

**IN THE COURT OF COMMON PLEAS
PROBATE DIVISION
CLARK COUNTY, OHIO**

IN THE MATTER OF : CASE NO. 20130007
THE ESTATE OF :
THERESA J. PRESTON : **ENTRY**

This matter came before the Court for rehearing on May 29, 2013, pursuant to this Court's Order of April 22, 2013, to consider the issue of whether the document purported to be the Last Will and Testament of Theresa Preston should be treated as being in compliance with R.C. 2107.03 for purposes of its admission to probate. The Court finds that all appropriate persons were served with notice of this hearing. The Court further notes that it received the testimony of several witnesses and several exhibits etc. herein which the Court has carefully reviewed before rendering the following decision, to-wit:

The decedent, Theresa Preston and her husband, Jimmie Preston, caused to be prepared documents, marked as Exhibits A and B, which they intended to serve as their Wills. With this intention, and on November 4, 2008, each signed their respective Will in the presence of Nancy Brackett, a Notary Public, who then acknowledged and signed the same. No other person, however, signed as a witness to these documents. Jimmie Preston thereafter died. Subsequently, Theresa Preston died December 6, 2012.

The Applicant, Richard Potts, now seeks admission to Probate of Theresa Preston's Last Will and Testament despite the fact that only one person --- Nancy Brackett --- signed as a witness. This is in contravention to R.C. 2107.03, which requires two witnesses to sign a Will. In all other respects, however, the Will appears to be in statutory compliance.

The sole issue of import before this Court, then, is whether this Last Will and Testament should be treated as being in compliance, nevertheless, and pursuant to R.C. 2107.24, for the reason that

Theresa Preston executed the same in the “conscious presence of two or more witnesses” --- even though only one witness signed. More specifically, the question at bar is whether Theresa Preston executed in the conscious presence of her husband, Jimmie Preston. Should the Court find that Jimmie Preston was indeed present at the time of the execution of Theresa Preston’s Will, the document marked as Exhibit A may properly be admitted into probate. On the other hand, should the Court not be able to make that finding, then the document marked Exhibit A cannot be admitted to probate.

As to this singular issue, the parties acknowledge that only Nancy Brackett is in a position to shed light on the execution of Ms. Preston’s Will as she is the only living witness to the same. In her prior testimony at the January, 2013 hearing, Nancy Brackett testified that she was “very sure” that Theresa and Jimmie Preston came into her office together and signed the documents together. Indeed, Ms. Brackett testified that she was “convinced that they signed these documents together.” Thus, the Court’s prior decision to admit the Will, subsequently set aside for other reasons.

Upon examination by Attorney Kavanagh at the May 29th hearing, however, Nancy Brackett testified that she had no recollection of the event. Indeed, Ms. Brackett conceded that it is “possible” that the Prestons signed the documents separately and not in each other’s presence. Under examination by Attorney Harkins, Ms. Brackett clarified that while it was possible that the two signed the documents separately, she is not inclined to believe that they did so. She explained that she would have thought something unusual about the execution of the documents had they come separately. Ms. Brackett then “reaffirmed” her January testimony. Thus Ms. Brackett concluded that while she lacked a clear recollection of the event she believes that when Theresa Preston executed her last Will that she did so in the presence of her then spouse, Jimmie Preston.

There is some circumstantial evidence to support this belief. Exhibit B --- the Last Will of Jimmie Preston --- is reciprocal in nature and was executed on the same day and likewise acknowledged

and witnessed by Nancy Brackett. Additionally the acknowledgement signed by Ms. Brackett refers to the signing of Ms. Preston's Will "in our presence and signed by us at her request, and in her presence, and in the presence of each other on the day and year last above written." Finally, Ms. Brackett and the Prestons worked together for several years such that Ms. Brackett would normally have expected them to come into her office together to have signed these documents.

After due consideration, the Court is inclined to believe that Jimmie Preston *probably* was consciously present when Theresa Preston executed her Last Will and Testament. Indeed, it is *likely* that he was present. However, the law binds the Court to a higher standard. That is to say that the evidence must be "clear and convincing" that Jimmie Preston was present during the execution of the Will. Another way of saying this, per the Ohio jury instructions definition, is that the Court must come to a "firm belief" or "conviction" that Jimmie Preston was present. This, the Court cannot do based on the evidence presented herein.

Clearly Nancy Brackett would like to definitively testify that she remembers Jimmie Preston being present during the signing of the Will. Unfortunately, she has no clear recollection of the event. Consequently, she is left to testify about what she is sure to have *probably* been the case. The Court needs more than this. R.C. 2107.24, enacted July 20, 2006, carved a very narrow exception to the longstanding rule in Ohio that two witness signatures are necessary to validate a Will. The Court believes this exception to the rule, then, should be strictly construed to demand more than *probabilities* and *likelihood*. Thus, the language "clear and convincing."

In the case at hand, the Court is left with nothing more than probabilities and likelihood. The sole witness of import can afford the Court nothing more than her own conjecture, insofar as she concedes no specific recollection of the event. This simply is not enough to pass the threshold of R.C. 2107.24.

For the foregoing reasons, the Court now finds that the Last Will and Testament of Theresa Preston as marked Exhibit A fails to comply with the statutory requirement of R.C. 2107.03 that there be two witnesses and two signatures to the execution of a Will. For this reason, this document shall not be admitted into probate for purpose of the administration of this estate.

This is a Final Appealable Order.

IT IS SO ORDERED.

RICHARD P. CAREY, PROBATE JUDGE

cc: Kenneth Elder, Esq.
Paul Kavanagh, Esq.
Daniel Harkins, Esq.
Theresa E. Rape
Mary Travis
St. Joseph Catholic Church
Linda West
Diane Alsip
Michelle West
Angel West Sheppard
Joshua Courson
Kelly Preston
Ashley Rape Wilson
Taylor Rape Holmes
Cathy McLendon Alexander
Cheryl McLendon Click
Dylan Rape
Deborah Potts O'Neal
Richard K. Potts