

IN THE COURT OF APPEALS OF IOWA

FILED

OCT 28 1987

CLERK SUPREME COURT

IN THE MATTER OF THE ESTATE OF)
DWIGHT R. DALE, Deceased.)

Filed October 28, 1987

EVELYN L. SWARNER,)
Appellant.)

7-303
86-1814

52

Appeal from the Iowa District Court for Cerro Gordo County (19846),
Jack W. Frye, Judge.

Appellant appeals the trial court's decision finding that she wrongfully
transferred property belonging to the decedent, and ordering her to reimburse
his estate. **AFFIRMED IN PART; REVERSED IN PART.**

Robert S. Kinsey, Jr. of Brown, Kinsey & Funkhouser, Mason City, for
appellant.

Donald L. Goranson of Stillman, Goranson, Stone & Lovell, Clear Lake,
for the estate.

Considered by Oxberger, C.J., and Hayden and Sackett, JJ. Snell, J.,
takes no part.

HAYDEN, J.

Evelyn Swarner appeals the trial court's decision finding that she, as attorney-in-fact for the decedent, Dwight R. Dale, wrongfully transferred property belonging to the decedent, and ordering her to reimburse his estate. On appeal, Ms. Swarner asserts the trial court did not have jurisdiction over this proceeding brought pursuant to Iowa Code section 633.112 since there exists a good faith dispute regarding the ownership of the property transferred. In the alternative, Ms. Swarner asserts that, even if the trial court had jurisdiction, its rulings were contrary to the evidence.

The trial court found Ms. Swarner exceeded her power of attorney for the decedent since the transfers in question were not made for the decedent's "use and benefit." Ms. Swarner was also, however, the attorney-in-fact for her mother, Fern Dale. Ms. Swarner contends the disputed transfers were of property owned jointly by the decedent and Fern Dale and were made pursuant to her power of attorney for Fern.

As stated in In re Estate of Samek, 213 N.W.2d 690, 691-92 (Iowa 1973):

Section 633.112, The Code, is merely a discovery statute. It provides the estate's representative an easy, inexpensive means to obtain possession of all the property of the deceased. . . .

The law is clear, however, once it is established a controversy exists, other proceedings must be brought to determine the ownership of the contested property. . . .

The difficult question is, of course, what constitutes a controversy? The general rule which may be distilled from the above cases is that it requires only a modicum of evidence establishing a good-faith dispute over the contested property to deprive the court of jurisdiction to determine ownership in a § 633.112 proceeding. We have said unless it appears beyond controversy that the person being examined has wrongful possession the court has no authority to determine the question of ownership. . . . (Citations omitted.)

The trial court concluded it was "beyond controversy" that Evelyn L. Swarner as attorney-in-fact for Dwight R. Dale took wrongful possession of her principal's

property by the improper transfers thereof." The court went on to state, however, that

[t]here are good-faith disputes created by the conduct of Evelyn L. Swarner as attorney for Dwight R. Dale. The executor may be required to litigate ownership of some funds in a regular proceeding. The executor, however, should not be required to use such proceedings for the rightful possession of that property improperly transferred by the fiduciary, Evelyn L. Swarner.

The trial court did not address Ms. Swarner's assertion that she was acting as attorney for Fern Dale during the transactions at issue.

We agree with the trial court's conclusion there exist good-faith disputes in this case. We conclude, however, these disputes extend to the property transferred by Ms. Swarner. Whether she was acting as attorney for the decedent or as attorney for Fern Dale is not a matter beyond controversy. Thus, neither is the propriety or impropriety of her actions beyond controversy. As such, application of the general rule distilled and enunciated in In re Estate of Samek would deprive the trial court of jurisdiction under Iowa Code section 633.112. The court erred in not so ruling.

The trial court listed five sums for which Ms. Swarner was to reimburse the decedent's estate. We reverse as to \$12,983.90 of the \$19,000.00 in item one and as to the entire amounts in items two, three, and five. We affirm as to item four since this ruling was not contested.

AFFIRMED IN PART; REVERSED IN PART.