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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1735**

In re the Marriage of:
Kurt William Schendel, petitioner,
Respondent,

vs.

Karen Sue Schendel,
Appellant.

**Filed November 18, 2008
Reversed and remanded
Hudson, Judge**

Hennepin County District Court
File No. 27-FA-05-795

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Considered and decided by Hudson, Presiding Judge; Toussaint, Chief Judge; and
Kalitowski, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

In this spousal maintenance dispute, appellant-wife challenges the amount of the
district court's spousal maintenance award and argues that the district court

(a) understated respondent-husband's ability to pay maintenance by understating his income and overstating his expenses; and (b) understated wife's monthly expenses. Because the district court's decision is unsupported by logic and facts in the record, it abused its discretion in setting spousal maintenance. Accordingly, we reverse and remand.

FACTS

After 26 years, the parties' marriage was dissolved in 2007. The parties stipulated to the division of property, and the only issues at trial were the amount and duration of spousal maintenance to wife. The first judgment and decree was filed April 12, 2007. Both parties moved the court for amended findings of fact and conclusions of law, and wife also moved the court for an amended judgment and decree. The district court entered an order for amended findings of fact, conclusions of law, and order for judgment and decree granting the parties' motions in part and denying in part. Judgment was entered upon that order on July 2, 2007.

The parties' stipulated property settlement divided the parties' bank accounts, property, and debt. Pursuant to the property settlement, husband received sole ownership of the business, Modern Avionics Acquisition Corporation (Modern Avionics). Because the property settlement resulted in a fiscal disparity between the parties, husband was ordered to pay wife \$100,055 as a "cash equalizer"—\$30,055 immediately and the remaining \$70,000 in monthly payments of \$989.37.

To determine husband's net income, the district court added gross annual income of \$57,000 (salary plus "other monetary compensation") with S-Corporation distributions

(“distributions”) from Modern Avionics in the amount of \$19,667. The district court based its distributions determination on the 2006 annual sales of Modern Avionics and expert testimony from husband’s accountant who testified that “projected pre-tax income of Modern Avionics [for 2006] would be approximately \$19,667.” Although admitted into evidence, the district court did not consider annual S-Corporation distributions of \$52,164 (2001), \$72,823 (2002), \$15,904 (2003), \$51,438 (2004), and \$85,539 (2005). The annual average of these distributions for the period 2001–2005 is \$55,574. In addition, the district court declined to include as income \$3,453 husband earns yearly as a firefighter because it was “nominal” and “because [husband] testified he [will] retire soon.” The district court also declined to factor in expenses husband incurred on his business credit card, which wife argued were actually personal expenses and thus should be counted as income.

With respect to husband’s expenses, the district court included in husband’s reasonable monthly expenses the \$989 “cash equalizer” payment, reasoning that the amount is a “very real expense for [husband] and diminishes his ability to pay spousal maintenance.”

The district court ultimately determined that husband’s net monthly income was \$4,746 with reasonable monthly expenses of \$4,417, leaving a monthly surplus of approximately \$330. But in a later finding, the court noted that “as stated previously,” husband had a net monthly income of \$4,393 (not \$4,746) and reasonable monthly expenses of \$4,417, leaving a “monthly surplus” of only \$24 (not \$330).

The district court found wife's net monthly income was \$2,913. Husband testified that all of wife's claimed monthly expenses were accurate and reasonable except for her clothing budget of \$400 and eyeglasses cost of \$23. As a result, the district court reduced wife's clothing expenses by \$200. But the district court made further deductions from wife's monthly expenses, notably, a deduction of \$290 from wife's automobile expense. The district court also declined to include in wife's reasonable monthly expenses a \$600 monthly payment she makes toward credit card debt. The district court reasoned that because wife assumed the debt as part of the property settlement, it was "unfair and unreasonable to include [it in wife's] monthly budget." The district court determined that wife had reasonable monthly expenses of \$3,881 and a monthly "shortfall" of \$968. The district court awarded wife permanent spousal maintenance in the amount of \$300 per month.

This appeal by wife follows.

DECISION

Wife argues that the district court abused its discretion in setting the amount of permanent spousal maintenance. We review spousal-maintenance awards for an abuse of discretion. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997). An abuse of discretion will not be found unless the district court's decision is unsupported by logic and facts in the record. *LeRoy v. LeRoy*, 600 N.W.2d 729, 732 (Minn. App. 1999), *review denied* (Minn. Dec. 14, 1999). In determining the amount of maintenance, the district court must make findings showing that it considered all of the factors listed in Minn. Stat. § 518.552, subd. 2 (2006). *Stich v. Stich*, 435 N.W.2d 52, 53 (Minn. 1989).

The district court must consider the financial resources of each party, the time the recipient needs to acquire education leading to appropriate employment, the couple's marital standard of living, the duration of the marriage, the length of absence from employment, the age and physical condition of the spouse seeking maintenance, the providing spouse's ability to meet the needs of both spouses, and the contributions of the parties in acquiring marital property. Minn. Stat. § 518.552, subd. 2(a)-(h) (2006).

The district court's findings of fact are reviewed for clear error. *Antone v. Antone*, 645 N.W.2d 96, 100 (Minn. 2002). If we conclude that the district court relied on findings of fact that are clearly erroneous, then we also conclude that the district court abused its discretion when it calculated spousal maintenance. *Kampf v. Kampf*, 732 N.W.2d 630, 633 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007).

Wife points to several alleged errors and inconsistencies in the district court's findings in support of her contention that the district court abused its discretion in setting the amount of spousal maintenance. We address each in turn.

Husband's income

Firefighter income

Wife argues that the district court abused its discretion by not including husband's firefighter salary in his income. We agree. The district court specifically found that the \$3,453 annual income husband receives as a firefighter is "nominal" and credited his testimony that he is likely to retire soon. Initially, we question whether, on this record, \$3,453 is a nominal amount. More importantly, we conclude that the district court abused its discretion when it excluded husband's firefighter salary from husband's

income based on a prospective event—husband’s retirement. *See Carrick v. Carrick*, 560 N.W.2d 407, 412 (Minn. App. 1997) (holding that district court erred by failing to calculate income at the time of trial). The better practice would have been for the district court to provide for a review hearing in the decree. Moreover, husband can later move for modification of his spousal maintenance obligation under Minn. Stat. § 518A.39, subd. 2a (2006), if his predictions of a reduced income become reality.

Credit-card expenses

Wife contends that many of husband’s alleged business expenses are in fact personal expenses and that the district court abused its discretion in not counting those expenses as income to husband. We agree. The district court found that husband presented credible explanations for all of the questioned charges on his corporate credit card statements and added that, while certain charges seemed to be unrelated to the business, the court was without additional evidence to determine that husband was misusing the credit card. We acknowledge that even though “the record might support findings other than those made by the trial court” it “does not show that the court’s findings are defective.” *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000). However, on this record, we have a definite and firm conviction that a mistake was made.

The transcript reveals that purchases were made on the Modern Avionics credit card at several clothing stores and sporting goods stores, including Gander Mountain, Cabela’s, Dahlgren Golf Club, Run ‘n Fun, Men’s Wearhouse, Gear Running Store, and Big Dog Sportswear. These entries strongly suggest that the purchases were for personal

purposes. The transcript also reveals that husband frequently answered, “I don’t know,” when asked how the purchases were business-related. For example, husband answered, “I don’t know,” when asked to explain how purchases at Click & Print Tickets, Carbon Cliff Bait, Autumn Cottage Co., The Golf Warehouse, and Treasures Within were business-related. Absent further substantiation from husband that these and other similar expenses are business-related, or that husband reimbursed the business for these expenses, the district court’s findings are unsupported by logic and the facts on the record, and the district court abused its discretion by not including these expenses in husband’s income as in-kind income.

S-Corporation distributions

Wife argues that the district court abused its discretion by not factoring into husband’s income the five-year average of the S-Corporation distributions. We agree. This court has recognized that considering an obligor’s past income or earning capacity may be appropriate when an obligor’s income fluctuates. *Ferguson v. Ferguson*, 357 N.W.2d 104, 108 (Minn. App. 1984). Here, the district court specifically found that husband had not been manipulating his salary or distributions from the corporation. The district court arrived at the S-Corporation distribution figure by crediting husband’s testimony that a large part of the distributions were being used to service the corporation’s debt. The district court also relied on testimony from husband’s accountant who calculated husband’s adjusted earning capacity based on projected gross sales and arrived at projected pre-tax S-Corporation distribution income of \$19,667. Based on this testimony, the district court declined to consider a large part of the distributions as

income. Specifically, the district court did not consider annual corporate distributions of \$52,164 (2001); \$72,823 (2002); \$15,904 (2003), \$51,438 (2004); and \$85,539 (2005). These distributions totaled an annual average of \$55,574.

But an average of several years' distributions would have taken into account fluctuations, resulting in a more accurate representation of husband's income. *See Veit v. Veit*, 413 N.W.2d 601, 606 (Minn. App. 1987) (finding that the trial court properly relied on respondent's average cash flow and additional available funds in calculating respondent's net monthly income), *see also Beede v. Law*, 400 N.W.2d 831, 835 (Minn. App. 1987) (holding that earning capacity findings are commonly used when addressing a self-employed individual's support obligations). On this record, it was an abuse of discretion for the district court not to consider the average S-Corporation distributions from the years 2001–2005 in its determination of husband's income, or at least that portion of the average distribution not used to service legitimate corporate debts.

Discrepancies in the findings of fact

Wife argues that there are irreconcilable discrepancies in the district court's findings regarding husband's income. We agree.

In the amended judgment and decree, the district court first found husband's net monthly income was \$4,746, with reasonable monthly expenses of \$4,417. This left a monthly surplus of approximately \$330. But in a later finding, the court inexplicably found that husband had a net monthly income of \$4,393 (not \$4,746) and reasonable monthly expenses of \$4,417, leaving a monthly surplus of only \$24 (not \$330). It is impossible to determine how the district court arrived at these figures, but a mistake was

clearly made at some point in calculating husband's income, expenses, and monthly surplus. At oral argument, respondent's counsel indicated that the district court's latter findings reflected appellant's monthly \$300 spousal maintenance award. But that is not clear from the record before us. Moreover, adding or subtracting the \$300 from the various figures provided by the district court still does not reconcile the inconsistent findings. Accordingly, we conclude that the district court's findings of fact on husband's income and expenses were clearly erroneous.

Wife's monthly expenses

Wife argues that the district court abused its discretion by reducing her monthly expenses for clothing by \$200 and for her car payment by \$290. We agree. "The purpose of a maintenance award is to allow the recipient and the obligor to have a standard of living that approximates the marital standard of living, as closely as is equitable under the circumstances." *Peterka v. Peterka*, 675 N.W.2d 353, 358 (Minn. App. 2004). The court must make specific findings regarding the parties' respective incomes and expenses. *Geske v. Marcolina*, 624 N.W.2d 813, 817–18 (Minn. App. 2001). The district court found that wife had reasonable monthly expenses of \$3,881 and a monthly "shortfall" of \$968. Despite husband's agreement that wife's itemized expenses were reasonable (except for the clothing expense and eyeglasses expense), the district court reduced wife's monthly expenses by an additional \$490.¹ The district court stated no rationale for this reduction other than that wife's car payment and clothing

¹ We do not address the court's additional \$250 deduction for attorney fees because it is not in dispute.

budget were “unreasonable” expenses. On this record, how the district court reached its determination that wife’s expenses were “unreasonable” is unclear and is against logic and facts in the record.

Husband’s monthly expenses

Wife argues that the district court abused its discretion by its disparate treatment of payments made by the parties pursuant to the stipulated property settlement. We agree. The district court must balance the financial needs of appellant and her ability to meet those needs against respondent’s ability to provide financial support. *Erlandson v. Erlandson*, 318 N.W.2d 36, 39–40 (Minn. 1982).

Here, the district court reasoned that husband’s \$989 monthly cash equalizer payment was a “very real” expense and thus included this amount in husband’s monthly expenses. But the district court found that wife’s \$600 monthly credit card payment should not be included in her expenses since it would be “unfair and unreasonable” to do so because wife had assumed the debt as part of the stipulated property settlement. The district court, therefore, considered husband’s assumption of debt pursuant to the property settlement as a monthly expense, and yet declined to afford similar treatment to wife’s assumption of debt pursuant to the same property settlement. The district court provided no explanation for its disparate treatment of the parties. Its ruling was significant given that inclusion of the \$989 cash equalizer payment decreased husband’s monthly surplus for purposes of determining the amount of wife’s spousal maintenance. At the same time, the exclusion of the \$600 increased wife’s monthly surplus for purposes of determining need. On this record, the district court’s determination is against

logic and the facts on the record and, therefore, constitutes an abuse of the court's discretion.

For all of the reasons stated herein, we conclude that the district court abused its discretion in setting wife's spousal maintenance award and we reverse and remand for proceedings consistent with this opinion. At its discretion, the district court may reopen the record to receive additional testimony or other evidence.

Reversed and remanded.