

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 30, 2005

Cornelia G. Clark
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. 2005AP320

Cir. Ct. No. 2004CV20

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**GEORGIA L. BERTSCHINGER BY HER PERSONAL
REPRESENTATIVE AND SHERRY L. BERTSCHINGER,**

PLAINTIFFS-APPELLANTS,

V.

KIM WENGER,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Buffalo County:
DANE F. MOREY, Judge. *Reversed and cause remanded with directions.*

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

¶1 PER CURIAM. The estate of Georgia Bertschinger appeals a judgment awarding Kim Wenger title to their jointly owned Buffalo City house upon Wenger's payment to Bertschinger of \$3,538.50, half the principle paid on their joint mortgage. We conclude the trial court's decision was based on facts

that are not supported by the record and a misallocation of the burden of proof. Because Wenger failed to meet his burden of rebutting the presumption of equal division, we reverse the judgment and direct the court on remand to amend the equalization payment to half the equity in the property at the time of trial.

¶2 Only Bertschinger and Wenger testified at the trial.¹ Bertschinger testified that she and Wenger lived together in her Minnesota home before purchasing the Buffalo City house. Approximately six months before buying the Buffalo City house, Wenger agreed to pay Bertschinger \$500 per month rent while he lived with her in her Minnesota home. He never made any rental payments. Rather, when he received money from the sale of a business, he made a \$6,000 downpayment on the Buffalo City house. Bertschinger testified that the parties agreed half of the down payment was attributable to her as payment for the rents due.

¶3 The title and mortgage were in Bertschinger's name because Wenger had a bad credit rating. When the couple refinanced and Wenger's credit rating improved, they took a joint mortgage and created a joint tenancy in the Buffalo City house. The mortgage payments were made from Wenger's checking accounts. Bertschinger deposited money in Wenger's accounts and also gave him cash to enable him to make the mortgage payments. She estimated that she paid more than half the mortgage payments in that manner. Bertschinger took the tax deduction for the mortgage interest and used the money for home improvements. Bertschinger testified that both parties expended funds and effort improving and protecting the Buffalo City house. When the couple separated, Bertschinger

¹ Bertschinger died shortly after the trial and her estate brought this appeal.

moved to the Buffalo City house and Wenger moved to his new girlfriend's house, but kept a room and some personal property at the Buffalo City house where he had his own key for access. Bertschinger brought this partition action seeking more than half the equity in the property.

¶4 Wenger confirmed that he owed Bertschinger past rents from living in her Minnesota home and that she should be credited with half the \$6,000 down payment. He also confirmed that Bertschinger periodically gave him cash in addition to her direct deposits to his checking account, but he declined to estimate the amount of cash she paid. Wenger also confirmed that both parties paid for and performed maintenance on the Buffalo City house.

¶5 The trial court found that Bertschinger's name was placed on the title as a matter of convenience and the property was Wenger's. The court declined to give Bertschinger any credit for the down payment, finding that Wenger never actually lived in the Minnesota house, any rental agreement was more than six and one-half years earlier and was barred by the statute of limitations, and Bertschinger paid Wenger no rent for the time she lived in the Buffalo City house after the couple separated. The court found that Bertschinger failed to meet her burden of proving the amount or designated purpose of any cash payments she gave Wenger. The court found that \$7,077 of the principle was paid on the mortgage and awarded Bertschinger half that amount as the equalization payment.

¶6 When a joint tenancy is partitioned during the lives of the co-tenants, a rebuttable of presumption is created that the property will be equally divided. *See Jezo v. Jezo*, 23 Wis. 2d 399, 406, 127 N.W.2d 246 (1964). The presumption may be rebutted by evidence showing the source of the cash outlay at the time of

acquisition, the intent of a co-tenant creating the joint tenancy to make a gift, unequal contribution by way of money or services, unequal expenditures in improving the property or freeing it from encumbrances and clouds, or other evidence raising inferences contrary to the idea of equal interest in the joint estate. *Id.*

¶7 The trial court initially appropriately placed the burden of proof on Bertschinger because she sought unequal division. Before awarding Wenger a disproportionate share of the property, however, the court should have applied the burden of proof to require him to rebut the presumption of equal division. At the close of the trial, the court appropriately noted that “[t]he burden of proof was not met very thoroughly by either party.” Proper application of the burden of proof would have resulted in equal division of the property because neither party rebutted the presumption of equal division.

¶8 The trial court’s conclusion that Bertschinger should not be credited with the down payment is based on clearly erroneous findings of fact and misapplication of the law, and its implicit finding that the Buffalo City house was intended to be Wenger’s sole property is not supported by the evidence. The trial court found that Wenger never lived at Bertschinger’s Minnesota home. That finding is contradicted by the testimony of both parties. The court’s failure to recognize Bertschinger’s contribution to the down payment in the form of forgiving Wenger’s rental debt was based in part on applying the statute of limitations for breach of contract. The statute of limitations is inapplicable. Bertschinger did not seek enforcement of the rental agreement, rather she testified that Wenger paid the debt by paying her half of the down payment. Wenger confirmed that arrangement. Bertschinger had no basis for suing Wenger for rents due after that payment was made.

¶9 The trial court also declined to credit Bertschinger with half the down payment because she paid Wenger no rent when she lived in the Buffalo City house after the couple separated. The situations are not comparable. Wenger lived in Bertschinger's Minnesota home for six months without paying rent after he agreed to pay rent. When Bertschinger lived in the Buffalo City house, she was a joint tenant with an equal ownership interest in the house. It would be unreasonable to expect an owner to pay rent to another equal owner. The trial court's belief that Bertschinger should have paid rent is apparently based on its notion that Wenger was intended to be the sole owner of the house when the property was initially purchased in Bertschinger's name. Nothing in the record supports that supposition. Both of the parties' testimony suggests the property was initially titled in Bertschinger's name only as a matter of convenience, but that ultimately both parties intended to create a joint tenancy with equal interest in the property. Because Wenger did not rebut the presumption of equal division by showing that he disproportionately paid for the property or unequally contributed to improving it or freeing it from encumbrances, the trial court should have equally divided the property.

¶10 The court awarded Bertschinger a share of the principle paid on the joint mortgage. The record discloses no basis for relying on that figure. At the time of trial, the court found the property to be worth \$131,000. \$82,128.75 was still due on the mortgage, creating an equity of \$48,871.21. Bertschinger was entitled to half that amount as her equalization payment.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5 (2003-04).

