

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

March 18, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**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 § 808.10 and RULE 809.62, STATS.

**No. 98-3465-FT**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN RE THE ESTATE OF SALLY M. TOWNSEND:**

**ESTATE OF KEITH R. TOWNSEND,**

**APPELLANT,**

**v.**

**ESTATE OF SALLY M. TOWNSEND,**

**RESPONDENT.**

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APPEAL from an order of the circuit court for Rock County:  
RICHARD T. WERNER, Judge. *Reversed and cause remanded.*

Before Dykman, P.J., Eich and Roggensack, JJ.

PER CURIAM. The estate of Keith R. Townsend appeals from an order entered in proceedings concerning the estate of Sally M. Townsend. Keith and Sally were married until Sally's death in 1997. The issue is whether property

titled in Sally's name was predetermination date property<sup>1</sup> now owned by her estate, or whether provisions of the Marital Property Act subject the property to division between the estates as marital property. We conclude that the trial court erroneously dismissed Keith's petition to reclassify the homestead as marital property, and remand for further proceedings on that issue.<sup>2</sup>

Sally acquired the property in question in 1982. She married Keith in 1983. The parties then used the property as their homestead, although it remained titled in Sally's name. The parties stipulate that from the time of the marriage until the mortgage on the home was satisfied in 1991, at least a portion, if not all, of the payments came from jointly held funds.

Sally died in July 1997, and Keith died fourteen days later, without filing a written instrument for the election of deferred marital property. Sally's will bequeathed Keith a life estate in the home, but no other interest. Consequently, her estate asserted that it solely owned the home, and that it was not subject to division with Keith's estate. This appeal is taken by Keith's estate from the trial court's ruling in favor of Sally's estate. The trial court reasoned that Keith's failure to file a written election of deferred marital property before he died caused the estate to forfeit its claim.

The dispositive issue is whether Keith's estate can pursue its claim to reclassify the home as marital property even though Keith failed to file an election of deferred marital property before he died. Because resolving this

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<sup>1</sup> The determination date for property is "the date on which the last of the following three events occurs: (1) marriage; (2) both spouses are domiciled in Wisconsin; or (3) January 1, 1986." *Lloyd v. Lloyd*, 170 Wis.2d 240, 253, 487 N.W.2d 647, 651 (Ct. App. 1992).

<sup>2</sup> This is an expedited appeal under RULE 809.17, STATS.

question involves the application of the Marital Property Act to undisputed facts, it is a question of law we decide *de novo*. *Bille v. Zuraff*, 198 Wis.2d 867, 874-75, 543 N.W.2d 568, 570 (Ct. App. 1995).

Section 766.31(2), STATS., provides that all property of spouses is presumed to be marital property. Section 766.63(1), STATS., provides that “mixing marital property with property other than marital property reclassifies the other property to marital property unless the component of the mixed property which is not marital property can be traced.” Section 858.01(2), STATS., 1995-96, provided at the time of Keith’s and Sally’s deaths that if the presumption of marital property is overcome, the property is presumed to be “deferred marital property.” Section 851.055, STATS., 1995-96, defined deferred marital property as property acquired while the spouses were married and ch. 766 did not apply, which would have been marital property under ch. 766 if it were acquired when ch. 766 applied. Section 861.02, STATS., 1995-96, provided that the surviving spouse could claim by election a one-half interest in any or all items of the deferred marital property owned by the decedent spouse.

The trial court erred by concluding that Keith’s failure to file an election precluded his estate from prevailing upon its reclassification claim. The election is required to claim a share of deferred marital property. However, the real estate in question is not deferred marital property because Sally did not acquire it during the marriage. Keith’s claim to a share in the value of the home does not require or depend on his election under § 861.02, STATS., 1995-96, but on the mixing provision set forth in § 766.63(1), STATS., because the home is predetermination date property to which Keith claims a right by virtue of the mixing of marital property with predetermination date property.

The real controversy, which remains untried, is whether § 766.63(1), STATS., requires reclassification of the property on the facts of this case. Where mixing is claimed, the claimant's burden is to first establish that mixing occurred. *Kobylski v. Hellstern*, 178 Wis.2d 158, 173, 503 N.W.2d 369, 374 (Ct. App. 1993). Keith's estate has met that burden through the stipulation that Keith and Sally used marital income to make payments on the mortgage from January 1, 1986 (the effective date of the Marital Property Act)<sup>3</sup> until 1991. On remand, the burden shall therefore fall on Sally's estate to trace, through the real estate assessment records and the amortization schedule for the principal amount of the mortgage, for example, the non-marital component of the property. *Id.* If successful, Sally's estate will retain the non-marital component and the marital component, which may have been created between January 1, 1986 and 1991, will be divided between her estate and Keith's estate. For purposes of the remand, we refer the parties to the tracing rules set forth in the case of *Lloyd v. Lloyd*, 170 Wis.2d 240, 257-262, 487 N.W.2d 647, 653-55 (Ct. App. 1992).

*By the Court.*—Order reversed and cause remanded.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

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<sup>3</sup> Payments made before January 1, 1986 did not create a marital property component.

