

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 27, 2001

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 01-0604

Cir. Ct. No. 01-CV-3

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

KATHY ELROD,

PLAINTIFF-APPELLANT,

V.

ELROY BROMMER,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Buffalo County:
DANE F. MOREY, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Kathy Elrod appeals a judgment dismissing her complaint against Elroy Brommer, who holds the power of attorney for Sylvina Brommer. Kathy argues that the circuit court erred when it determined that she lacked standing to maintain an action for injunctive relief against Elroy. We affirm the judgment.

¶2 Sylvina, who is now incompetent, is Elroy's ninety-year-old mother and Kathy's grandmother. Sylvina entered a nursing home in November 1997 and remains there as a private pay patient. Sylvina owns considerable assets, including real estate. By virtue of a power of attorney executed in 1994, Elroy manages Sylvina's affairs. In order to pay for Sylvina's care, Elroy has sold some of Sylvina's real estate, equipment and livestock.

¶3 Kathy commenced this action to enjoin Elroy from selling certain real estate belonging to Sylvina. Kathy alleged that Elroy's plan to liquidate the "home farm" contradicts Sylvina's testamentary intent expressed in her will. Kathy claimed that Elroy must first exhaust other assets before he resorts to the specifically devised farm.

¶4 Kathy contended that before 1994, when Sylvina executed her will, Kathy, her parents and siblings made significant contributions to Sylvina's care and to the operation of her farms. Kathy maintained that under the terms of Sylvina's will, Kathy is a beneficiary of the specific devise of the home farm.

¶5 At the hearing on Kathy's motion for a temporary injunction, the trial court determined that Kathy did not have standing to proceed with her claim. The court entered judgment dismissing her complaint with prejudice. Kathy appeals the judgment of dismissal.

¶6 Kathy argues that the trial court erroneously concluded that she lacked standing. We are unpersuaded. Standing, the right to be heard by a court, is not construed narrowly or restrictively. *In re J.C.G.*, 177 Wis. 2d 424, 427, 501 N.W.2d 908 (Ct. App. 1993). It is required as a matter of judicial policy, not as a jurisdictional prerequisite. *Id.* Nonetheless, to have standing, a person must show that the proceedings will have a direct effect upon his or her legally protected

interest. *Id.* Whether the person claiming standing has such an interest is a question of law. *Id.*

¶7 We conclude that Kathy has demonstrated no legally protected interest. Our supreme court has stated:

Wisconsin case law indicates that an heir or named beneficiary has no right or legal interest in the property of a living relative by reason of the absolute right of disposal of property by the owner, as is true here. Any expectancy ... is too conjectural and remote to be recognized as a legal right.

Sanborn v. Carpenter 140 Wis. 572, 575, 123 N.W. 144 (1909). More recently, it held: “[A] will does not create an enforceable right in a beneficiary until the testator has died.” *Auric v. Continental Cas. Co.*, 111 Wis.2d 507, 517, 331 N.W.2d 325 (1983) (citation omitted). Because Kathy has demonstrated no legally protected interest, the trial court correctly dismissed her complaint for lack of standing.

¶8 Kathy contends that because Sylvina is incompetent and, therefore, cannot change her will, public policy is served by permitting her to challenge Elroy’s decisions that frustrate Sylvina’s estate plan. Kathy grounds her argument in a testator’s constitutional right to make a will and have it carried out according to his or her intentions. *See id.* at 513.

¶9 We decline Kathy’s invitation to create rights in beneficiaries under a will of a still living testatrix. The *Auric* court’s concern, that “this state’s long-standing public policy supporting the right of a testator to make a will and have its provisions carried out,” *id.* at 514, is not promoted by permitting beneficiaries under a will to attempt to enforce rights in a future potential inheritance. By its very nature, a will involves the disposition of property after the testatrix’s death.

It is consistent with a will's intent that the beneficiaries have no rights until the testatrix's death. If the testatrix had intended that the beneficiaries obtain rights in her property before her death, she could have so provided by making a gift. We are unconvinced that public policy favors extending property rights to beneficiaries "who are likely to be more concerned with their own hopes of inheritance" than with the testatrix's intent. See *Beauchamp v. Kemmeter*, 2000 WI App 5 ¶5, 240 Wis. 2d 733, 625 N.W.2d 297. We conclude that Kathy's proposition is inconsistent with the very nature of a will itself.

¶10 This is not to say that those who manage the affairs of an infirm or incompetent individual are not to be held accountable for their decisions. As Elroy points out, WIS. STAT. § 880.19 provides a mechanism for judicial oversight of the management of his mother's real and personal property. WIS. STAT. § 880.07 provides that "Any relative ... may petition for the appointment of a guardian of a person subject to guardianship." If the principal is no longer competent, the guardian of the principal's estate may revoke a durable power of attorney. WIS. STAT. § 243.07(3)(a).

¶11 We are satisfied that Kathy has demonstrated no legally protected interest and that public policy does not require that we create one. We conclude that the trial court correctly dismissed her complaint for lack of standing.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

