IN DISTRICT COURT, GRAND FORKS COUNTY, NORTH DAKOTA

Jean Kruger, by and through her Co-Guardians Michael Kruger and Kathy (Kruger) Hann, Petitioners, -vs- Ann Marie Kruger, and the Heirs and Beneficiaries of Jean Kruger, Respondents.	Civil No. 18-2019-CV-00089 **ORDER GRANTING** **MOTION TO DISMISS**

SUMMARY OF DECISION

[¶ 1] Petitioners Michael Kruger ["Michael"] and Kathy (Kruger) Hann ["Kathy"], collectively the "Petitioners", filed an Amended Petition for Declaratory Action (Doc. # 4) on January 9, 2019. The Petitioners request the Court grant a Declaratory Judgment invalidating the ward Jean Krueger's ["Jean"] Last Will and Testament (Doc. # 27) dated June 11, 2015. The Respondent Ann Marie Kruger ["Ann"] filed a Motion to Dismiss (Doc. #s 19-23) on April 25, 2019.

[¶ 2] The Court grants the Motion to Dismiss, on the grounds that Jean is surviving and there is not a justiciable matter to invoke the Court's declaratory jurisdiction under N.D.C.C. §§ 32-23-02 and -04 for Michael and Kathy individually as "person[s] interested." The Court also finds Michael and Kathy lack standing as co-guardians/conservators to petition on Jean's behalf and request the Court invalidate the Last Will and Testament under N.D.C.C. § 30.1-08.1-01. The Court concludes the legislative intent was to restrict an action under the North Dakota Ante-

Mortem Probate Act to the "person who executes the will" and then only to declare the "validity" of the Will and not to challenge it pre-death.

STATEMENT OF CASE

[¶ 3] Jean executed a Durable Power of Attorney to Ann Marie Krueger (Doc. # 2, Exhibit 1) on June 9, 2015. Jean then executed her Last Will and Testament (Doc. # 27) on June 11, 2015, naming Ann as her personal representative, and devising almost all of her reported $1.5 million estate to Ann. Michael, Kathy and Ann are Jean's children, and Jean is not survived by a spouse.

[¶ 4] Michael and Kathy filed for guardianship of Jean in Case No. 18-2015-PR-00078. The Neuropsychology Report (Doc. # 3) of Dr. Susan Thompson of Midwest Neuropsychology, dated June 24, 2015, was filed as Exhibit A to the Petition for the emergency appointment (Doc. # 1) on July 17, 2015. Dr. Thompson's impression was Jean suffered from mild to moderate dementia, had present formed visual hallucinations and some mild Parkinsonian type symptoms, and which raised the possibility of Lewy Body Dementia and her status as a vulnerable adult. A hearing was held on the temporary petition on July 24, 2015. The Court appointed Michael and Kathy as temporary guardians/conservators for Jean on July 21, 2015 (Order, Doc. # 10), and affirmed its emergency appointment on July 28, 2015 (Doc. # 14) and allowed the co-guardians/conservators to act independently.

[¶ 5] Dr. William Haug, Jr. of Altru Health Systems was appointed as the expert examiner (Order, Doc. # 26). His Report (Doc. # 32) was filed on September 21, 2015. Dr. Haug also noted Jean's dementia and her visual hallucinations. A contested hearing was held on October

7, 2015. The Court entered its Order, appointing Michael and Kathy as Jean's permanent co-guardians/conservators (Order, Doc. # 53), filed on October 20, 2015, and including full authority in legal and financial matters and her healthcare needs.

[¶ 6] Michael and Kathy filed a Petition for Declaratory Judgment (Doc. # 2) in Case No. 18-2019-CV-00089 on January 9, 2019, pursuant to N.D.C.C. § 59-10.1-01 (Action to Determine Validity of Trust). On the same date, they filed an Amended Petition for Declaratory Judgment (Doc. # 4), under N.D.C.C. Chapter 32-23 (Declaratory Judgments) and N.D.C.C. § 30.1-08-01 of the North Dakota Ante-Mortem Probate Act. Michael and Kathy seek to invalidate Jean's Last Will and Testament due to her dementia and vulnerable condition. They include a letter dated April 25, 2017 from Dr. Thompson (Doc. # 28), in which Dr. Thompson stated she examined Jean on June 24, 2015, and found Jean suffered from at least a moderate degree of dementia which rendered her vulnerable to undue influence, coercion or exploitation.

[¶ 7] Ann was served with the petition on January 9, 2019 by the Grand Forks County Sheriff (Doc. # 3), but did not file an Answer (Doc. #13) until March 6, 2019. Ann then filed a Motion to Dismiss the amended petition (Motion to Dismiss, Doc. #s 19-23), filed on April 25, 2019. Ann alleged "Petitioner's Complaint fails to state a claim upon which relief can be granted," and the Court "lacks subject matter jurisdiction over the cause of action and Petitioners lack standing to commence an ante mortem probate" of the Jean's Estate. Michael and Kathy filed a Brief and supporting documents (Doc. #s 26-33) on May 9, 2019, alleging they have standing as Jean's Co-Guardians/Conservators to pursue an Ante-Mortem declaratory judgment to invalidate the Will. Ann filed a Reply Brief (Doc. #s 34-40) on May 17, 2019.

[¶ 8] The Motion to Dismiss was heard before the undersigned on May 28, 2019. No testimony or evidence was offered. The Court heard arguments of counsel, took the matter under advisement, and now issues this Order Granting Motion to Dismiss.

ISSUES FOR DETERMINATION

[¶ 9] Do Michael and Kathy, in their capacity as Co-Guardians/Conservators, have standing or authority to request declaratory relief, invalidating Jean's Last Will and Testament under the North Dakota Ante Mortem Probate Act?

[¶ 10] Do Michael and Kathy, in their individual capacities as heirs, or interested persons, in Jean's estate, have standing to bring a declaratory action to invalidate Jean's Last Will and Testament under N.D.C.C., Chapter 23-20 (Declaratory Judgment)?

PRINCIPLES OF LAW

[¶ 11] North Dakota Century Code [N.D.C.C.] § 30.1-08.1-01, Declaratory judgment states:

> **Any person who executes a will** disposing of the person's estate in accordance with this title **may institute a proceeding** under chapter 32-23 for judgment **declaring the validity of the will** as to the signature on the will, the required number of witnesses to the signature and their signatures, and the testamentary capacity and freedom from undue influence of the person executing the will.

N.D.C.C. § 30.1-08.1-01 (Emphasis added).

[¶ 12] N.D.C.C. § 32-23-02, Power to construe contracts, statutes, and wills states:

> **Any person interested under a will**, written contract or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, **may have determined any question of** construction or **validity arising under the instrument**, statute, ordinance, contract, or franchise **and may obtain a declaration of rights, status, or other legal relations thereunder.**

N.D.C.C. § 32-23-02 (Emphasis added).

[¶ 13] N.D.C.C. § 32-23-04, Rights in trust or estate **determined** states:

> **Any person interested as** or through a personal representative, trustee, guardian, conservator, or other fiduciary, creditor, devisee, **heir, next of kin**, or cestui que trust, **in the administration** of a trust, or **of the estate of a decedent**, an infant, a mentally ill or deficient person, or an insolvent, **may have a declaration or rights or legal relations in respect thereto:**
>
> 1. To ascertain any class of creditors, devisees, heirs, next of kin, or others;
> 2. To direct the personal representative or trustees to do or abstain from doing any particular act in their fiduciary capacity; or
> 3. **To determine any question arising in the administration of the estate** or trust, **including questions of construction of wills** and other writings.

N.D.C.C. § 32-23-04 (Emphasis added).

LEGAL ANALYSIS

[¶ 14] An ante-mortem probate act gives a person the ability to seek court validation of his or her will during lifetime, rather than wait until death and a probate proceeding determines the validity. Only five states have enacted such an act: (1) North Dakota in 1977 (Chapter 30.1-08.1); (2) Arkansas in 1979 (A.C.A. § 28-40-202); (3) Ohio in 1980 (R.C. § 2107.081, repealed and now R.C. § 5817.02); (4) Alaska in 2010 (Alaska Stat. § 13.12.530); and (5) North Carolina in 2015 (N.C.G.S.A § 28A-2B-1).

[¶ 15] Petitioners contend the ante-mortem act is new law and has not been fully interpreted. "In many respect, ante-mortem probate is not a product of this century or even the previous one." *Leopold & Beyer*, Ante-Mortem Probate: A Viable Alternative, Arkansas Law

Review, 1990, Vol. 43:131, Page 148. Even ancient laws and customs are recorded in the Bible (notably the Book of Ruth in the Old Testament and the book of Genesis with Isaac and Jacob), which illustrate accounts of the unquestionable right of inheritance given before the death of the decedent. *Id.* "There is evidence in the early development of English ecclesiastical law that a testament could be proved during the testator's lifetime at the testator's request." *Id.* at 149.

[¶ 16] "In 1883, the Michigan legislature made a novel attempt to cope with the disruptive and uncertain post-mortem will contest by enacting one of the earliest ante-mortem statutes." *Id.* at 152. However, the short-lived statute was declared unconstitutional by the Michigan Supreme Court because it enabled the testator to avoid the rights of a spouse and child by failing to provide proper notice; and it failed to provide for finality of judgment because the will could be modified or revoked. *Id.*, citing *Lloyd v. Wayne Circuit Judge*, 56 Mich. 236, 239, 23 N.W. 28, 29 (1885). "The *Lloyd* court felt that allowing a judicial determination in such a situation would be paramount to issuing an advisory opinion which was prohibited by Michigan's constitution." *Leopold & Beyer,* at 155, citing *Lloyd,* 56 Mich. at 239, 23 N.W. at 29 (no authority exists for circuit court to decide cases not properly judicial).

[¶ 17] "In 1937, the United States Supreme Court spoke to clarify the issue of a court's authority to issue a declaratory judgment." *Leopold & Beyer*, at 155, citing *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 244 (1937) (upholding constitutionality of Declaratory Judgment Act). "By its decision, the Court ratified the Declaratory Judgment Act and gave a new spark of hope for ante-mortem solutions to post-mortem problems." *Leopold & Beyer, supra.* "The National Conference of Commissioners on Uniform State laws created a special committee (in 1932) to draft a uniform act to establish wills before the death of the testator." *Id.* at 161. "During the early 1940s, the drafters of the Model Probate Code (MPC) gave brief consideration to the possibility

of including provisions for ante-mortem probate." *Id.* at 164. "In the early stages of the development of the Uniform Probate Code (UPC), the drafters again gave serious consideration to inclusion of an ante-mortem procedure." *Id.* at 165. No legislation was enacted despite these revivals.

[¶ 18] "Between 1976 and 1982, many articles were written expressing both the advantages and disadvantages of the ante-mortem alternative." *Id.* The first model, the Contest Model, was proposed by Professor Howard Fink of Ohio State University, and is closely related to the Michigan Act of 1883." *Id.* at 166. "This proposal places the testator and the prospective heirs in an adversarial situation which allows for a declaratory judgment." *Id.* "In 1980, Professor John Langbein of the University of Chicago attempted to solve the problems of the contest model with his proposal of the conservatorship model." *Id.* at 167. While it relies on a declaratory judgment, it appoints a conservator to litigate the interests of all the prospective heirs and beneficiaries." *Id.* This model failed due to notice problems, jurisdictional function and public disclosure concerns. *Id.* The third model was the Administrative Model, proposed by University of Georgia Professors Gregory Alexander and Albert Pearson. *Id.* at 168. This theory eliminated notice requirements and both judicial and adversarial functions by using an ex parte proceeding, with a guardian ad litem appointed as an investigating agent for the court. *Id.*

[¶ 19] North Dakota, Ohio and Arkansas enacted their ante-mortem statutes, all based on the Contest Model. *Id.* at 169. Simultaneously, the National Conference of Commissioners on Uniform State Laws drafted several versions of a Uniform Ante-Mortem Probate of Wills Act; however, the enthusiasm waned and the National Conference abandoned its work on the Uniform Act. *Id.* at 169-170

[¶ 20] North Dakota's law was introduced as Senate Bill No. 2198 on January 19, 1977 (Senate Judiciary minutes, Doc. # 35, ¶ 3). Senator Howard Freed was the sponsor of the bill, who became interested in promoting the act after reading an article on the subject by an Ohio State University professor. *Id.* While the minutes do not identify the professor, it appears the reference was to Professor Howard Fink of Ohio State University who, as noted above, was involved in the early stages of development of the Uniform Probate Code. The committee minutes of both the Senate and House make no reference to any person other than the testator/testatrix having authority to bring a petition for a declaratory judgment on a will. Nor is there any reference to bringing such an action to declare the *invalidity* of a will suspected of being the result of undue influence or incapacity. The bill was narrowly drafted, and done with the view "the person drawing the will is concerned about someone causing trouble if they do not receive the same amount as someone else in the family." Doc. # 35, ¶ 10. The committee made some changes to the draft before the legislature adopted the act; however, those changes do not affect the central issue in this case---- that is whether a third party can bring the action to invalidate a will.

[¶ 21] Attorney Larry Richards makes a sensible argument for the Petitioners' case to have a guardian act on behalf of the incapacitated person who was unduly influenced during a time of incapacity. They ask the will be declared invalid because the medical evidence may be stale or nonexistent at Jean's death. Even our current Attorney General, then State Representative Stenehjem less tactfully said "it's easier to find someone 'crazy' before death than to prove after death." *Id.* But North Dakota's law falls short of these protective and prospective measures. Furthermore, the North Dakota State Bar Association did not heartily endorse this "very imaginative" legislation and its effect on the probate code. Doc. # 35, ¶ 4. As noted, only five states have adopted this seldom used, if at all, pre-death procedure. No filings were discovered in

North Dakota under the Act. Furthermore, the National Conference of Commissioners on Uniform State Laws could not agree on a model act.

[¶ 22] North Dakota has not revised its Ante-Mortem Probate Act since its adoption. Its applicable language for this case is "[a]ny person who executes a will...may institute a proceeding under chapter 32-23 for judgment declaring the validity of the will...." N.D.C.C. § 30.1-08.1-01. Arkansas' statute is almost identical to North Dakota's. It provides "[a]ny person who executes a will...may institute an action...for a declaratory judgment establishing the validity of the will." Arkansas Code Annotated (A.C.A.) § 28-40-202(a). Professor Fink's state, Ohio, is more specific. Ohio's law states: "[a] testator may file a complaint....to determine before the testator's death that the testator's will is a valid will. The right....is personal to the testator and may not be exercised by the testator's guardian or an agent under the testator's power of attorney." Ohio Revised Code Annotated (R.C.) § 5817.02(A). Only Alaska extended the right to other persons to act on behalf of a testator. Its applicable statute states: "[a] testator, a person who is nominated in a will to serve as a personal representative, or with the testator's consent, an interested party may petition the court to determine before the testator's death that the will is a valid will...." Alaska Statutes, § 13.12.530. North Carolina was the last state to enact an ante-mortem law, and modeled it after North Dakota, by stating: "[a]ny petitioner....who has executed a will or codicil may file a petition seeking a judicial declaration that the will or codicil is valid." North Carolina General Statutes Annotated (N.C.G.S.A.) § 28A–2B–1(a). In summary, North Dakota, Arkansas, Ohio and North Carolina restrict the right to bring the action to the person who wrote the will. Only Alaska expressly allows a third party, i.e...a nominated personal representative or an interested party with the testator's consent, to bring the action. In Jean's case, Michael and Kathy would not be able to do so as guardians since they apparently are not nominated as personal representatives nor do they

have her consent if she was able to do so. Interestedly, Professor Fink advised Senator Freed when North Dakota was the first to adopt the Act. But three years later, his State of Ohio deemed it necessary to specifically exclude guardians or powers of attorney, and limit the right to petition as being "personal" to the testator.

[¶ 23] Michael and Kathy argue the ante-mortem act does not specifically prevent a third party representative from petitioning the court to determine the invalidity of the ward's will. Our legislators could have included such language as Ohio to expound on any limits; however, it is unnecessary because our Act is clear as written. The North Dakota Supreme Court, in *Estate of Elken,* 2007 ND 107, stated:

> Statutory interpretation is a question of law, fully reviewable on appeal. GO Comm. ex rel. Hale v. City of Minot, 2005 ND 136, ¶ 9, 701 N.W.2d 865. The primary objective in interpreting a statute is to determine legislative intent. Amerada Hess Corp. v. State ex rel. Tax Comm'r, 2005 ND 155, ¶ 12, 704 N.W.2d 8. Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears. N.D.C.C. § 1-02-02. Statutes are construed as a whole and are harmonized to give meaning to related provisions. N.D.C.C. § 1-02-07. If the language of a statute is clear and unambiguous, "the letter of [the statute] is not to be disregarded under the pretext of pursuing its spirit." N.D.C.C. § 1-02-05. The language of a statute must be interpreted in context and according to the rules of grammar, giving meaning and effect to every word, phrase, and sentence. N.D.C.C. §§ 1-02-03 and 1-02-38(2). We construe statutes to give effect to all of their provisions, so that no part of the statute is rendered inoperative or superfluous. N.D.C.C. § 1-02-38(2) and (4). We also construe statutes to avoid constitutional infirmities. E.g., City of Belfield v. Kilkenny, 2007 ND 44, ¶ 8, 729 N.W.2d 120; In re G.R.H., 2006 ND 56, ¶ 15, 711 N.W.2d 587.

Elken, 2007 ND 107, at ¶ 7. N.D.C.C. § 30.1-08-01 is clear and unambiguous, and reflects the legislative intent expressed by Senator Freed when he introduced the initial draft. Who can bring the petition ["any person who executes a will"], and for what purpose ["declaring the validity of the will"], are stated in plain, ordinary, and commonly understood terms. Senator Freed's

proposed draft on this part of the Act was not amended or revised before its final adoption, nor was it affected by the changes made to other sections of the Act before adoption.

[¶ 24] Petitioners cite *In re the Guardianship of Lillian Glasser*, 2007 WL 867783 (N.J.Super.Ct. March 8, 2007) and *In re Conservatorship of Davis*, 954 So.2d 521 (Miss.App 2007) on the standing issue. *Glasser* involved a proceeding to determine a permanent guardian for the testatrix, and her will was invalidated and litigated while she was living. The invalidation was based on undue influence with a lack of testamentary capacity. *Glasser* is the exception, even in New Jersey. Furthermore, the case was decided under a state statute, N.J.S.A. 3B:12-57(1) which provides: "a guardian shall (10) [i]f necessary, institute an action that could be maintained by the ward including but not limited to, actions alleging...undue influence." The Petitioners have not argued or pointed to any comparable North Dakota statute. In fact, North Dakota specifically denies a conservator the "power to make a will" for a ward. N.D.C.C. § 30.1-29-08(2)(c). Neither side has argued Jean had a Will prior to June 11, 2015, which would have been revived if the disputed Will was invalidated. That issue will be left to the probate court at Jean's death.

[¶ 25] Michael and Kathy cite *Davis* for the proposition a conservator has standing to invalidate a will. *Davis* involved the removal of a conservator, and the court determined the Appellant had standing to bring a claim for removal. The Petitioner was the father of minor daughters who were the sole beneficiaries of the ward's will. As such, they had an "anticipated or expected interest" in the estate and were thus an "interested party" under Miss. Code Ann. § 91-7-285. The Will's validity apparently was not decided.

[¶ 26] North Dakota's Ante-Mortem Probate Act does not include any reference to an "interested party." Michael and Kathy alternatively argue they have standing to invalidate Jean's will under N.D.C.C. § 32-23-02 as stated herein. They point to the language "[a]ny person interested under...a will...may have determined any question of....validity arising under the instrument...and may obtain a declaration of rights, status, or other legal relations thereunder." N.D.C.C. § 32-23-02. This is similar to the standing issue in the *Davis* decision. However, N.D.C.C. § 32-23-04 limits the declaratory action, in this case, to Michael and Kathy as heirs interested in the "estate of a decedent." Thus, no ante-mortem relief is available under Chapter 32-23.

[¶ 27] Michael and Kathy allege their sibling Ann has committed fraud and undue influence against their mother Jean which acts have reduced Jean's assets. The Petitioners have the power as guardians/conservators to "prosecute...actions, claims or proceedings in any jurisdiction for the protection of estate assets...." N.D.C.C. § 30.1-29-24(3)(x). As such, they have the opportunity to obtain and preserve the medical testimony which they assert may be unavailable at Jean's death.

[¶ 28] Ann correctly argues the distinction between incapacity to make a will and incapacity required for a guardianship. Any adult who is of sound mind may make a will. N.D.C.C. § 30.1-08-01. The North Dakota Supreme Court, in *Estate of Wagner, et al v. Keller*, 551 N.W.2d 292, (N.D. 1996) referred to *Storman v. Weiss*, 65 N.W.2d 475, 504-05 (N.D. 1954), in explaining testamentary capacity:

> Testator must have sufficient strength and clearness of mind and memory, to know, in general, without prompting, the nature and extent of the property of which he is about to dispose, and nature of the act which he is about to perform, and the names and identity of the persons who are to be the object of his bounty, and his relation

> towards them. He must have sufficient mind and memory to understand all of these facts;.... He must also be able to appreciate the relations of these factors to one another, and to recollect the decision which he has formed.

Wagner, 551 N.W.2d 292, 296. By contrast, "incapacity" for guardianship purposes is defined as:

> "Incapacitated person" means any adult person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, or chemical dependency to the extent that the person lacks capacity to make or communicate responsible decisions concerning that person's matters of residence, education, medical treatment, legal affairs, vocation, finance, or other matters, or which incapacity endangers the person's health or safety.

N.D.C.C. § 30.1-26-01(2). Thus, testamentary capacity is determined by memory, identity of property, and identity of heirs or devisees. Incapacity for a guardianship is determined by a number of factors indicating impairment in decision making and safety.

FINDINGS OF FACT and CONCLUSIONS OF LAW

[¶ 29] Michael Kruger and Kathy (Kruger) Hann are the appointed co-guardians and conservators of Jean S. Kruger, by this Court's order dated October 16, 2015 in Case No. 18-2015-PR-00078.

[¶ 30] Michael Kruger, Kathy (Kruger) Hann, and Ann Marie Kruger are the children of the ward Jean S. Kruger.

[¶ 31] The Petitioners bring a declaratory judgment action pursuant to N.D.C.C. Chapter 32-23, seeking to invalidate Jean S. Kruger's will dated June 11, 2015 on the grounds of undue influence by Ann Marie Kruger and the lack of testamentary capacity of Jean S. Kruger at such time.

[¶ 32] N.D.C.C. § 30.1-08-01 restricts the filing of a declaratory action to Jean S. Kruger as the person who executed the will, and does not allow any third party representative or interested party to do so on her behalf, including the Petitioners as guardians/conservators. It further restricts the action to seek a judicial determination of the validity, and not the invalidity, of the will. In essence, the statute promotes supporting the Will and not challenging it. The Petitioners lack standing to bring the action on behalf of Jean S. Kruger.

[¶ 33] The Petitioners also bring the declaratory judgment action as heirs to determine the validity of Jean S. Kruger's will dated June 11, 2015, pursuant to N.D.C.C. § 32-23-02. The matter is not ripe or justiciable at this time because Jean S. Kruger is surviving and the statute is limited to determining the heirs' interest in the estate of a decedent. The Court lacks jurisdiction to hear the matter at this time.

ORDER

THEREFORE, IT IS HEREBY ORDERED that:

[¶ 34] The Respondent Ann Marie Kruger's Motion to Dismiss is GRANTED.

[¶ 35] No attorney fees or costs are awarded to any parties; however, the Petitioners shall restore, within sixty days, any funds to Jean S. Kruger's estate which were expended in bringing this action.

Dated this 13th day of June 2019.

BY THE COURT:

Don Hager
Judge of the District Court