

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 20, 2004**

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. 03-2752-FT  
STATE OF WISCONSIN**

**Cir. Ct. No. 01FA000538**

**IN COURT OF APPEALS  
DISTRICT III**

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**IN RE THE MARRIAGE OF:**

**LINDA A. BIANCO (N/K/A LINDA A. HANSON),**

**PETITIONER-RESPONDENT,**

**v.**

**MICHAEL P. BIANCO,**

**RESPONDENT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Outagamie County: DEE R. DYER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Michael Bianco appeals an unequal property division ordered in his divorce judgment.<sup>1</sup> He argues that the trial court erred by

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<sup>1</sup> This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

enforcing the parties' premarital agreement. He further argues that the court erroneously exercised its discretion when it ordered an unequal property division. Because the record fails to establish an erroneous exercise of discretion, we affirm the judgment.

¶2 Linda and Michael Bianco were married in 1990. This was Linda's second marriage and Michael's fourth. While Linda had two children during her first marriage, Michael and Linda had no children of their marriage. The parties had entered into a premarital agreement. The court held that the premarital agreement applied to the parties' divorce and called for what resulted in an unequal property division.

¶3 The court also held, however, that even had the agreement not applied at the time of divorce, consideration of appropriate factors would compel the same property division. The court found that Linda brought significant assets to the marriage, but that Michael brought no specific assets, just some personal effects. The record indicates Linda owned a home at the time of the marriage valued at \$100,000 with a mortgage of \$48,000. Linda also had retirement benefits due to her twenty-two year employment at Fox Valley Technical College, ten of which she completed before the marriage.

¶4 The court found further that Michael held a variety of jobs, mostly in the car business, lasting only one month at one place of employment. During the marriage, Michael started Bianco Auto Sales. The court specifically found that Linda "assisted in that business for one year, but was forced out by [Michael] at that point." The court determined that due to "poor handling of the business and being out of trust with the bank, it failed" and both parties filed bankruptcy.

¶5 The court stated:

The FBI investigated [Michael] for which he hired legal counsel to the tune of \$8,500 in legal fees. On October 30, 2002, [Michael] testified under oath in this case that he and Linda hid a lot of things from the bankruptcy court. As a result of that testimony and ... other evidence throughout this record, this Court finds [Michael's] credibility to be nil, zero. Nothing [Michael] says in this case is worthy of belief.

[Michael] has admitted his willingness to commit fraud on the bankruptcy court, hid assets and failed to report income to the IRS.

¶6 The court observed that Michael implicated Linda in these activities and that she may have been involved, but that the parties “should be put back in a position as close as possible to the position they came into this marriage.” The court concluded that it was equitable to enforce the premarital agreement, but “even if the premarital agreement were not applicable to the divorce of these parties, the equities I have just mentioned would compel the Court to make an unequal division of property left in this marriage in favor of [Linda] ....”

¶7 The court found further that Michael “has not cooperated in this case from day one” and that property “has just disappeared, and there’s no getting it back.” The court awarded the parties the personal property that was titled in each of their names or in each of their possession. The court found that there were three businesses: RJ Countryside, M & M Transport and Bianco Enterprises. The court found that Michael owned an interest in RJ Countryside and M & M Transport and awarded those businesses to Michael. The court awarded Linda Bianco Enterprises.

¶8 The court noted that there was no expert valuation for the businesses, and that there was no way to determine value from the record.

Because the record lacked evidence of value, the court explained: “the Court finds no plus or minus [effect] in the property division for these awards. The court considers them equal.”

¶9 The court awarded Linda her house, pension and a business refund. The court awarded Michael a \$9,000 refund from an attorney. The court approved the parties’ agreement that Michael would receive a \$4,900 payment and one of \$7,000, representing one-half of Bianco Enterprise’s inventory. The court divided the parties’ credit card, tax liabilities and other debts. The court held that Michael was responsible for a \$10,732 Wisconsin Department of Revenue liability, finding: “That entire debt is ... a result of the business that [Michael] failed in, and therefore, that is his responsibility ....”

¶10 Property division is addressed to the trial court’s discretion. *Peerenboom v. Peerenboom*, 147 Wis. 2d 547, 551, 433 N.W.2d 282 (Ct. App. 1988). This court will interfere with the exercise of that discretion only when it is erroneously exercised. A trial court abuses its discretion when it fails to consider legally relevant factors, acts on mistaken facts, makes an inadequate or excessive division or acts on an erroneous view of the law. *Duffy v. Duffy*, 132 Wis. 2d 340, 343, 392 N.W.2d 115 (Ct. App. 1986). With certain exceptions not applicable here, WIS. STAT. § 767.255 requires the court to presume that all property is to be divided equally between the parties. *Mack v. Mack*, 108 Wis. 2d 604, 607, 323 N.W.2d 153 (Ct. App. 1982).<sup>2</sup> The court may alter this distribution,

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<sup>2</sup> WISCONSIN STAT. § 767.255 provides in part:

(3) The court shall presume that all property not described in sub. (2)(a) is to be divided equally between the parties, but may alter this distribution without regard to marital misconduct after considering all of the following:

(continued)

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- (a) The length of the marriage.
  - (b) The property brought to the marriage by each party.
  - (c) Whether one of the parties has substantial assets not subject to division by the court.
  - (d) The contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.
  - (e) The age and physical and emotional health of the parties.
  - (f) The contribution by one party to the education, training or increased earning power of the other.
  - (g) The earning capacity of each party, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children and the time and expense necessary to acquire sufficient education or training to enable the party to become self-supporting at a standard of living reasonably comparable to that enjoyed during the marriage.
  - (h) The desirability of awarding the family home or the right to live therein for a reasonable period to the party having physical placement for the greater period of time.
  - (i) The amount and duration of an order under s. 767.26 granting maintenance payments to either party, any order for periodic family support payments under s. 767.261 and whether the property division is in lieu of such payments.
  - (j) Other economic circumstances of each party, including pension benefits, vested or unvested, and future interests.
  - (k) The tax consequences to each party.
  - (L) Any written agreement made by the parties before or during the marriage concerning any arrangement for property distribution; such agreements shall be binding upon the court except that no such agreement shall be binding where the terms of the agreement are inequitable as to either party. The court shall presume any such agreement to be equitable as to both parties.
  - (m) Such other factors as the court may in each individual case determine to be relevant.

however, after considering the relevant factors listed in § 767.255(3)(a-m). *See Mack*, 108 Wis. 2d at 607.

¶11 Here, the court considered the length of the marriage, which it characterized as not long term. WIS. STAT. § 767.255(3)(a). The court considered the property brought to the marriage by each party, which weighed in favor of Linda. WIS. STAT. § 767.255(3)(b). The court considered the parties' written agreement and concluded that the absence of an agreement would not change its determination. WIS. STAT. § 767.255(3)(L). It also considered Michael's mishandling of the parties' business and disappearance of assets and his lack of credibility. WIS. STAT. § 767.255(3)(m). The court found that Michael's intentional conduct was a significant factor in the depletion of the parties' marital estate. *See Haack v. Haack*, 149 Wis. 2d 243, 253-54, 440 N.W.2d 794 (Ct. App. 1989). It concluded these factors called for a property division that approximated as closely as possible a return of the parties to their financial position at the inception of the marriage.

¶12 The record demonstrates the court properly exercised its discretion. Based on the record, the court considered the appropriate factors under WIS. STAT. § 767.255. It articulated a rational basis and reached a reasonable conclusion. Because the record fails to establish an erroneous exercise of discretion, the trial court's determination will be upheld on appeal.

¶13 Michael argues that the trial court erroneously concluded that the parties' premarital agreement governed at the time of divorce. Because the court held that WIS. STAT. § 767.255 provided an alternate basis for its decision, any alleged error with respect to the interpretation of the premarital agreement does

not prejudice Michael. Consequently, Michael's argument does not provide grounds for reversal on appeal. *See* WIS. STAT. § 805.18.

¶14 Michael further argues that the trial court erroneously laid blame for the failed business on Michael, contrary to *Hauge v. Hauge*, 145 Wis. 2d 600, 427 N.W.2d 154 (Ct. App. 1988). He argues that in the absence of misconduct, business losses cannot be attributed to him. We are not persuaded. Here, the trial court found misconduct. The court stated that Michael admitted his willingness to commit fraud on the bankruptcy court, hid assets and failed to report income to the IRS. His legal fees resulting from the FBI investigation cost the marital estate \$8,500. The court found that Michael's credibility was zero.

¶15 Michael complains, nonetheless, that Linda contributed to the losses and that the court ignored Linda's testimony and the testimony of another witness who stated that Linda was an active participant in the business in the summer of 1997. Michael's complaints regarding the trial court's credibility assessments are unavailing. An appellate court gives deference to a trial court's findings because of the "superior opportunity of the trial court to observe the demeanor of witnesses and to gauge the persuasiveness of their testimony." *Kleinstick v. Daleiden*, 71 Wis. 2d 432, 442, 238 N.W.2d 714 (1976). It is the fact-finder's function to resolve any conflicts or inconsistencies in the evidence and to judge the credibility of the evidence, *State v. Pankow*, 144 Wis. 2d 23, 30-31, 422 N.W.2d 913 (Ct. App. 1988), and the fact-finder may believe some of the testimony of one witness and some of the testimony of another witness even though their testimony, read as a whole, may be inconsistent. *State v. Toy*, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985). Unless the testimony is inherently incredible, an appellate court may not substitute its judgment for that of the fact-finder. *State v. Saunders*, 196 Wis. 2d 45, 54, 538 N.W.2d 546 (Ct. App. 1995). Because the trial court

could reasonably accept parts of witness testimony, Michael's challenge that the court did not accept Linda's testimony verbatim, or that of another witness, is not grounds for reversal. Because the record reflects a reasonable exercise of discretion in dividing the property, we affirm the judgment.

*By the Court.*—Judgment affirmed.

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