COURT OF APPEALS
DECISION
DATED AND FILED

January 22, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2109 **Cir. Ct. No. 01-CV-461**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

LEANNE ARBS, LILITH KLOPP, SALLY WOODFORD, BRUCE HEUER, JANESE POULSON AND ERIC HEUER,

PLAINTIFFS-APPELLANTS,

V.

DIANNA D. NELSON AND GLENN D. NELSON,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Eau Claire County: LISA K. STARK, Judge. *Affirmed*.

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

¶1 PER CURIAM. Jerome Heuer's children appeal an order dismissing their claims to real estate left by Heuer in his will to his wife, Dianna. The children argue (1) their interest in the property was not terminated; (2) the court improperly concluded the property was marital property; and (3) public

policy is not violated by a conditional gift to children. Because we determine that the children's interest was terminated, we affirm.

BACKGROUND

¶2 On December 18, 1982, Heuer married Dianna Nelson.[1] Heuer owned a homestead prior to the marriage. Heuer died on May 12, 1996. In his will, Heuer provided as follows:

> Subject to the condition below, and subject to Article II above, I give all of my property of whatever kind and wherever located to my wife Dianna, provided she survives me by thirty (30) days.
>
> This bequest to my wife is subject to the following condition: the homestead which I own at the time of my death shall pass to my wife provided she survives me by thirty (30) days; however, if my wife should ever remarry, that homestead is to be sold, and the net proceeds after customary sales costs shall be divided as follows:
>
> A. Fifty percent (50%) to my wife Dianna;
>
> B. Fifty percent (50%) to be divided equally among the children of my first marriage living at that time.

At the time the will was probated, there were six living children from Heuer's previous marriage.

¶3 Nelson received a personal representative's deed to the property. The deed stated:

> Should Dianna D. Heuer ever remarry, the above described real estate shall be sold and the net proceeds, after customary sales costs, shall be divided as follows:

[1] Nelson is Dianna's name by marriage following Heuer's death.

> (a) Fifty percent (50%) to Dianna D. Heuer;
>
> (b) Fifty percent (50%) to be divided equally among the children of the first marriage of Jerome F. Heuer living at the time of sale.

On April 15, 1997, Nelson conveyed the property by warranty deed to her son from her first marriage, Scott Scheppke. The deed did not include the contingency.

¶4 On May 15, 2000, Nelson married Glenn Nelson. Shortly after the marriage, Scheppke reconveyed the property to Nelson and her new husband. This deed also did not include the contingency.[2]

¶5 The children filed a complaint on August 22, 2001, asserting a one-half interest in the property under the contingency in their father's will. They sought a declaration of interest, partition, possession and a constructive trust.

¶6 Both parties moved for summary judgment. The court first concluded the property was owned as marital property. The court then determined the conditional interest was limited to Nelson owning the property at the time of her remarriage. Otherwise, there was no restriction on sale, gift, or transfer of the property stated in the will or the deed. The court further concluded that the will and deed created in the children only future interests in proceeds from the property, not an interest in the property itself. The children's interest in the proceeds was extinguished when Nelson transferred the property to her son. The court dismissed the children's complaint, and they appeal.

---

[2] There is some dispute between the parties as to the nature of the consideration paid in both the transfers. The trial court determined this was irrelevant, however, because there was no restriction on the sale of the land at any time for valid or no consideration.

STANDARD OF REVIEW

¶7 The construction of a will is a question of law we review without deference to the trial court. ***Furmanski v. Furmanski***, 196 Wis. 2d 210, 214, 538 N.W.2d 566 (Ct. App. 1995). Our task in construing a will is to determine the testator's intent, and the best evidence of this is the language of the document itself. ***Lohr v. Viney***, 174 Wis. 2d 468, 480, 497 N.W.2d 730 (Ct. App. 1993). When the will is unambiguous, there is no need to look any further to ascertain the testator's intent, as it is clearly stated in the will. ***Id.***

DISCUSSION

¶8 The children claim they received an interest in their father's property and that the transfer to Scheppke did not destroy that interest. They argue that the will and deed granted them either a legal right in the property or an equitable interest in the proceeds from its sale. The children further argue that because their interest is a future interest contingent on the occurrence of an uncertain event, their interest is classified as a remainder interest subject to a condition precedent. *See* WIS. STAT. § 700.05(4).[3] As a result, the children argue that by statute the transfer of the property cannot destroy their future interest. *See* WIS. STAT. § 700.14.

¶9 We are not pursuaded. There is nothing in the language of the will that placed any restriction on Nelson's ability to sell or otherwise dispose of the property. The only provision was that if she were to remarry, she would then have to sell the property and divide the assets as specified in the will. This means two

[3] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

things. First, the children's interest could not be vested unless and until Nelson remarried while still in possession of the property. Second, they have only a future interest in the *proceeds* of the property, not in the property itself. Because the children have no interest in the property, the statutes the children rely upon do not apply.

¶10 When a condition precedent attached to an inheritance of real estate becomes impossible to perform, the inheritance fails. ***Stark, et al. v. Conde***, 100 Wis. 633, 641-42, 76 N.W. 600 (1898). Here, once Nelson transferred the property to her son, it was no longer possible for her to sell it upon her remarriage.

¶11 To determine otherwise would be unreasonable. For example, what if, instead of transferring the property to her son, Nelson had sold it to a third party? According to the children, that third party would then be required to sell the property upon Nelson's remarriage and divide the proceeds between Nelson and the children. However, because Heuer put no restrictions on the sale of the land, we cannot say that he intended that result. Because we determine that the children's interest was terminated, we need not address the children's remaining two arguments.

By the Court.—Order affirmed.

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