

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
NH CIRCUIT COURT

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Case Name: **Estate of Joseph J. McKenzie**
Case Number: **318-2017-ET-01197**

ORDER ON OBJECTION TO INVENTORY

I held a hearing on April 11, 2018 on the objection to inventory filed by Triscia McInnis and Amie McKenzie. Present for the hearing were Amie McKenzie and her counsel, Attorney Siracusa Hillman. Also appearing was Attorney Kalinski for the estate. The executrix, Sophie Tellier, arrived over 30 minutes late for the hearing. The record remained open after the hearing for the parties to obtain additional testimony from Citizen's Bank regarding access to the deceased's safe deposit box, and to file briefs with the court.

At the hearing, the parties agreed to proceed by offers of proof. The issue before the court was whether certain coins contained in a safe deposit box are the property of the estate, or the property of Amie McKenzie, Triscia McInnis, or both. The evidence from the offers of proof for Amie McKenzie is that her father began purchasing coin sets for Amie and her sister at an early age. She recalled that he would take the coin sets out on Christmas or birthdays or at various other times to show the girls. She understood that the coins were his gifts to them. In addition, she recalled that he would often get two sets of coins, one for each of the girls.

The evidence established that even after the girls became adults, their father continued to hold the coins. There is no evidence that they ever requested possession of them, or that their father attempted to physically deliver the coins to them.

In addition, Amie's testimony was represented to be that she came to New Hampshire to visit in 2015. When she saw her father, he asked her to come to Citizens Bank with him. At the bank, she signed a safe deposit box access card. She did not access the box itself. She understood that she was added to the box so that after her

father's death, she could access the box and take the coins that belonged to herself and her sister.

The offer of proof for Amie also included that her father offered to let her have a key to the box, but that she told her father to keep the key and to have it in a drawer in a bedroom in the house so that she would know how to access it when she needed it. Amie was moving between Florida and New Hampshire several times and she felt that she was not in a position to take possession of the coins.

After the death of Mr. McKenzie, Amie told the executrix of the safe deposit box. Amie claims joint ownership of the safe deposit box under the contract between Mr. McKenzie and the bank that she became a party to when she visited with her father in 2015. She claims that she can identify some of the sets of coins in the box, including a Lady Liberty set, a set of nickels, indian head pennies and a 50 state quarters set, but she could not describe with any particularity what coins or coin sets were in the box.

The testimony also included an offer of proof for Regina Marzullo. Ms. Marzullo lived with the deceased for approximately 12 years and said that she was everything but married to the deceased. During that time she knew that the decedent would purchase certain coin sets or coins, and that he would put some in the safe deposit box. She recalled him saying that the coins were valuable and that when he retired they would be able to do things as a result of having the coins. In addition, the decedent gave the executrix, Ms. Tellier, a key to the safe deposit box, which also contained the deceased's will and trust, and some currency. After the death of Mr. McKenzie, the other key was found by Ms. Marzullo in a bureau in an upstairs bedroom of the house she shared with the deceased. She gave it to Ms. Tellier.

Ms. Marzullo also testified as to her belief that the deceased did not allow his daughters to have the coins because of legal issues that they were having in their lives. In particular, he was concerned about Triscia who had served time in jail. Ms. Marzullo told the court that based on her living with the deceased, even if the coins had been intended as a gift when the girls were younger, that Mr. McKenzie did not intend for the coins to be gifts later in life as a result of everything else he had done for his daughters.

Finally, the access card for the safe deposit box shows that Amie never accessed the box. The card shows that Mr. McKenzie accessed the box on numerous occasions

from 1998 to 2013. After the last access in 2013, the next person to access the box was Ms. Tellier under a court order in 2017 regarding the estate.

The executrix argues that the coins are the property of the estate. She cites the case law relating to gifts to support her position. Her argument is that even if there was an intention by the deceased to make a gift of the coins to his daughters, there was no completion of the actions required for a legal gift to occur.

The case law and statutes recognize two categories of gifts; those that are *inter vivos*, and those made *in causa mortis* (in expectation of death – see RSA 551:17). As none of the parties argued that the gifts were made in expectation of death, I will review the facts to determine if any *inter vivos* gifts were made by the deceased.

In *Blazo v. Cochran*, 71 N.H. 585 (1902), the Supreme Court addressed the actions required for an *inter vivos* gift. It found that “[t]he distinguishing feature of a gift *inter vivos* is that it is unconditional, and goes into immediate and absolute effect”, citing *Reed v. Spaulding*, 42 N.H. 114, 119. Therefore, “it must appear that by ... delivery the donor intended to part with all control and dominion over the property”, citing *Frazier v. Perkins*, 62 N.H. 69 (1882); *Blasdel v. Locke*, 52 N.H. 238, 243 (1872); *Emery v. Clough*, 63 N.H. 552 (1886). *Id.*

In *Reynolds v. Kenney*, 87 N.H. 313 (1935), the Supreme Court dealt with a situation involving property left in a deceased’s safe deposit box. In *Reynolds*, the decedent had a safe deposit box with envelopes inside that were marked “Property of Nellie Reynolds”. Inside the envelopes were five bonds purchased by the deceased. The evidence was that two of the bonds may have been purchased with the funds of Ms. Reynolds. However, as to the other three bonds, there was no evidence of a delivery to show the completion of an *inter vivos* gift, even though they were in envelopes marked as her property. *Id.*

In this case, there were no markings on any of the property in the safe deposit box. However, the name of one of the objecting parties, Amie McKenzie, was on the bank documents for the box. Under the bank’s policies, she could access the box on her own. Indeed, the bank considered her a joint owner of the box. Although this is a factor to consider regarding the ownership of the contents of the box, it is not dispositive since RSA 383-B:5-501(h) provides that the existence of a person’s name on a safe deposit box does not create a legal joint tenancy.

Ms. McKenzie argues that the agreement between her father and the bank when she was added to the box governs the determination of ownership in this case. She claims that because the agreement with the bank treats her as a joint owner, as between she and the estate and any heirs or legatees, she is the joint owner as well. However, I find that the agreement between the bank and those whose names are on the box is not dispositive as to the estate.

The testimony by Ms. McKenzie was that her father told her he was giving her access to the box so that after he died she could get the coins that were gifts to herself and her sister many years before. There was no evidence that he ever intended for her to be a joint owner of the box such that she would own all of the property in the box, which included both coins and currency. She never contributed anything to the assets that were in the box, and has never examined the contents of the box. The testimony of Ms. Marzullo was that the deceased did not want either of his daughters to have what was in the box, and that she believed that the money in the box could be used during Mr. McKenzie's retirement. Added to this is the fact that Ms. McKenzie did not retain a key to the box, with her father retaining control over both keys. She could not access either key unless he wanted her to have it.

In addition, in the objection to inventory filed by Ms. McKenzie and Ms. McInnis, they argue that the coins were gifts to them, and do not assert that Ms. McKenzie was a co-owner of the safe deposit box. Indeed, in paragraph 17 of the objection they specifically state that they are not seeking to establish ownership of the contents of the box based on the status of Amie McKenzie as a joint renter of the box.¹ In their final post-hearing memorandum they do make the argument that Ms. McKenzie is a co-owner of the box, but that argument is not persuasive as it is based only on the bank's paperwork. Given all of the above facts, I cannot find that Amie McKenzie was a joint owner of the safe deposit box.

The issue before me, then, is whether there is sufficient evidence to establish that the coins in the box were gifts to Amie McKenzie and Triscia McInnis. After reviewing the credible evidence before me, I find that there is insufficient evidence to establish that the deceased completed the gifts of the coins as claimed by Ms. McKenzie and Ms. McInnis. The evidence does not show that Mr. McKenzie intended to "part with all control and

¹ I note that other than signing the bank's papers, Ms. McKenzie did nothing to "rent" the box. There was no evidence that she contributed anything to the maintenance of the box, or that she had anything to do with it for the more than 15 years that her father held it prior to her being added to the bank's paperwork.

dominion over the property.” *Blazo*, supra. Instead, the evidence shows that he intended to retain control until he died.

In support of this decision I first find that there is no evidence to support any gift to Triscia McInnis other than the testimony of Amie McKenzie that their father gave them coin sets as little girls. Aside from that testimony, the evidence does not establish any effort by Mr. McKenzie to give Triscia any coins. Amie McKenzie testified that their father would take the coins out and show the girls the coins, but he never allowed them to take the coins. As I already noted, Ms. Marzullo testified that Mr. McKenzie did not want his daughters to take possession of the coins, and stated that he might use them for his own purposes during retirement.

Amie McKenzie argues that she was added to the access list and owner agreement with the bank for the safe deposit box, and she had full access to the coins. Therefore, she took delivery of the coins. However, a review of all of the facts establishes that there was no completion of any gift to Ms. McKenzie.

As I found above regarding the ownership of the box, Ms. McKenzie’s testimony was that she could not identify all of the coins that were gifts to herself and her sister. She also said that the possession of the coins was purposefully left with her father. When she became a co-signor on the safe deposit box, she did gain the ability to access the box by herself. However, she testified that her father told her not to access the box until after he died.

Moreover, she did not retain a key to the box. Instead, her father kept the keys – entrusting one key to his executrix, and keeping the other key in the home that he shared with Ms. Marzullo. Although Amie McKenzie knew where that key was located, she also knew that she was not to access the box until after her father’s death, and there is no evidence that she had the right to go into her father’s house to get the key any time that she wanted to do so.

Finally, when these facts are coupled with the credible testimony of Ms. Marzullo, I find that there could not have been a delivery to complete any gift in this matter. At any time up until his death, Mr. McKenzie could have accessed the box and used the coins for whatever purpose he deemed necessary. Ms. Marzullo’s testimony was that Mr. McKenzie put coins in the box over the time that she knew him, and the access card to the box reflects that he did access it numerous times over nearly 15 years. He may have

liquidated some of the coin sets years before his death. There is no way to determine that fact.

However, it is clear that Ms. McKenzie never accessed the box, and did not have a list or any kind of accounting of what coins were in the box, and could only tell the court that she recalled certain sets of coins from her childhood. Her testimony was vague and non-specific regarding when she last saw the coins, how many sets of coins might exist, and how she could determine which coins were hers and which ones were put in the box by her father for other purposes.

Based on these facts, I find that the property contained in the safe deposit box is the property of the estate and was properly included in the inventory filed with the court. The objection to the inventory is overruled.

May 11, 2018
Date



Judge Mark F. Weaver