgment of the trial court and remand the case for further proceedings.

Artman and Clara Vanover married in 1986, after each had retired from work in automobile plants in the north. They brought similar resources into the marriage, including real property and savings. After the marriage, the parties resided together in Pulaski County until Artman's death in August, 2000. The record reveals that as of July 13, 2000, the parties had over \$420,000 in savings and certificates of deposit at the Bank of McCreary County. Toward the end of July 2000, Artman cashed several certificates of deposit having a face value of approximately \$229,000 which had been held jointly with Clara with right of survivorship, and caused them to be re-issued in the form of a \$30,000 cashier's check and eleven certificates of deposit. A number of the certificates were re-issued in his name jointly with that of his brother, appellee Samuel Vanover, and the remaining ones in his name jointly with his niece, appellee Norma Vanover.

Artman died testate on August 8, 2000, leaving the entirety of his estate to Clara, including a house, all his real and personal property, as well as life insurance proceeds. Clara subsequently renounced the will in order to claim the certificates of deposit Artman held jointly with appellees,

alleging that they had been transferred in violation of her dower rights. In granting appellees' motion for summary judgment, the trial judge found that the transfer did not implicate the dower statute because it did not have the effect of disinheriting or leaving appellant destitute. The court stated that it found no evidence or facts of record that would in any way indicate an intent to defraud the surviving spouse. This appeal followed.

In support of her contention that the transfers must be set aside as fraudulent, Clara relies upon Harris v. Rock,² in which the Kentucky Supreme Court upheld invalidation of similar transfers, concluding they had been made in an attempt to defeat the dower interests of the surviving spouse:

Likewise, it has long been the law of Kentucky by virtue of KRS 392.020 that a husband has no legal right to dispose of more than one-half of his property with intent to defeat a dower claim by his widow. It follows that a husband cannot be permitted to circumvent the law and intentionally defeat a dower claim by means of a deposit into a joint account with someone other than his wife. We interpret K.R.S. 391.315(1) to mean that upon the death of a party to a joint account, the funds on deposit therein do not belong to the survivor if:

(1) there is clear and convincing evidence of a different intention at the time the account was created, or (2) if the depositor

² 799 S.W.2d 10, 12 (Ky. 1990) (emphasis added).

was not legally entitled to make such a disposition of the funds.

Absent an agreement of the parties, a disposition of property with the intent to defeat the right of dower creates a presumption of fraud upon the surviving spouse. The deposit of approximately seven-eighths (7/8) of the personal estate of the decedent in this case into a joint account with his children leaves no doubt of his intent to defeat the movant's dower interest, and as such, raised a presumption of fraud which was not rebutted.

So it is in this case. It is clear that the trial court failed to give effect to the long-standing law of this Commonwealth that the non-probate transfer of the bulk or a substantial portion of the spouse's property, which has the effect of diminishing the surviving spouse's share, raises a rebuttable presumption of fraud on the survivor's marital rights.³ A factor in raising the fraud presumption is that the wife did not know of the gift.⁴ Moreover, a transfer of a substantial portion of the property, even though less than half the estate, has been held to raise the presumption of fraud.⁵ Our Supreme Court has reaffirmed the rule in a more recent setting by holding that *inter*

³ See Manikee's Administratrix v. Beard, 85 Ky. 20, 2 S.W. 545 (1887); Murray v. Murray, 90 Ky. 1, 13 S.W. 244 (1890); Gibson v. Gibson, 12 Ky.L.Rptr. 636 (1890); Wilson v. Wilson, 23 Ky.L.Rptr. 1229, 64 S.W. 981 (1901).

⁴ Benge v. Barnett, 309 Ky. 354, 217 S.W.2d 782 (1949).

⁵ *Id.*

vivos transfers of funds into survivorship accounts could be deemed a fraud upon spousal rights and therefore reachable in an action by the surviving spouse, reasoning that "the depositor simply had no legal right to dispose of the money so deposited."⁶

Eight days before he died, acting without Clara's knowledge, Artman transferred \$229,801.64 from certificates of deposit owned jointly with Clara, to certificates held jointly with his brother and niece. Under these facts, we are convinced that the entry of summary judgment in favor of the brother and the niece constitutes a misapplication of the law. Upon remand, appellant is entitled to application of the presumption of fraud on her marital rights and thereafter appellees must be afforded an opportunity to rebut that presumption.

Accordingly, the judgment of the Pulaski Circuit Court is reversed and the case remanded for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT:

D. Bruce Orwin
Somerset, Kentucky

BRIEF AND ORAL ARGUMENT FOR
APPELLEE:

Daniel J. Venters
Somerset, Kentucky

⁶ Harris v. Rock, 799 S.W.2d 10, 12 (Ky. 1990).