

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 3, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

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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.

No. 99-1742

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN RE THE ESTATE OF GORDON DITTBERNER,
DECEASED:**

IRENE DITTBERNER,

APPELLANT,

v.

ALLEN G. LUEBKE, PERSONAL REPRESENTATIVE,

RESPONDENT.

APPEAL from an order of the circuit court for Columbia County:
RICHARD L. REHM, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Irene Dittberner appeals from an order construing the will of her late husband, Gordon Dittberner. She specifically challenges the court's disposition of the deceased's individually owned bank accounts. We

conclude the trial court properly assigned those accounts to the residuary of the estate, and we therefore affirm.

¶2 Gordon died owning farm real estate, personal items, individually owned bank accounts, and bank accounts owned jointly with Irene. His will provided, in relevant part, the following:

I do hereby give to my wife, Irene, if she survives me, all personal property which I may own at my death, and any vehicle which I may own at my death.

Any jointly held or survivorship assets or banking accounts which I may own at my death shall be given to such joint or survivorship tenant.

... If I own the Town of Lodi farm property at the time of my death, I do grant a right to purchase this property to my nephew, ... for a period of six months after my death, ...

All the rest ... of my estate I do hereby give to [19 named friends and relatives].

... I empower my personal representative, ... to permit any of the beneficiaries named hereto to enjoy the use in kind, during the probate of this Will of any tangible personal property

¶3 Both sides in the dispute relied solely on the language of the will to prove Gordon's intent. There are no extrinsic facts of record concerning the circumstances surrounding the drafting of the will, other than the stipulated fact that an attorney drafted it for Gordon. Irene contended that Gordon plainly intended to leave her his individually owned bank accounts as part of his "personal property." The trial court concluded, however, that the will was ambiguous, and that reading it as a whole led to the conclusion that Gordon intended to leave her only his tangible personal property in addition to assets or accounts jointly owned with her, and to leave his individually owned bank accounts to his nineteen residuary beneficiaries.

¶4 The purpose of will construction is to ascertain the decedent's intent. *See Grochowski v. Larson*, 196 Wis. 2d 231, 234, 538 N.W.2d 802 (Ct. App. 1995). The intent is determined from the will's language, the entire testamentary disposition, and the circumstances surrounding the will's execution. *Id.* Where, as here, there is no evidence of the circumstances surrounding the execution, interpretation of the will presents a legal question that this court reviews de novo. *Id.*

The general rule is that in construing a will the court is entitled to put itself in the position of the testator, and to consider all material facts and circumstances known to the testator with reference to which he is to be taken to have used the words in the will, and then to declare what is the intention (i.e., sense) evidenced by the words used, with reference to those facts and circumstances which were (or ought to have been) in the mind of the testator when he used those words.

Gehl v. Reingruber, 39 Wis. 2d 206, 211, 159 N.W.2d 72 (1968) (citation omitted). Language in a will is given its common and ordinary meaning. *Grochowski*, 196 Wis. 2d at 234.

¶5 Tangible property is that which may be felt or touched and is necessarily corporeal. *Id.* at 235 (citing BLACK'S LAW DICTIONARY 1456 (6th ed. 1990)). Intangible property is such that has no intrinsic value, but is merely the representative of value. *Id.* Bank accounts are intangible property under Wisconsin law. *Id.* at 234.

¶6 The most persuasive interpretation of Gordon's intent excludes the individual bank accounts from the "personal property" bequeathed to Irene. Accounts that Gordon jointly owned with Irene went to Irene by operation of law. The fact that Gordon nevertheless expressly bequeathed them to her persuasively

suggests an intent not to bequeath her the individual accounts. Otherwise, under Irene's construction of the will, the second paragraph not only has no legal effect, but offers no inferences to Gordon's intent either. That proposition we reject.

¶7 Additionally Irene's interpretation potentially renders the residuary clause meaningless. Gordon's estate consisted of farm real estate, other tangible property, and the jointly and individually owned bank accounts. If Irene received all of the latter two categories, and Gordon had disposed of the real estate before his death, thereby converting it into cash, then Irene would have received the entire estate and the residuary beneficiaries nothing. That is not an outcome that Gordon likely intended, given the overall scheme of distribution expressed in his will. The far more reasonable interpretation assures that the residuary beneficiaries would receive the individual accounts at least.

¶8 We recognize that Gordon's reference to "tangible personal property" in the last provision of the will could indicate that he intended "personal property" to include intangible items as well. However, we are not persuaded that in the context of the entire will the use of the two different terms reflects that intent.

By the Court.—Order affirmed.

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

