

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 3, 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. 03-1412
STATE OF WISCONSIN**

Cir. Ct. No. 01FA000904

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE MARRIAGE OF:

LISA A. KOENIGS, F/K/A LISA KOENIGS-COKER,

PETITIONER-APPELLANT,

V.

FRANK H. COKER,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County:
ROBERT G. MAWDSLEY, Judge. *Affirmed in part; reversed in part and cause
remanded with directions.*

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

¶1 PER CURIAM. Lisa A. Koenigs appeals from a judgment of divorce from Frank H. Coker. She argues that the property division is unfair to

her because she supported the marriage financially and that the circuit court failed to recognize that her vehicle was purchased with gifted funds and was not a marital asset. We reverse the determination that Lisa's vehicle was a marital asset and direct the circuit court on remand to recalculate the property division excluding the vehicle as a marital asset. We affirm the remainder of judgment.

¶2 The parties were married in 1993. This action for divorce was filed in 2001. During the marriage the parties lived in large part on money received from their parents and trust funds. The circuit court observed that this fostered a standard of living above the standard they would have enjoyed on their earned income alone.

¶3 Lisa sought a 50/50 property division with respect to two properties Frank brought into the marriage: a vacation property in Linville, North Carolina, which Frank inherited in 1975 (and in which his sister held a one-fourth interest), and a duplex/rental property located in Milwaukee, which Frank purchased in 1988 (using inherited funds for the down payment). The circuit court found that the Linville property was nonmarital and Lisa does not challenge that finding.

¶4 The circuit court found that the duplex was converted to marital property because funds from the parties' joint account were used to pay rent and other expenses related to the duplex. The court awarded Frank a greater share of the equity in the duplex because: he had brought the property to the marriage, he had maintained the property with his trust money and rental income before the parties moved into the duplex, Lisa had only limited proof of contribution to the property, and Lisa retained other personal property of significant value. The circuit court also considered other property subject to division. Lisa was awarded \$30,000 equity in the duplex. When the value of marital assets awarded to each

party was totaled, including a \$13,327.50 for the value of Lisa's 1998 Ford vehicle, Frank owed Lisa a \$32,769.83 equalizing payment.¹

¶5 Lisa first takes issue with the circuit court's finding that "both parties' earned incomes were approximately equal during the ten years of the marriage." Lisa claims this finding is clearly erroneous. WIS. STAT. § 805.17(2) (2001-02).² At first blush we are not persuaded that the finding with respect to the parties' earned income has any consequence since the parties waived any claim for maintenance. However, we recognize that while property division, maintenance and child support differ from each other, there can be significant overlap in the three. See *Cook v. Cook*, 208 Wis. 2d 166, 180, 560 N.W.2d 246 (1997). Indeed, WIS. STAT. § 767.255(3)(d), requires consideration of the contribution of each party to the marriage if an unequal division of property is to be made. Cf. *Long v. Long*, 196 Wis. 2d 691, 696-97, 539 N.W.2d 462 (Ct. App. 1995) (under § 767.255(3)(d) and (g) the court may consider bonus income or fees when examining the disparity in actual income or earning capacity of the parties when dividing the marital estate).

¶6 The circuit court specifically references exhibit 24 in the finding that Lisa contends was error. Exhibit 24 is titled, "Separate Earning and Total Income of the Parties." Frank testified that it was a summary of the income Lisa testified to and the income reflected on his tax returns. Exhibit 24 reflects that Frank's

¹ The required "equalizing payment" is a misnomer. The circuit court did not make an equal property division because it determined that Lisa was entitled to only \$30,000 of the \$190,016 equity in the duplex, a marital asset.

² All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

earnings were \$59,953 more than Lisa's for an eight-year period from 1994 to 2001. We will not debate the sensibility of whether a \$60,000 difference can be described as "approximately equal" when dealing with parties virtually living off trust and gifted funds well in excess of that amount. That is not the argument Lisa makes. Rather, she argues that the exhibit misrepresents Frank's income, conflicts with the actual tax returns, and confuses earned and unearned income. This was never litigated in the circuit court. In fact, Lisa waived her initial objection to admission of the exhibit after an opportunity to confirm that the figures regarding Frank's income corresponded to the tax returns. Lisa does not make citation to any place in the record where she challenged the accuracy of the exhibit. Lisa cannot now claim that it was error for the circuit court to rely on the exhibit.³ It is well established that where a party has induced certain action by the circuit court, he or she cannot later complain on appeal. *Zindell v. Central Mut. Ins. Co. of Chicago*, 222 Wis. 575, 582, 269 N.W. 327 (1936).

¶7 Lisa also contends that the circuit court's finding that she did not contribute a far greater share of her inherited money to support the marital lifestyle should be set aside.⁴ The circuit court rejected Lisa's claim that she contributed a far greater share because her proof that she infused funds into the marriage was conclusory. It also found that each party individually directed how their own

³ The type of mathematical calculations Lisa advances in her argument suggests that a motion under WIS. STAT. § 805.17(3) to amend or make additional findings might have been the appropriate remedy. See *Schinner v. Schinner*, 143 Wis. 2d 81, 93, 420 N.W.2d 381 (Ct. App. 1988).

⁴ Lisa sought to be compensated through an equal division of property for her excess contributions to the marriage. She contends she used her earned income and substantial gifted assets to support Frank and the marriage, whereas Frank provided minimal unearned income to the marriage and used his earned income to support his exempt assets rather than the marriage.

inherited, gifted or trust funds would be used and that there was little shared decision making about funding marital activity. These findings are based on the testimony of the parties. When a finding of fact is premised on the court's assessment of the competing credibility of the parties, we must give due regard to the circuit court's opportunity to make this assessment. WIS. STAT. § 805.17(2); *Jacquart v. Jacquart*, 183 Wis. 2d 372, 386, 515 N.W.2d 539 (Ct. App. 1994). The circuit court's finding that Lisa did not contribute a far greater share to the marriage is not clearly erroneous.

¶8 Lisa argues that the circuit court erroneously exercised its discretion in awarding her only \$30,000, far less than one-half, of the equity in the duplex.⁵ We approach this case as involving an unequal division of property, specifically the unequal division of the largest marital asset—the \$190,016 equity in the duplex. Cf. *LeMere v. LeMere*, 2003 WI 67, ¶16, 262 Wis. 2d 426, 663 N.W.2d 789.

¶9 WISCONSIN STAT. § 767.255 creates a presumption in favor of the equal division of marital property, but the circuit court may deviate from the presumption after considering the lengthy and detailed list of statutory factors. *LeMere*, 262 Wis. 2d 426, ¶16. *LeMere* indicates that the circuit court's failure to subject a request for unequal division of property to the "proper statutory rigor" is an erroneous exercise of discretion. *Id.*, ¶25. The record must "at least reflect the court's consideration of all applicable statutory factors before a reviewing court

⁵ We need not address Lisa's secondary argument that Frank did not meet his burden of proving the duplex was a nonmarital asset because the circuit court found that the asset had been converted to a marital asset. Frank is wrong when he asserts that Lisa failed to demonstrate a reason to treat the entire asset marital property.

can conclude that the proper legal standard has been applied to overcome the presumptive equal property division.” *Id.* However, that charge is tempered by the recognition that it is not an erroneous exercise of discretion to ignore factually inapplicable statutory factors and that the error, if any, may be harmless because the overlooked factors are only marginally relevant or not relevant at all. *Id.*, ¶¶26, 27. Although Lisa makes reference to the circuit court’s failure to address each of the statutory factors, she does not argue how the unaddressed factors are relevant. We need not consider arguments broadly stated but not specifically argued, *Fritz v. McGrath*, 146 Wis. 2d 681, 686, 431 N.W.2d 751 (Ct. App. 1988), or independently develop a litigant’s arguments. See *Vesely v. Security First Nat’l Bank*, 128 Wis. 2d 246, 255 n. 5, 381 N.W.2d 593 (Ct. App. 1985). Thus, we do not consider the circuit court’s failure to mention each of the factors under § 767.255(3) as a per se erroneous exercise of discretion.

¶10 The circuit court’s enumerated reasons for deviating from the equal division touch on these statutory factors: property brought to the marriage, whether one party has substantial assets not subject to division by the court, the contribution of each party to the marriage and other factors the court deems relevant. WIS. STAT. § 767.255(3)(b), (c), (d), (m). We will not, as Lisa does, separate the reasons given by the circuit court to see if any one alone could support the deviation from an equal division of property. The consideration of these factors together demonstrates a proper exercise of discretion.

¶11 We summarily reject Lisa’s attack on each individual reason given by the circuit court as an impermissible factor or a flawed analysis. We see no reason why the circuit court could not consider that Frank brought the duplex to the marriage even though the \$32,000 down payment made with inherited funds

was exempt and taken off the top. As the circuit court noted, for the first four years of the marriage no marital use was put to the property.

¶12 Lisa's claim that the circuit court failed to recognize that income from the duplex was marital income and her reliance on *Arneson v. Arneson*, 120 Wis. 2d 236, 355 N.W.2d 16 (Ct. App. 1984), misses the mark. *Arneson* determined that property purchased with income from exempt property could be marital property. *Id.* at 244-45. Here the circuit court found that the duplex was converted to marital property because marital funds, including rental income, were used to maintain the property and reduce the mortgage. Although the circuit court rejected Lisa's proof that her own personal efforts had substantially increased the value of the duplex, its finding that the duplex was converted to marital property recognized her contribution of marital income.

¶13 Even though Frank did not seek the division of personal property, the circuit court was informed as to the items of personal property Lisa retained.⁶ The circuit court was not foreclosed from considering other property the parties took from the marriage just because it was not asked to divide it. Indeed, WIS. STAT. § 767.255(3)(c) specifically allows consideration of other substantial property not subject to division by the court. The circuit court did not erroneously exercise its discretion in determining that Lisa was entitled to only a \$30,000 interest in the duplex.

⁶ We recognize that exhibit 22, cited by the circuit court in its decision as listing items of personal property having significant value, was not admitted into evidence but merely used during Lisa's cross-examination. No objection was made to use of the exhibit and in her testimony Lisa testified as to her opinion of value of the items listed. The circuit court did not make findings as to the value of each item and was not required to do so since the division of personal property was not at issue. The circuit court did not err in referencing the exhibit as a shortcut.

¶14 The final claim is that the circuit court should have excluded Lisa's 1998 Ford vehicle from the marital estate because it was purchased with gifted funds. Lisa testified that the vehicle was purchased with a \$10,000 gift from her father and the remainder paid for out of her personal account, not a joint account. Frank concedes that the court erred as a matter of law when it equally divided the value of the vehicle purchased with gifted funds. We accept this concession of error. Thus, we reverse that portion of the judgment dividing the value of Lisa's vehicle as marital property. On remand, the circuit court shall reconfigure the "equalization" figure giving Lisa the benefit of having the vehicle removed from the marital estate, a mere mathematical calculation.⁷

¶15 No costs to either party.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions.

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

⁷ We note that the vehicle was one of the items listed on exhibit 22 which the circuit court referred to in considering personal property Lisa took from the marriage. However, the circuit court separately listed the vehicle on its division of property thus negating any possibility that it was deemed an item of personal property not subject to division by the court.

