

COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE

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Final Report: October 23, 2017  
Draft Report: October 6, 2017  
Date Submitted: July 26, 2017

*via U.S. Mail & FSX*

Ms. Irene E. Kessler-Millius  
43 North Fawn Drive  
Newark, DE 19711

Mr. Alan H. Paikin  
13 Deer Run  
Newark, DE 19711

Mr. Steven M. Paikin  
1100 Lovering Avenue, Apt. 306  
Wilmington, DE 19806

Re: *IMO the Will of Lillian P. Kessler*  
C.A. No. 12852-MZ

Dear Ms. Kessler-Millus and Messrs. Paikin:

In this estate matter, the decedent, Lillian P. Kessler, was the second wife of Paul E. Kessler. Petitioner Irene E. Kessler-Millius is Paul's daughter by his first marriage.<sup>1</sup> Lillian had two sons by her first marriage, Alan Paikin and Steven Paikin, who are co-executors of Lillian's estate (collectively, "the Co-Executors").

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<sup>1</sup> In this blended family dispute, I use first names in pursuit of clarity. I intend no disrespect.

Paul died testate in October, 1987. Lillian died testate on October 30, 2015, with a will dated April 14, 2014. Pending before me is the Co-Executors' motion to dismiss Irene's petition. For the reasons that follow, I recommend the Court grant the motion.

### **I. Background<sup>2</sup>**

Lillian's will was admitted to probate on December 4, 2015. The will gave a mink coat to Louise Hetrick, and left the remainder of Lillian's estate to the Co-Executors, or to the Danielle Rose Paikin Foundation if the Co-Executors did not survive Lillian. The inventory filed on February 22, 2016, listed a condominium, \$340 in a checking account, and personal property including the mink coat, furniture, and jewelry valued at \$8,200.00. On February 23, 2016, Irene filed a claim for \$10,000 against Lillian's estate based on a first codicil to Paul's will. That codicil states that if Lillian survived Paul, Lillian would receive Paul's entire estate; if Lillian did not survive Paul, Irene should receive \$10,000 and the

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<sup>2</sup> In deciding a motion to dismiss, this Court is generally limited to the factual allegations contained in the complaint, the documents integral to the complaint, and those matters as to which the Court may take judicial notice under Delaware Uniform Rules of Evidence Rules 201 and 202. *Metropolitan Life Ins. Co. v. Tremont Group Holdings, Inc.*, 2012 WL 6632681, at \*12 (Del. Ch. Dec. 20, 2012). Irene's Petition stated it attached Lillian's "purported will" dated April 14, 2014, but the will was not attached. *See* Docket Item 1. Because the Register of Wills is a Clerk of the Court of Chancery, 12 *Del. C.* § 2501, I take judicial notice of that office's records. *Del. R. Evid.* 202(d)(1)(B). I consider Lillian's will to be integral to Irene's claim and incorporated into it, and therefore consider it, sourced from the Register of Wills docket. *Estate of Lillian P. Kessler*, Folio No. 162713, Docket Item 4.

remainder of Paul's estate should be distributed among the Co-Executors and Irene.<sup>3</sup> Lillian survived Paul. The Co-Executors rejected Irene's claim on September 2, 2016, and on September 23, 2016, the Register of Wills informed Irene of the statutory process for further pursuing her claim.<sup>4</sup>

The First and Final Accounting filed on September 3, 2016, indicated \$8,540 in probate assets and \$2,919.89 in contributions by the Co-Executors to pay for Lillian's funeral expenses. In other words, there were no funds to distribute to any beneficiaries. The Register of Wills approved that accounting and closed the estate on December 3, 2016.

On October 26, 2016, Irene filed a *pro se* "Petition for Review of Proof of Legality of Will" in this Court. Irene's Petition challenges the validity of Lillian's will, Paul's will, the contents and distribution of Paul's estate, and the circumstances of Paul's divorce from Irene's mother and remarriage to Lillian. Irene alleges Paul's June 1987 will and codicil gave Irene \$10,000 and gave the remainder of Paul's estate to Lillian.

On November 1, 2016, the Co-Executors filed a *pro se* response to Irene's Petition, requesting the Petition be dismissed. Irene responded on April 19, 2017. I referred the parties to mandatory mediation, but mediation was unsuccessful. On

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<sup>3</sup> Ans. Ex.

<sup>4</sup> See 12 Del. C. § 1202(c).

July 11, 2017, the Co-Executors filed a *pro se* motion to dismiss for failure to state a claim. Irene responded on July 26, 2017. I issued a draft report on the Co-Executors' motion on October 6, 2017. No party took exception. This is my final report.

## II. Analysis

Irene's Petition claims Lillian's will is invalid, alleging one of the witnesses to the will told Irene that he did not know and had never met Lillian and did not sign any papers dealing with her will. Irene's claim against Lillian's will fails for lack of standing.

"This Court has an independent obligation to consider whether it can properly exercise jurisdiction over a matter, regardless of whether the issue has been raised by the parties."<sup>5</sup> A party seeking to invoke the jurisdiction of a court bears the burden of establishing standing to sue.<sup>6</sup> "Standing is a threshold question, and, because standing is jurisdictional in nature, the Court may raise it *sua sponte*."<sup>7</sup> The right of review of a will is limited to "interested" persons.<sup>8</sup> "An 'interested person' is one who has a pecuniary interest in the estate of an alleged

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<sup>5</sup> *In re Pantalone*, 2011 WL 6357794, at \*2 (Del. Ch. Dec. 9, 2011) (internal quotation omitted) (citing Ct. Ch. R. 12(h)(3)).

<sup>6</sup> *Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1109 (Del. 2003).

<sup>7</sup> *In re Pantalone*, 2011 WL 6357794 at \*2 (quoting *Thornton v. Bernard Techs., Inc.*, 2009 WL 426179, at \*4 (Del. Ch. Feb. 20, 2009)).

<sup>8</sup> 12 *Del. C.* § 1309.

testator which will be defeated or impaired if the instrument in question is held to be a valid will.”<sup>9</sup>

Irene is not a beneficiary of Lillian’s estate, either pursuant to her will or if she had passed intestate.<sup>10</sup> Irene suffers no injury from the will’s admission to probate. Irene’s \$10,000 claim against Lillian’s estate is based on Paul’s will and codicil, not Lillian’s; it does not depend on the validity of Lillian’s will. “[I]t appearing from the proof that the entire estate of the testatrix was disposed of and that the caveator received nothing thereunder, it is impossible to see upon what theory the caveator had any standing before the Register to resist the probate, or here to prosecute an appeal.”<sup>11</sup> In other words: because there are no circumstances under which Irene would inherit from Lillian, and because Irene’s claim does not depend on the validity of Lillian’s will, Irene has no standing to contest Lillian’s will. Irene’s Petition seeking to invalidate Lillian’s will must be dismissed.

Irene’s Petition also takes issue with Paul’s will. An action to seek review of a will must be brought within six months after the entry of the order of probate.<sup>12</sup> Paul died on October 3, 1987, and the Register of Wills granted Lillian

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<sup>9</sup> *In re Estate of Tollin*, 1983 WL 103265, at \*3 (Del. Ch. Aug. 4, 1983) (citing *Conner v. Brown*, 3 A.2d 64 (Del. Super. 1938)); accord, *McCarty v. McCarty*, 2014 WL 1995013, at \*1 (Del. Ch. May 15, 2014).

<sup>10</sup> See 12 *Del. C.* § 503(1). Irene is Lillian’s stepdaughter. If Lillian had died intestate, her entire estate would pass to Lillian’s issue per stirpes, *i.e.*, the Co-Executors.

<sup>11</sup> *Conner*, 3 A.2d at 74.

<sup>12</sup> 12 *Del. C.* § 1309(a).

authority to act as personal representative on October 19, 1987; I infer the order of probate was entered around that time.<sup>13</sup> Irene alleges that she did not contest Paul's will until now, thirty years later, because Lillian misrepresented that there were no funds in Paul's estate. Irene's excuses are unavailing. "Delaware courts strictly construe the requirement that a petition for review of a will be filed in a timely manner under Section 1309(a), because it reflects a special public policy in favor of prompt settlement of decedents' estates."<sup>14</sup> "[E]ven fraud does not toll a statute which limits challenges to the validity of a will."<sup>15</sup>

To the extent Irene is seeking relief from Lillian's estate for fraud or breach of contract by Lillian while alive, such as failure to maintain gravesites or misappropriating Paul's property or funds, those claims are also untimely. Claims against a decedent's estate that arose before the death of the decedent are barred unless presented within eight months of the decedent's death.<sup>16</sup> Lillian died October 30, 2015; Irene's claims asserting wrongdoing by Lillian were not filed until October 26, 2016. Those claims must also be dismissed as untimely.

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<sup>13</sup> See Register of Wills Docket Item 7.

<sup>14</sup> *Tunnell v. Stokley*, 2006 WL 452780, at \*3 (Del. Ch. Feb. 15, 2006).

<sup>15</sup> *Criscoe v. Derooy*, 384 A.2d 627, 630 (Del. Ch. 1978).

<sup>16</sup> 12 *Del. C.* § 2102.

### **III. Conclusion**

I recommend the Court dismiss Irene's petition for lack of standing to contest Lillian's will, and because her claims regarding Paul's will and actions by Lillian while alive are untimely. This is a final report pursuant to Court of Chancery 144.

Respectfully,

*/s/ Morgan T. Zurn*

Master in Chancery