

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

November 16, 2000

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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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.

**No. 99-2718**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**IN RE THE MARRIAGE OF:**

**ANN E. BATES (F/K/A DWYER),**

**PETITIONER-APPELLANT,**

**v.**

**JOHN P. DWYER,**

**RESPONDENT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Dodge County:  
ANDREW P. BISSONNETTE, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

¶1 PER CURIAM. Ann E. Bates appeals a judgment of divorce from John P. Dwyer. She contends that the trial court erroneously exercised its discretion when it determined that only \$20,963 of a \$70,000 mortgage was a

marital debt, to be divided equally, and the remaining \$49,037 was the sole obligation of Bates. We affirm.<sup>1</sup>

¶2 The parties were married in 1991. Both parties brought property to the marriage, which lasted for approximately six years. They had no children. The judgment provided for a fifty/fifty property division. The particular aspect of the property division to which the appellant objects deals with one of two parcels of real estate owned by the parties at the time of the divorce.

¶3 That real estate parcel, referred to as the Lark Road residence, was awarded to Bates in the divorce. Both sides agreed that the Lark Road residence is worth \$230,000. That piece of property is encumbered by two mortgages: the first has a current balance of \$139,388; the second, which is held by Bates's parents, is in the amount of \$70,000, and is the focus of this appeal.

¶4 At the time the parties were engaged in the construction of their residence on Lark Road, Bates was employed as an office manager and bookkeeper at C.A. Jones Rentals (Jones), a company that provided contracting services among other things. In addition to being employed by Jones, she was also a client, hiring Jones to construct the Lark Road residence at the cost of \$142,000. During the construction, Bates used her own personal charge cards to purchase materials for the residence; she paid those bills with money from one or more of the Jones businesses. When this activity came to the attention of Bates's employer, she abandoned the construction work with that company and entered into a new contract with Berry Builders in the amount of \$84,803.

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<sup>1</sup> The respondent, John P. Dwyer, has not filed a response brief in this matter. However, because the appellant does not present a sufficient basis for reversal, a response brief is not necessary for an affirmance.

¶5 Bates testified that she had made arrangements with Jones that justified her actions.<sup>2</sup> The trial court found this testimony “totally incredible.” The court found that Bates had “embezzled or fraudulently used” funds belonging to her employer to help pay for the construction of the Lark Road residence, and also found that not all of the credit card expenditures had been used on the construction project.<sup>3</sup>

¶6 Bates was charged criminally with felony fraud in Columbia County Circuit Court in addition to having a civil lawsuit filed against her by Jones. The civil lawsuit was settled by a payment of \$70,000 by Bates to her former employer. She obtained the money for this payment from her father by signing a second note and mortgage on the Lark Road residence in that amount. Dwyer did not sign either the note or the mortgage. The \$70,000 settlement payment not only disposed of the civil suit, but, the trial court found, it resulted in the criminal charges against Bates being dropped.

### STANDARD OF REVIEW

¶7 A trial court has broad powers to divide property in divorce actions. *See Wozniak v. Wozniak*, 121 Wis. 2d 330, 335, 359 N.W.2d 147 (1984). The division of property in a divorce “is within the sound discretion of the trial court and will not be reversed on appeal except for an abuse of discretion.” *Bonnell v. Bonnell*, 117 Wis. 2d 241, 248, 344 N.W.2d 123 (1984). An abuse of discretion

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<sup>2</sup> According to the explanation provided by Bates, this arrangement was intended to enable the couple to take advantage of the contractor’s discount available to Jones when buying materials.

<sup>3</sup> The trial court stated that “some of the charges may have been for other items such as clothing, entertainment, etc.”

occurs when the trial court fails to consider proper factors, makes a mistake or error with respect to the facts upon which the division was based, or when the division itself was, under the circumstances, either excessive or inadequate. *See id.*

¶8 We will not reverse a discretionary determination by the trial court if the record shows that discretion was exercised and we can perceive a reasonable basis for the court's decision. *See Prahl v. Brosamle*, 142 Wis. 2d 658, 667, 420 N.W.2d 372 (Ct. App. 1987). Further, we do not assess the credibility of witnesses or weigh the evidence on appeal: “[w]here there are inconsistencies within a witness’s testimony or between witnesses’ testimonies, the jury determines the credibility of each witness and the weight of the evidence.” *State v. Sharp*, 180 Wis. 2d 640, 659, 511 N.W.2d 316 (Ct. App. 1993). Findings of fact made by a trial court sitting without a jury will not be set aside unless they are clearly erroneous, *see* WIS. STAT. § 805.17(2) (1997-98),<sup>4</sup> and when more than one inference can be drawn from the credible evidence, we must accept the inference drawn by the trier of fact, *see Mentzel v. City of Oshkosh*, 146 Wis. 2d 804, 808, 432 N.W.2d 609 (Ct. App. 1988). We search the record not for evidence opposing the trial court’s decision, but for evidence supporting it. *See id.*

## DISCUSSION

¶9 Bates contends that the trial court erred when it found she had embezzled or fraudulently used her employer’s funds, and then, based on that finding, made an unequal allocation of the \$70,000 second mortgage. Bates

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<sup>4</sup> All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

argues that the \$70,000 settlement, which occasioned the second mortgage, was used in its entirety to implement upgrades to the Lark Road residence, and not to benefit her personally, and that these upgrades were jointly agreed upon between Dwyer and Bates.

¶10 The law governing this issue is WIS. STAT. § 767.255, which permits a court to deviate from an equal property division where one party has “depleted the marital assets because of his squandering and neglect.” *Anstutz v. Anstutz*, 112 Wis. 2d 10, 12, 331 N.W.2d 844 (Ct. App. 1983). The rationale is “[t]o require a party to share in the debts created by a spouse’s unjustified depletion of marital assets would constitute a failure to consider the total contribution of each of the parties to the marital estate.” *Id.* at 13. We conclude the trial court’s findings are not clearly erroneous, and it properly exercised its discretion in allocating the majority of the second mortgage to Bates based on its findings.

¶11 Dwyer testified that he did not sign the second mortgage, nor did he take part in the settlement negotiations for the civil lawsuit. Bates testified that she handled the majority of the transactions with Jones. The criminal charges were brought against Bates and not Dwyer. The settlement benefited Bates personally: she testified that it led directly to the criminal charges being dropped.

¶12 Bates’s testimony on the use of Jones’ money to pay her personal MBNA bill was vague. She stated that she had access to all of the company’s financial information but could give no satisfactory explanation for why she and her husband were not billed for the construction of their house until the civil lawsuit was filed against them. At several points in her testimony Bates responded to questions asking her to make sense of the documentary exhibits, but it appears her answers did not satisfy counsel.

¶13 In contrast, Dwyer testified as to his lack of knowledge of and involvement in the use of Jones' money to pay off Bates's personal credit card. His awareness of the "agreement" was limited to their ability, through Jones, to get discounts on the appliances and materials purchased for the Lark Road residence. He testified that, based on his understanding, the money that had actually gone into the property itself was somewhere in the neighborhood of \$216,000, which did not account for the additional \$70,000, which Bates claims went into the construction. He also testified that, of the amounts charged on their personal credit cards and paid by Jones, only \$171 was charged to his own card.

¶14 It is clear from the court's complete and cogent discussion of this issue that it found Bates was an incredible witness and found it was highly unlikely that the \$70,000 had gone toward the construction and improvement of the Lark Road residence. There is ample evidence to support this determination. Further, it is entirely permissible for the court to consider misuse of marital assets that do not result in criminal prosecution as the basis for an unequal award. The fact that the criminal prosecution against Bates was dropped upon payment of the \$70,000 does not, as Bates argues, necessarily justify an equal distribution; rather, it weighs *against* an equal division of the second mortgage used to pay it since the benefit clearly went only to her.

¶15 Bates also argues that the trial court erroneously exercised its discretion when it valued the Lark Road residence at its fair market value. Examining the circumstances of the construction of the Lark Road residence and taking into account the finding of Bates's misuse of the marital assets, the court decided it was reasonable to allow only \$20,963 of the second mortgage on the

home as marital debt.<sup>5</sup> Valuation of the marital estate lies within the sound discretion of the trial court, *see Sommerfield v. Sommerfield*, 154 Wis. 2d 840, 851, 454 N.W.2d 55 (Ct. App. 1990), and fair market value is a proper method of valuation in a divorce, *see Corliss v. Corliss*, 107 Wis. 2d 338, 345, 320 N.W.2d 219 (Ct. App. 1982). Because there is evidence in the record to support this determination and the trial court provided a reasoned explanation for its decision, we conclude it properly exercised its discretion.

*By the Court.*—Judgment affirmed.

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

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<sup>5</sup> In doing so, it calculated that the parties had already invested \$209,037 in the property before factoring in the second mortgage. It arrived at its division by allowing, as marital debt, only enough of the second mortgage to make the parties' investment equal to the property's fair market value of \$230,000.

