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

IN THE MATTER OF	:	CASE NO. 20200008
THE ESTATE OF		
VICKI L. McCUREAY aka etc.	:	**ENTRY**

This matter came on for hearing on January 12, 2021 to consider whether a particular writing should be considered to be the valid Last Will and Testament of Vicki McCureay. The Court received the writing, marked as Exhibit 1, as well as the testimony of two witnesses, and the arguments of Attorneys Louis Valencia, Paul Kavanagh and James Heath. Some history.

Vicki McCureay, the decedent herein, died November 19, 2019. An Application for Authority to Administer her estate was filed on January 6, 2020 by Attorney James Heath. In said Application, it was represented to the Court that to the applicant's knowledge, "decedent did not leave a Will." Letters of Authority issued to Attorney Heath to serve as the Administrator of the estate on that date. On October 7, 2020 an Inventory was filed describing a parcel of real estate located in New Carlisle as the principal asset. Subsequently, this property was transferred from the estate and sold.

On November 13, 2020, Attorney Louis Valencia II filed a motion "producing proof of Will" on behalf of two individuals described to be beneficiaries thereunder, to-wit: Jose Francisco Alvarez Diaz and Maria De la Luz Espinosa. The two beneficiaries alleged therein that the decedent died testate and that they were the rightful beneficiaries under the decedent's Last Will and Testament. In support thereof, the beneficiaries tendered to the Court a copy of a photographic duplicate of a writing purported

to be the decedent's Will --- the aforementioned Exhibit 1. Said Exhibit reveals handwriting on what appears to be an 8" x 10" piece of paper which reads as follows:

> "I, Vickie McCureay, March 20, 2019, am gifting my house, garage, hot tub, and all contents to Jose & Maria Alvarez and family. – 543-7451 Any money should go to Debbie Brubaker, Georgia Shaw – split equally SS#-5285 SS#9098 my truck to Philip Spurs Thank you"

This writing then appears to have a subscription by "Vickie L McCureay", followed by the words, "I witnessed this signing" followed by two apparent signatures: "Victoria J Portner" and "Cathleen G Marshall."[1]

At the January 12th hearing, in addition to Exhibit 1, the Court received the testimony of Cathleen Marshall and Victoria Portner. The testimony established that both of these witnesses worked in the New Carlisle City Water Department and that both signed the writing after Vicki McCureay signed her name to this paper. The testimony was that the nature of the document was never discussed; but that all three individuals signed this paper in each other's presence. Cathleen Marshall believes that the date written on said Exhibit, to-wit: March 20, 2018, could well have been the date that their signatures were affixed --- though she could not recall the precise date. Neither witness knew what became of the paper after they signed the same. Cathleen Marshall observed no coercion and believed the decedent to be competent.

As represented to the Court, the paper in question was in the possession of the decedent's son, Andrew Bowsman. He acknowledged, by an Affidavit penned prior to hearing, that he had possession of the same at the time of the decedent's death. He referred to it not as a Will but as the "incomplete gift paper." Per said Affidavit, this paper was reviewed by Attorney Heath who concluded that it was not a Will. To that end, the estate was considered to be intestate.

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[1] A copy of this Exhibit is attached to this Decision for reference.

R.C. Section 2107.03 sets forth the requirements for a Will to be valid. Except for an oral Will, every Will must be handwritten or typewritten. The Will must be signed at the end by the testator. And the Will must be attested and subscribed in the conscious presence of the testator by two or more competent witnesses who saw the testator sign his or her name to the Will.

Movants contend that this is what we find with the writing in Exhibit 1, to-wit: the Exhibit is handwritten, signed at the end by the decedent, and witnessed by two competent witnesses who observed the decedent sign the document and signed in the decedent's and in each other's presence.

The inquiry, however, does not end there. These same features could readily be found in a number of other documents of legal import. Transfers of real estate, inter vivos gifts, and powers of attorney could all be executed in the same manner. And so the question at bar: Does execution of a document which comports with R.C. Section 2107.03 alone determine if a document is a Last Will and Testament. Unfortunately, the Revised Code affords no answer to this question: "Last Will and Testament" is not defined therein. Rather we must look to the common law.

It was the appellate court in *In Re Estate of Ike* 7 Ohio Ap. 3rd 87 (1982) which echoed another court's sentiment that "in order to construe the instrument as a Will it must operate only and by reason of the death of the maker…" That is to say that it must be testamentary in nature. Probate courts, accordingly, examine a document to insure proper execution to be sure, but also to discern whether there is a testamentary intent revealed in the document itself. By that is meant that the court looks to see if there is a disposition of property to take effect upon the death of the owner of the property. It is the presence of a testamentary intent which distinguishes a Last Will and Testament from any other legal document. This has been the case even absent a specific statutory requirement regarding testamentary intent. While it may seem unusual that R.C. Chapter 2107 does not specifically speak in terms of a

requirement of the testamentary character of a writing, the same has, nevertheless, long been part and parcel of our American juris prudence. See, for instance, *79 American Juris Prudence 2nd 276-277, Wills, Section 6*, which states:

> "testamentary character, no less than execution in accordance with the requirements of the law, is requisite to the existence of a valid Will. An instrument which accomplishes nothing of a testamentary character is not a Will, even though it may purport to be such an instrument and be executed with all the testamentary formalities. An instrument is testamentary in character, where from the language used, it is apparent that the writer intended to make disposition of his property, or some part thereof, to be effective at his death …"

This Court finds no such intention manifested on the face of the document in question. To the contrary, the words in Exhibit 1 are written in the present tense: "I… am gifting…" There is no mention of the death of the testator. There is no writing found in the document describing it as a "Last Will and Testament". Nor are there any of the other earmarks commonly found in Wills: no suggestion of the testamentary capacity of the decedent; no mention of a person to serve as the executor for the decedent's estate; no mention of the decedent's heirs; no future contingencies or residuums contemplated. Indeed the writing speaks in terms of a gift, and not of a Will.

So while the writing in Exhibit 1 may well have been executed pursuant to R.C. 2107.03, it lacked any and all indicia of a testamentary intent. For this reason, the Court cannot accept Exhibit 1 as the Last Will and Testament of Vickie L. McCureay for purposes of probating the same in this case.

IT IS SO ORDERED.

THIS IS A FINAL APPEALABLE ORDER.

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RICHARD P. CAREY, PROBATE JUDGE

cc: James Heath, Esq.

Louis E. Valencia II, Esq.
Paul J. Kavanagh, Esq.