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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2106**

In Re the Marriage of:
Janet Kay Timmerman, petitioner,
Respondent,

vs.

Ronald Leo Timmerman,
Appellant,

County of Lyon, intervenor,
Respondent.

**Filed June 25, 2012
Affirmed in part and reversed in part
Bjorkman, Judge**

Lyon County District Court
File No. 42-FA-09-725

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Considered and decided by Johnson, Chief Judge; Stoneburner, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant-father challenges the district court's child-support order, arguing that the district court (1) abused its discretion by including an anomalous year in its income calculation, and (2) erred by ordering him to pay retroactive support. We affirm the district court's income calculation but reverse its order of retroactive support.

FACTS

Appellant-father Ronald Timmerman and respondent-mother Janet Timmerman were married from 1989 to 2010. They have one minor child.

On February 4, 2010, after mother commenced dissolution proceedings, the district court granted mother temporary legal and physical custody of the child and temporarily ordered father to pay child support. On May 17, the district court issued a partial judgment and decree, dissolving the marriage, dividing marital property, determining tax and debt liability, and stating that "issues of custody, parenting time and child support shall be determined by separate court order [and u]ntil a final court Order, the terms of the court's [temporary order] shall remain in full force and effect."

On June 15, the district court issued a partial judgment and decree, granting sole legal and physical custody to mother and setting parenting time. The judgment reserved the issue of child support for determination in the expedited child-support process. Accordingly, father stopped making child-support payments as of July 1.

Mother applied for assistance from the county to pursue child support. The county filed a motion to establish ongoing and past child support on March 10, 2011. The child

support magistrate (CSM) issued an order establishing child support on July 27. In doing so, the CSM calculated father's farming income based on the average of his 2007 through 2010 farming income:

2007 Income:	\$4,935.00
2008 Income:	\$23,982.00
2009 Income:	\$166,557.00
2010 Income:	\$8,521.00
Average Income:	\$50,998.75

The CSM calculated father's total support obligation to be \$1,356 per month, as of August 1, 2011. In addition, the CSM found that father had the ability to pay this amount during the two years prior to the proceeding and therefore ordered past support back to July 1, 2010, under Minn. Stat. § 256.87, subd. 5 (2010).

Father filed a motion for review, challenging the CSM's decision to average his 2007 through 2010 farming income and award retroactive support. The district court denied the motion and affirmed the CSM's order. This appeal follows.

DECISION

We review the district court's method of calculating a child-support obligor's income for abuse of discretion. *Quick v. Quick*, 381 N.W.2d 5, 9 (Minn. App. 1986). Likewise, we review the district court's award of child support for abuse of discretion, including legal error. *Guyer v. Guyer*, 587 N.W.2d 856, 858 (Minn. App. 1999), *review denied* (Minn. Mar. 30, 1999).

I. The district court did not abuse its discretion by calculating father's farming income using an average of his 2007 through 2010 farming income.

Father first argues that inclusion of his 2009 farming income in the averaging calculation unfairly inflates his income. We are not persuaded. It is generally appropriate to average an obligor's past income if the obligor's income naturally fluctuates. *Veit v. Veit*, 413 N.W.2d 601, 606 (Minn. App. 1987). *But see Sefkow v. Sefkow*, 372 N.W.2d 37, 48 (Minn. App. 1985) (holding that averaging is inappropriate if an average would not represent the obligor's current and future income), *remanded on other grounds*, 374 N.W.2d 733 (Minn. 1985). The parties had farmed for more than a decade, during which time their income fluctuated, in part due to when they incurred production-related expenses for a given year's crop. Father presented no evidence that his 2009 income was an unprecedented anomaly or was unlikely to repeat itself in the future such that the district court should not include it in its income calculation. He simply testified that his 2009 farming income was the result of selling 2008's grain and most of 2009's grain in 2009.

Father also contends that the inclusion of his 2009 farming income in the averaging calculation violated the dissolution judgment. We disagree. The dissolution judgment provides that "[t]he filing of [father's 2009 tax] returns [on farming income] pursuant to this Agreement is a part of a property settlement agreement and shall not be determinative of either party's income for determination of child support." In other words, although father was required to pay taxes on the 2009 farming income as part of the property settlement, his act of filing the tax return did not affect the calculation of

either party's income for child-support purposes. The judgment did not preclude the district court from considering father's 2009 farming income in its income calculation. On this record, we discern no abuse of discretion occasioned by the district court's consideration of father's 2009 farming income.

II. The district court committed legal error by ordering retroactive child support.

As a preliminary matter, mother urges us to reject father's challenge to the district court's award of retroactive support because he raised it for the first time in his posttrial motion. "Arguments presented for the first time in a posttrial motion are usually not considered on appeal." *Angell v. Angell*, 777 N.W.2d 32, 38 (Minn. App. 2009), *aff'd*, 791 N.W.2d 530 (Minn. 2010). We nevertheless address father's argument in the interests of justice. *See* Minn. R. Civ. App. P. 103.04.

The district court awarded mother retroactive child support under Minn. Stat. § 256.87, subd. 5, which states that "[a] noncustodial parent's liability [for child support] may include up to the two years immediately preceding the commencement of the action." But the county brought its motion to establish support not under section 256.87 but under Minn. Stat. § 518A.34 (2010). Under section 518A.34, it is improper to order support effective prior to the date of the motion for support if (1) no prior order to pay child support exists and (2) a court has previously reserved support. *Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243-44 (Minn. App. 2003), *review denied* (Minn. Nov. 25, 2003) (addressing a similar question under prior child-support statute and caselaw). Since there was no prior order for father to pay child support and the district court

expressly reserved support in its June 15 judgment, mother is only entitled to child support as of the date of the motion for support: March 10, 2011.

Affirmed in part and reversed in part.