

**COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY, PENNSYLVANIA
ORPHANS' COURT DIVISION**

**No. 1304 DE of 2014
Control No. 162725**

Estate of OTTO C. NAY, JR., Deceased

OPINION SUR DECREE

OVERTON, J.

Date: December 15, 2016

Before the Court is a Petition for Declaratory Judgment and Order to Turnover Assets to the Estate. A one-day trial was held on November 21, 2016 to decide the matter.

Factual Background and Procedural History schedule

Otto C. Nay died on August 21, 2012 having left a Will, dated June 12, 2012, which was admitted to probate before the Register of Wills of Philadelphia County on September 4, 2012. Decedent named his two daughters, Julie Nay and Kathleen Nay as co-executrixes of said Will. On March 1, 2015, this court removed the said executrixes after they agreed to step down. The Register of Wills of Philadelphia County granted Letters of Administration, D.B.N.C.T.A. to John Della Rocca, Esquire. The only specific bequest in said Will are as follows: "I give my Buick Regal to my daughter Kathleen Nay and my Oldsmobile to my son, Stephen Nay." After funeral expenses, administration expenses, and specific bequest, the residue of the estate goes to Stephen Nay.¹

Otto Nay Jr., Deceased



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¹ "If my son, STEPHEN NAY, survives me by thirty (30) days, I give the residue of my estate to CHRISTOPHER NAY as trustee, IN TRUST, for the benefit of my son Stephen Nay, who has mental disabilities..."

On July 29, 2016, John Della Rocca, Esquire filed a Petition for Citation for Kathleen Nay to show cause why the gold coins and precious metals should not be declared an asset of the Estate of Otto C. Nay. Petitioner alleges at Decedent's death said precious metals were located in a duffel bag in the Decedent's bedroom closet in the Decedent's home where he resided with his son, Stephen Nay, at 2757 Lardner Street, Philadelphia, PA 19149. Petitioner further alleges that Kathleen Nay and Stephen Nay removed the precious metals from the Decedent's house and deposited the precious metals into a safe deposit box at Republic Bank, 8764 Frankford Avenue, Philadelphia PA 19136. In Respondent's Answer, Kathleen Nay alleges that Decedent transferred the precious metals to her as a gift during his lifetime and the precious metals were in her possession prior to and at the time of Decedent's death.

The Court held a hearing and received testimony on November 21, 2016.

At the hearing, John Della Rocca presented one witness, Stephen Nay, son of decedent and a specific and residuary beneficiary under the Will. Mr. Nay testified that he was living with his father, the Decedent, prior to his death and that the precious metals were in a back closet at his house at the time of Decedent's death. (N.T. 11/21/16, 36:15-37:21). He testified that his father never told him nor did he hear his father speak of gifting the precious metals to Kathleen Nay. (*Id.*). He added that Kathleen did not approach him about the precious metals until after his father's death. (*Id.* at 37:22-38:4). He stated Ms. Nay asked him to take precious metals from the house and put them in a safety deposit box. (*Id.*). He stated "she [Ms. Nay] influenced me to take them out of the house to the bank, to Republic Bank." (*Id.* at 47:18-19). He stated that Ms. Nay told him to take it out of the house in case he gets robbed. (*Id.* at 47:4-8). Ms. Nay did not provide him with any documentation showing that those metals had been gifted to her by their father. (*Id.* at 38:15-21). In fact, Mr. Nay testified that Ms. Nay questioned him as to whether the precious metals belonged to him. (*Id.* at 46:19-20). The safety deposit box at the Republic Bank was opened in

Stephen and Kathleen Nay's names. (*Id.* at 45:5-46:6). He added the Republic safety deposit box was opened about two or three months after his father's death. (*Id.* at 49). About a year after they deposited the metals he went to check on the safety deposit box and the gold was gone. (*Id.* at 48:17-49:2).

Kathleen Nay testified on her own behalf. Ms. Nay testified that it was an *inter vivos* transfer from her father in May of 2012. (*Id.* at 25:23-263). Specifically, she stated she received a phone call from her father in May of 2012 asking her to come over. (*Id.* at 31:11-24). Upon arrival, she stated that her father told her to go and retrieve the precious metals from the bedroom closet and then he gave them to her. (*Id.*). Ms. Nay added that no one else was present when this occurred. (*Id.* at 34:13-17). When asked to explain why she did not remove the precious metals at that time, she stated because no one was there and there had been a prior robbery. (*Id.* at 59:10-22). Ms. Nay testified that prior to being stored in the back closet the metals were stored in her father's safety deposit box at Wells Fargo where Stephen and her father were key holders but she never had a key. (*Id.* at 34-35:4). Ms. Nay only explanation for opening a safe deposit at Republic after her father's death was that she had to store them somewhere. (*Id.* at 55:8-9).

The Last Will and Testament of Otto C. Nay and Inheritance Tax Return were moved into evidence by the Petitioner. A packet of documentation was collectively moved into evidence by the Respondent. This court held the matter under advisement.

Discussion

Petitioner requests that the Court declare that the precious metals are an asset of the Estate of Otto C. Nay, Deceased, and order Kathleen Nay to immediately turn over the said precious metals or the monetary equivalent, to the Petitioner. Respondent alleges that the precious metals were an *inter vivos* transfer from Decedent to Respondent. This court has the authority to issue

Declaratory Judgment in this matter. *42 Pa.C.S.A. § 7532.*²

A. Respondent’s testimony regarding the precious metals transfer is barred by the Dead Man’s Act

The Dead Man’s Act provides, in relevant part, as follows:

...in any civil action or proceeding, where any party to a thing or contract in action is dead, ... and his right thereto or therein has passed ... to a party on the record who represents his interest in the subject in controversy, neither any surviving or remaining party to such thing or contract, nor any other person whose interest shall be adverse to the said right of such deceased ..., shall be a competent witness to any matter occurring before the death of said party....

42 Pa. Stat. and Cons. Stat. Ann. § 5930. The rationale behind the Dead Man's Act is that the law should not permit the surviving party to testify since she could lie and attempt to testify favorably to herself and adversely to the deceased party, knowing the other party is incapable of contradicting the fallacious testimony. *In re Fiedler*, 132 A.3d 1010, 1024 (Pa. 2016). Under the Dead Man's Act three conditions must exist before the surviving party or witness is disqualified: “(1) the deceased must have had an actual right or interest in the matter at issue, *i.e.* an interest in the immediate result of the suit; (2) the interest of the witness—not simply the testimony—must be adverse; (3) a right of the deceased must have passed to a party of record who represents the deceased's interest.” *In re Hendrickson's Estate*, 130 A.2d 143, 146–47 (1957).

Here, all three conditions clearly exist. The Deceased was the owner of the precious metals. The collection was valued at \$118,465.00 on the Inheritance tax return. Upon the deceased death, the Decedent’s estate has an interest in the precious metals. Should Respondent not prevail on the

² Courts of record, within their respective jurisdictions, shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a final judgment or decree.

merits, she will have to return the precious metals to the Decedent's estate. The residue of the estate is set up to go into a trust for Decedent's son Stephen Nay. Mr. Della Rocca as administrator of the estate represents the interest of the Decedent's estate.

Under the Dead Man's rule, where there is an issue regarding the validity of an *inter vivos* gift, the court may not admit statements of decedent absent independent testimony and establishing prima facie evidence of donative intent. *Zigmantanis v. Zigmantanis*, 797 A.2d 990, 995 (Pa. Super. 2002). If the alleged donee fails to establish prima facie evidence of a gift or transfer, by independent testimony before he takes the stand, he is not competent to testify. *Id.* In *Zigmantanis*, Decedent's son failed to present independent testimony establishing prima facie evidence of decedent's donative intent, and thus dead man's rule precluded son from testifying concerning statements decedent allegedly made regarding his making of an *inter vivos* gift of real property to son. *Id.*

Here, there was no independent testimony. Mr. Nay testified that his father never told him that it was gifted or going to be gifted to his sister. (N.T. 11/21/16, 37-38). Even Ms. Nay admitted that no one else was present during this alleged transaction that resulted in the metals being gifted to her, not Stephen Nay nor Sue the housekeeper. (*Id.* at 34:13-17). The only evidence Ms. Nay put forth was a self-serving statement that the conversation took place with no corroborating evidence. Therefore, since Ms. Nay failed to produce independent evidence of the Decedent's donative intent, she is precluded from testifying about said transaction.

B. Respondent failed to establish through clear and convincing evidence that Decedent intended to give her an *inter vivos* gift.

The main controversy in this case is whether Otto C. Nay, Decedent, made a valid *inter vivos* gift of his precious metals to his daughter Kathleen Nay. The elements required to establish

a valid *inter vivos* gift are donative intent and delivery. *In re Est. of Petro*, 694 A.2d 627, 632 (Pa. Super. 1997). Initially, the burden is on the alleged donee, Kathleen Nay, to prove an *inter vivos* gift by clear, precise, and convincing evidence. In *Estate of Petro*, the decedent's daughters who were alleged beneficiaries of *inter vivos* gifts failed to produce independent testimony and therefore did not establish a prima facie case for donative intent and delivery. *Id.*

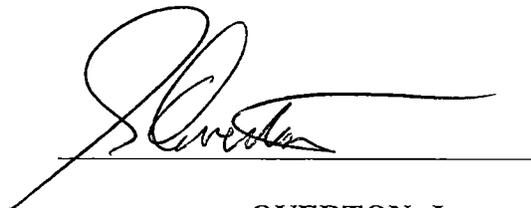
Notwithstanding the Dead Man's Act ruling discussed above, Ms. Nay failed to put forth evidence of the Decedent's donative intent and delivery. Bias is always relevant in determining the probative value of a witness's testimony and credibility. First, Ms. Nay clearly has an interest or possible bias in the matter. The precious metals were valued at \$118,465.00. (Inheritance Tax Return). Beyond the monetary value, Ms. Nay testified about being estranged from the family and of various instances of family discord. . (N.T. 11/21/16, 58).

Furthermore, Ms. Nay's testimony flies in the face of all other evidence presented. First, Decedent's Will itself makes no mention of precious metals. Ms. Nay herself admitted that much. (*Id.* at 60:15-17). The only specific bequest referenced were for two automobiles. The Will clearly states that the residue of the estate goes into a Trust for Stephen Nay. Ms. Nay's only evidence of said transfer is a self-serving statement. She readily admits no one else was present at the time of the alleged transfer. (*Id.* at 34:13-17). She presented no documentation of said gift or transfer. Ms. Nay was unable to give a specific date of the transfer other than to say it occurred in May of 2012. She did not take possession of the metals at the time of the alleged gift. (*Id.* at 59:10-22). In fact, Mr. Nay testified that Ms. Nay did not approach him about the metals until after their father passed and that she encouraged him to take them out of his own bedroom closet and to put them into a safety deposit box. (*Id.* at 37:11-13, 47:16-20). Mr. Nay stated that Ms. Nay asked him at that time whether the metals belonged to him. (*Id.* at 46:19-20). Based on the testimony, Stephen Nay had access to the original Wells Fargo safety deposit box while Ms. Nay did not. (*Id.* at 34-35:4).

It was Stephen Nay who brought said metals back home for storage upon his father's request. (*Id.* at 39). They were stored in Stephen Nay's closet. (*Id.* at 39:13-15) Aside from Ms. Nay's testimony, there is no evidence that she ever had access or possession of the metals until after the Decedent passed. Her testimony to the contrary based on the evidence of record was not credible. She had no adequate explanation for why she did not take possession of the metals immediately after they were gifted or why she waited until months after her father's death to put them in a safety deposit box.

Conclusion

Based on the testimony and credible evidence of record, this Court hereby grants the Petitioner's request for a Declaratory Judgment as it finds Petitioner established by clear, convincing evidence that the precious metals are part of Decedent's estate. Moreover, the Respondent failed to introduce independent evidence that the Decedent intended to give his precious metals to her. The Court finds Kathleen Nay's testimony regarding the gifting or transfer of the precious metal not credible. Because she has not met this burden, the Dead Man's Act precludes her testimony about her father's intent regarding these assets. Accordingly, this court declares that the precious metals are an asset of the Estate of Otto C. Nay, deceased. The grant of said request is set forth in a separately issued decree which will bear even date with this Opinion.



OVERTON, J.