STATE OF MICHIGAN

COURT OF APPEALS

JAMES LYONS, Personal Representative of the Estate of JANET T. LYONS, a/k/a JANET F. LYONS, a/k/a JANET FAYE LYONS,

Plaintiff-Appellee,

v

KATHERINE ANN DONALDSON, a/k/a KATHERINE A. DONALDSON, and JAN'S FLOWER & GIFT SHOP, INC.,

Defendants-Appellants.

UNPUBLISHED
April 28, 2000

No. 216589
Hillsdale Probate Court
LC No. 98-031933 SE

Before: Gage, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendants appeal as of right a bench trial award of a parcel of real estate on which the decedent had operated a flower and gift shop. The court after trial awarded the property to the decedent's estate. We affirm.

Defendants first contend that the trial court erred in determining that the real estate on which the flower shop was located did not represent "property used in connection with any trade or business." This Court reviews a probate court's findings of fact to determine whether they were clearly erroneous. *In re Webb H Coe Marital & Residuary Trusts*, 233 Mich App 525, 531; 593 NW2d 190 (1999). "Findings of fact by a probate judge sitting without a jury will not be reversed unless the evidence clearly preponderates in the opposite direction." *In re Kurtz Estate*, 113 Mich App 769, 771-772; 318 NW2d 590 (1982).

The court's primary duty when faced with the task of resolving a disputed testamentary disposition is to effectuate as nearly as possible the intention of the testator. When no ambiguity exists, that intention must be gleaned from the four corners of the instrument, and the court must interpret and enforce the language employed. *In re Butterfield Estate*, 405 Mich 702, 711; 275 NW2d 262 (1979). The court cannot resort to parol testimony to add to, vary or contradict the language of a will unambiguous on its face. *Detroit Wabeek Bank & Trust Co v City of Adrian*, 349 Mich 136, 143;

84 NW2d 441 (1957). If the court cannot ascertain the testator's intention solely by reference to the instrument, however, "in other words, if the document evidences a patent or latent ambiguity, there are two external sources through consideration of which a court may establish the intent of the testator: (1) surrounding circumstances and (2) rules of construction." *In re Butterfield*, *supra*.

This issue involves the interpretation of one paragraph of the decedent's last will and testament, specifically will and testament section II, titled "Tangible Personal Property." Under this section, the will provides in relevant part as follows:

> I have five children, including Thomas F. Lyons, Jr., James Patrick Lyons, Melanie Fay Lyons Tibbetts, Katherine Ann Lyons Donaldson, and Sue Lyons. *I give all of my tangible personal property, not including property used in connection with any business or profession, for which I have made separate disposition, to my children, if they survive me, in equal shares*. My tangible personal property includes, but is not limited to, my household goods and personal effects, jewelry, automobiles and boats, together with all policies insuring such property against loss. [Emphasis added.]

Defendants suggest that while section II distributes equally to the decedent's children the decedent's personal property, section II specifically excludes from this distribution all "property used in connection with" operation of the flower shop, which excluded property includes the real estate on which the flower shop is located.

This paragraph of section II, however, clearly and unambiguously refers only to the decedent's disposition of personal property used in the operation of the flower shop. The paragraph heading and repeated other references within the paragraph to "tangible personal property" weigh heavily against defendants' suggestion that, in mentioning "property used in connection with any business," the decedent contemplated real property utilized by the business. We conclude that the trial court properly interpreted the unspecified term "property" in the context of this paragraph as referencing only tangible personal property utilized in the business' operation. *In re Butterfield*, *supra*; *Detroit Wabeek Bank*, *supra*.

Defendants also assert that the trial court erroneously ignored many witnesses' testimony regarding the decedent's intent to leave to defendant Donaldson the real estate on which the flower shop is located. The parties did not dispute at trial that while the flower shop apparently included the real estate on its balance sheet and income tax returns, the record legal title to the real estate remained in the decedent's name, and that the decedent executed no instruments of transfer purporting to convey title to the flower shop. In the absence of any written instrument purporting to transfer title in the property to defendants, the trial court correctly concluded that the statute of frauds prohibited its consideration of oral testimony concerning the decedent's intent to transfer the real estate. *Frosh v Sportsman's Showcase, Inc*, 4 Mich App 408, 416-417; 145 NW2d 241 (1966) ("The statute of frauds is express that no interests in lands . . . shall be created or transferred otherwise than by deed." "The law does not permit the title to rest in parol, nor does it allow anything which is evidenced by the deed to be changed on parol testimony of promises, agreements, understandings."). Because title to the property remained in the decedent's name and the decedent's will did not otherwise specifically dispose

of the real estate, we conclude that the trial court correctly relied on the recorded title to the property in finding that the real estate belonged to the decedent's estate, and that the real estate passed in equal shares to the decedent's children according to the residuary clause of the decedent's will.[1]

Defendants also argue that the decedent's estate owes the flower shop $82,609 for a 1991 sale of the real estate (from the flower shop to the decedent) that was never properly completed. As evidenced by the deed to the property, however, the decedent in April 1990 obtained legal title to the real estate from Henry E. and Margaret F. Resseguie. As discussed above, no instruments of transfer purported to convey title from the decedent to the flower shop. Thus, no instrument existed indicating any transfer of the real estate from the flower shop back to the decedent. Because the evidence established no flower shop interest in the real estate, we conclude that defendants' argument lacks merit.

Lastly, defendant claims that the decedent's estate owes the flower shop $31,147.49 for various leasehold improvements that the flower shop funded. Because defendants cite no authority in support of this contention, however, they have waived our consideration of this issue. *Goolsby v Detroit*, 419 Mich 651, 655, n 1; 358 NW2d 856 (1984).

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Donald S. Owens

[1] To the extent that plaintiff suggests that the trial court erred in finding that a van used by the flower shop passed to defendants under the decedent's will, we decline to consider this contention because plaintiff failed to file a cross appeal pursuant to MCR 7.207. *Barnell v Taubman Co, Inc*, 203 Mich App 110, 123; 512 NW2d 13 (1993).