COURT OF APPEALS
DECISION
DATED AND RELEASED

September 18, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-0736

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

DONALD R. MAC CLYMONT,
as guardian of:
DAVID B. MAC CLYMONT,
incompetent,

Plaintiff-Respondent-
Cross Appellant,

v.

HARRIET J. GILLIGAN,

Defendant-Appellant-
Cross Respondent.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Washington County: RICHARD T. BECKER, Judge. *Affirmed*.

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

PER CURIAM. Harriet J. Gilligan appeals and David B. MacClymont, by his guardian, cross-appeals from a judgment determining the parties' interest in the sale proceeds of a lake home in which Harriet and David cohabitated for more than ten years. Harriet contends that her claim for unjust

enrichment entitles her to more than 28.5% of the net sale proceeds, that she should have been awarded interest at the statutory rate and that the judgment for double rent due after a notice of termination was error. David argues that the evidence does not support a damages award for unjust enrichment. We affirm the judgment.

David and Harriet started to live together as nonmarital cohabitants in 1975 at a home Harriet owned in Hartford. In December 1977, they moved into a home they built together on Pike Lake. David had purchased the lot the home was built on and obtained a $25,000 loan to fund construction.

In August 1990, David suffered heart failure which left him incapacitated. David's brother, Donald MacClymont, was appointed guardian. Harriet had moved out of the lake home sometime prior to August but returned to the lake home when it became apparent that David would not be able to live there any longer. Harriet was served with a notice terminating her tenancy effective December 31, 1992, but she did not move out of the home until August 1993. When an action was brought to sell a Jaguar owned by Harriet and David as tenants in common, Harriet counterclaimed for a declaration of her interest in the lake home. Harriet's claim was tried to the court. A subsequent action was commenced to recover rent due for Harriet's tenancy holdover.

We first address the cross-appeal which challenges the trial court's conclusion that Harriet should recover a portion of the sale proceeds from the lake home based on unjust enrichment. In a nonmarital cohabitation situation, three conditions must be present to permit recovery for unjust enrichment: "(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." ***Waage v. Borer***, 188 Wis.2d 324, 329-30, 525 N.W.2d 96, 98 (Ct. App. 1994). Whether the facts as found by the trial court satisfy the legal standard for unjust enrichment is a question of law which we review de novo. ***Id.*** at 328, 525 N.W.2d at 98.

David argues that Harriet provided only personal services or shared living expenses during the relationship. He contends that shared living arrangements alone are not enough to permit recovery for unjust enrichment.

We would agree with him if this case was simply a claim for "uncompensated housekeeping efforts made in contemplation of marriage." ***Id.*** at 330, 525 N.W.2d at 98. Here we have efforts of a different character than the housekeeping services provided by the unsuccessful claimant in ***Waage***.

The type of benefit to be conferred and compensated for by unjust enrichment is one involved in the joint accumulation of wealth or assets. ***Id.*** at 330-31, 525 N.W.2d at 98-99. The trial court found that in addition to the sharing of living expenses, Harriet found the real estate and negotiated its purchase, she participated in drawing the house plans, she applied for the necessary variance and attended the hearing with David, she expended labor and personal funds in constructing the home, and she purchased interior items for the house, including a pier and deck. These contributions went directly to the improvement and increased value of the lake home. The parties' joint efforts to design and build the house that they resided in was more than just a mere sharing of expenses. It was a joint effort to accumulate assets.

David next argues that the trial court did not and could not find that it would be "inequitable" to not return to Harriet the value of the benefits she conferred. He misdirects his claim by looking for some wrongful or unconscionable conduct on his part or a disproportionate benefit by Harriet which entitles her to compensation. He further attempts to supplant the entire unjust enrichment theory by arguing that the agreement to split expenses was a contract which prevents recovery under the "quasi contract" theory of unjust enrichment.

We reject David's attempt to obscure the issue. The focus is on the joint efforts to build the lake home. With respect to that particular asset, the trial court addressed the essential elements. In doing so, the court was performing a factfinding function. There was sufficient evidence from which the trial court could determine that Harriet's "efforts fertilized the increased value" of the lake home, including the payment of household expenses, thereby "freeing" up David's income for mortgage payments and taxes. ***Watts v. Watts***, 152 Wis.2d 370, 381, 448 N.W.2d 292, 296-97 (Ct. App. 1989). David paid $11,350 for the real estate and took out a $25,000 mortgage to finance construction. The lake home sold for $191,000. The inequity of allowing David to retain the entire appreciated value of the home is apparent.

David claims that there was no evidence to support an award of damages for unjust enrichment. Our discussion here encompasses Harriet's appellate claim that she was entitled to more than the recovery of $40,502.50 (28.5% of the net sale price). Paradoxically, David argues that there was no evidence from which the trial court could measure the value of the benefit conferred, while Harriet maintains that the trial court improperly fixated on measuring the value of the actual benefit she conferred.

We conclude that the trial court properly focused on what amount it was inequitable for David to retain. Contrary to David's assertion, it was not necessary to have specific testimony on the value of the services Harriet performed in relation to the natural appreciation of the lake home. *See* ***Watts***, 152 Wis.2d at 382, 448 N.W.2d at 297. In recognizing that David was entitled to appreciation in value not directly attributable to Harriet's active efforts, the trial court deducted the appreciated value of the real estate from the sale price. It then divided the remaining net sale proceeds equally. The tax bill was sufficient evidence for the trial court to make a division between the value of the land and improvements. Thus, the 50% award of the value of the improvement must be sustained as a product of both the trial court's factfinding function and discretionary authority to fashion an equitable remedy between the parties.

David's final claims are that the damages award was improper because an award of an interest in real estate contravenes the writing and recording requirements for conveyances of real estate under ch. 706, STATS., and because Harriet lacked the "clean hands" necessary to obtain equitable relief. We summarily reject both claims. The requirements of ch. 706 do not restrict the remedies the court may order, particularly here where the real estate was sold and only a money judgment was entered against the sale proceeds. The claim that Harriet lacks clean hands because she moved out and started living with another man is irrelevant to the claim for an interest in the lake home. Wisconsin has long removed itself from assigning "fault" in the failure of an interpersonal relationship. *See* Laws of 1977, ch. 105, § 1(1).

Harriet argues that the trial court erred in finding that an agreement was made with David's guardian that she pay rent when she returned to the lake home in September 1990. She claims that she had the right to occupy the property as part of her unjust enrichment recovery. Her argument is nothing more than a disagreement with the trial court's evaluation

of the evidence. As to the agreement that Harriet would make mortgage payments and pay insurance and taxes as rent, the trial court chose to believe the guardian's testimony. It was a credibility determination for the trial court to make. *See* ***Hughes v. Hughes***, 148 Wis.2d 167, 171, 434 N.W.2d 813, 815 (Ct. App. 1988). There was a written acknowledgement of the agreement under which Harriet performed until November 1992. The trial court's finding is not clearly erroneous. *See* ***Estate of Lade***, 82 Wis.2d 80, 88, 260 N.W.2d 665, 669 (1978) (finding that a lease exists is sustained if not contrary to the great weight and clear preponderance of the evidence).

Pursuant to § 704.27, STATS., the trial court awarded double the rent for Harriet's refusal to vacate the lake home pursuant to a notice of termination served on her in December 1992. Harriet's claim that double damages was inappropriate is a restatement of her claim that a tenancy could not be imposed when she had an occupancy interest by virtue of her unjust enrichment claim. We again reject this reasoning. Having determined that a tenancy existed and giving Harriet credit for capital expenditures, the trial court properly applied § 704.27. It was not required to assess the impact that double damages had on the unjust enrichment award.

The final issue is whether Harriet was entitled to interest at the rate imposed under § 814.04(4), STATS. David's guardian was to pay Harriet sums owed from the sale proceeds within sixty days of the court's September 7, 1994 decision. An additional hearing was needed to determine the appropriate sale costs to be deducted from the proceeds. The trial court ruled that Harriet was entitled to interest after November 7, 1994, on the sum due from the sale proceeds at the rate paid by the bank account in which the proceeds were retained pending the litigation.

We first reject Harriet's claim that an award of interest at the statutory rate of 12% is mandated by § 814.04, STATS. That statute gives the trial court discretion in making the award of costs. Moreover, § 814.02(2), STATS., deals with costs in an equitable action, as this is. The trial court has discretion in making the award. Here, the court was dividing a common fund, and the award of interest earned on the fund pending litigation was reasonably related to the function of the equitable action. We sustain the discretionary determination.

By the Court.—Judgment affirmed.

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