

By Ray J. Koenig III and Adam S. Kornblatt

Suppose your client was left out of a will – does she have standing to contest it? This article discusses the question, taking a special look at a conflict in the appellate court over when a legatee under an earlier version of the will constitutes an “interested party” and thus has standing.

Disappointed Would-Be Legatees: Who Has Standing to Contest a Will?

Most estate-planning attorneys have encountered their share of clients who thought they would be named in a will but were completely excluded or received less than expected. Not surprisingly, many disappointed would-be legatees seek to contest the will. Under what circumstances do they have standing to do so?

To petition to contest a will, the disappointed person must 1) allege that when the will was executed the testator lacked the requisite testamentary capacity or was under the undue influence of a third party and 2) be an “interested person.”

This article discusses who is an “interested person” with standing to file a will contest. Illinois law, including a recent Illinois Supreme Court case, is

generally clear about what makes an individual or entity “interested.” However, courts have issued con-

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flicting rulings about when a legatee under a will executed prior to the will in question is an interested party.

"Interested person": the Probate Act's broad definition

The Illinois Probate Act allows any "interested person" to file a petition to contest the validity of a will within six months after its admission to probate.¹ "Interested person" in relation to any particular action, power or proceeding under [the Probate] Act means 'one who has or represents a financial interest, property right or fiduciary status at the time of reference which may be affected by the action, power or proceeding involved....'"² Interested person includes "without limitation an heir, legatee, creditor, person entitled to a spouse's or child's award and the representative" of the estate.³

Heirs always have standing

An heir is a person who by statute would inherit from a decedent who died intestate (without a will).⁴ In *In re Estate of Schlenker*, the decedent executed four separate wills prior to his death.⁵ Petitioner, daughter of the decedent, was excluded as a legatee from all four of decedent's wills.⁶ She filed a petition contesting the will admitted to probate alleging that her father lacked mental capacity to execute that will and that her brother exerted undue influence over her father.⁷

The executor moved to dismiss, arguing that the petitioner lacked standing because she would not benefit if the probated will was invalidated because she was not a legatee under the immediately prior will, much less the two executed before it.⁸ He argued that she would become an interested person only if the last three wills were invalidated and the estate passed by intestacy.⁹ The trial court granted the motion to dismiss.¹⁰

The appellate court reversed, holding that the petitioner had standing as an heir.¹¹ The fact that there were multiple wills disinheriting the daughter was irrelevant because, very simply, as an heir, she satisfied the statutory definition of an "interested person."¹² The definition of interested person in the Probate Act expressly includes the term heir.¹³ Thus, heirs always have standing to contest as a matter of law.¹⁴

The conflict over legatees under prior wills

Under Illinois law, non-heir legatees under a will executed prior to the testator's final will are "interested persons" if they have a "direct, pecuniary, existing interest which would have been detrimentally affected by the probate" of the final will.¹⁵ Appellate cases from the first and third districts conflict over the definition of "prior will" for the purpose of determining whether a legatee has standing to contest a will.

In 1988, the third district decided in the *Estate of Keener* that a legatee has standing as an "interested person" only if he was a named legatee in the will executed immediately prior to the contested will.¹⁶ In 1992, however, in the *Estate of Malcolm*, the first district held that a legatee is an "interested person" if he was a legatee under any prior will.¹⁷ The remainder of this article addresses that conflict, which has not yet been addressed by the Illinois Supreme Court or the other districts.

The Keener standard. In *Keener*, the contest petitioner was a named legatee of one will but was excluded as a legatee in the next four wills, including the final one admitted to probate.¹⁸ The trial court dismissed the petition to contest, concluding that the petitioner was not an interested person and lacked standing to contest the will.¹⁹

The appellate court affirmed, defining an interested person as one who would "inherit if the contested will [was] set aside."²⁰ The court decided that granting standing to each legatee under any prior will, no matter how remote from the will under probate, would "conflict with the orderly administration of estates" because the contestant would have to prove the invalidity of all intervening wills, a lengthy, repetitious process.²¹ (The court reasoned that an interested person may not contest a will until it is admitted to probate, and when one will is deemed invalid, the immediately prior will is typically admitted to probate. At that point, a new will contest would have to be filed. Each prior will would have to be contested in this manner.)

Malcolm adopts the Keener dissent. Four years after *Keener*, the first district faced a similar issue in *Malcolm*. The

contest petitioners were named legatees in three consecutive wills.²² They were to receive the same amounts under the second and third wills, but a much larger amount under the first.²³

The petitioners contested the validity of the last will based only on undue influ-

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ence.²⁴ The trial court reluctantly followed *Keener* and dismissed the petitioners' will contest, ruling that the petitioners were not interested persons because they would receive the same benefit, and no increase in legacy, under the second will if the third will was found invalid.²⁵ The first district appellate court declined to follow the third district's majority decision in *Keener*, instead adopting the logic of the *Keener* dissent.²⁶

The dissent in *Keener* used a broader definition of "prior" than did the majority in relation to a prior will.²⁷ Per the dissent, "prior" does not just mean "immediately preceding," but rather any that

1. 755 ILCS 5/8-1(a)

2. 755 ILCS 5/1-2.11

3. *Id.*

4. *In re Estate of Schlenker*, 209 Ill 2d 456, 462, 808 NE2d 995, 999 (2004).

5. *Id.* at 458-59, 808 NE2d at 997.

6. *Id.*

7. *Id.*

8. *Id.* at 459-60, 808 NE2d at 997.

9. *Id.* at 460, 808 NE2d at 997-98.

10. *Id.* at 460, 808 NE2d at 998.

11. *Id.*

12. *Id.*

13. 755 ILCS 5/1-2.11

14. *Schlenker* at 464-65, 808 NE2d at 1000.

15. *Kelly v First State Bank of Princeton*, 81 Ill App 3d 402, 413, 401 NE2d 247, 255 (3d D 1980).

16. 167 Ill App 3d 270, 271-72, 521 NE2d 232, 234 (3d D 1988).

17. 234 Ill App 3d 962, 964-65, 602 NE2d 41, 43 (1st D 1992).

18. *Keener* at 271, 521 NE2d at 233.

19. *Id.*

20. *Id.* at 271-72, 521 NE2d at 234.

21. *Id.* at 272, 521 NE2d at 234.

22. *Malcolm* at 963, 602 NE2d at 42.

23. *Id.*

24. *Id.*

25. *Id.* at 964, 602 NE2d at 43.

26. *Id.* at 966, 602 NE2d at 44.

27. *Keener* at 273-74, 521 NE2d at 235 (Heiple dissenting).

came before the last.²⁸ The *Keener* dissent concluded that a legatee is an interested person if his or her interest is detrimentally affected by the probate of the last

commit fraud without legal consequence. By allowing only legatees named in the immediately preceding will to contest the final will, the *Keener* majority established a roadmap for people who wish to commit fraud and take advantage of a testator. These unscrupulous individuals could exert undue influence over the testator and have the testator execute two wills subsequent to the original will, neither of which would name the testator's intended beneficiaries.

colm rule should be adopted statewide. The *Malcolm* court stated that "fraud should never be insulated from the reach of the court because the court may have more work to do to detect and correct the fraud."³¹ Justice Garman, concurring in *Schlenker*, stated "the will contest provisions of the Probate Act should not be interpreted in a way that would work to protect fraud."³²

In addition, the *Malcolm* rule should be extended beyond contests alleging only undue influence to apply to will contests based on lack of testamentary capacity. It is even easier for an individual who wishes to commit fraud to do so against a testator lacking capacity. Those testators deserve our greatest efforts to protect them. ■

28. *Id.* at 274, 521 NE2d at 235.

29. *Id.*

30. *Id.*

31. *Malcolm* at 966, 602 NE2d at 41.

32. *Schlenker* at 470, 808 NE2d at 1003 (Garman concurring).

By allowing only legatees named in the immediately preceding will to contest the final, probated version, the *Keener* majority established a roadmap for fraud.

will "whether or not there are intervening wills between the will naming the plaintiff as a beneficiary and the will sought to be probated."²⁹ The *Keener* dissent reasoned that to refuse standing to a legatee would effectively allow parties to commit fraud.³⁰

Blueprint for fraud? The first district adopted and applied this reasoning in *Malcolm*, highlighting how the *Keener* majority rule provided a blueprint to

Under the *Keener* majority rule, the testator's true intended beneficiaries would not be interested persons and therefore could not contest the third and final will. The result is law that protects parties engaged in fraudulent activity and further victimizes vulnerable testators, simply to promote the efficiency of estate administration.

The conflict needs to be addressed and, as a matter of public policy, the *Mal-*