

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 10, 2008

David R. Schanker
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP722

Cir. Ct. No. 2005PR49

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN RE THE ESTATE OF
LESTER A. MOEN, DECEASED:**

JOYCE MOEN,

APPELLANT,

V.

**SHANE MOEN, LANCE MOEN,
CHRISTIAN MOEN AND JASON MOEN,**

RESPONDENTS.

APPEAL from an order of the circuit court for Green County:
JAMES R. BEER, Judge. *Affirmed.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Joyce Moen appeals from an order denying her motion to reopen the probate of the estate of her husband, Lester Moen. The dispositive issue is whether the marital property agreement reclassified certain property as non-survivorship marital property. We conclude it did, and therefore we affirm.

¶2 Joyce filed a motion to reopen the estate under WIS. STAT. § 879.31 (2005-06),¹ which incorporates the standards provided in WIS. STAT. § 806.07. The motion asserted that, as to a property the parties refer to as “Farm No. 3,” Joyce succeeded to Lester’s interest in the farm upon his death by right of survivorship, and therefore the Estate had no legal interest in the farm, and the personal representative had no legal authority to convey any interest in the farm to heirs under the will. The circuit court denied the motion. On appeal, Joyce frames her argument for reopening in various ways, but all of them ultimately rely on the assertion that she had a survivorship interest in Farm No. 3. We conclude that this assertion is in error.

¶3 In March 2000, Joyce and Lester received a warranty deed on Farm No. 3, which titled the property in their names, with the further notation “Husband and Wife as Survivorship Marital Property.” In May 2000, they executed a marital property agreement. The respondents argue that this agreement reclassified Farm No. 3 in a manner that extinguished Joyce’s survivorship right that was provided in the title. We agree.

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 Construction of a marital property agreement is a question of law. *Gardner v. Gardner*, 190 Wis. 2d 216, 240, 527 N.W.2d 701 (Ct. App. 1994). This case hinges on the distinction between “marital property” and “survivorship marital property.” For both forms of marital property, each spouse normally has a present undivided one-half interest in each item. WIS. STAT. § 766.31(3). The difference is at the death of one spouse. If property is held in the names of the spouses “as marital property,” that phrase does not alone establish survivorship ownership. WIS. STAT. § 766.60(5)(a). However, if the property is instead described as “survivorship marital property,” the ownership rights of the decedent spouse vest solely in the surviving spouse by nontestamentary disposition. *Id.*

¶5 The marital property agreement in this case provides in paragraph 3.II.A. that the parties “designate the following property as marital property: All real estate owned by them or either of them.” Farm No. 3 fits within the description of “real estate owned by them.” We conclude that by describing this property as “marital property,” rather than “survivorship marital property,” the marital property agreement had the effect of altering the form in which the property was held. In other words, for purposes of determining survivorship rights, the agreement had the effect of modifying the form of ownership that was earlier established in the title.

¶6 Joyce argues that this interpretation of the agreement is erroneous because, in her view, the agreement actually *confirms* the existing forms of ownership and survivorship as to all real estate, by expressly confirming the primacy of any designation set forth in the title. In support of this contention she quotes a sentence from paragraph 3.III: “All other property shall be classified as marital property unless otherwise titled.” Because Farm No. 3 was “otherwise titled,” Joyce argues that the title controls. However, we conclude that Joyce is

reading this sentence too broadly. In the context of paragraph 3.III., it is clear that this sentence is part of the provisions regarding “property acquired by them together or individually *after the date of this agreement.*” (Emphasis added.) Therefore, this provision is irrelevant to Farm No. 3, which was acquired before the agreement.

¶7 Joyce also argues that the court erred by deciding her motion to reopen without permitting her to take discovery on her allegation that the personal representative may have committed fraud in the classification of Lester’s interest in Farm No. 3 as an asset of the Estate. We conclude that this issue is resolved by our conclusion that the personal representative’s treatment of Lester’s interest was legally correct. Even if we assume for purposes of argument that the personal representative reached that result by fraud, that would not be a ground to reopen the estate, since the result as to Joyce would still be the same in the absence of any fraud.

By the Court.—Order affirmed.

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

