

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-206339

DATE: January 17, 1983

MATTER OF: Estate of William A. Sixbury—Claim for Proceeds
of Unpaid Treasury Checks

DIGEST: Claimants assert entitlement to proceeds of 13 Treasury checks issued in 1936 and 1937. Original payee died in 1954. Payee had indorsed one check incident to unsuccessful attempt to negotiate it in 1939, but other 12 were unindorsed. Checks were found among personal effects of payee's nephew, who was not a legatee under payee's will and who died in 1979. Claimants are heirs of nephew. Mere fact of possession does not establish inter vivos gift or other basis of entitlement, and record contains no evidence of delivery of checks by payee to nephew. Therefore, GAO finds no basis to allow claim, under either Uniform Commercial Code or relevant state law.

This is a claim for the proceeds of 13 Treasury checks issued in 1936 and 1937. The claimants allege that the checks were a gift from the payee to his nephew and that the nephew subsequently died and left the checks to them. The matter has been referred to our Office by the Department of the Treasury pursuant to 31 U.S.C. § 3328(a)(1) (formerly 31 U.S.C. § 132(a)), which provides that where a doubtful question of law or fact exists regarding the presentation of a United States Treasury check for payment, "the Secretary [of the Treasury] shall defer payment until the Comptroller General settles the question." The doubtful question in this matter is whether the named payee transferred or delivered the checks to his nephew with intent to make a gift, or whether the facts of this case are otherwise legally adequate to permit payment. We conclude that there is insufficient evidence to allow payment of the proceeds to these claimants.

Between June 1936 and August 1937, the Treasury Department issued 13 Treasury checks totalling \$18,828.97 to George T. Howeth, a gold dealer in Syracuse, New York. Each check bore the notation that it was issued for "bullion". Except for one unsuccessful attempt by Mr. Howeth to cash one of the checks in 1939, no claim was made on any of the checks until February 1980, when the Treasury Department was informed that the checks (12 of which were not indorsed by Mr. Howeth) had been found among the personal effects of a Mr. William A. Sixbury, of Syracuse, New York, who was the nephew of Mr. Howeth, but not a legatee under Mr. Howeth's will. Mr. Sixbury died in 1979. The claimants in the case, Harry J. Snyder and Mary Snyder, are the residuary legatees of Mr. Sixbury's estate.

024404

Few facts are known beyond those stated above. Mr. Howeth did not mention the checks in his will. His entire estate was left to his wife, Lucy Howeth, who died in 1956. She in turn left her estate to her brother, Harry J. McCarthy, Sr., who died in 1963. Mr. McCarthy's estate, with the exception of one specific bequest to his son, Harry, Jr., was left to his wife Agnes F. McCarthy.

The will of Mr. Sixbury similarly does not mention the checks or how he gained possession of them.

The claimants have argued that the checks must have been a gift from Mr. Howeth to Mr. Sixbury. However, they have presented no evidence of this. Both Mr. Sixbury and Mr. Howeth are dead, and the residual heirs of Mr. Howeth, Agnes McCarthy and Harry McCarthy, Jr., have not been located. Thus, there is no way for us to ascertain how Mr. Sixbury gained possession of the Treasury checks which were payable to Mr. Howeth.

Analysis

Federal law rather than state law governs the rights and duties of the United States on commercial paper that it issues. To hold otherwise would cause an undue diversity in results "by making identical transactions subject to the vagaries of the laws of the several states." Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1942). More specifically, our Office has held that the Government should follow the Uniform Commercial Code (UCC) "to the maximum extent practicable in the interest of uniformity where not inconsistent with Federal interest, law or court decisions." 51 Comp. Gen. 668, 670 (1972).

Under the UCC, the rights of a person in possession of an instrument depend largely on whether that person qualifies as a "holder." If the person is a "holder," he may negotiate the instrument and enforce payment in his own name. UCC § 3-301. Mere production of the instrument is sufficient, and a party asserting a defense has the burden of proving it. UCC § 3-307 and Comment 1 thereto.

With respect to an "order" instrument (all of the checks in question are order instruments), status as a holder requires both delivery and indorsement. UCC § 3-202. Without indorsement, a transferee of an order instrument is not a holder. See UCC § 3-201, Comment 8. Mere possession of the instrument does not suffice. With respect to the 12 unindorsed checks, therefore, Mr. Sixbury could not be viewed as a "holder," nor can his heirs. Without the status and rights of a holder, the "person in possession of an instrument must prove his right to it and account for the absence of

any necessary indorsement." UCC § 3-307, Comment 2. See also UCC § 3-201, Comment 8. Since there is no indorsement and no evidence of delivery by Mr. Howeth to Mr. Sixbury, the UCC would appear to preclude recovery.

With respect to the one check that was indorsed by Mr. Howeth, claimants argue that Mr. Sixbury became a holder and that the executors of his estate acquired this status. However, the record shows that the indorsement was incident to an attempt by Mr. Howeth to negotiate the check, and not to any transfer of the check to Mr. Sixbury. The check in question was dated September 14, 1936. Mr. Howeth indorsed it pursuant to an attempt to negotiate it in January 1939. Under the law in effect at that time, Government checks generally had to be negotiated by the end of the fiscal year following the fiscal year in which they were issued. 31 U.S.C. § 725t (1934 ed.). After that time, negotiation required settlement by the General Accounting Office and the issuance of a substitute check.^{1/} The check in question was returned to Mr. Howeth unpaid because he had exceeded the time limit, and he apparently made no further attempts (nor did Mr. Sixbury) to negotiate it or any of the other 12 checks. Thus, the record contradicts any inference that the indorsement on the September 14 check bore any relationship to a transfer to Mr. Sixbury. As with the other 12 checks, there is no evidence of delivery and therefore no basis for recovery.

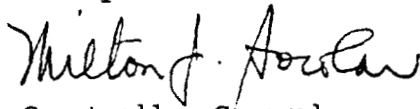
Claimants in this case can recover only if the mere fact of possession is sufficient to establish an entitlement or perhaps to create the presumption of a gift. As seen above, the UCC does not provide the basis for recovery.

To determine whether the checks in Mr. Sixbury's possession were a gift, we also turned to New York law for guidance. Under New York law, the essential elements of an inter vivos gift are (1) delivery of the property by the donor to the donee, (2) intent to pass title, and (3) acceptance by the donee. See First National Bank of Lockhaven v. Fitzpatrick, 289 N.Y.S. 2d 314, 320 (1968). The law never presumes a gift. Rabinof v. United States, 329 F. Supp. 830, 839 (S.D. N.Y. 1971). All three facts, but especially the first two, should be proven. The burden of proving a gift is upon those claiming it, and the evidence or proof must be clear and convincing.

^{1/} Now, with certain exceptions, Treasury checks may be negotiated without time limit. 31 U.S.C. § 3328 (formerly 31 U.S.C. § 132).

Based on the record in this case, we have no evidence as to any of the essential elements. The claimants know only that the checks were found with Mr. Sixbury's personal effects after his death. From this information, we cannot assume that delivery took place, that Mr. Howeth had donative intent, or that Mr. Sixbury accepted the gift sometime between 1937 and 1954, the year of Mr. Howeth's death. Possession by one claiming property as a gift is insufficient to prove a valid gift. Duboff v. Duboff, 186 N.Y.S. 2d 760 (1959); accord, In Re Hackenbroch's Estate, 182 N.E. 2d 375, 377 (D. Ill., 1962).

In conclusion, we fail to find evidence of either the proper requirements for the transfer of the negotiable instruments or of the essential elements of a gift. Therefore, on the facts presented, we determine that there is no basis for the Treasury Department to make payment to Mr. and Mrs. Snyder.

for 
Comptroller General
of the United States