ORIGINAL

IN THE SUPREME COURT OF OHIO

Andrew J. Art, Successor Guardian of the Person and Estate of Katherine A. Guzay, et al.,	:	Case No. 11-1108
Plaintiffs,	:	On Appeal From The Court Of Appeals For Franklin County, Ohio, The Tenth Appellate District
Ohio Casualty Insurance Company,	:	
Plaintiff-Appellee,	:	Court of Appeals Case No. 10AP-747
vs.	:	
Butler Wick, et al.	:	
Defendants-Appellants.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT AND THIRD-PARTY PLAINTIFF BUTLER WICK & CO., INC.

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EXPLANATION OF WHY THIS CASE IS OF PUBLIC OR GREAT GENERAL INTEREST

If allowed to stand, the Tenth District Court of Appeals's (the "Appellate Court") holding would strictly apply the quasi-criminal Ohio Concealment Statute, R.C. § 2109.52, when such application was never intended by the legislature or reviewing courts to date. The precedent set if the Appellate Court's holding is allowed to stand would make completely innocent parties, particularly financial institutions acting in commerce, liable for "damages" arising from lost or concealed estate assets, when:

A. Those very same assets were not lost or concealed from their rightful owners by the accused; or

B. The proximate cause of an estate's loss of assets is the acts of others, not acting in concert with the accused; or

C. The existence of a pending probate estate, including a guardianship, has never been noticed or disclosed to the accused, who acted completely in good faith.

Finally, the Appellate Court's holding would place overwhelmingly burdensome requirements upon financial institutions engaging in commerce in Ohio to completely investigate every single financial transaction, including, but not limited to, simple bank deposits or check honoring and processing, to insure that the owner of accounts and/or funds on deposit has not been declared incompetent and subject to control by an undisclosed, court-appointed guardian. The burden placed upon financial institutions in both time and expense to conduct such due diligence would cripple Ohio commerce for businesses and individuals alike.

STATEMENT OF THE CASE AND RELEVANT FACTS

On November 5, 1993, Katherine Guzay ("Mrs. Guzay") opened a personal Butler Wick brokerage account. On October 11, 1997, Mrs. Guzay suffered a traumatic brain injury in an automobile accident. On November 14, 1997, Mrs. Guzay's daughter, Davis Erwin ("Ms. Erwin" or "Guardian"), applied to serve as her mother's legal guardian to the Franklin County Probate Court (the "Probate Court"), and was subsequently appointed the guardian over Mrs. Guzay and Mrs. Guzay's estate (the "Guardianship"). Ms. Erwin obtained a guardian's bond from Appellee Ohio Casualty Insurance Company ("Appellee OCIC").

Following her appointment as guardian, Ms. Erwin ordered transfers of Mrs. Guzay's Butler Wick account assets to a newly opened guardianship brokerage account with Eisner Securities. Butler Wick received the account transfer requests through the Automated Customer Account Transfer Service ("ACATS"), an electronic transfer system facilitating the movement of brokerage accounts between participating ACATS brokerage firms. The transfer of Mrs. Guzay's assets to her guardianship account occurred on December 18, 1997.[1] Well after all of the transfers were completed and the assets deposited into Mrs. Guzay's guardianship account, Ms. Erwin's husband misappropriated Mrs. Guzay's assets from the Eisner Securities' guardianship account. Mr. Erwin did not misappropriate any of Mrs. Guzay's assets from a Butler Wick account.

On August 21, 2001, successor guardian Andrew Art initiated this action to investigate activity in Mrs. Guzay's estate. On June 18, 2002, the Probate Court determined that while Ms.

---

[1] Butler Wick also maintained for Mrs. Guzay's benefit Four Thousand Seven Hundred and Fifty Nine Dollars and Eighty Five Cents ($4,759.85). In January 1998, and again at Ms. Erwin's request as Mrs. Guzay's Guardian, Appellant Butler Wick transferred this cash balance plus accumulated dividends to Mrs. Guzay's Eisner Securities guardianship account.

Erwin was guardian of Mrs. Guzay's estate, One Hundred Eighty Five Thousand Eight Hundred Thirty-Eight Dollars and Thirty-Three Cents ($185,838.33) was stolen from the Guardianship by Mr. Erwin. The Probate Court found that the Guardianship's losses were proximately caused by Ms. Erwin's failure to properly manage her mother's Guardianship estate. The Probate Court also granted judgment in the amount of the Guardianship's losses against Mr. Erwin. On May 4, 2004, the Probate Court authorized Guardian Art to settle his Guardianship's bond claim against Appellee OCIC. As part of this settlement, Appellee OCIC received an assignment of the remaining concealment claims.

On January 18, 2005, Butler Wick filed its Answer to Appellee OCIC's Second Amended Complaint, asserting among other things that Appellee OCIC's claims were subject to arbitration. On August 3, 2005, Butler Wick moved to compel arbitration. The Probate Court denied Butler Wick's Motion to Compel Arbitration. Butler Wick appealed the Probate Court's Decision to the Appellate Court in *Art v. Erwin*, 183 Ohio App. 3d 651, 2009-Ohio-4306, 918 N.E.2d 207. The Appellate Court affirmed the Probate Court's holding that Appellee OCIC's claims were not subject to arbitration.

Following remand, Appellant Butler Wick moved for summary judgment as to Appellee OCIC's concealment action. The Probate Court granted summary judgment in Butler Wick's favor (the "MSJ Decision"). Appellee OCIC pursued an appeal and the Appellate Court on May 17, 2011, reversed and remanded the Probate Court's decision granting Appellant Butler Wick's motion for summary judgment (the "Decision") for further proceedings. It is from the Appellate Court Decision that Appellant Butler Wick appeals.

PROPOSITION OF LAW NO. 1: The Ohio Concealment Statute does not impose strict liability.

The Appellate Court reversed the Probate Court's decision, essentially holding that Appellant Butler Wick violated the Ohio Concealment Statute, R.C. § 2109.50 et seq., when it transferred Mrs. Guzay's accounts' assets to Mrs. Guzay's guardian, Ms. Erwin, after her appointment. The Probate Court found that R.C. § 2109.50 permits a guardian to seek court intervention and a determination regarding allegations of asset concealment when:

> (1) The fiduciary suspects another of having property belonging to the estate (and such person refuses to give the property to the fiduciary); or
>
> (2) The fiduciary suspects another of having had property belonging to the estate and has conveyed away such property to a third party not entitled to such property.

MSJ Decision at pp. 9 and 10. The emphasis is not on the manner of conveyance but, rather, on the recipient of such conveyance. *Id.* at p. 10.

Further, to recover in a concealment action against a financial institution, the complaining party must also establish all of the following:

> 1) The financial institution made a conveyance;
>
> 2) Of assets belonging to the trust estate; and
>
> 3) To a party unauthorized to take possession of the assets.

In re Estate of Popp (1994), 94 Ohio App. 3d 640, 647, 641 N.E.2d 739 (emphasis added).

A court inquiring under the Concealment Statute therefore must always focus on:

> 1) the ownership of the asset(s) in question and whether possession of the same is being impermissibly concealed or withheld from the estate. *Wozniak v. Wozniak* (1993), 90 Ohio App. 3d 400, 407, 629 N.E.2d 500; and
>
> 2) if there has been a conveyance, what is the recipient's right to the property. What logically follows therefore is that an asset that

> is not concealed nor withheld from the estate, and/or which has been a conveyed to the proper recipient, cannot be the subject of a Concealment Statute claim.

But in applying the Ohio Concealment Statute to the undisputed facts of the instant case, the Appellate Court failed to follow this reasoning and reached an improper result. Simply stated, the undisputed facts reveal that the assets in question were not concealed nor withheld by Appellant Butler Wick. Rather, Appellant Butler Wick acted lawfully at all times:

1. The electronic ACATS transfer request was received by Appellant Butler Wick in the normal course and scope of the ACATS usage;

2. Nothing in the ACATS transfer request received by Appellant Butler Wick indicated that a guardian had been appointed for Mrs. Guzay, nor did Appellant Butler Wick know or have reason to know that a guardian had been appointed for Mrs. Guzay;

3. Under the terms of the ACATS system industry-wide agreement, Appellant Butler Wick had no reason or right to delay or prevent the transfer of Mrs. Guzay's account to Eisner Securities as directed;

4. Appellant Butler Wick transferred assets held in Mrs. Guzay accounts to Eisner Securities in accordance with the ACATS request;

5. Upon Eisner Securities' receipt of Mrs. Guzay's assets from Appellant Butler Wick via the ACATS system, they were deposited into a guardianship account at Eisner Securities;

6. The Guardian filed accounts with the Probate Court identifying the assets previously held by Appellant Butler Wick as now being on deposit in a Guardianship account;

7. Only after Mrs. Guzay's Butler Wick account was transferred to the Guardianship account did the Guardian's husband steal those assets;

8. The Probate Court found that both the Guardian and the Probate Court itself had been defrauded by the Guardian's husband's use of false account statements and theft;

9. The Probate Court ultimately found both the Guardian and the Guardian's husband legally liable for the misappropriated assets previously transferred by Appellant Butler Wick. The Probate Court never found Appellant Butler Wick to be at fault or the cause of the Guardianship's loss; and

10. Appellee OCIC was ordered to pay upon the guardian's bond due to the Guardian's culpability in the Guardianship's loss, in order to compensate the Guardianship.

Applying these facts to the three (3) elements for financial institution liability under the Concealment Statute:

1. Appellant Butler Wick made a conveyance to Eisner Securities in the ordinary course of business and in full accordance with the securities industry ACATS requirements;

2. Although unknown to Appellant Butler Wick, Ms. Erwin had been appointed a guardian prior to the ACATS transfer request, those assets fell under the control of the Guardianship upon its creation; and

3. At the moment of transfer there was clearly only one person who could take custody and control of those assets...the court appointed guardian, who had stepped into the ward's shoes for all purposes.

It is fundamental to any finding of liability under the Concealment Statute that ownership and possession of an estate's assets after the transfer under review, must be held by a person without any legal right in such assets; i.e., a non-owner. But here, the Butler Wick transfer resulted in control and possession of Mrs. Guzay's assets ultimately being received by the only party with a legal right to the same: the Guardianship estate. It is undisputed that upon their arrival at Eisner Securities, the assets received from Appellant Butler Wick via the ACATS transfer request were deposited into an account registered in guardianship form, and therefore under the Probate Court control. Ms. Erwin even filed accounts with the Probate Court listing the transferred assets as being held by her as Mrs. Guzay's guardian. If the uncontroverted facts are applied, no violation of the Concealment Statute should be found.

The Probate Court found BOTH Ms. Erwin as Guardian and Mr. Erwin to be culpable and responsible for the Guardianship estate's loss. It is also significant that the Appellate Court itself agreed that the Guardian was defrauded by Mr. Erwin's scheme, including his use of false Eisner Securities (not Appellant Butler Wick) statements, so he could misappropriate the transferred assets. And the Appellate Court also agreed that even the Probate Court itself was defrauded by Mr. Erwin's false Eisner Securities' statements and theft. Having transferred the

Guzay assets to Eisner Securities, which then deposited the same into Guardianship accounts, Appellant Butler Wick could not be the proximate or even contributing cause of Mr. Erwin's fraud and theft or Guardian Davis Erwin's misfeasance since all of their acts and unlawful conduct occurred after the ACATS transfers were completed and assets were on deposit with the Guardianship.

Without question, the proximate cause of the losses incurred by the Guardianship estate was not Appellant Butler Wick's transfer of Mrs. Guzay's account to Eisner Securities via ACATS. But the Appellate Court ignores this realty and tries to strictly apply the Concealment Statute to make liable a party who had no role or contribution in the concealment or theft of estate assets. If the Appellate Court ruling is allowed to stand and the Concealment Statue so strictly applied, other unfair and unjust results will be imposed upon innocent Ohio financial institutions. Further, clever guardians may reap undeserved benefits when no loss has occurred. For example, a guardian may take guardianship letters of authorities to unsuspecting banks, savings and loans, brokerage firms or other asset custodians, and use the same to request the transfer of a ward's assets. If the institution complies, and the Appellate Court ruling is applied, an action for concealment can be successfully pursued EVEN IF THE TRANSFERRED ASSETS WERE NEVER LOST, STOLEN OR CONCEALED and are ultimately expended for the ward's benefit. This "double dipping" result was not contemplated by the legislature in creating or the courts in applying the Ohio Concealment Statute. The Appellate Court's holding should not stand.

PROPOSITION OF LAW NO. 2: The Probate Court and Mrs. Guzay's Guardian ratified the transfer of assets to the Guardianship.

The Probate Court properly held that by taking possession and control of the transferred funds, Ms. Erwin (as Mrs. Guzay's guardian) and the Probate Court (by accepting filed accounts

without objection or question), ratified the Butler Wick transfer. The Appellate Court should have reached the same conclusion.

Ratification is found where one under no disability voluntarily adopts and gives sanction to some unauthorized act or defective proceeding, which without his sanction would not be binding on him. *Ohio Bank v. Beltz*, 2002-Ohio-4886, ¶28, Logan App. No. 8-02-13. A guardian may ratify a transaction made in conjunction with the ward's estate even if there are issues that might otherwise call that transaction into question. See, *Huntington Nat'l Bank v. Toland* (1991), 71 Ohio App. 3d 576, 594 N.E.2d 1103; *In re Guardianship of Allen* (1990), 50 Ohio St. 3d 142, 552 N.E.2d 934. Ratification has long been applied to transactions that the ward, despite incompetency, creates rights and/or obligations for herself that the guardian later adopts on the ward's behalf. *Id.* Certainly, if the courts allow ratification for a transaction that an incompetent person engineers, it should allow ratification for transactions made on the ward's behalf by the guardian and those working in concert with the guardian, even if imperfectly executed.

In this case, the Probate Court properly found that Ms. Erwin, as guardian for Mrs. Guzay's estate, ratified the ACATS transfer of funds from the Butler Wick accounts to Eisner Securities. Ms. Erwin represented at the guardianship hearing that Mrs. Guzay had approximately Two Hundred Thousand Dollars ($200,000.00) in her Butler Wick brokerage accounts. After she was appointed guardian of the estate, Ms. Erwin filed guardian accounts that included identifying an Eisner Securities' Guardianship account where the now transferred Butler Wick assets were on deposit. The Guardian's accounts did not list or identify the Butler Wick accounts. Ms. Erwin's Guardian accounts confirm that she knew that the assets contained in the Butler Wick accounts had been transferred to Eisner Securities and that the Butler Wick

account had been either closed or had no balance. Assuming that Appellant Butler Wick's act of fulfilling the ACATS request to transfer the funds from its accounts to Eisner Securities qualifies as an "unauthorized act or defective proceeding" (it does not, see *supra*), Ms. Erwin's actions as guardian of Mrs. Guzay ratified the transfer.

It is also worth noting that one of the elements that Appellee OCIC must prove to establish Appellant Butler Wick's liability under the Concealment Statute is that the conveyance must have occurred *without the estate's consent*. In granting Appellant Butler Wick's motion for summary judgment, the Probate Court stated clearly on this issue: "[a]t the very least, Ms. Erwin ratified and consented to the transfer and took control of the account." The Probate Court's finding that Guardian Davis Erwin consented to the transfer is simply another way of saying that Ms. Erwin, as Guardian, ratified the transfer from Appellant Butler Wick to Eisner Securities. The fact that it has now been held that Ms. Erwin as her mother's Guardian *ratified and consented* to the transfer, demonstrates that one of the required elements for proving a Concealment Statute claim cannot be met. Whether characterized as ratification, or consent, or both, the fact remains that Ms. Erwin never revoked the ACATS requests sent by Eisner Securities to Appellant Butler Wick, did nothing to return the assets to Appellant Butler Wick upon their arrival at Eisner Securities, and actually represented to the Probate Court that the Eisner Securities Guardianship account was opened with the transferred Butler Wick funds on deposit. Because Ms. Erwin, as Guardian, adopted, approved and therefore ratified the transfers, Butler Wick cannot be found liable for concealment.

PROPOSITION OF LAW NO. 3: Appellant Butler Wick was Authorized to Transfer Assets.

The use of probate court forms is authorized by Civ. R. 73(H) and Rule Sup. 51. But a probate form is merely a procedural device and does not create substantive legal requirements.

Statutory or other substantive authority governs over conflicting rules and procedures of court. See generally, *Proctor v. Blank*, 2006-Ohio-2386, ¶19, Trumbull App. No. 2005-T-0027 (applying statutory authority where the Rules of Civil Procedure appeared in conflict). In fact, when the forms do not strictly comply with the versions promulgated by the rules, minor deviations constituted only harmless error. *In re Guardianship of Brady*, 2005-Ohio-287, Cuyahoga App. Nos. 84517 & 84743.

In this case, the Probate Court's Motion for Summary Judgment Decision was proper because it concluded that it was not bound to follow the language of the Letters of Guardianship as if they were binding authority. Appellee OCIC contends that probate court forms have precedential value, like a statute or a decision from a superior court. The law is clear that forms, adopted for logistical convenience, cannot be afforded that type of deference nor legal power.

Reviewing Courts have used this analysis in Concealment Statute proceedings. The Appellate Court in *Rinehart v. Bank One* (1998), 125 Ohio App.3d 719, 709 N.E.2d 559, held that the language of the guardianship letters did not impose a duty on a bank to control disbursements by the guardian. But in this case, the Appellate Court needed not consider and decide the legal effect and possible duty imposed upon Appellant Butler Wick had it received a separate, specific Court order authorizing transfer of the Guzay account assets. Nor does there need to be a similar analysis of what effect receipt of Guardian Davis Erwin's letters of guardianship should have had upon Appellant Butler Wick. That is because Appellant Butler Wick NEVER received a copy of Ms. Erwin's letter of guardianship, nor any other notice advising of Mrs. Guzay's incompetency or the guardianship's creation. Appellant Butler Wick did what it was instructed to do by Ms. Erwin's ACATS transfer request. Nothing in the ACATS request received electronically by Appellant Butler Wick indicated or suggested that a

guardian had been appointed for Mrs. Guzay. To suggest that Appellant Butler Wick should now be liable for transferring assets to the undisclosed guardian of Mrs. Guzay, who deposited the same into Probate Court controlled guardianship accounts, is both nonsensical and unfair.

PROPOSITION OF LAW NO. 4: Application of the Appellate Court Decision will unduly burden Ohio commerce and is against the public's interests.

There is no evidence in the record that Appellant Butler Wick had knowledge or notice of Mrs. Guzay's incompetency and/or the appointment of a guardian for her person and her estate. There is no evidence in the record that Appellant Butler Wick should have known or had notice of such incompetency and/or the appointment of such a guardian. Nevertheless, the Appellate Court, without the benefit of any testimony or other evidence, jumped to the colossal conclusion that a reference on the address line of the electronically-received ACATS request indicating that Mrs. Guzay's address was "c/o Davis Erwin" put Appellant Butler Wick on *actual* notice of the existence of her guardianship. The Appellate Court's factual conclusion is not only improper but it creates notice of a guardianship that was never identified to Appellant Butler Wick. At best, the ACATS form address reference ("c/o Davis Erwin") is more likely to be construed as nothing more than an address change. To suggest that a change of address reference on an electronic ACATS account transfer form should signify to a financial institution that its customer is now the ward of a guardianship estate is not proper.

Guardian Davis Erwin and Eisner Securities could have identified the party requesting the ACATS transfer as "Guardian" or "GDR" or could have provided notice that the transfer was authorized by the "Guardianship of Katherine Guzay." No such designations were made. To hold Appellant Butler Wick to a standard of prescience that it should have discerned the existence of a guardianship from the ACATS request is unreasonable and legally unjustifiable.

Nevertheless, the Appellate Court (with the benefit of 20-20 hindsight) has decided that the "c/o" reference placed Appellant Butler Wick on actual notice of the existence of the Guardianship. The impact of this ruling upon the routine commercial practices of Ohio financial institutions and financial institutions doing business in Ohio cannot be understated. If this holding is allowed to stand, every financial institution that transfers accounts, honors checks, accepts deposits, moves money and securities between accounts and institutions, issues bank or certified checks, etc., for an Ohio customer will be required to scrutinize each and every such transaction to insure that the customer is lawfully permitted to conduct his/her own business (by, among other things, investigating whether a guardianship exists). The Appellate Court's holding will essentially require every financial institution in Ohio or doing business in Ohio to independently investigate and determine, before performing a transaction for a customer, that the customer is not subject to Probate Court control and/or custody because of the appointment of an undisclosed guardian in a unknown jurisdiction potentially hundreds of miles away. If allowed to stand, the Appellate Court's strict liability holding will have the unintended consequence of bringing Ohio commerce to a grinding halt. Both electronic and traditional financial transactions will no longer be easily nor promptly processed and concluded because of fear of liability under the Ohio Concealment Statute.

CONCLUSION

The cause of the Guardianship's loss was legally determined to be the misfeasance and malfeasance of its Guardian, Ms. Erwin, and the fraud and deceit of her husband. All of their acts and omissions occurred long after Appellant Butler Wick had transferred the Guzay account balances to Eisner Securities and Eisner Securities held the funds for the Guardian, who deposited the same into Probate Court controlled, guardianship accounts. Appellant Butler Wick

never concealed nor denied Mrs. Guzay or her Guardian control and possession of Mrs. Guzay's assets. The Ohio Concealment Statute does not apply herein. This Court should reverse the Appellate Court's Decision of May 17, 2011.

Respectfully submitted,

COOLIDGE WALL CO., L.P.A.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the following via regular U.S. Mail, postage prepaid, on this 29th day of June 2011:

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APPENDIX

Appx. Page

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(May 17, 2011)

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(May 17, 2011)

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

2011 MAY 17 PM 12: 42
CLERK OF COURTS

Andrew J. Art, Successor Guardian of the Person and Estate of Katherine A. Guzay et al.,	:	
Plaintiffs,	:	
(Ohio Casualty Insurance Company,	:	No. 10AP-747 (Prob. No. 455209-B)
Plaintiff-Appellant),	:	(REGULAR CALENDAR)
v.	:	
Joseph Erwin et al.,	:	
Defendants-Appellees.	:	

D E C I S I O N

Rendered on May 17, 2011

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Coolidge Wall Co., L.P.A., Richard A. Talda and *Sasha Alxa M. VanDeGrift*, for appellee Butler Wick & Co., Inc.

APPEAL from the Franklin County Court of Common Pleas, Probate Division

KLATT, J.

{¶1} Plaintiff-appellant, the Ohio Casualty Insurance Company ("Ohio Casualty"), appeals from a judgment of the Franklin County Court of Common Pleas, Probate Division, which granted summary judgment in favor of defendant-appellee, Butler

Wick & Company, Inc. ("Butler Wick"). For the following reasons, we reverse and remand this case for further proceedings.

{¶2} On October 11, 1997, Katherine A. Guzay suffered severe injuries, including traumatic brain injury, as a result of an automobile accident. Since Guzay's injuries left her with memory deficits and in need of 24-hour care, Guzay's daughter, Davis A. Erwin ("Davis"), applied to the probate court for appointment as guardian of her mother's person and estate. A magistrate conducted a hearing on Davis' application, at which Davis testified that her mother had a brokerage account valued at approximately $200,000. Following the hearing, the magistrate recommended that the probate court appoint Davis guardian of her mother's person and estate and set her guardian's bond at $400,000.

{¶3} On December 12, 1997, the probate court entered judgment adopting the magistrate's decision. In accordance with the judgment, Davis secured and filed with the probate court a $400,000 guardian's bond issued by Ohio Casualty.

{¶4} On the same day that the probate court entered judgment appointing Davis guardian for her mother, the probate court also issued Davis letters of guardianship. Pursuant to Sup.R. 51, the letters of guardianship consisted of a standard form that the probate judge completed and signed. The letters of guardianship included the following "Notice to Financial Institutions:"

> Funds being held in the name of the within named ward shall not be released to the Guardian without a Court Order directing release of a specific fund and amounts thereof.

{¶5} At the time that Davis became Guzay's ward, she had a brokerage account with Butler Wick that held securities and cash valued in excess of $180,000. Davis

referred to this account—her mother's single most valuable asset—in her testimony before the magistrate. On or about December 15, 1997, Butler Wick received an electronic request to transfer the securities and cash contained in Guzay's account to another brokerage, National Financial Services Corporation ("NFS"). Butler Wick received the request through the Automated Customer Account Transfer Service ("ACATS"), a computerized system that automates and standardizes procedures for the transfer of assets from a customer account with one brokerage or bank to an account with another brokerage or bank. To facilitate the transfer, the ACATS system generated an "Asset Detail Report as Deliverer" that Butler Wick printed out and retained. That report indicated that Butler Wick was to transfer the securities and cash in Guzay's account to NFS account number CHW-033839, held by "Katherine A. Guzay C/O Davis A. Erwin."

{¶6} NFS is a registered and licensed securities broker-dealer firm that provides clearing services for correspondent securities broker-dealers. As a clearing broker, NFS executes and clears sales and purchases of securities and carries brokerage accounts for correspondent securities broker-dealers. From December 1997 to February 2001, NFS acted as a clearing broker for Eisner Securities ("Eisner"). Thus, NFS carried brokerage accounts for Eisner clients that Eisner opened and serviced.

{¶7} Joseph Erwin ("Joseph"), Guzay's son-in-law, was employed as a branch manager and registered representative of Eisner's Columbus branch from June 1997 to September 2000. In early December 1997, Eisner opened brokerage account number

CHW-033839 in the name of "Davis A. Erwin, Guardian for Katherine A. Guzay" with NFS. Joseph served as the account executive for NFS account number CHW-033839.[1]

{¶8} On December 18, 1997, Butler Wick transferred all of the securities in Guzay's account to NFS account number CHW-033839. In January 1998, Butler Wick transferred all the cash in Guzay's account to NFS account number CHW-033839.

{¶9} Immediately after the transfers, Joseph began to systemically divert Guzay's funds into his Bank One bank account. From December 1997 to early March 1998, Joseph transferred a total of $92,969.41 from NFS account number CHW-033839 to a National City Bank checking account that Guzay had opened prior to the commencement of the guardianship. Joseph then forged Guzay's signature on checks and used the forged checks to deposit $90,338.33 of Guzay's funds into his own bank account. From mid-March 1998 to May 1999, Joseph forged his wife's signature on checks payable from the funds in NFS account number CHW-033839 and deposited those checks in his own bank account. By this more direct method of embezzlement, Joseph stole $95,500 of Guzay's money.

{¶10} Joseph concealed his theft from Davis by providing her and her attorney fraudulent account statements. The accounts of administration that Davis filed with the probate court on March 17, 1999 and September 28, 1999 relied on Joseph's misrepresentations regarding the value of the NFS accounts. Unaware that the accounts reflected fraudulent information, the probate court issued judgments approving and settling those accounts.

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[1] Eisner opened a second NFS account in the name of "Davis A. Erwin, Guardian for Katherine A. Guzay" sometime in or about February 1998. Joseph also served as the account executive for that account.

{¶11} Davis filed her second (and final) account after resigning as guardian of Guzay's estate. The judgment that approved and settled Davis' final account also discharged Davis as guardian of the estate and Ohio Casualty as her bondsman. Davis continued to serve as guardian of her mother's person, while W. Sean Kelleher took over as guardian of Guzay's estate.

{¶12} Joseph did not only steal from Guzay. From May 1997 through September 2000, Joseph embezzled over $2.5 million from other Eisner clients.[2] In September 2000, Kelleher, then the guardian of Guzay's estate, discovered that Eisner had terminated Joseph's employment and that Eisner, in conjunction with the Federal Bureau of Investigations, was investigating Joseph's mishandling of Eisner clients' money. Kelleher became alarmed when Eisner repeatedly avoided his attempts to verify the existence of Guzay's assets. In addition to serving as Guzay's guardian, Kelleher was also Joseph's attorney. In light of the conflict of interest between Guzay and Joseph, Kelleher resigned as guardian of Guzay's estate. At the same time, Davis resigned as guardian of Guzay's person.

{¶13} The probate court appointed Andrew J. Art as the successor guardian of Guzay's estate and person. On February 14, 2001, Art filed exceptions to the two accounts that Davis had submitted during her tenure as guardian and the sole account that Kelleher had filed. In the exceptions, Art represented that only $1,233.39 remained in the NFS accounts. Art followed the exceptions with a motion seeking relief from the

[2] As a result of this embezzlement, Joseph was indicted in the United States District Court for the Southern District of Ohio on one count of mail fraud and one count of wire fraud. He pleaded guilty to both counts and received a sentence of 60 months' imprisonment for mail fraud, and a consecutive term of 60 months' imprisonment for wire fraud. See *United States v. Erwin* (C.A.6, 2003), 67 Fed.Appx. 876 (affirming the sentence).

judgments in which the probate court approved and settled the two accounts that Davis had filed. The motion also asked the probate court to find Erwin and Ohio Casualty liable for the loss of the funds that Joseph had embezzled, as well as related damages, including unauthorized transactional fees and commissions that Eisner had collected from the estate.

{¶14} Art then filed a complaint in the probate court alleging concealment of Guzay's assets pursuant to R.C. 2109.50. Art asserted this action against multiple defendants, including Joseph, Davis, Eisner, Bank One, National City Bank, Ohio Casualty, and Butler Wick. Ohio Casualty, however, moved to be realigned as a plaintiff, arguing that it shared Art's interest in recovering estate assets. The probate court granted Ohio Casualty's motion.

{¶15} On June 18, 2002, the probate court sustained Art's exceptions to the accounts and granted his motion for relief from the two judgments approving and settling the accounts. The probate court found that because Davis had failed to exercise any diligence whatsoever as guardian of her mother's estate, she was liable for the losses sustained due to Joseph's theft. The probate court also found it "was defrauded by the presentation of falsified bank or brokerage statements, [which] constitute[d] fraud sufficient to vacate the [two previous] orders under O.R.C. 2109.35." The probate court surcharged Davis $271,415.51, plus interest, for the losses incurred through her abdication of her duties as guardian. Recognizing Guzay's financial distress, the probate court ordered Art to proceed expeditiously against Ohio Casualty to satisfy Davis'

obligation.[3] Ohio Casualty appealed the probate court's judgment and lost. *In the Matter of the Guardianship of Guzay*, 10th Dist. No. 02AP-745, 2003-Ohio-5036.

{¶16} After its unsuccessful appeal, Ohio Casualty agreed to settle with Art. As part of the settlement, Art assigned to Ohio Casualty the claims and demands that he had asserted in the R.C. 2109.50 concealment action. In its order authorizing the settlement, the probate court allowed Ohio Casualty to pursue the R.C. 2109.50 concealment action in Art's place.

{¶17} Upon assuming control of the R.C. 2109.50 litigation, Ohio Casualty voluntarily dismissed all defendants except Joseph, Davis, National City Bank, and Butler Wick.[4] On August 5, 2005, Butler Wick moved to stay the proceedings pending arbitration. Butler Wick argued that the Customer's Margin Agreement that Guzay signed when she opened her brokerage account required arbitration of the R.C. 2109.50 concealment action. The probate court denied Butler Wick's motion. On appeal of that ruling, this court affirmed the probate court's judgment. *Art v. Erwin*, 183 Ohio App.3d 651, 2009-Ohio-4306.

{¶18} On remand to the probate court, both Ohio Casualty and Butler Wick filed motions for summary judgment. The probate court issued a decision granting Butler Wick's motion and denying Ohio Casualty's motion. Essentially, the probate court concluded that Butler Wick was not guilty of conveying away assets of the trust estate. The probate court reached this conclusion because Butler Wick transferred the securities

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[3] By this time, Davis had moved to the Virgin Islands, and she did not return for any court proceedings involving her mother's estate. On May 30, 2001, Davis filed an affidavit with the probate court in which she claimed not to have any assets.

[4] Ohio Casualty later voluntarily dismissed National City Bank as well.

and cash in Guzay's brokerage account to an account under Davis' control. The probate court assumed that, as guardian, Davis was a "proper person" to take possession of estate assets. The probate court reduced its decision to judgment on August 5, 2010.[5] Ohio Casualty now appeals from that judgment and assigns the following errors:

> [1.] The Probate Court Erred as a Matter of Law in Overruling Ohio Casualty's Motion for Summary Judgment and Granting Butler Wick's Cross-Motion by Failing to Apply the Law of the Case as Stated in This Court's Opinion in *Art v. Erwin*. The Probate Court's Holding That Butler Wick Is Not Strictly Liable for Conveying Away the Assets in Guzay's Brokerage Account Without Obtaining an Order from the Probate Court, as Superior Guardian, Is in Direct Conflict with the Plain Text of Ohio's Standard Letters of Guardianship (Form 15.4A) and the Law of this Case as Stated in this Court's Prior Opinion in *Art v. Erwin*.
>
> [2.] The Probate Court Erred as a Matter of Law in Holding That Davis Erwin, as Guardian, NFS And/Or Eisner Were "Properly Authorized" to Receive the Transfer of Guzay's Brokerage Account from Butler Wick Even Though the Probate Court Had Not Ordered Butler Wick to Release Custody and Control of Guzay's Brokerage Account. The Probate Court's Holding That Butler Wick Was Properly Authorized to Convey Away the Assets in Guzay's Brokerage Account Without Obtaining an Order from the Probate Court, as Superior Guardian, Is in Direct Conflict with this Court's Prior Holding in *Art v. Erwin*.
>
> [3.] The Probate Court Erred in Holding That Davis Erwin, as Court-Appointed Guardian of Guzay, Had the Authority to Ratify Butler Wick's Transfer of Custody of Guzay's Brokerage Account to NFS And/or Eisner.

{¶19} Because they are interrelated, we will address Ohio Casualty's first and second assignments of error together. By these assignments of error, Ohio Casualty

[5] Before entering this judgment, the probate court granted Ohio Casualty a default judgment against Joseph, ordering him to pay Ohio Casualty $194,619.24, plus interest. Ohio Casualty voluntarily dismissed its action against Davis.

argues that the probate court erred in granting summary judgment to Butler Wick and denying it summary judgment. We agree.

{¶20} Appellate review of summary judgment motions is de novo. *Andersen v. Highland House Co.*, 93 Ohio St.3d 547, 548, 2001-Ohio-1607. " 'When reviewing a trial court's ruling on summary judgment, the court of appeals conducts an independent review of the record and stands in the shoes of the trial court.' " *Abrams v. Worthington*, 169 Ohio App.3d 94, 2006-Ohio-5516, ¶11 (quoting *Mergenthal v. Star Banc Corp.* (1997), 122 Ohio App.3d 100, 103). Civ.R. 56(C) provides that a trial court must grant summary judgment when the moving party demonstrates that: (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made. *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, ¶6.

{¶21} Pursuant to R.C. 2109.50, a person interested in a trust estate may file a complaint in the probate court with jurisdiction over the trust estate "against any person suspected of having concealed, embezzled, or conveyed away or of being or having been in the possession of any moneys, chattels, or choses in action of such estate." R.C. 2109.52 provides that:

> When passing on a complaint made under section 2109.50 of the Revised Code, 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 proceedings delineated in R.C. 2109.50, et seq., "facilitate the administration of estates by summarily bringing into them those assets which rightfully belong there." *In re Estate of Fife* (1956), 164 Ohio St. 449, paragraph two of the syllabus.

{¶22} Culpability under R.C. 2109.52 turns upon whether the defendant has unauthorized possession of an estate asset or in some way has impermissibly disposed of an estate asset. *Goldberg v. Maloney*, 111 Ohio St.3d 211, 2006-Ohio-5485, ¶35 (quoting *Wozniak v. Wozniak* (1993), 90 Ohio App.3d 400, 407). A financial institution impermissibly disposes of an estate asset if it conveys an estate asset in its possession to an unauthorized individual. *Art* at ¶15; *Rinehart v. Bank One, Columbus, N.A.* (1998), 125 Ohio App.3d 719, 728. To prove a financial institution's culpability under R.C. 2109.52 for such action, the interested party must establish three elements: (1) the financial institution made a conveyance (2) of assets belonging to the trust estate (3) to a party unauthorized to take possession of the assets. *Art* at ¶15; *In re Estate of Popp* (1994), 94 Ohio App.3d 640, 647.

{¶23} In the case at bar, the parties do not dispute that Butler Wick made a conveyance of assets belonging to Guzay's estate. As established by the uncontested evidence, Guzay owned securities and cash held in a Butler Wick brokerage account that became part of her estate when the probate court instituted the guardianship. In December 1997 and January 1998, Butler Wick conveyed away those estate assets by transferring them to NFS account number CHW-033839. The only question in dispute, therefore, is whether Butler Wick conveyed the estate assets to a person who was not authorized to take possession of them.

{¶24} To resolve this question, we must first determine who took possession of the transferred estate assets. The evidence shows that Butler Wick transferred securities and cash from a brokerage account held in the name of "Katherine A. Guzay" to a NFS brokerage account held in the name of "Davis A. Erwin, Guardian for Katherine A. Guzay." Thus, Davis, acting as her mother's guardian, took possession of the transferred estate assets.

{¶25} Next, we must determine whether Davis, as Guzay's guardian, was authorized to take possession of the transferred estate assets. R.C. 2111.50 sets forth the parameters of a guardian's authority to act on behalf of a ward. That statute deems the probate court the superior guardian of all wards who are subject to its jurisdiction. R.C. 2111.50(A)(1). As superior guardian, the probate court, subject to some exceptions, has "all the powers that relate to the person and estate of the person and that he could exercise if present and not * * * under a disability." R.C. 2111.50(B). As a general matter, the probate court may confer on a guardian any power that R.C. 2111.50(B) grants the probate court in connection with wards. R.C. 2111.50(A)(2)(b). However, a guardian does not possess complete dominion over the ward. *In re Guardianship of B.I.C.*, 9th Dist. No. 09CA0002, 2009-Ohio-4800, ¶15. Rather, "the control of a guardian over the person, the estate, or both of his ward is limited to the authority that is granted to the guardian by the Revised Code, relevant decisions of the courts of [Ohio], and orders or rules of the probate court." R.C. 2111.50(A)(2)(a). See also *In re Guardianship of Spangler*, 126 Ohio St.3d 339, 2010-Ohio-2471, ¶53 ("Because the probate court is the superior guardian, the appointed guardian is simply an officer of the court subject to the court's control, direction, and supervision.").

{¶26} Both the letters of guardianship and the rules of the probate court limit a guardian's authority to take possession of estate funds held in the name of the ward. As we stated above, the letters of guardianship that the probate court issued Davis state that, "[f]unds being held in the name of the within named ward shall not be released to the Guardian without a Court Order directing release of a specific fund and amounts thereof." This prohibition supplements Loc.R. 66.3 of the Franklin County Court of Common Pleas, Probate Division, which provides that, "[f]unds in the name of the ward shall not be released to the guardian without a specific court order." Because both court orders and court rules bind a guardian, Davis had an obligation to ensure compliance with the order and rule in carrying out guardianship business. See R.C. 2111.14(D) (imposing on guardians of the estate the duty "[t]o obey all orders and judgments of the courts touching the guardianship"). Consequently, without a specific court order, Davis lacked the authority to seek the release or take possession of funds held in Guzay's name. Despite this restriction on Davis' authority, Davis never secured a probate court order permitting the release of the assets from the Butler Wick account, which was held solely in Guzay's name. Davis, therefore, did not have authority to take possession of the estate assets after their release and transfer.

{¶27} In arguing otherwise, Butler Wick contends that the letters of guardianship do not curtail Davis' authority as guardian. Butler Wick asserts that the letters of guardianship are merely a legal form, and thus, they have no legal power. We reject this contention. Letters of guardianship are no mere formality; without them "[n]o act or transaction by a fiduciary is valid." R.C. 2109.02. Although Sup.R. 51 prescribes a standard probate form for letters of guardianship, once that form is completed and signed

by a probate judge, the result is an enforceable court order. Consequently, the letters of guardianship control and limit Davis' authority as guardian.

{¶28} Next, Butler Wick argues that, even if the letters of guardianship are an enforceable court order, the language of that order does not impose a duty on financial institutions to control disbursements to a guardian. Butler Wick relies on *Rinehart* for this proposition. In *Rinehart*, a successor guardian pursued an R.C. 2109.50 concealment action against a bank that held an account in the name of the guardianship. The successor guardian asserted that the bank impermissibly conveyed away funds belonging to the ward when it permitted the prior guardian to withdraw funds from the guardianship account for his own purposes. In part, the successor guardian based this assertion on the prohibition contained in the letters of guardianship against release of funds held in the ward's name absent a specific court order. The probate court decided the action in the bank's favor, finding that the prohibition contained in the letters of guardianship "may impose a restriction upon withdrawals from a custodial account in the name of the *ward*, [but] it would not apply to funds held in the name of *guardianship*, as in the [instant] case." Id. at 729 (emphasis sic). Deferring to the probate court's interpretation of the letters of guardianship, we held that the letters did not require the defendant bank to police the disbursement of funds from an account held in the name of a guardianship.

{¶29} Thus, in *Rinehart*, this court concluded that the guardianship letters' prohibition on the release of funds does not prevent a guardian from withdrawing funds from an account in the name of the guardianship. However, the account at issue here was held in the name of the ward, not the guardianship. *Rinehart*'s holding, therefore, has no applicability to the case at bar. *Rinehart* bears on this case only to the extent that

this court adopted the probate court's conclusion that the prohibition in the letters of guardianship "may" restrict a guardian from withdrawing funds from an account in the ward's name without a specific court order. In this decision, we advance the probate court's ruling one step further and hold that the letters of guardianship *do* preclude such action.

{¶30} Finally, Butler Wick urges this court to ignore the letters of guardianship and Loc.R. 66.3 because it "never received a copy of the Letter[s] of Guardianship, nor any other notice of the guardianship's creation." (Appellee brief, at 11.) The evidence belies Butler Wick's claim that it lacked any notice. In the "Asset Detail Report as Deliverer" that Butler Wick received before transferring Guzay's assets, the customer name is listed as "Katherine A. Guzay C/O Davis A. Erwin." This indication that Davis was in "care of" Guzay should have alerted Butler Wick to the existence of a guardianship.

{¶31} In sum, because Davis lacked the authority to take possession of assets transferred from her mother's Butler Wick account, we conclude that the evidence establishes that Butler Wick is culpable for conveying away estate assets under R.C. 2109.52. Accordingly, we sustain Ohio Casualty's first and second assignments of error to the extent that they assert that the probate court erred in concluding otherwise.

{¶32} By its third assignment of error, Ohio Casualty argues that the probate court erred in holding that Davis ratified the transfer of assets from Butler Wick to NFS that her husband initiated. The probate court reached this holding in response to Ohio Casualty's argument that Davis did not know about the transfer. However, Davis' knowledge or lack thereof has no relevance to a determination of Butler Wick's culpability under R.C. 2109.52. As we stated above, to establish Butler Wick's culpability, Ohio Casualty had to

prove that: (1) Butler Wick made a conveyance (2) of assets belonging to the trust estate (3) to a party unauthorized to take possession of the assets. *Art* at ¶15; *Popp* at 647. As Ohio Casualty established these three elements, it is entitled to summary judgment. We thus find that the third assignment of error is moot, and we decline to address it.

{¶33} For the foregoing reasons, we sustain Ohio Casualty's first and second assignments of error to the extent noted above, and we find Ohio Casualty's third assignment of error moot. We reverse the judgment of the Franklin County Court of Common Pleas, Probate Division, and we remand this case to that court for further proceedings consistent with law and this decision.

Judgment reversed; cause remanded.

FRENCH and CONNOR, JJ., concur.

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IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Andrew J. Art, Successor Guardian of the Person and Estate of Katherine A. Guzay et al.,	:	
Plaintiffs,	:	
(Ohio Casualty Insurance Company,	:	No. 10AP-747 (Prob. No. 455209-B)
Plaintiff-Appellant),	:	(REGULAR CALENDAR)
v.	:	
Joseph Erwin et al.,	:	
Defendants-Appellees.	:	

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on May 17, 2011, we sustain Ohio Casualty's first and second assignments of error to the extent noted in our decision, and we find Ohio Casualty's third assignment of error moot. We reverse the judgment of the Franklin County Court of Common Pleas, Probate Division, and we remand this case to that court for further proceedings consistent with law and this decision. Costs assessed against appellees.

KLATT, J., FRENCH and CONNOR, JJ.

By William A. Klatt
Judge William A. Klatt