

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 19, 2011

A. John Voelker
Acting 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. 2010AP3135

Cir. Ct. No. 2008FA570

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

GEORGEANNE FARLEY KETTNER,

PETITIONER-RESPONDENT,

V.

TERRENCE JEROLD KETTNER,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: KAREN L. SEIFERT, Judge. *Affirmed.*

Before Brown, C.J., Reilly, J., and Neal Nettlesheim, Reserve Judge.

¶1 REILLY, J. Terrence J. Kettner appeals from a judgment of divorce. The issue on appeal is whether the circuit court erroneously exercised its

discretion when it ruled that Terrence and his ex-wife, Georgeanne F. Kettner, were jointly responsible for a mortgage that the two of them entered into. Terrence argues that the terms of their prenuptial agreement require Georgeanne to pay the entire mortgage. As we hold that the circuit court did not erroneously exercise its discretion, we affirm the circuit court.

BACKGROUND

¶2 Terrence and Georgeanne were married on August 11, 2007. Prior to the marriage, Terrence owned a home in Lake Arbutus, Wisconsin, while Georgeanne owned a home in Berlin, Wisconsin. Terrence also had a joint tenancy ownership interest in a home in Omro, Wisconsin. On August 7, 2007, Terrence and Georgeanne entered into a prenuptial agreement which specified that property owned before the marriage would remain that party's solely owned property and would not be subject to division in the event of a divorce. They also agreed to live at Terrence's Omro residence. The prenup stipulated that the Omro residence was worth \$750,000, and that Georgeanne would pay one-half this amount (\$375,000) to buy out the current joint tenant and thus become a 50% tenant-in-common with Terrence. Georgeanne paid \$175,000 of the amount in cash, while the remaining \$200,000 was financed through a joint mortgage with Terrence. The mortgage was agreed to the day before the prenup.

¶3 On July 25, 2008, Georgeanne filed for divorce. Soon thereafter, Terrence moved out of the Omro home and put it up for sale. On November 7, 2008, Georgeanne filed a motion with the circuit court requesting permission to sell her Berlin home and retain the proceeds. Terrence contested the motion on the grounds that the proceeds from the sale should instead go towards paying off the joint mortgage on the Omro residence. The court ultimately allowed the Berlin

property to be sold, but ordered that the funds go into a trust account until the court resolved the issue of whether the proceeds should go directly to Georgeanne or whether they should go to pay off the joint Omro mortgage.

¶4 Shortly after the court permitted the sale of Georgeanne’s Berlin home—and with a sale pending—Terrence sent an unsigned e-mail through his girlfriend’s e-mail address warning the prospective buyers that Georgeanne’s home contained several dangerous defects. The court found that Terrence was attempting to stop the sale of Georgeanne’s home, and that he had “malicious” intent and exhibited “contemptuous behavior.” Despite Terrence’s efforts, the home still sold. Terrence also submitted to the court a one-page document that he claimed was an amendment to the prenup. The document was purportedly a contract whereby Georgeanne agreed to pay off the joint Omro mortgage from the proceeds of the sale of her Berlin home. The court found that the document was fraudulent and that Terrence had forged Georgeanne’s signature.

¶5 Both parties concede that the prenup conflicts with the joint Omro mortgage. Specifically, the prenup states that Georgeanne must pay Terrence one-half of the value of the Omro house (\$375,000) in order to acquire a 50% interest. While Georgeanne paid Terrence \$175,000 in cash, the remainder was financed by the \$200,000 joint Omro mortgage that lists both Georgeanne and Terrence as the mortgagor.

¶6 Terrence testified at trial that he made the joint mortgage payments during their marriage. It was also stipulated that Georgeanne contributed roughly \$127,000 towards the property while Terrence contributed approximately \$79,000.

¶7 The circuit court found that Terrence and Georgeanne entered into a marital agreement and that the stipulated value of the Omro house was \$750,000.

Furthermore, as both parties jointly entered into the Omro mortgage, the court determined that each of them was responsible for paying one-half of the remaining mortgage. The court—after awarding certain costs to each side—ruled that the proceeds from the sale of the Omro property were to be divided equally between Terrence and Georgeanne, and that Georgeanne would receive the proceeds from the sale of her Berlin house.

¶8 Terrence appeals, arguing that the circuit court erroneously exercised its discretion when it held both parties liable for the joint Omro mortgage, when it awarded Georgeanne all of the proceeds from the sale of her Berlin house, and when the court evenly divided the proceeds from the sale of the Omro property. Terrence argues that Georgeanne should be responsible for the entire Omro mortgage.

STANDARD OF REVIEW

¶9 The division of marital property is a discretionary decision for the circuit court to make. *McReath v. McReath*, 2011 WI 66, ¶21, ___ Wis. 2d ___, 800 N.W.2d 399. We will not disturb a circuit court’s discretionary decision about property division unless the court erroneously exercised its discretion. *Id.* A circuit court erroneously exercises its discretion if it makes an error of law or if it fails to base its decision upon the facts in the record. *Steinmann v. Steinmann*, 2008 WI 43, ¶20, 309 Wis. 2d 29, 749 N.W.2d 145.

DISCUSSION

¶10 The issue in this action is whether the Omro property is governed by the prenup or whether it became a marital asset and a marital obligation. Terrence argues that the prenup requires that the proceeds from the sale of Georgeanne’s

Berlin house should be used to pay off the joint Omro mortgage rather than going directly to Georgeanne.

¶11 At trial, Terrence testified that he and Georgeanne agreed that the joint Omro mortgage would be satisfied by the sale of Georgeanne's Berlin house. Georgeanne, however, testified that they did not have such an agreement. The only document that allegedly supported such an agreement was submitted by Terrence, and the court found that the document was fraudulent and that Terrence had forged Georgeanne's signature. The circuit court's discretionary credibility determination to accept Georgeanne's word over Terrence's is amply supported by the record. We affirm the circuit court's decision to award the proceeds from the sale of Georgeanne's Berlin house to Georgeanne.

¶12 We also reject Terrence's argument that Georgeanne should be responsible for paying the entire joint Omro mortgage. While the prenup states that Georgeanne was to pay Terrence one-half the value of the Omro property (\$375,000) in order to become a 50% tenant-in-common, the parties acted in a manner contrary to the prenup. For example, while Georgeanne paid Terrence \$175,000 in cash, the remaining \$200,000 was financed via a joint mortgage that lists both Georgeanne and Terrence as the mortgagor. During their marriage, Terrence made the mortgage payments. It was stipulated at trial that Georgeanne contributed roughly \$127,000 towards the property while Terrence contributed approximately \$79,000. Terrence testified that when he signed the mortgage he understood he would be responsible for paying one-half of it. Given the parties' conduct, we hold that the circuit court properly exercised its discretion when it determined that Georgeanne and Terrence were equally responsible for the joint Omro mortgage and equally entitled to the proceeds from the sale of the Omro property.

CONCLUSION

¶13 The judgment of divorce of the circuit court is affirmed.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

