

**COURT OF COMMON PLEAS
PROBATE DIVISION
HAMILTON COUNTY, OHIO**

JEANNE A. BERTOIA, Executrix of	:	Case No. C-97349
The Estate of John D. Schwertman,	:	
Deceased,	:	<u>OPINION AND ENTRY FINDING</u>
	:	<u>DEFENDANT GUILTY</u>
Complainant	:	<u>OF CONCEALING ASSETS</u>
	:	
-vs-	:	
	:	
MARILYN POYNTER	:	
	:	
Defendant	:	
	:	

This matter came before Judge Wayne F. Wilke on September 3, 1997 and was continued in progress to October 16, 1997. Complainant Jeanne A. Bertoia alleges that Defendant Marilyn Poynter has concealed, embezzled, or conveyed away assets belonging to the Estate of John D. Schwertman. Present before the Court were Ralph J. Conrad and Eric C. Holzapfel, who represent the Complainant herein, as well as Patrick J. Hanley and John J. Cruze, who represent the Defendant. The parties were given time to file their respective written closing arguments and additional time in which to file replies to the opposing party's brief.

FACTS

The decedent herein, John D. Schwertman, died testate on May 13, 1997, survived by two adult children, to wit: Marilyn Poynter and Jeanne Ann Bertoia. On May 19, 1997, Defendant Marilyn Poynter filed an application to admit to probate a will

executed by the decedent in 1989 (hereinafter “the 1989 will”). The 1989 will nominated Defendant Marilyn Poynter to serve as executrix. That same day, Marilyn Poynter was appointed Executrix of the Estate of John D. Schwertman under that 1989 will.

On May 27, 1997, Complainant Jeanne A. Bertoia submitted a later will (hereinafter “the 1996 will”) to probate. The 1996 will nominates Jeanne A. Bertoia to serve as executrix. This 1996 will was admitted to probate and Jeanne A. Bertoia was appointed Executrix of the Estate of John D. Schwertman on May 27, 1997. The events which transpired between May 19, 1997 and May 27, 1997 are the subject of this intra-family dispute that the Court is called upon to adjudicate.

On June 4, 1997, Executrix Bertoia filed a complaint for the concealment of assets pursuant to R.C. §2109.50. The Executrix alleges that the former fiduciary concealed, embezzled, conveyed away and has been in possession of property belonging to the Estate. The Complainant further alleges that the Defendant wrongfully applied to be appointed executrix of the decedent’s estate since the Defendant allegedly knew of the 1996 will’s existence.

The evidence clearly indicates that the Defendant knew that she was no longer named as executrix of John D. Schwertman’s estate and that the decedent had instead named the Complainant as executrix of his will. The decedent made clear to the Defendant his intention to change fiduciaries from Marilyn Poynter to Jeanne A. Bertoia. Accordingly, the Defendant had no justifiable reason to cause herself to be appointed executrix under the 1989 will.

The evidence also indicates that the Defendant never contacted the Complainant to inform her that she had been appointed executrix of their father’s estate nor that the

1989 will had been admitted to probate. This allowed the Defendant time to operate in the capacity of fiduciary of the estate. The Defendant admits to entering the decedent's house on May 22, 1997. While in the house, the Defendant removed documents and numerous items of personalty. While the Defendant's attorney delivered many of the items taken by the Defendant to the Complainant's attorney (Plaintiff's Exhibit 10) on July 8, 1997, Complainant believes much of what the Defendant took is still in the Defendant's possession.

CONCLUSIONS OF LAW

Revised Code §§ 2109.50 et seq., provides a summary proceeding to recover assets of an estate that have been embezzled, concealed, conveyed away, or are wrongfully in another person's possession. *Ukrainiec v. Batz* (1982), 24 Ohio App.3d 200, 202. Revised Code §2109.50 provides, in part:

“Upon complaint made to the probate court of the county having jurisdiction... by a person interested in such trust estate or by the creditor of a person interested in such trust estate against any person suspected of having concealed, embezzled, or conveyed away or of being or having been I the possession of any moneys, chattels, or choses in action of such estate, said court shall... compel the person or persons so suspected to forthwith appear before it to be examined; on oath, touching the matter of the complaint.”

An action under R.C. §2109.50 involves the unauthorized and wrongful concealment, embezzlement, or conveyance of estate property in denial of, and inconsistent with, the rights of the estate. *Fecteau v. Cleveland Trust Co.* (1960), 171 Ohio St. 121. The purpose of R.C. §2109.50 is to provide a speedy and effective method of discovering assets belonging to the estate and securing their recovery. See, e.g.,

Popp v. Ohio Savings Bank (1994), 94 Ohio App.3d 640; *In re Estate of Fife* (1956), 164 Ohio St. 449.

Revised Code §2109.52 provides that

“when passing on a complaint made under §2109.50... the probate court shall determine... whether the person accused is guilty of having concealed, embezzled, conveyed away, or been in the possession of moneys, chattels, or choses in action of the trust estate. If such person is found guilty, the probate court shall assess the amount of damages to be recovered or the court may order the return of the specific thing concealed or embezzled or may order restoration in kind.”

The amount of evidence needed to establish a defendant’s guilt is a preponderance of the evidence. *In re Estate of Woods* (1959), 110 Ohio App. 277, 282. Furthermore, R.C. §2109.52 requires a probate court to render judgment in favor of the fiduciary against the person found guilty for the amount of the chattels concealed or held in possession, together with all costs of such proceedings or complaint. This judgment is to then be reduced to the extent of the value of any thing specifically restored or returned in kind.

In this case, the Defendant’s conduct amounts to wrongful or culpable conduct that justifies a finding that she is guilty of concealing assets under R.C. §2109.50. 24 Ohio App.3d at 202. The Defendant knew or should have known that the decedent changed his mind about having her serve as fiduciary of his estate and that the Complainant was going to be appointed fiduciary. The Defendant, therefore, wrongfully submitted the 1989 will for admission to probate. The Defendant failed to notify the Complainant that she had the 1989 will admitted to probate, yet R.C. §2107.19 requires such notification. The Defendant required the assistance of a locksmith in order to enter the decedent’s house. Despite learning that the Complainant was filing the 1996 will and

was going to be appointed executrix, the Defendant still acted as though she were the estate's fiduciary. The evidence shows that the Defendant acted wrongfully by entering the decedent's house and removing various assets.

While the Complainant was able to construct a list of what she believes is still wrongfully being held by the Defendant (Plaintiff's Exhibit 11), the evidence does not support those allegations *in toto*. For example, the Complainant testified that she had last seen many of the items listed on Plaintiff's Exhibit 11 only in February of 1997, three months before the decedent's death. Those items are as follows:

1. "Box of Family Photographs:
2. "Old Picture and Antique Frame of my father as a little boy"
3. "Mom and Dad's Wedding Album"
4. "Pictures Inside the Wedding Album Box"
5. "Two rings from boxes on nightstand"
6. "My Mom's Funeral Guest Book"
7. "Three Candlestick Telephones"
8. "Photo Album Scrapbook of Photos"
9. "Box of pictures from school taken from Dad's closet"

Under those circumstances, the Court is not persuaded that the Defendant concealed those items or that she currently possesses them.

On the other hand, the Court finds the Defendant, Marilyn Poynter, is guilty of concealing the other assets of the Estate of John D. Schwertman listed on Plaintiff's Exhibit 11, as well as those items that the Defendant has previously returned to the Complainant. The chattels listed on Plaintiff's Exhibit 11 have no readily ascertainable value so that it is difficult, in accordance with R.C. §2109.52, for the Court to assess damages with respect to those items. However, the Court orders that the Complainant's attorney fees for prosecuting this action shall be paid by the Defendant. Since the Complainant did not furnish evidence of the amount of those fees, the parties shall set a

mutually convenient date for the Court to hear testimony concerning those fees and other costs incurred so that the Court may render judgment in accordance with R.C. §2109.52. Last, the Defendant is ordered to forthwith return to the Executrix any other property in the Defendant's possession that belongs to the Estate of John D. Schwertman.

SO ORDERED.

WAYNE F. WILKE, JUDGE

cc: Ralph J. Conrad
Eric C. Holzapfel
Patrick J. Hanley
Richard L. Goettke