STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1657

In re the Marriage of: Joyce Marie Peterson, petitioner,
Respondent,

vs.

David Lee Peterson,
Appellant.

Filed June 17, 2013
Reversed and remanded
Hooten, Judge

Ramsey County District Court
File No. 62-FA-08-3522

Robb L. Olson, Geck, Duea & Olson, PLLC, White Bear Lake, Minnesota (for respondent)

Kay Nord Hunt, Lommen, Abdo, Cole, King & Stageberg, P.A., Minneapolis, Minnesota; and

John R. Schulz, Corey J. Ayling, McGrann Shea Carnival Straughn & Lamb, Chartered, Minneapolis, Minnesota (for appellant)

Considered and decided by Cleary, Presiding Judge; Hooten, Judge; and Willis, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

HOOTEN, Judge

Appellant challenges the district court's determination that he dissipated marital assets through an investment scheme and the resulting property division and spousal maintenance award. Because the district court failed to apply the criteria set forth in the dissipation statute, Minn. Stat. § 518.58, subd. 1a, in making its findings of fact, we reverse and remand for further proceedings.

FACTS

Appellant David Peterson and respondent Joyce Peterson were married in September 1980. Around the time that the parties were married, appellant began working at two electronics shops while he attended college. As a result of gaining experience in entertainment system design through his work at electronics stores, appellant did not obtain a college degree and instead started a business in 1985 called Peterson's Entertainment Design, Inc. (PED). PED designs and installs high-end electronics, entertainment, and lighting systems for individual and corporate clients. The business was successful until at least 2008, with gross receipts exceeding two million dollars some years, from which appellant received an annual salary between $180,000 and $400,000. The parties also accrued wealth through several investment accounts, but invested directly in at least two schemes that appear to have lost all value, including one associated with Tom Petters. The parties enjoyed a relatively luxurious lifestyle, which included owning a homestead and lake home, each worth more than a million dollars.

The dissipation claim is based on events that occurred in August and September of 2007. Appellant testified that, around that time, K.V., who was a client of PED and the brother-in-law of a PED employee, told him about "a lawyer in California that ha[d] put together a currency trading platform that uses collateralized money." Appellant testified that he spent approximately 50 hours in conversations with Jeffrey Dennis Ferentz, the lawyer from California, about the investment. Appellant testified that he saw or had copies of numerous documents relating to the investment, including "a copy of a $100 million deposit in a UBS Bank in Switzerland," a copy of "the bank certificate [] in Jeffrey Dennis Ferentz's name," a screen shot of account information for the currency trading, and other documents.

Appellant indicated that he was initially unconvinced about the investment, despite these documents, but was invited to fly to Zurich, Switzerland, on a private jet to "consummate th[e] platform." Just before the trip, appellant wired $100,000 to Ferentz's "private client trust account," and $100,000 to the wife of Todd Rocha, an associate of Ferentz, on Ferentz's promise that he could have the money back if he "didn't like what [he] saw." Both of these transfers came from PED business accounts.

The trip took place on August 8 or 9, 2007. On the private plane were Ferentz and his wife, Rocha and his wife, K.V., and appellant. Appellant testified that they discussed the investment at length on the plane, where he was shown the original certificate of deposit from UBS Bank. Once in Zurich, the group went to UBS Bank, where armed guards purportedly took only Ferentz to meet with the currency trader, while the rest of the group waited in the lobby.

After the trip to Zurich, appellant met with Rocha and gave him $400,000 from the parties' personal account. Appellant testified that when he met with Rocha, Rocha indicated that he had another investment opportunity in an entity called Synertech and gave appellant various documents pertaining to the Synertech investment, which appellant put in the same folder with other documents related to the Ferentz investment. Notably, these documents refer to a "Brazilian principal/co-owner" for that entity. But appellant testified that he was not interested in that opportunity because Ferentz himself was not involved, and his involvement in the Ferentz investment was predicated on Ferentz, his reputation as an attorney and as the author of a book on how to identify and avoid financial investment scams, and his documentation of the investment. Appellant testified that, after giving the $400,000 check to Rocha, the participants in the investment sent a number of e-mails indicating that the investment was moving forward. In reliance on those e-mails, appellant participated in a second round of funding, investing another $350,000 in the first week of September 2007. In total, appellant invested $950,000, of which $400,000 came from the parties' personal account and $550,000 came from PED business accounts. A document dated August 28, 2007, and purportedly drafted by Ferentz on his law firm stationery, set forth the terms of appellant's agreement with Rocha, under which appellant was to receive four million dollars per month for an estimated 60 months.

Around the time of the trip to Switzerland, appellant told a golfing friend, who was a real estate investor and developer, about the investment. This golfing friend, on the basis of appellant's understanding of the investment, wired $400,000 to Ferentz for

investment in the purported second round of funding. The golfing friend testified that he was comfortable relying on appellant's representations about the investment because he believed appellant was "not the type of guy who's going to write a check for large sums of money without doing . . . pretty detailed due diligence." Though the golfing friend researched Ferentz online and found nothing negative, he also testified that he never saw any documents pertaining to the investment before investing.

Appellant testified that respondent knew about the Ferentz investment at the time the transactions occurred because he discussed it with her, noting that when he went to Switzerland, she drove him to the airport. Respondent also testified that she knew about the investment, that the parties discussed the investment extensively during the time appellant was transferring money, and that she drove appellant to the airport to fly to Switzerland to investigate the Ferentz investment. Respondent testified that she did not object to the transactions because she "trusted [appellant]'s judgment impeccably," as "he had always been . . . a very smart, wise businessman," but testified that she "really didn't understand what [the investment] was." Indeed, respondent testified that she did not have any evidence regarding where the money in the Ferentz investment ultimately went, did not have any information about how the Synertech documents or the Rocha agreement related to the investment, and did not dispute the veracity of the golfing friend's testimony that he lost $400,000 in the Ferentz investment. Rather, respondent testified that she found the Synertech documents in the same folder as other Ferentz investment documents and that she had "serious concerns that" the money was "offshore."

On cross-examination, appellant testified that he was "a pretty conservative investor" and relied primarily on Merrill Lynch advisors to direct his investments, though he also had invested in several other independent entities. Appellant acknowledged that he did not address the Ferentz investment with his advisors at Merrill Lynch, but testified that he discussed the investment with a friend who was a "very serious investor" and with the golfing friend, who also invested. The district court was not presented with evidence establishing the ultimate location of the funds put into the Ferentz investment, but the parties do not dispute the accuracy of the minimal documentary evidence showing transfers out of their business and personal accounts to accounts associated with the Ferentz investment.

Appellant testified that he remained in contact with the other investment participants, who indicated that the deal was moving forward as expected. Appellant testified that he believed in the investment in large part because of Ferentz, who represented himself as a lawyer engaged in recovering losses for investors in fraudulent transactions. However, contact between appellant, Rocha, and Ferentz became less frequent, and appellant became concerned when he received word that Ferentz died in May or June of 2008. At that time, appellant spoke to his lawyer in the dissolution proceedings about possible ways to recover the money. Appellant testified that he believed that it would require engaging a law firm in California and he was unable to convince other participants to pursue recover. Respondent questioned why appellant was not more aggressive in pursuing recovery of the money that he invested in the Ferentz investment either through legal action in court or the FBI.

Appellant testified that he had little hope of recovery, outside of going after Ferentz's law firm, because the FBI indicated that the investigation was still active and ongoing. The golfing friend also testified that he never received any money back from his investment and believed that the money was unrecoverable. The friend testified that he "sent multiple emails" to Ferentz questioning him about the investment, but Ferentz did not respond. After hearing of Ferentz' death, the friend telephoned one of his law partners in California to confirm his death. The friend also testified that he and appellant "had multiple discussions" about taking legal action against Ferentz, including meeting with a law firm, but that it appeared that the cost of litigation was prohibitive in light of the remote possibility of recovery. Approximately two years after his initial investment with Ferentz, appellant met an FBI agent, a post office investigator, respondent, K.V., and two other investors about pursuing recovery of his investment funds.

According to respondent, appellant told her on March 13, 2008, that he had developed a relationship with a woman from Brazil. Appellant moved out of the house the day after this conversation. Appellant testified that he first met this woman when he went to New York City in October 2007 to set up an account to receive the profits of the Ferentz investment. Appellant testified that he next saw her in January and March 2008, that they travelled from Brazil to Minnesota together in May 2008, and that he took eight trips to Brazil over the next four years to see her.

In contrast, respondent testified that she believed that appellant met his Brazilian girlfriend in May 2007 during a trip to Costa Rica because he came back from that trip "narcissistic and puffed up," which was "noticeable to everyone." However, respondent

acknowledged that she did not have any direct evidence that appellant met his girlfriend at that time. Respondent testified that she believed that he went to New York to be with his girlfriend, but when asked how she knew this information, she stated: "I don't know how I know."[1]

Respondent filed a petition for legal separation on September 15, 2008, and an amended petition for dissolution on December 17, 2008. During the course of the proceedings, a forensic accounting firm investigated PED, at respondent's request, and found no financial discrepancies in the accounting at PED. Respondent acknowledged that this examination showed that there was "not one penny out of place." After lengthy and contentious pretrial proceedings, a trial was held in August 2011. Following trial, the district court issued its findings and order, which, after largely adopting the facts put forth by appellant, concluded:

> Under the circumstances, when a substantial marital asset goes missing in proximity to the breakup of the marriage, the Court will give the matter close scrutiny. [Appellant's] narrative does not withstand scrutiny, for at least the following reasons:
>
> 1. This money 'disappeared' near the time when [appellant] met his Brazilian girlfriend, the consequent separation of Petitioner and [appellant], and commencement of this dissolution proceeding;
>
> 2. No prospectus, statement of investment objectives, or even a description of the investment, was provided to

[1] At trial, respondent also offered an internet chat log between appellant and his girlfriend, which respondent claimed was evidence that appellant transferred money to his girlfriend. Appellant explained that the account discussed in the chat log was his girlfriend's education account. While this chat log was received as an exhibit, the district court specifically indicated that there would be no findings based on the inadmissible hearsay contained in the document.

[appellant] or to the Court. There is very little documentation to substantiate [appellant's] narrative—documents do show the wire transfers, trip to Zurich (after the 'investment' was made), and some correspondence with the other actors;

3. [Appellant] has had a long investment history with Merrill Lynch, and testified that he has historically 'relied heavily' on his investment advisors at Merrill Lynch. For the Ferentz investment, he sought only the advice of the father of a friend. This lack of diligence is uncharacteristic for [appellant]. [Appellant] is an experienced, successful businessman;

4. Although [appellant] was investing a substantial sum, he was not allowed to meet, or even see, the purported currency trader in Zurich;

5. [Appellant] did not travel to California or make any other serious attempt to recover the 'lost' marital funds. He never obtained a death certificate for Ferentz, and apparently did not even learn of a cause of death;

6. [Appellant] did not bring a lawsuit to recover the money, claiming he 'couldn't afford to sue.' This is out of character for [appellant]. Petitioner testified that [appellant] has been prone to litigate over even small amounts of money. The Court notes the inconsistency of [appellant's] claim that he could not afford to litigate for the return of $950,000, but he can litigate the Ferentz investment issue in this proceeding;

7. Having been 'scammed' out of nearly $1 million, [appellant] made no effort to enlist the assistance of law enforcement until some 21 months after the reported death of Ferentz, and then only because his lawyer urged him to do so; and

8. After [appellant] moved out of the marital homestead, Petitioner found a briefcase belonging to him in a closet. In the briefcase were documents which give rise to a suspicion that there is a Brazilian connection to the missing money.

This claim of [appellant] has the appearance of fraud upon the Court and Petitioner. The narrative defies credibility.

In the unlikely event that [appellant's] narrative is true, it was an extremely reckless act for which Petitioner should not suffer. Petitioner had no knowledge of the money transfers and did not consent to the scheme. [Appellant] exercised

> almost no diligence at all in this activity. At the very least, [appellant] committed unmitigated waste on the threshold of the divorce.

As a result, the district court awarded appellant this $950,000 "investment," and imputed income to appellant on the "investment" at the rate of five percent per year. The district court also awarded PED to appellant, finding that "the reasonable current value of the business for purposes of property division" is $84,074, which corresponded to the "[b]ook value of the business, as shown on the June 30, 2010, balance sheet." The district court awarded permanent spousal maintenance to respondent, using these awards to calculate appellant's ability to pay the maintenance.

After the decision, appellant moved for amended findings, a new trial, and an opportunity to present new evidence. As newly discovered evidence, appellant offered a statement of deposits and withdrawals from Ferentz's accounts to substantiate appellant's claim that he gave $950,000 to Ferentz, which was then spent or distributed by Ferentz to various other accounts or entities. This statement was prepared for appellant by a receiver appointed by a federal court to investigate an unrelated series of fraudulent transactions that also involved Ferentz. In addition, appellant submitted an affidavit from PED's accountant, indicating that this evidence was sufficient to permit a characterization of the Ferentz investment as a fraud loss for PED for tax purposes. Appellant claimed that because of this fraud loss and a restatement of income in 2009, the accounting showed that the company had negative book value in 2010.

The district court denied appellant's motion, stating that appellant "had the duty to account for the 'loss' of this money," that appellant's "narrative in the accounting was

neither credible nor plausible, and had scant corroboration in the record," and that the "record was insufficient to support a finding that this was an 'investment' which turned out to be a scam." According to the district court, "[s]uch a finding would have required the Court to suspend disbelief." This appeal follows.

D E C I S I O N

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 (2012). A party has violated that duty, "[i]f the court finds that a party[,] . . . in contemplation of commencing, or during the pendency of, the current dissolution" proceeding, has "transferred, encumbered, concealed, or disposed of marital assets" without the other party's consent, "except in the usual course of business or for the necessities of life." *Id.* If dissipation is found, the court "shall compensate the other party," so that both parties are placed "in the same position that they would have been" without the dissipation. *Id.* The party "claiming that the other party" dissipated marital assets bears the burden of proof on the dissipation claim. *Id.*

This statute is "not meant to provide a financial windfall to the innocent party." *Sirek v. Sirek*, 693 N.W.2d 896, 899 (Minn. App. 2005). The purpose of the dissipation doctrine 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." *Bollenbach v. Bollenbach*, 285 Minn. 418, 428, 175 N.W.2d 148, 155 (1970).[2]

Whether a party dissipated marital assets under subdivision 1a is a question of fact, which this court reviews for clear error. *See* Minn. Stat. § 518.58, subd. 1a (stating that the district court shall compensate a party if it "finds" that the other party has violated the statute and that "[t]he burden of proof under this subdivision is on the party claiming" dissipation); Minn. R. Civ. P. 52.01 (stating that findings of fact "shall not be set aside unless clearly erroneous"). "We defer to the trial court's findings of fact and will not set them aside unless they are clearly erroneous." *Sirek*, 693 N.W.2d at 899. Witness credibility is the province of the fact-finder. *Melius v. Melius*, 765 N.W.2d 411, 417 (Minn. App. 2009). Appellate courts give great deference to district court determinations of witness credibility. *Alam v. Chowdhury*, 764 N.W.2d 86, 89 (Minn. App. 2009).

Under the statute, respondent had the burden to prove that appellant (1) "transferred, encumbered, concealed or disposed of marital assets"; (2) did so without her consent; (3) did so "in contemplation of commencing, or during the pendency of, the current dissolution, separation, or annulment proceeding"; and (4) did not transfer the

[2] Before enactment of subdivision 1a, Minnesota courts held that parties "subject to severance in divorce proceedings cannot be permitted to subvert the orderly processes of the courts by concealing, dissipating, or misusing his assets in anticipation of divorce so as to reduce the property available for division or as a standard for the court in fixing" spousal maintenance. *Bollenbach*, 285 Minn. at 428, 175 N.W.2d at 155; *Moore v. Moore*, 391 N.W.2d 42, 43 (Minn. App. 1986) (quoting this language from *Bollenbach*). This common-law doctrine is the conceptual precursor to subdivision 1a, and the source of the "dissipation" phraseology used in this opinion for purposes of simplicity.

assets "in the usual course of business or for the necessities of life." Minn. Stat. § 518.58, subd. 1a. Despite the clear statutory language that "[t]he burden of proof . . . is on the party claiming that the other party . . . disposed of marital assets" in violation of subdivision 1a, the district court stated that "[appellant's] narrative does not withstand scrutiny," that the "claim of [appellant] has the appearance of fraud upon the Court and [respondent]," and "[t]he narrative defies credibility." Moreover, in denying appellant's motion for a new trial, the district court correctly cited the statutory burden of proof, but then stated that "[appellant] had the duty to account for the 'loss' of this money." That is an incorrect reading of the statutory burden of proof applicable to this statute, and the district court erred in so stating.

The only legal basis cited by the district court for its decision on this issue was subdivision 1a, and the district court clearly applied the remedy in subdivision 1a for an improper disposal of assets, imputing "the entire value of an asset and a fair return on the asset to the party who transferred, encumbered, concealed, or disposed of it." *Id.* But in order for the district court to have applied this remedy, the district court must have found that the party to whom the asset is assigned improperly disposed of an asset. However, there are no such findings in the district court's order, and to the extent that the district court made findings that would satisfy the statutorily required elements of an improper-disposal claim, those findings are clearly erroneous.

The district court found that respondent "had no knowledge of the money transfers and did not consent to the scheme." But respondent acknowledged at trial that she was aware of the Ferentz investment activity, and that she believed that appellant was making

good decisions with the marital assets. Thus, this finding is clearly erroneous unless the district court accepted respondent's theory that while she consented to the Ferentz investment, the martial funds were transferred or diverted to appellant's girlfriend or an offshore location instead of the Ferentz investment. The district court did not specifically accept this theory, but such a finding is necessary in order for the district court to reach the conclusion that respondent had no knowledge of the "money transfers." Thus, we presume that such a finding was implied, and we therefore inquire as to whether that finding has sufficient support in the record.

Even if we completely disregard appellant's evidence and assume that he is not credible, we do not find any evidentiary support for respondent's theory. Respondent admitted that she had no evidence that the money went anywhere other than the Ferentz investment. Rather, the only evidence that respondent provided to support her theory that appellant somehow diverted the investment funds was that she had "serious concerns that" the money was "offshore."

We also note that the district court also found that the Ferentz investment occurred "in proximity to the breakup of the marriage," was "near the time" that appellant met his Brazilian girlfriend, and was "on the threshold of the divorce." But none of the district court's findings indicate that the Ferentz investment, which occurred in August and September 2007, occurred "in contemplation of" the dissolution of the marriage. The parties did not separate until May 2008, the parties attended marriage counseling in June 2008, and respondent filed for legal separation in September 2008. Thus, to the extent that a finding that the alleged dissipation was in contemplation of dissolution is implied

by the district court's ultimate result, we are not able to find any support in the record for that finding. In support of this contention, respondent argued that appellant met his girlfriend in May 2007, which was prior to the Ferentz investment, and, implicitly, that appellant contemplated marriage dissolution at this time. Yet, the only evidence respondent presented to support this claim was that upon appellant's return from Costa Rica, he seemed different. Without any other evidence, that claim is insufficient to support a finding that the alleged dissipation was done in contemplation of dissolution or that such funds were transferred to appellant's girlfriend. Under this same analysis, there is insufficient evidence to support a finding that appellant made a "reckless" investment in contemplation of dissolution.

Because the district court abused its discretion in finding that respondent met her burden of proof relative the appellant's alleged dissipation of marital assets, and because the district court erred in placing the burden of disproving dissipation upon appellant, we reverse the district court's conclusion that appellant disposed of marital assets in violation of Minn. Stat. § 518.58, subd. 1a. Given this reversal, we remand this matter to the district court for consideration of the effect of our decision upon the distribution of marital property between the parties.

Apart from the argument that appellant improperly disposed of marital assets, the district court offered no justification for assigning the value of the Ferentz investment to appellant as an asset. Because we conclude that the district court erred in finding that appellant dissipated marital assets, and because the basis for assigning the full value of

that asset to appellant is no longer viable, the assignment of the Ferentz investment to appellant on this basis constitutes an abuse of discretion.

As a result, we remand this matter to the district court for an equitable redetermination of the property division. We note that, in making that division, the district court "shall," among other things, "consider the contribution of each [spouse] in the acquisition, preservation, depreciation or appreciation in the amount or value of the marital property." Minn. Stat. § 518.58, subd. 1; *see also Fick v. Fick*, 375 N.W.2d 870, 874 (Minn. App. 1985) (noting the possibility, under the pre-subdivision 1a, common-law dissipation doctrine, that even where a party's conduct does not qualify as an improper dissipation of a marital asset, a party may be credited with that asset in the property division in certain circumstances). However, we also note that, in making that equitable division, the district court's decision must have "an acceptable basis in fact and principle." *Antone v. Antone*, 645 N.W.2d 96, 100 (Minn. 2002). In making that property division, the district court should decide how to allocate any value of the Ferentz investment, including the treatment of any recovery from the Ferentz investment.[3] This redetermination may necessarily require the district court to address any changes to appellant's income and maintenance obligation as a result of the redistribution of marital property, and the district court has discretion to determine whether, and what, new evidence should be considered on remand.

Reversed and remanded.

[3] We note that, as to the two other investments of the parties—"Arrowhead" and "Preserve Equity"—that appear to have become worthless, the district court assigned no value to either, and ordered an equal division of any recovery from the latter.