

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 9, 2002

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. 02-0090
STATE OF WISCONSIN

Cir. Ct. No. 00-CV-587

**IN COURT OF APPEALS
DISTRICT II**

KATHRYN M. MCCABE,

PLAINTIFF-APPELLANT,

V.

GERALD ROBERT MCCABE,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Sheboygan County: JOHN B. MURPHY, Judge. *Affirmed.*

Before Nettesheim, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Kathryn M. McCabe appeals from a judgment requiring her to convey ownership in a home to her brother, Gerald Robert McCabe. She argues that the terms of the implied contract enforced by the trial court were not proven or definite enough for enforcement and that Gerald's breach

of contract claim is barred by the statute of limitations. We affirm the judgment of the trial court.

¶2 In July 1990, Gerald and his then-wife Tracy were interested in purchasing the home at 2628 N. 11th Street in Sheboygan. They spoke to Kathryn about purchasing the home because Gerald was unable to obtain financing. Kathryn purchased the home on September 5, 1990. Gerald and Tracy attended the closing with Kathryn and advanced money at the closing in addition to earnest money they put down. No one lived in the house for ten months while extensive remodeling was done. Then Gerald, Tracy, Kathryn, her infant son, and Gerald's son and daughters lived in the home. Kathryn no longer lived in the home after 1994. Gerald and Tracy made all mortgage payments, paid for all improvements to the home, and made all decisions regarding the home.

¶3 In 1998, Gerald requested that Kathryn convey ownership of the home to himself and Tracy as he was then able to obtain financing. Kathryn refused. Gerald and Tracy divorced later that year and the judgment of divorce awarded Gerald the interest he had in the home. The portion of the judgment of divorce pertaining to real estate was recorded with the register of deeds. In December 2000, Kathryn served Gerald with a notice terminating his tenancy in the home and commenced this action to clear title in the home by a declaration that the recorded document regarding Gerald's interest in the home was null and void. She sought damages for slander of title. Gerald filed a counterclaim alleging that Kathryn had breached a contract to transfer title to Gerald when he was able to obtain financing. He also sought conveyance of the home on claims of unjust enrichment and intentional misrepresentation.

¶4 The case was tried to the court. The trial court found that there was an implied contract between Gerald and Kathryn. It found that Kathryn had not acted like an owner of the house; rather, she acted like a person who implicitly or explicitly agreed that Gerald was going to have the house and bear the costs of it. In comparison, Gerald and Tracy did not act like they were mere tenants. Gerald and Tracy invested more money in the house than Kathryn. In addition, they oversaw and paid all costs of maintaining the house. No one treated amounts paid by Gerald and Tracy on the mortgage as rent. The trial court concluded that equitable reasons existed to enforce the implied contract. It required Kathryn to convey the property to Gerald upon his payment to her of money she had put into the house.

¶5 Although the trial court spoke about enforcing an implied contract, it was clearly providing equitable relief under WIS. STAT. § 706.04 (1999-2000).¹

Under the statute of frauds, *see* WIS. STAT. § 706.02, a contract to convey land must be in writing. However, WIS. STAT. § 706.04 provides the conditions under which a trial court may use equitable doctrines to enforce a promise to convey real estate despite noncompliance with the statute of frauds. The first condition under that statute is that “all of the elements of the transaction are clearly and satisfactorily proved.”

Lenhardt v. Lenhardt, 2000 WI App 201, ¶7, 238 Wis. 2d 535, 617 N.W.2d 218 (citation omitted).

¶6 Kathryn argues that the elements of the transaction were not satisfactorily proven because there was uncertainty as to when she would be

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

required to convey the property to Gerald and at what “buy-out” price. The trial court found that the parties intended the conveyance to occur at some time in the future at Gerald’s demand. It also found that the parties agreed there would be an accounting for the money Kathryn put into the house. These findings must be upheld unless clearly erroneous. WIS. STAT. § 805.17(2).

¶7 Both Gerald and Tracy testified that they asked Kathryn to help them purchase the house and that title would be transferred to them when they had other matters cleared up and were able to get a mortgage in their own names. They also confirmed that Kathryn was agreeable to the concept that she would be reimbursed for her portion of the down payment. This testimony supports the trial court’s findings.

¶8 Kathryn attempts to imbue uncertainty through her own testimony denying that a contract existed. The trial court found her testimony, particularly her characterization of Gerald’s payment of the mortgage as rent, incredible. We are required to give due regard to the opportunity of the trial court to assess the credibility of the witnesses. *Hughes v. Hughes*, 148 Wis. 2d 167, 171, 434 N.W.2d 813 (Ct. App. 1988).

¶9 We agree with the trial court that it was not fatal that a date certain or an amount certain was never spoken about between the parties. At the time they could not have known those elements with certainty. The understated nature of the arrangement comported with Gerald and Kathryn’s sibling relationship over the years. Kathryn assisted Gerald in his restaurant business, lived with Gerald and Tracy, and lived in the apartment above the restaurant. Gerald and Tracy cared for Kathryn’s child while she went to school and worked in Milwaukee. The parties exchanged these benefits without any financial structure. The

testimony demonstrated that the parties contemplated a certain state of affairs as compelling performance—Gerald’s ability to get a mortgage and repayment to Kathryn. The elements were sufficiently defined to permit equitable relief. *See Krauza v. Mauritz*, 78 Wis. 2d 276, 281, 254 N.W.2d 251 (1977) (for relief under WIS. STAT. § 706.04, the trial court was entitled to accept testimony that specific terms would be taken care of under the general agreement to pay “what you had in it”).

¶10 Kathryn argues that there was no consideration for the implied contract to convey the home to Gerald. Kathryn is compelled to convey the property for equitable reasons. There is no necessity that consideration sufficient to support an enforceable contract be demonstrated. Under WIS. STAT. § 706.04, only elements of the transaction, and not elements of a contract, need be established.²

¶11 Even if the elements of the transaction were not sufficiently defined to support relief under WIS. STAT. § 706.04, Gerald is entitled to conveyance of the property under his alternative theory of unjust enrichment. We may affirm on grounds different than those relied on by the trial court. *Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 595, 530 N.W.2d 16 (Ct. App. 1995). The circumstances here are similar to those found in *Meyer v. Ludwig*, 65 Wis. 2d 280, 222 N.W.2d 679 (1974), in which a constructive trust was imposed divesting a father of his interest in real estate that his wife had promised to bequeath to his daughter. In *Meyer*, the father was unjustly enriched by retention of the property

² Thus, we deem the trial court’s reference to an implied contract as superfluous. We need not, as Kathryn urges, determine whether the trial court was enforcing a contract implied in law or fact.

after the daughter's substantial investments of time, labor and money over a long period of years in reliance on the promise that the property would be hers. *Id.* at 287. Gerald labored, expended money, and lived in the house under the same impression. Moreover, as in *Meyer*, a confidential relationship existed between Kathryn and Gerald by virtue of the “exchange of labor, mutual support and assistance, and inter-family relationship of the ... family units here involved.” *Id.* at 288. Kathryn's refusal to convey the home to Gerald was an abuse of the confidential relationship. Unjust enrichment and abuse of the confidential relationship support the trial court's judgment that Kathryn be required to convey the home to Gerald.

¶12 Kathryn argues that a six-year statute of limitations applies to the implied contract enforced by the trial court. *See* WIS. STAT. § 893.43. She contends that the limitation period expired because Gerald first requested that she convey the property in either 1993 or 1994. As we made plain at the outset, relief was afforded for equitable reasons. The timeliness of an action in equity is governed by consideration of laches. *Suburban Motors of Grafton, Inc. v. Forester*, 134 Wis. 2d 183, 187, 396 N.W.2d 351 (Ct. App. 1986). “The three essential elements of laches are unreasonable delay in commencing the action, knowledge of the course of events and acquiescence therein and prejudice to the party asserting the defense.” *Elkhorn Area Sch. Dist. v. E. Troy Cmty. Sch. Dist.*, 127 Wis. 2d 25, 31, 377 N.W.2d 627 (Ct. App. 1985). The record does not demonstrate unreasonable delay on Gerald's part. Nor is there a suggestion of prejudice to Kathryn. Relief is not barred by laches.

By the Court.—Judgment affirmed.

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

