

**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. 03-2383-FT  
STATE OF WISCONSIN**

**Cir. Ct. No. 02FA000010**

**IN COURT OF APPEALS  
DISTRICT III**

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**IN RE THE MARRIAGE OF:**

**RUSSELL A. SLEIGHT,**

**PETITIONER-COUNTER DEFENDANT-  
RESPONDENT,**

**v.**

**VICKI L. SLEIGHT, K/N/A VICKI PARKER,**

**RESPONDENT-COUNTER-PLAINTIFF-  
THIRD-PARTY PLAINTIFF-APPELLANT,**

**v.**

**MICHAEL SLEIGHT,**

**THIRD-PARTY DEFENDANT-  
RESPONDENT.**

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APPEAL from a judgment of the circuit court for Iron County:  
DOUGLAS T. FOX, Judge. *Affirmed in part; reversed in part and cause  
remanded with directions.*

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

¶1 PER CURIAM. Vicki Sleight appeals the property division portion of a judgment dissolving her marriage to Russell Sleight. Vicki also appeals that part of the judgment awarding attorney fees and costs to Russell’s brother, Michael Sleight, resulting from her third-party claim against him.<sup>1</sup> Vicki argues the trial court erred by (1) failing to equally divide the marital estate; and (2) sanctioning her under WIS. STAT. § 814.025 for pursuing a frivolous third-party claim against Michael. Vicki alternatively argues that the trial court erred by making her solely liable for the sanctions imposed under § 814.025.

¶2 Because we conclude the circuit court properly divided the marital estate and determined that Vicki’s third-party claim against Michael was frivolous, we affirm those parts of the judgment. Because Vicki was deprived of the opportunity to be heard on the issue of who should be responsible for these fees and costs for frivolous claim, we reverse that part of the judgment assigning responsibility solely to Vicki for payment of the attorney fees and costs and remand the matter for further proceedings.

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

## BACKGROUND

¶3 The court found the following facts. Russell and Vicki were married in February 1996. At the time of their marriage, Russell was residing in a home owned by his brother, Michael. Russell and Vicki continued to reside in the home after their marriage and in lieu of paying rent to Michael, the couple paid insurance, taxes and maintenance expenses on the house. Russell and Vicki separated during the summer of 2002 and Russell filed for divorce.

¶4 Vicki subsequently filed a third-party claim against Michael, alleging that because she and Russell had entered into an agreement with Michael to purchase the residence, it should be included in the marital estate. After a hearing, the trial court divided the marital property. Concluding that there was no agreement for the sale and purchase of the home, the court also denied Vicki's third-party claim and imposed sanctions against her for pursuing a frivolous claim. This appeal follows.

## ANALYSIS

### A. Property Division

¶5 Vicki argues that the trial court erred by failing to equally divide the marital estate. Property division in divorce is governed by WIS. STAT. § 767.255, which establishes a presumption in favor of equal division of marital property. WIS. STAT. § 767.255(3). “[T]he legislatively prescribed 50 percent presumption in awarding property division is a rebuttable one.” *Jasper v. Jasper*, 107 Wis. 2d 59, 68, 318 N.W.2d 792 (1982). A circuit court may deviate from the presumption of equal property division, but only after considering a lengthy and detailed list of statutory factors. *Id.*

¶6 The statutory list contains twelve enumerated factors, plus a catch-all, and is preceded by an explicit requirement that the circuit court consider all of the enumerated factors before altering the presumption of equal property division:

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

- (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.

WIS. STAT. § 767.255(3). There is, however, nothing precluding the circuit court from giving one statutory factor greater weight than another, or from concluding that some factors may not be applicable at all. *LeMere v. LeMere*, 2003 WI 67, ¶25, 258 Wis. 2d 300, 653 N.W.2d 772.

¶7 Here, Vicki argues the trial court misused its discretion by failing to consider Russell’s substantial assets not subject to division by the court. *See* WIS. STAT. § 767.255(3)(c). We are not persuaded. In its decision, the court acknowledged that upon marriage, the parties “entered into a prenuptial agreement whereby they agreed that Russell’s interest in his parents’ resort and in the cranberry marsh would remain his separate property.” The court further noted that Vicki did not contest the validity of the agreement. In considering what Vicki describes as the “inequality of assets,” the trial court specifically acknowledged: “Although Russell has substantial assets not subject to division, Vicki is not disadvantaged by that fact or by the fact of the marriage itself.” In fact, the court concluded that “[o]n balance, Russell is in a worse financial position as a result of the marriage,” due in large part to credit card debt Vicki had incurred.

¶8 Vicki also claims the trial court erred by placing undue emphasis on “its perception that Vicki had engaged in marital misconduct by squandering assets on credit cards.” In considering the couple’s debt, the court acknowledged Russell’s claim that he had no knowledge of various credit card debts until he discovered their existence on a credit report shortly before the divorce. The court ultimately found Russell’s testimony more credible, noting its belief “that Vicki applied for the credit cards without Russell’s knowledge, in all likelihood signing his name to the applications, and that she concealed the existence of the accounts from Russell until he discovered them.” Vicki is essentially challenging the trial court’s determination that Russell was a more credible witness. The weight of the evidence and credibility of the witnesses, however, is best measured by the trial court. *Bahr v. Bahr*, 107 Wis. 2d 72, 77, 318 N.W.2d 391 (1982). Upon the foregoing, we conclude the circuit court properly divided the marital estate.

#### B. Frivolousness

¶9 Vicki argues that the circuit court erred by sanctioning her for pursuing a frivolous claim under WIS. STAT. § 814.025, which provides:

(1) If ... a counterclaim, defense or cross complaint commenced, used or continued by a defendant is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees.

....

(3) In an order to find a ... counterclaim, defense or cross complaint to be frivolous under sub. (1), the court must find one or more of the following:

(a) The ... counterclaim, defense or cross complaint was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

- (b) The party or the party's attorney knew, or should have known, that the ... counterclaim, defense or cross complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

¶10 In reviewing a circuit court's decision regarding frivolousness, our standard involves a mixed question of fact and law. *Stern v. Thompson & Coates, Ltd.*, 185 Wis. 2d 220, 236, 517 N.W.2d 658 (1994). "The findings by the circuit court of what was said, what was done, what was thought, and reasonable inferences drawn therefrom, are questions of fact" that will not be overturned unless clearly erroneous. *Id.* The ultimate conclusion of whether the facts cited fulfill the legal standard of frivolousness is a question of law we review independently. *Id.*

¶11 In her third-party claim against Michael, Vicki alleged that because she and Russell had entered into an agreement with Michael to purchase the residence, it should have been included in the marital estate. Vicki also alleged that Russell and Michael had colluded to make it appear that Michael was still the lawful owner of the residence. The trial court determined, however, that although evidence of these claims, if it existed, was readily available to Vicki, she failed to produce any credible evidence to support her claims.<sup>2</sup> Additionally, the trial court noted that Vicki's initial claims were contradicted by her own trial testimony, her financial disclosure statement and two loan applications. Ultimately, the court determined that "[t]he dearth of any credible evidence supporting her claim

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<sup>2</sup> To the extent Vicki argues her counsel is culpable for any weakness in her claim against Michael, Vicki retained counsel of her choice and therefore, "has no right to avoid the consequences of [her] attorney's conduct by disavowing the actions of counsel." *Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 284, 470 N.W.2d 859 (1991).

together with the multiple internal inconsistencies and contradictions cannot be explained as an honest mistake or lapse of memory, [but only] as willful and deliberate falsehood.”

¶12 Concluding that there was no agreement for the sale and purchase of the home from Michael, the court found that Vicki knowingly and intentionally fabricated her claim. The court’s opinion demonstrates that it found no factual or legal basis for Vicki’s claim, she should have known that none existed and she nevertheless pursued the claim in bad faith. We therefore conclude that the court’s findings adequately support the award of reasonable attorney fees and costs under WIS. STAT. § 814.025.

¶13 Vicki alternatively argues that the trial court erred by making her solely liable for the sanctions imposed under WIS. STAT. § 814.025. In its opinion, dated June 6, 2003, the court gave Michael thirty days to submit a verified itemization of his attorney fees and, in turn, gave Vicki thirty days thereafter to contest the reasonableness or necessity of any of the claimed fees. Michael filed the itemization of attorney fees on July 3, 2003. On July 18, Vicki’s attorneys filed a motion to withdraw as counsel and on July 22, they filed a Memorandum in Opposition to Fees, arguing that an assessment of attorney fees against counsel was unwarranted and should be assessed against Vicki alone.

¶14 Ultimately, without hearing from Vicki directly, the trial court assigned responsibility for the fees solely to Vicki, noting its belief that she had offered false testimony at trial and that counsel could not anticipate that her trial testimony would contradict her earlier assertions. Because Vicki was not given the opportunity to be heard on the issue of who should be responsible for these fees and costs for frivolous claim, we reverse that part of the judgment assigning

responsibility solely to Vicki for payment of the attorney fees and costs and remand the matter to the circuit court for further proceedings. Although Marks and Legal Associates were allowed to withdraw as Vicki's counsel, they should be given notice and an opportunity to appear at the hearing on remand regarding allocation of the attorney fees and costs.

*By the Court.*—Judgment affirmed in part; reversed in part and cause remanded with directions. Costs on appeal are awarded to Russell Sleight and Michael Sleight.

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

