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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1988**

In re the Marriage of: Jean Marie Guezmir, petitioner,
Respondent,

vs.

Kemais Guezmir,
Appellant.

**Filed August 20, 2012
Affirmed
Rodenberg, Judge**

Hennepin County District Court
File No. 27FA085974

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Minnesota (for respondent)

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Considered and decided by Rodenberg, Presiding Judge; Stauber, Judge; and
Cleary, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

In this marital-dissolution dispute, appellant-husband argues that the district court erred in (1) failing to enforce the parties' settlement agreement regarding distribution of gains and losses from a deferred-compensation plan and (2) failing to find that respondent-wife's use of the parties' frequent flyer miles for the children's vacation

constituted dissipation of marital assets. By notice of related appeal, respondent challenges the district court's denial of her request for conduct-based attorney fees. We affirm.

FACTS

Respondent filed a petition to dissolve the parties' thirteen-year marriage in September 2008. The parties have two minor children; however, they settled custody and child-support issues early in the process and reserved property and debt issues for later resolution.

I. Deferred-compensation plan

On April 19, 2010, the parties placed on the record what they purported to be a full and final settlement regarding property division. The settlement was based on the recommendations and property valuations of one Mr. Harjes, a financial neutral upon whose qualifications the parties had previously agreed. With regard to respondent's deferred compensation plan (the EDCP), a market-based account, the parties agreed that the account had a value of \$425,058 as of the valuation date of October 6, 2008. The parties agreed that appellant would receive the equivalent of a share of the plan in the amount of \$212,529, that his share would be treated as maintenance for income tax purposes, and that the parties would submit to Mr. Harjes the issue of structuring the payments.¹ The parties also referenced treating the plan as through it were divided by a

¹ Although the parties disagree on a number of issues, both agree that there was an enforceable agreement between them to divide the EDCP account utilizing a spousal maintenance mechanism. Both parties agree that the district court properly used a property-division analysis for an award that will be paid out as spousal maintenance. The

qualified domestic relations order (QDRO).² However, the parties did not expressly agree to a division of gains and losses on appellant's portion of the account, nor to any interest payments to appellant for his deferred receipt of the agreed-upon amount.

The district court subsequently entered a partial stipulated judgment and decree. It found that the parties had agreed that appellant would be awarded a \$212,529 share in the EDCP account, to be paid in the form of temporary spousal maintenance. However, it found that the parties did not agree on the timing of the payments, nor on whether they were subject to "earnings, losses, or some other interest factor." The court therefore reserved jurisdiction over the issue of "additional interest or other payments" on appellant's share of the plan.

Following entry of the partial findings of fact, both parties filed cross-motions to enforce the property settlement. The parties disputed whether gains and losses within the deferred compensation plan after the valuation date were subject to equal division. After several evidentiary hearings and further motions, the district court issued an order

parties further agreed to use a maintenance label for these future payments and neither argues on appeal that this was error. To the extent that the parties have agreed on these matters, we do not address them. Further, in this appeal, neither party raised, and we do not address, whether, how, or to what extent the taxing authorities will recognize this agreement.

² Under the Employee Retirement Income Security Act (ERISA), a QDRO permits the assignment or transfer of an employee's interest in a pension plan to an alternate payee, granting the alternate payee the right to "receive all or a portion of the benefits payable with respect to a participant under a plan." 29 U.S.C. § 1056(d)(3)(B)(i)(I) (2006). A QDRO may provide for the transfer of such an interest in the form of alimony payments. *Id.* § 1056(d)(3)(B)(ii)(I). Because respondent's EDCP was not a qualified plan under ERISA, it could not be divided through a QDRO. The parties clearly expressed an agreement to approximate, as closely as possible in the judgment of Mr. Harjes, a result commensurate with what a QDRO would accomplish.

awarding appellant his share of the plan valued at \$212,529, characterized as temporary spousal maintenance, and payable in annual installments of \$42,590 for a six-year period. These payments reflect appellant's agreed-upon "share" plus interest (at the statutory rate) totaling \$43,011.³

II. Frequent-flyer miles

The partial judgment and decree awarded each party his or her own frequent-flyer miles, without attributing any valuation to those miles. In his post-decree motions, appellant argued that respondent's use of a portion of the miles during the dissolution proceedings constituted dissipation of a marital asset. At the evidentiary hearing, respondent testified that in March 2010, she used the parties' miles to take the parties' two children on vacation to Florida using the frequent-flyer miles for herself and the children. In the spring of 2011, she again used frequent-flyer miles to take the children on vacation, but this time used the miles only to pay for the children's fare and not for her own. She testified that she did not consult appellant about using the miles. At the date of the hearing, only about 15,000 miles remained in the account.

In its order following the hearings, the district court stated that it "partially agree[d]" that respondent's use of the miles constituted dissipation of a marital asset. It awarded appellant \$2,240 as reimbursement for the miles used for *respondent's* flights, but did not compensate appellant for the miles used for the children's flights.

³ The district court embedded the interest payments in the annual sum in order to maintain the payments' characterization as alimony for purposes of federal income taxation.

III. Conduct-based attorney fees

Respondent initially requested attorney fees in the summons and petition for dissolution, and she reiterated her request for conduct-based attorney fees throughout the proceeding. In her written submission following the settlement hearing, respondent requested conduct-based attorney fees based on (1) appellant's motion for temporary relief requesting alimony; (2) appellant's refusal to participate in therapy during the proceedings; (3) appellant's motions seeking temporary custody; and (4) appellant's motion to enforce the settlement regarding the deferred compensation plan. The district court declined to award attorney fees, finding that respondent's submission failed to establish a factual basis for the specific conduct justifying an award of fees.

This appeal follows.

D E C I S I O N

I. Deferred-compensation plan

Appellant argues that the district court erred in failing to enforce the parties' settlement regarding distribution of gains and losses of the parties' shares in the deferred-compensation account. In the partial judgment and decree, the district court found that the parties did not reach an agreement on whether appellant's share would be "subject to earnings, losses, or some other interest factor." In essence, it found that the parties did not reach a meeting of the minds on the gains/losses issue.

A. Settlement

Property settlements in dissolution cases are "accorded the sanctity of binding contracts." *Toughill v. Toughill*, 609 N.W.2d 634, 638 (Minn. App. 2000) (quotation

omitted). They are therefore subject to the laws regarding contracts. *Shirk v. Shirk*, 561 N.W.2d 519, 521 (Minn. 1997). A contract requires mutual assent or a “meeting of the minds,” as measured by an objective standard. *SCI Minn. Funeral Servs., Inc. v. Washburn-McReavy Funeral Corp.*, 795 N.W.2d 855, 864 (Minn. 2011) (quotation omitted). Whether the parties reached an objective meeting of the minds on the essential elements of a contract is a question of fact, which this court reviews under the clear-error standard. *Morrisette v. Harrison Int’l Corp.*, 486 N.W.2d 424, 427 (Minn. 1992) (“[T]he existence and terms of a contract are questions for the fact finder.”); Minn. R. Civ. P. 52.01 (providing that a district court’s findings of fact are subject to clearly erroneous standard of review).

Here, the record supports the district court’s determination that the parties did not reach an agreement regarding whether appellant’s share in the deferred compensation plan would be subject to gains and losses. At the settlement hearing, the parties agreed to value appellant’s share at \$212,529 as of the valuation date of October 6, 2008. Respondent’s counsel repeatedly referred to each party as receiving an “equal value” in the account. In context, it appears that she was referring to an equal value *as of the valuation date*. Appellant’s counsel then raised the question of how gains and losses would be calculated. She expressly noted that this issue was complicated and would “have to be resolved with the help of Mr. Harjes.” Respondent’s counsel replied that she agreed to allow Mr. Harjes’s input into structuring the payments, “as long as the value stays the same.” It is evident from this colloquy that respondent’s counsel never agreed

to a division of gains and losses, but only to Mr. Harjes's assistance in structuring the payment of appellant's \$212,529 share, calculated as agreed as of the valuation date.

Appellant argues that because respondent expressly agreed to structure the payments "as though a QDRO were used," this necessitates that the court equally divide gains and losses after the valuation date. But the record permits multiple inferences from respondent's reference to a QDRO. Immediately after the discussion of the agreed-upon attempt to replicate a QDRO, respondent's counsel went on to clarify that "[i]n other words," each party would receive \$212,529, in pretax value, "at the time of distribution from the EDCP." The parties expressly agreed that the payments would be treated as temporary spousal maintenance. It thus appears that the parties were referring to a QDRO as a model for the payment structure, and were not referring to the specific attributes of a QDRO applicable to the division of gains and losses or to an alternate valuation of appellant's share.

At no time did respondent expressly agree to a division of gains and losses. The settlement record reflects only her agreement to an equal division of the plan's value, as fixed on the date of valuation. Thus, the record supports the district court's finding that the parties did not reach an agreement that the parties would share gains and losses after the valuation date.

B. Interest award

Appellant alternatively argues that even if the parties did not reach an agreement regarding division of gains and losses, the district court abused its discretion in failing to adequately compensate him for the delayed receipt of his share. He argues that awarding

statutory interest (instead of an income- or performance-based rate of return) was not justified on this record because the delayed payments remained in a market-performing account, potentially generating substantial gains.

The district court enjoys broad discretion in effectuating a division of marital property. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). We must affirm the court's decision so long as it had an "acceptable basis in fact and principle." *Bollenbach v. Bollenbach*, 285 Minn. 418, 426–27, 175 N.W.2d 148, 154 (1970).

As appellant points out, when a party's receipt of a property settlement is delayed, the district court must either award interest or make explicit findings explaining why interest is not warranted. *Thomas v. Thomas*, 407 N.W.2d 124, 127 (Minn. App. 1987). Here, the district court complied with *Thomas* by awarding appellant an equivalent to interest at the statutory rate, incorporated into the future maintenance payments.

Appellant essentially takes issue with the district court's allocation of risk. By awarding appellant interest, it allocated the risk of loss (and attendant potential for return) to respondent. *Thomas* requires only an award of *interest*, i.e., compensation for a party's inability to earn market-based gains on property as to which receipt is deferred. Nothing in the language of *Thomas* required the district court to award market-based gains on financial accounts.

In light of the record as a whole, the district court's decision to award interest (rather than gains and losses) was within its discretion. As noted above, the parties submitted to the court a purportedly full and final settlement on property division, but failed to reach an express agreement as to division of gains and losses or interest on the

EDCP account. In their cross-motions to enforce the settlement, the parties effectively requested the court to resolve the issue. The district court complied with the parties' request and resolved the residual dispute in a reasonable and equitable manner consistent with statutory and case law.

Moreover, as part of the property settlement, appellant received substantial assets, including various bank and retirement accounts valued at nearly \$400,000. Appellant had a steady employment history and earned about \$8,000 per month. The court awarded him an equalization payment in the amount of \$157,000. Thus, in view of the property settlement as a whole, the court's decision to award interest instead of market-based returns on appellant's share of the deferred compensation plan was not an abuse of discretion.

Appellant also argues that the district court abused its discretion in providing that interest would start accruing in February 2011, as opposed to the valuation date of October 6, 2008. It appears that the district court selected the 2011 starting point for interest in order to have interest coincide with the date of the dissolution decree.

Computing interest as of the dissolution date does not run afoul of *Thomas*. In that case, the district court awarded the wife substantial nonmarital funds, but postponed the first payment until one year after the date of the dissolution. *Thomas*, 407 N.W.2d at 126. This court remanded for a finding of why interest on an amount of nonmarital funds ordered to be repaid beginning one year after the date of dissolution was not justified, given the delay in payments from the date of dissolution. *Id.* at 127; *cf. Riley v. Riley*, 385 N.W.2d 883, 884–85, 888 (Minn. App. 1986) (remanding for entry of interest on

delayed receipt of property settlement, to begin accruing thirty days after dissolution, which was the date by which property settlement was to be accomplished). Thus, the district court in the present case did not abuse its discretion by computing the interest component of the future payments as of the date of dissolution.

II. Dissipation of frequent-flyer miles

Appellant argues that the district court clearly erred in finding that respondent's use of frequent-flyer miles for the children's vacation fares did not constitute dissipation of a marital asset. As noted above, the district court compensated appellant for the miles respondent used for her own fare but did not compensate him for miles used for the children's flights.

Parties to a dissolution proceeding owe each other a "fiduciary duty . . . for any profit or loss derived by the party, without the consent of the other, from a transaction or from any use by the party of the marital assets." Minn. Stat. § 518.58, subd. 1a (2010). Thus, if the district court finds that a party has transferred, encumbered or concealed marital assets without the other's consent, the district court must compensate the other party unless the assets were expended "in the usual course of business or for the necessities of life." *Id.*

The party seeking compensation for a violation of § 518.58, subd. 1a, has the burden of proving that dissipation actually occurred. Minn. Stat. § 518.58, subd. 1a. Whether a party violates the statute is a question of fact, which this court reviews for clear error. *See id.* (establishing the burden of proof for the fact of dissipation); Minn. R. Civ. P. 52.01.

Here, the district court implicitly found that respondent's use of the miles for the children's vacation to Florida did not violate the statute. The record reflects that during the marriage, the parties traveled extensively with the children, including taking trips to Europe and Tunisia. It thus appears that using the frequent-flyer miles for the children's vacation was "in the usual course of business" for the parties. Minn. Stat. § 518.58, subd. 1a. *C.f. Barber v. Barber*, 733 N.W.2d 815, 823–24 (Minn. App. 2007) (affirming district court's ruling that husband did not violate the statute where his expenditures of marital funds were consistent with those made during the marriage), *aff'd in part, rev'd in part, and remanded on other grounds*, 753 N.W.2d 644 (Minn. 2008). The use of these frequent-flyer miles was consistent with the parties' lifestyle during the marriage.

Moreover, the purpose of the dissipation statute is to prevent parties from "subvert[ing] the orderly processes of the courts by concealing, dissipating, or misusing [their] assets in anticipation of divorce so as to reduce the property available for division or as a standard for the court in fixing payments for alimony or support." *See Bollenbach*, 285 Minn. at 428, 175 N.W.2d at 155 (making this statement in a pre-Minn. Stat. § 518.58, subd. 1a, context). Here, there was no evidence that respondent used the miles for any such improper purpose. Respondent did not conceal or dispose of the miles in an attempt to subvert the orderly division of marital property; she testified that she did not believe she had been holding the miles in trust for appellant. Likewise, appellant did not establish that respondent's use of the miles for the children was frivolous, unjustified, or otherwise inconsistent with the parties' conduct during the marriage. To the contrary, appellant conceded that he was not opposed to the children taking trips or going on

vacation; his expressed concern was that respondent failed to tell him beforehand. *Cf. Griep v. Griep*, 381 N.W.2d 865, 869 (Minn. App. 1986) (affirming finding that record was insufficient to establish dissipation when wife merely alleged that husband's total monthly expenses, including funds used for ski trips with the children, exceeded his monthly income). Thus, the district court did not clearly err in implicitly finding that appellant failed to establish dissipation with regard to the children's flights.

III. Attorney fees

Respondent argues, by notice of related appeal, that the district court abused its discretion in declining to award her conduct-based attorney fees. Courts may award conduct-based attorney fees against a party who unreasonably contributes to the length or expense of a dissolution proceeding. Minn. Stat. § 518.14, subd. 1 (2010). However, the award must be based on specific behavior that occurred during the litigation. *Geske v. Marcolina*, 624 N.W.2d 813, 818–19 (Minn. App. 2001). An award of attorney fees is not justified when “no one party [is] solely responsible for the complex and protracted procedural history of [a] case.” *Nazar v. Nazar*, 505 N.W.2d 628, 636 (Minn. App. 1993), *review denied* (Minn. Oct. 28, 1993), *superseded by statute on other grounds*, Minn. Stat. § 518.551, subd. 5b(d) (Supp. 1993). The decision whether to award conduct-based attorney fees lies “almost entirely” within the discretion of the district court. *Crosby v. Crosby*, 587 N.W.2d 292, 298 (Minn. App. 1998) (quotation omitted), *review denied* (Minn. Feb. 18, 1999).

Nearly all of respondent's proffered grounds for an award of conduct-based fees were based on conduct that occurred *before* the parties' settlement on April 19, 2010. By

placing a full and final settlement on the record without reserving the issue of attorney fees, respondent waived any claim she might have had to attorney fees based on conduct that occurred before the settlement. *Cf. Stephenson v. Martin*, 259 N.W.2d 467, 470–71 (Minn. 1977) (holding that relators waived right to claim subrogation by entering full and final settlement of disability claims without reserving subrogation).

The only asserted basis for attorney fees incurred post-settlement was appellant's motion to enforce the property settlement, which respondent alleges was frivolous and unjustified. But as discussed above, the record was unclear regarding whether the parties' settlement encompassed equal division of gains and losses. The lack of clarity was not occasioned by only one of the parties. In fact, the parties' cross-motions on this issue enabled the court to resolve it, as it had become apparent that the parties were going to be unable to reach a final resolution without court involvement with respect to the EDCP account. Moreover, as respondent concedes in her briefing and oral argument, appellant prevailed at least in part with respect to his motion. Appellant's motion was therefore not frivolous. The district court did not abuse its discretion in finding that respondent failed to establish a sufficient factual basis for attorney fees.

Affirmed.