COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2976

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

MARION WILSON,

PLAINTIFF-RESPONDENT,

V.

CLARENCE L. OGILVIE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed.*

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

PER CURIAM. Clarence Ogilvie appeals a judgment ordering him to pay Marion Wilson $14,500 on her unjust enrichment claim and to move his encroaching septic system. He argues that the facts are insufficient to support unjust enrichment; that ch. 768, STATS., abolished Wilson's claim, and that the

court erroneously concluded that it had no authority to fashion a remedy for the encroaching septic system. We reject his arguments and affirm the judgment.

Wilson commenced this unjust enrichment action seeking reimbursement for the value of two acres of land she had conveyed to Ogilvie. The trial court found that the parties did not intend to sever the two acres from Wilson's remaining acreage. The court also determined that the transfer was not a gift and that there is really no dispute that Wilson conferred a benefit on Ogilvie. The trial court found that the two acres were worth $14,500, not counting improvements.[1] The court concluded that Ogilvie's retention of the benefit without payment would be unjust under the circumstances, and ordered that he compensate Wilson $14,500.

Ogilvie argues that the record fails to support the trial court's conclusion that he was unjustly enriched. Unjust enrichment requires proof of three elements: "(1) a benefit conferred on the defendant by the plaintiff, (2) appreciation or knowledge by the defendant of the benefit, and (3) acceptance or retention of the benefit by the defendant under circumstances making it inequitable for the defendant to retain the benefit." ***Watts v. Watts***, 137 Wis.2d 506, 531, 405 N.W.2d 303, 313 (1987). A finding of gift defeats a claim for unjust enrichment. *See* ***Brown v. Thomas***, 127 Wis.2d 318, 326-27, 379 N.W.2d 868, 872 (Ct. App. 1985). We conclude the record supports the court's conclusion that the conveyance was not a gift and that, under the circumstances, it was inequitable for Ogilvie to retain the land without payment.

[1] This finding is not challenged on appeal. Expert opinion introduced at trial placed values of $25,500 and $14,500 on the land if vacant. With the residence and other improvements, the property is valued at $130,000.

We first address the parties' dispute concerning our standard of review. Ogilvie contends that we must review de novo whether the facts fulfill the legal standard of unjust enrichment, which is solely a question of law. *See* ***Waage v. Borer***, 188 Wis.2d 324, 328, 525 N.W.2d 96, 97-98 (Ct. App. 1994). Wilson, on the other hand, maintains that we must examine the record to determine whether the evidence supports the court's factual findings. *See* ***In re Estate of Becker***, 76 Wis.2d 336, 347, 251 N.W.2d 431, 435 (1977).

We conclude that both standards apply. We agree that the issue whether facts found by the court satisfy the legal standard for unjust enrichment presents a question of law we review de novo. *See* ***Waage***, 188 Wis.2d at 328, 525 N.W.2d at 97-98. Nonetheless, to the extent that the trial court's determinations rested upon resolution of disputed facts or conflicting inferences from undisputed facts, we must defer to the trial court and not reverse unless its findings are clearly erroneous. *See* § 805.17(2), STATS.; *see also* ***C.R. v. American Standard Ins. Co.***, 113 Wis.2d 12, 15, 334 N.W.2d 121, 123 (Ct. App. 1983). We may assume that a missing finding on an issue "was determined in favor of or in support of the judgment." ***Sohns v. Jensen***, 11 Wis.2d 449, 453, 105 N.W.2d 818, 820 (1960). We search the record for evidence to support trial court findings reached, not for evidence to support findings the trial court did not but could have reached. ***In re Estate of Dejmal***, 95 Wis.2d 141, 154, 289 N.W.2d 813, 819 (1980). We must consider that the trial court has the superior opportunity to observe the witnesses' demeanor and gauge the persuasiveness of their testimony. ***Id***. at 151-52, 289 N.W.2d at 818.

Wilson testified to the following facts in support of her unjust enrichment claim. Wilson owned twenty-two acres in River Falls where she resided and operated a dog training, grooming and kennel business. She and

Ogilvie had a romantic relationship and, in January 1996, Ogilvie moved in with Wilson. They planned to be married. Ogilvie was self-employed in a ceramic tile business. Wilson testified that Ogilvie asked if he could build a garage on her property in order to store his tools. He told Wilson that while he could store his tools in her granary, it was not worth fixing up. He therefore wanted to tear it down and replace it with a building for his tools and a shop.

In April, Ogilvie told Wilson that he felt bad about not contributing to household expenses and discussed how much he should contribute. He also told her that he was mistrustful that her children could evict him from his building if he built it on her land. In response, Wilson wrote a note indicating that she would give him two acres to build his garage. Wilson testified: "I didn't think it was a gift. It was just that I was letting him have a spot on my property to put his garage."

With Wilson's assistance, Ogilvie started construction in June. Wilson obtained the survey, a special use permit, building permit and a permit for a septic system. Wilson testified that she helped him tear down the granary. When the shell of the building was up in August, Ogilvie ran out of funds to complete the project. He told Wilson that he wanted to take out a loan to finish off a ceramic tile show room. He told her that the bank would not give him a loan because the land was not in his name. Wilson testified that she did not want to take out a loan, and Ogilvie proposed that she put the land in his name. Eventually, when she had not transferred title, he became angry and insisted that the two acres be put in his name so that he could get the bank loan.

As a result, Wilson contacted her lawyer and asked to have a warranty deed drawn up. The deed conveyed the land with the partially built

structure to Ogilvie. Wilson testified that she did not intend to transfer the property forever, but that "I expected that it was, would still belong to him and me after we were married. … I would have never wanted to part with that property."

Wilson testified that she continued to pay all the real estate taxes and used the two acres to store personal property, exercise her dogs and graze her horses. The area did not have road access, and Ogilvie used her driveway. The property shares a well with Wilson's residence, and the septic system is partially on Wilson's land. In January 1997, Ogilvie moved out of Wilson's home into the building on the two acres that he had turned into a residence and the parties broke their engagement. Wilson subsequently filed this action for unjust enrichment.

The record supports the trial court's finding of unjust enrichment. Both parties agree that Wilson contributed land to build what was originally planned as a garage and shop and what evolved into Ogilvie's residence. The parties worked together to construct the building and, after substantial progress, a loan was needed to complete it. Wilson deeded the property to Ogilvie to facilitate completion of the project. Wilson was uncompensated for the land. Wilson also provided assistance in the form of obtaining necessary building permits, and testified that she helped demolish an old building standing in the way. As the trial court pointed out, there is no real dispute that there was "a benefit conferred on the defendant by the plaintiff, [and] appreciation or knowledge by the defendant of the benefit." *See* ***Watts***, 137 Wis.2d at 531, 405 N.W.2d at 313.

The dispute centers on whether the acceptance or retention of the benefit by the defendant was under circumstances making it inequitable for the defendant to retain the benefit. *See* ***id***. Ogilvie contends that Wilson failed to show that it is inequitable for him to retain the benefit. We disagree. The trial

court concluded it was unfair that Wilson derived no benefit from the parties' joint efforts, yet Ogilvie did. The court pointed out that Ogilvie's residence is now worth $130,000 and that he would not have had this asset if not for Wilson's assistance. The court also observed that the only consequence to Wilson at this point is that she now has a hostile neighbor. Her property was not enhanced by his building. The court also considered expert testimony that the two acres when vacant were worth $25,500, but adopted the lower appraisal of $14,500. We conclude that the record supports the court's conclusion that Ogilvie was unjustly enriched in the sum of $14,500.

Ogilvie argues that the facts show merely that Wilson made a gift that she now regrets. He maintains that the law does not recognize her claim for the return of an expensive gift made to another in contemplation of marriage. In essence, Ogilvie maintains that the record shows as a matter of law that Wilson made an unconditional gift that defeats her claim for unjust enrichment. We are unpersuaded. "Generally, a gift *inter vivos* is completed when a delivery of the subject of the gift is made by the donor with intention to part with his interest in and over the property given." ***Potts v. Garionis***, 127 Wis.2d 47, 51, 377 N.W.2d 204, 206 (1985). What form the delivery of the property must take depends upon its nature and the situation of the parties. ***Id***. "The cases recognize as essential elements in these matters: (1) intention to give; (2) delivery; (3) end of dominion of donor; [and] (4) creation of dominion of donee." ***Id***.

In finding that the conveyance was not a gift and that the parties did not intend to create a separate parcel, the court essentially found that Wilson did not intend to make a gift and did not terminate dominion over the parcel. An individual's subjective intent is a question of fact that should ordinarily be determined by the trier of fact. ***Gouger v. Hardtke***, 167 Wis.2d 504, 517, 482

N.W.2d 84, 90 (1992). The trial court was entitled to believe Wilson's testimony that she did not intend to make a gift. Also, testimony that the septic system partially straddled the boundary, that the parcel shared a well, and that Wilson stored property, grazed horses, and exercised her dogs on the two acres supports the court's decision that Wilson did not end dominion over the acreage. In addition, the trial court apparently placed greater weight on Wilson's testimony to the effect that she transferred title to the property merely to facilitate the financing of Ogilvie's building project. The trial court, not the appellate court, judges the credibility of witnesses and the weight of their testimony. ***Micro-Managers, Inc. v. Gregory***, 147 Wis.2d 500, 511-12, 434 N.W.2d 97, 102 (Ct. App. 1988). Here, the record supports the trial court's determination that the conveyance was not a gift.

Ogilvie also points to inconsistencies in Wilson's testimony; on the one hand, she testified that she did not believe she was making a gift, and on the other, she also testified that it would not be right to keep an expensive present when the relationship did not work out. He notes that Wilson denied that she ever told Ogilvie she expected to be compensated if the relationship ended. He further argues that in reliance on her promise, he invested his life savings before the warranty deed was executed. He points to the note Wilson signed, the warranty deed and her request to purchase the property back if he ever decides to sell it. He argues that Wilson knew what she was doing, and when her friends advised her against it, had responded to them that she would not renege on her promise.

At trial, however, Wilson explained that she did not want to renege on her promise that Ogilvie could "use" the two acres. Although there may be inconsistencies in Wilson's testimony, it is the trial court's function, not this court's to resolve inconsistencies. *See* ***Fuller v. Reidel***, 159 Wis.2d 323, 332, 464

N.W.2d 97, 101 (Ct. App. 1990). We reject Ogilvie's suggestion that we draw inferences contrary to those of the trial court. *See* ***C.R.,*** 113 Wis.2d at 15, 334 N.W.2d at 123.

Next, Ogilvie claims that § 768.01, STATS., abolishes Wilson's unjust enrichment claim.[2] We disagree. In ***Watts***, our supreme court held:

> The Family Code, chs. 765-768, Stats. 1985-86, is intended to promote the institution of marriage and the family. We find no indication, however, that the Wisconsin legislature intended the Family Code to restrict in any way a court's resolution of property or contract disputes between unmarried cohabitants.

Id. at 523-24, 405 N.W.2d at 310. We are bound by supreme court precedent. ***State v. Clark***, 179 Wis.2d 484, 493, 507 N.W.2d 172, 175 (Ct. App. 1993).

Next, Ogilvie recasts his argument in various ways. For example, he argues that he "did not commit any wrongful or deceitful conduct to justify Wilson's demand for payment seven months after the transfer." He further claims that there is no evidence to support a claim of a conditional gift. Because Wilson did not claim fraud or that she made a conditional gift, these arguments are without merit. Ogilvie further argues that § 241.02(1)(c), STATS., requiring certain agreements be in writing, was not satisfied.[3] The "obligation to make

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[2] Section 768.01, STATS., provides: "All causes of action for breach of contract to marry, alienation of affections and criminal conversation are hereby abolished, except that this section shall not apply to contracts now existing or to causes of action which heretofore accrued."

[3] Section 241.02, STATS., provides in part:

> **Agreements, what must be written. (1)** In the following case every agreement shall be void unless such agreement or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party charged therewith:

(continued)

restitution arises not from any representation or promise, but rather upon the circumstances which create a duty to make restitution." ***Lawlis v. Thompson***, 137 Wis.2d 490, 497, 405 N.W.2d 317, 319 (1987). "[It is] the duty of an unjustly enriched person to return the property—'not his promise, agreement, or intention'—which is the basis for recovery under a theory of unjust enrichment." ***Id***. at 498, 405 N.W.2d at 319-20. Because a claim for unjust enrichment is not based upon any agreement, this argument fails. *See* ***id***. at 497, 405 N.W.2d at 319.

Finally, Ogilvie argues that the court erred when it found that it had no authority to fashion an equitable remedy to allow the septic system to remain in its present location. He argues that the trial court has the inherent power to apply equitable remedies to meet the needs of a particular case, citing ***Perpignani v. Vonasek***, 139 Wis.2d 695, 737, 408 N.W.2d 1, 18 (1987). Although Ogilvie correctly recites the law, his characterization of the record is incomplete. The court ordered that Ogilvie remove his encroaching septic system from Wilson's land because it found that Ogilvie was primarily responsible for locating the septic system. Although it held that it was without equitable power to require Wilson to deed or trade land with Ogilvie, it did not stop there. In a supplemental opinion, the trial court reasoned that "[T]here is no basis to shift the blame to someone else. Since it was due to defendant's own acts or lack of foresight and care that resulted in the encroachment taking place, there is no equitable basis to order plaintiff to help defendant resolve his difficulties."

> ….
>
> (c) Every agreement, promise or undertaking made upon consideration of marriage, except mutual promises to marry.

In ***Williams v. Kaerek Builders, Inc.***, 212 Wis.2d 150, 162, 568 N.W.2d 313, 318 (Ct. App. 1997), we held:

> The decision to provide an equitable remedy rests within the circuit court's discretion. We will not reverse a court's discretionary choice provided that it applies the correct legal standards to the facts of the case and reaches a reasonable conclusion. Therefore, the decision of whether to apply this equitable remedy was primarily a matter for the circuit court. (Citations omitted.)

Here, the record reflects that the trial court rationally applied the law to the facts and reached a reasoned conclusion. Consequently, we do not disturb its discretionary determination.[4]

By the Court.—Judgment affirmed.

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

[4] Wilson requests that we award her costs for a frivolous response brief, RULE 809.25(3), STATS. While we found the arguments to be without merit, we do not hold that Ogilvie or his attorney knew or should have known that they were without any reasonable basis in law or equity, or advanced solely for the purpose of harassment. Also, because we affirm on the merits, we do not address Wilson's waiver arguments.