COURT OF APPEALS
DECISION
DATED AND FILED

October 4, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP302 **Cir. Ct. No. 2004CV3507**

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

KIMBERLY HAEFNER,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

PATRICK FITZGIBBON,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Dane County: MORIA KRUEGER, Judge. *Affirmed*.

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

¶1 PER CURIAM. Patrick Fitzgibbon appeals from a judgment dividing property in a nonmarital cohabitation case. We affirm.

¶2 Fitzgibbon first argues that the circuit court erred in awarding property to Kimberly Haefner on a theory of unjust enrichment. A claim on this theory traditionally 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." ***Ulrich v. Zemke***, 2002 WI App 246, ¶10, 258 Wis. 2d 180, 654 N.W.2d 458 (citation omitted). However, in the context of a nonmarital cohabitation case, these elements are satisfied by showing: "(1) an accumulation of assets, (2) acquired through the efforts of the claimant and the other party, and (3) retained by the other party in an unreasonable amount." ***Id.***, ¶11 (citation omitted).

¶3 In Fitzgibbon's brief on appeal, he recites the first group of elements. In response, Haefner argues that these are the incorrect elements, and instead the second set should be used. In reviewing the circuit court's decision, we note that the court stated that the parties agreed on the elements of unjust enrichment, and that the court then went on to recite and apply the first set of elements. The parties' briefs in circuit court show that Fitzgibbons recited the first set of elements, while Haefner recited the second. In light of the discussion in ***Ulrich,*** it appears that the circuit court chose the set of older, more general, elements not specifically adapted to nonmarital cohabitation cases. However, the two sets of elements are similar in concept and purpose. And, as a practical matter, we are satisfied that there is little difference between them when applied in the context of this case, as we do below.

¶4 Fitzgibbon argues that the court erred in concluding that Haefner was entitled to a one-quarter interest in the parties' Marshall property, based on

her contributions toward that property. Fitzgibbon argues that Haefner made no significant contribution toward that property, and that instead its value was primarily from his own investment of money and labor. This is an argument that goes to the old element of whether there was a benefit conferred on the defendant by the plaintiff, and the new element of whether the accumulation of assets was acquired through the efforts of the claimant and the other party.

¶5 Under either element, the question of whether Haefner made a contribution is dispositive. The circuit court firmly rejected Fitzgibbon's argument that Haefner did not contribute. The court found that Haefner performed a much greater amount of care of the parties' children, leaving Fitzgibbon with additional time, which he used to perform labor on the land, and with additional money the couple saved on childcare. In addition, her providing childcare enabled Fitzgibbon to take a higher paying job, for which he was frequently away from home, that provided money he spent on the property. The court stated that Fitzgibbon "just simply refuses to recognize anything but dollar-for-dollar contribution as being a contribution."

¶6 His appellate brief shows that this refusal continues. He argues that the better job was only during the last four years of the relationship, but we note that this covered most or all of the time that they owned the Marshall property. Fitzgibbon does not dispute that Haefner provided a large amount of childcare, or that her doing so freed his time to work and money to apply to the property. He has not shown that the court's findings and conclusions on this issue were in error.

¶7 Fitzgibbon argues that the court erred by not enforcing a written note, signed by both parties in 2001, stating that Haefner would be limited to only

a 10% interest in the Marshall property. The court concluded that this was an unenforceable contract because it lacked consideration to Haefner.

¶8 Fitzgibbon argues that Haefner received consideration in two forms. The first is that the 10% interest itself was consideration, because Haefner was essentially receiving a gift of that interest in property for which she had not made a financial contribution. This argument assumes that at the time of signing this document, Haefner was not already entitled to a 10% or greater interest in the property. As a result, this argument essentially returns us to the first one, in which we concluded that Haefner had indeed made a contribution.

¶9 Fitzgibbon also argues that there was consideration in the form of him agreeing to pay more than his share of household expenses in return for her signing this agreement. However, he does not point to any such finding by the court, and the record citation that he gives for testimony in support of this point does not actually contain such testimony. Therefore, we reject the argument.

¶10 Fitzgibbon argues that the circuit court erred by placing too high a value on the Marshall property. The circuit court placed the value at approximately $279,400, while Fitzgibbon argues that it should have been valued at its $95,000 purchase price in 1999, since there was no proper evidence of any higher value.

¶11 Fitzgibbon argues that the appraisal relied on by the court was hearsay, and not properly admissible. The appraisal, obtained in the course of a potential acquisition by the Department of Transportation, valued the property at approximately $186,000. We have held that an appraisal is admissible against a party who obtained it, under two rules of evidence. *See* ***State ex rel. N/S Associates v. Board of Review***, 164 Wis. 2d 31, 58 n.11, 473 N.W.2d 554 (Ct.

App. 1991). Fitzgibbon argues that it was Haefner who obtained the appraisal, but regardless of who actually made the arrangements, it was clearly an appraisal made in Fitzgibbon's interest.

¶12 Fitzgibbon also argues that the court improperly relied on his "offhand" testimony that "I understand land has gone up to 10 percent a year." His argument is that his own testimony is "far from credible and reliable evidence." To the extent Fitzgibbons is arguing that the court should have used a lower appreciation figure, we note that this result has already partially occurred due to a computation error by the court.[1] Moreover, attacking the credibility of one's own testimony is not a convincing argument, and Fitzgibbon does not dispute the long-established case law that a property owner is competent to testify about the value of his own property. The court could properly rely on this testimony.

¶13 Fitzgibbon argues that the court erred by placing too low a value on the vacant lot next to their residence in Monona. The court used $8,000, while Fitzgibbon argues that the court should have used the appraisal he offered of $58,000. The court's figure was apparently based on an appraisal of the property prepared for Fitzgibbon, which concluded that the sale value of the residence would be increased by six to eight thousand dollars if the adjacent vacant lot was included. He again argues that it was hearsay, and we again reject the argument for the same reason as above. He argues that the appraisal was weak evidence for

[1] In calculating the value, the court started with the appraisal figure; determined what 10% of that amount would be; multiplied that 10% figure by the five years since the appraisal; and then added that sum to the appraisal total. This method eliminated the effect of compounding, in which each year's 10% increase would be added onto both the original appraisal amount and the increases that had occurred in prior years.

reasons not persuasive to us. Furthermore, his own appraisal was weak because it assumed, without actually establishing, that the vacant lot could be divided and sold separately.

¶14 Fitzgibbon argues that the court miscalculated the equalization payment because, in awarding Haefner 25% of the Marshall property, the court failed to also make her responsible for 25% of the payments that had been made on the property. In essence, he is arguing that for Haefner to receive 25% of the current, appreciated value, she must now contribute two years' worth of past payments. What Fitzgibbon again fails to recognize is that Haefner has already been found to have made that contribution, but in non-cash form. That was the reason she was awarded the 25% interest in the first place.

¶15 Finally, Fitzgibbon argues that the court erred by permitting Haefner to introduce expert rebuttal testimony on the value of the Marshall property. The argument is that this testimony should have been barred because Haefner did not name the expert within the required time period. However, the harm that Fitzgibbon appears to be claiming is not that such an expert testified, but that to prevent rebuttal expert testimony Fitzgibbon himself chose not to present expert testimony on this issue, so as to prevent rebuttal by Haefner. In other words, he seems to be arguing that the court's ruling deprived him of the opportunity to present his own expert. Once phrased this way, it is apparent that the harm complained of was a tactical choice, not a necessary consequence of the court's ruling.

¶16 Haefner filed and briefed a cross-appeal, but informs us that we need not address this issue if we otherwise affirm the circuit court, as we have done.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2005-06).