

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 21, 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. 98-1364

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN RE THE ESTATE OF BENEDICT S. FELCKOWSKI
A/K/A BEN FELCKOWSKI. DECEASED:**

SOPHIE FELCKOWSKI,

APPELLANT,

V.

HERMAN FELCKOWSKI AND THOMAS FELCKOWSKI,

RESPONDENTS.

APPEAL from orders of the circuit court for Wood County:
THOMAS T. FLUGAUR, Judge. *Affirmed in part; reversed in part and cause remanded.*

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

PER CURIAM. Sophie Felckowski appeals from orders admitting Benedict Felckowski's will to probate and determining her share of property under

her marital share election. She contends that: (1) her marriage to Benedict revoked the will made before that marriage; (2) the court erred by declaring the family farm to be nonmarital property; and (3) the court erred by excluding all of certain bank accounts from the marital property. We affirm on the first two issues, and reverse the trial court's ruling on the third.

Benedict's first wife died in 1972. In July 1973 he willed all of his property to his two sons from that marriage. In May 1974 he married Sophie. Until Benedict died in 1996, the couple lived on the farm Benedict owned from before the marriage.

Benedict also brought two bank accounts to the marriage. When the Wisconsin Marital Property Law took effect on January 1, 1986, one account was worth \$4,424. The trial court found that accrued interest brought the account's value to \$8,000 at the time of Benedict's death. Another account was worth \$13,900 in January 1986 and \$25,000 when Benedict died. The trial court found \$5,500 of the increase in the account after 1986 came from gifts made by one of Benedict's sons, and the rest from accrued interest. The couple paid their bills from a separate joint account.

The trial court denied Sophie's motion to revoke the will because it made provision for his sons. After Sophie subsequently elected to take her marital share, the trial court held that she did not satisfy her burden of proving that the appreciation in the farm during the marriage should be deemed marital property. The court also excluded from the marital property the entire value of the two bank accounts.

Benedict's marriage to Sophie did not revoke his will. Section 853.11(2)(a), STATS., provides in relevant part that a subsequent marriage

revokes a will unless it “makes provision for issue of the decedent.” That is precisely what Benedict’s will did. Although Sophie contends that § 853.11(2)(a) is ambiguous, and that the legislature intended “issue” to mean only future issue, that interpretation is not reasonably available. The term “issue” plainly and unambiguously includes living issue, as well.

The trial court properly deemed the thirty-eight acre farm nonmarital property. The farm was subject to reclassification, as marital property, under § 766.63(2), STATS., if Sophie proved a substantial appreciation in the farm’s value due to her “substantial labor, effort, inventiveness, physical or intellectual skill, creativity or managerial activity.”¹ What Sophie demonstrated at trial was that she contributed to the costs of living on the farm, helped grow crops, stacked and carried firewood, did the necessary housework, prepared meals, operated a garden and canned produce, helped landscape and mow the yard, and helped repair the home. However, such acts amount to no more than routine, normal and usual acts in a farm operation. Sophie offered no proof that they substantially, or even moderately increased the value of the farm.

The rule of [sec. 766.63(2), STATS.] is strict. It articulates a bias against creation of marital property from such an act unless the effort has been substantial and has been responsible for substantial appreciation. Routine, normal, and usual effort is not substantial.... The section is only satisfied by ... a truly substantial appreciation *attributable to the effort* [of the spouse].

¹ Sophie concedes that the state overcame the initial presumption that the farm was marital property, set forth in § 766.31(1), STATS.

UNIF. MARITAL PROPERTY ACT § 14, comment, 9A U.L.A. 131-32 (1987) (emphasis in original), quoted with approval in *Kobylski v. Hellstern*, 178 Wis.2d 158, 185-86, 503 N.W.2d 369, 379 (Ct. App. 1993).

The court erred by determining that the bank accounts belonged totally to Benedict's estate. Income earned or accrued by a spouse or attributable to property of a spouse after January 1986 is marital property. Section 766.31(4), STATS. The definition of "income" includes interest. Section 766.01(10), STATS. However, that definition of "income" also provides an exception if what is otherwise income is "attributable to a return of capital or to appreciation." The trial court applied the latter provision and held that the accrued interest on Benedict's accounts was an "appreciation" of their value. That determination is in error because this court has held interest that accrues on a separately owned bank account is marital property. *Lloyd v. Lloyd*, 170 Wis.2d 240, 258, 487 N.W.2d 647, 654-55 (Ct. App. 1992). The fact that Benedict chose to leave the accrued interest in his account rather than spend it or invest it elsewhere does not convert that interest from income to appreciation.² On remand, the trial court shall amend its order to include all interest accrued on the two bank accounts, since January 1, 1986, in the marital property and divide it accordingly.

Given our decision in this case, no costs shall be allowed under § 809.25, STATS.

² Chapter 766.01(2), STATS., defines "appreciation" as "a realized or unrealized increase in the value of property."

By the Court.—Orders affirmed in part; reversed in part and cause remanded.

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

