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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1789**

In re the Marriage of:
Steven Paul Kellen, petitioner,
Appellant,

vs.

Debra Jean Kellen,
Respondent.

**Filed August 13, 2012
Affirmed in part, reversed in part, and remanded
Wright, Judge**

Traverse County District Court
File No. 78-FA-10-63

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(for appellant)

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Considered and decided by Ross, Presiding Judge; Wright, Judge; and Toussaint,
Judge.*

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

UNPUBLISHED OPINION

WRIGHT, Judge

In this marital-dissolution appeal, appellant-husband challenges the district court's (1) parenting-time and legal-custody determinations; (2) determination regarding child-support; (3) award of spousal maintenance to respondent-wife; (4) division of the parties' property; and (5) award of need-based attorney fees to respondent-wife. We affirm in part, reverse in part, and remand.

FACTS

Appellant Steven Paul Kellen (husband) and respondent Debra Jean Kellen (wife) were married on July 24, 1999. Husband petitioned to dissolve the marriage in December 2009. After a series of motions and temporary orders concerning the parties' two minor children and multiple financial and discovery issues, the matter proceeded to trial in May 2011.

On September 13, 2011, the district court issued a final judgment. Among other legal rulings, this judgment (1) awards husband parenting time consistent with the schedule established in the district court's temporary order; (2) awards wife sole physical and legal custody of the parties' children; (3) requires husband to pay \$782 monthly in child support; (4) requires husband to pay wife spousal maintenance of \$200 monthly for a period of 60 months; (5) divides the parties' marital property; (6) requires husband to pay the debt remaining on a van awarded to wife; and (7) requires husband to pay wife's attorney fees. This appeal followed.

DECISION

I.

Husband argues that the district court erred by awarding him less than 25 percent of the parenting time and by awarding wife sole legal custody. Our review of custody decisions is limited to determining whether the district court abused its discretion by making findings unsupported by the evidence or by improperly applying the law. *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985). The district court's findings of fact will be sustained unless they are clearly erroneous. Minn. R. Civ. P. 52.01. A finding is clearly erroneous if we are left with the definite and firm conviction that a mistake has been made. *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000). When applying this legal standard, we view the record in the light most favorable to the district court's determination, giving deference to the district court's credibility assessment. *Id.*

If there is evidence to support the district court's decision, there is no abuse of discretion. *Doren v. Doren*, 431 N.W.2d 558, 561 (Minn. App. 1988). "That the record might support findings other than those made by the [district] court does not show that the [district] court's findings are defective." *Vangsness*, 607 N.W.2d at 474. Although the district court has broad discretion when determining custody matters, the basis for its decision must be set forth with particularity. *Durkin v. Hinich*, 442 N.W.2d 148, 151 (Minn. 1989). The district court must consider all relevant statutory best-interests factors when making a custody determination. Minn. Stat. § 518.17, subd. 1(a) (2010). It may not rely on one factor to the exclusion of all others, and it must make detailed findings on

each of the best-interests factors, explaining how the factors led to its conclusions and to its determination of the child's best interests. *Id.*

A.

Husband contends that the district court erred by awarding him parenting time below the statutorily presumed minimum without making sufficient findings to rebut the presumption.

Under Minnesota law, “[i]n the absence of other evidence, there is a rebuttable presumption that a parent is entitled to receive at least 25 percent of the parenting time for the child.” Minn. Stat. § 518.175, subd. 1(e) (2010). Our caselaw clearly establishes that the district court must “demonstrate an awareness and application of the 25% presumption when the issue is appropriately raised and the [district] court awards less than 25% parenting time.” *Hagen v. Schirmers*, 783 N.W.2d 212, 217 (Minn. App. 2010). The district court may allocate parenting time below the 25-percent benchmark based on “reasons related to the child’s best interests and considerations of what is feasible given the circumstances”; but in addition to its decision to grant less than 25-percent parenting time, the district court must identify the underlying reasons for that decision. *Id.* at 218. Although a previous order granting a parent less than 25-percent parenting time “may be a factor in addressing the presumption, the statute does not exempt application of the presumption in cases where parenting time was already below the presumptive mark.” *Id.*

Here, although the district court did not determine parenting-time percentages, the parties agree that in its September 13 order, the district court awarded husband less than

25-percent parenting time. With no further explanation, the district court found “that the schedule previously established by the [district court] in the temporary order is an appropriate schedule for the circumstances of the parties and . . . [husband] should be awarded the parenting time previously ordered.” This finding fails to acknowledge and apply the 25-percent presumption. Moreover, even if the district court could incorporate its previous analysis of the presumption by reference, the temporary order in this instance merely cited the 25-percent presumption. It did not apply the presumption or indicate whether the presumption was rebutted. When establishing the parenting-time schedule in the temporary order, the district court merely found that “[i]t is in the best interests of the child for [husband] to continue to have reasonable parenting time.”

Because the district court failed to address the 25-percent presumption sufficiently, we reverse and remand for the district court to (1) determine parenting time with due regard for the 25-percent presumption; (2) determine whether the parenting time awarded to husband is at least 25 percent of the parenting time; (3) make findings supporting its determinations; and (4) if applicable, state its basis for departing from the 25-percent presumption. *See id.* at 219.

B.

Husband contends that the district court erred by awarding wife sole legal custody, arguing that this determination is unsupported by the district court’s findings. Child custody determinations must be based on the best interests of each child. Minn. Stat. § 518.17, subd. 3(a)(3) (2010). Under Minnesota law, in the absence of domestic abuse between the parties, if joint legal custody is sought by either or both parties, there is a

presumption that joint legal custody is in the best interests of the child. *Id.*, subd. 2 (2010). When determining the best interests of the child, the district court must make detailed findings on each of the statutory “best interests of the child” factors. *Id.*, subd. 1(a). If joint legal custody is sought, the district court must consider the following additional factors:

- (a) the ability of parents to cooperate in the rearing of their children;
- (b) methods for resolving disputes regarding any major decision concerning the life of the child, and the parents’ willingness to use those methods;
- (c) whether it would be detrimental to the child if one parent were to have sole authority over the child’s upbringing; and
- (d) whether domestic abuse, as defined in section 518B.01, has occurred between the parents.

Id., subd. 2.

Here, it is undisputed that both parties sought joint legal custody. The district court, however, found that joint legal custody “is not in the children’s best interest.” Husband concedes that the district court addressed the relevant statutory factors. But he argues that the district court’s findings fail to overcome the presumption that joint legal custody is in the best interests of the children, a presumption that arises from his request for joint custody.

Regarding legal custody, the district court found that husband “has shown an inability to want to cooperate or want to communicate [directly] with [wife],” communicating with wife only by using their 10-year-old child, to the child’s detriment, “to deliver messages.” The district court also found that husband has primarily left wife with the responsibility of making major decisions and resolving disputes because

husband has “little involvement” in these matters. Finally, observing that wife has had sole authority over the children throughout their lives “and there has been no detriment,” the district court concluded that it would not be detrimental to provide wife sole authority over the children. Contrary to husband’s assertion, the district court’s findings support its implicit conclusion that the presumption in favor of joint legal custody is rebutted. The district court did not abuse its discretion by awarding wife sole legal custody of the children.

II.

Husband next challenges the district court’s child support determination, arguing that the district court clearly erred by finding his rent and utilities to be in-kind payments. The district court has broad discretion to provide for the support of the parties’ children. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). We will not reverse a district court’s determination of the income used to calculate child support if it has a reasonable basis in fact and is not clearly erroneous. *Strauch v. Strauch*, 401 N.W.2d 444, 447-48 (Minn. App. 1987). When determining a parent’s gross income for the purpose of calculating child support, “in-kind payments received by a parent in the course of employment, self-employment, or operation of a business shall be counted as income if they reduce personal living expenses.” Minn. Stat. § 518A.29(c) (2010).

Here, the district court found that husband’s sister—his employer—provides husband “with the use of a house, utilities, and gasoline once per month for his automobile.” Although husband testified that he rents a house from his sister and pays her \$200 monthly plus utility expenses, there is substantial evidence supporting the

district court's factual finding that these expenses are "fictitious." Citing an obligation to provide husband and his family with a place to live, husband's sister testified that she purchased husband's home because his family was "outgrowing the house that they were living in." She also testified that there is a binding agreement that husband will "always have a place to live" and, although husband recently asked to start paying rent and utilities to reduce his child support obligation, historically she has provided husband with free housing and utilities. Wife corroborated this testimony when she testified that, while she lived in the house, house payments and utility bills always were paid by husband's sister or her business. Husband's sister also acknowledged that, in light of husband's relatively low salary from her business, in-kind payments to husband of the sort at issue here were reasonable.

On this record, the district court's finding that husband, in the course of his employment, receives in-kind payments that reduce his personal living expenses is not clearly erroneous. Husband is not entitled to relief on this ground.

III.

Husband next challenges the district court's spousal-maintenance determination, arguing that the district court erred by calculating the parties' net income and expenses. Husband contends that the district court's findings establish that husband does not have the ability to pay wife spousal maintenance and that wife's expenses do not exceed her income.

A district court has broad discretion when determining a spousal-maintenance obligation. *Erlandson v. Erlandson*, 318 N.W.2d 36, 38 (Minn. 1982). Thus, on review,

we will not disturb the district court's decision as to the amount of spousal maintenance ordered absent an abuse of discretion. *Id.* A district court abuses its discretion if its findings are unsupported by the record or if it misapplies the law. *Pikula*, 374 N.W.2d at 710. Accordingly, unless the district court's findings of fact in support of a spousal-maintenance obligation are clearly erroneous, they will not be set aside on appeal. *Bourassa v. Bourassa*, 481 N.W.2d 113, 115 (Minn. App. 1992). A factual finding is clearly erroneous when, after careful review of the record, we are “left with the definite and firm conviction that a mistake has been made.” *Prahl v. Prahl*, 627 N.W.2d 698, 702 (Minn. App. 2001) (quoting *Gjovik v. Strope*, 401 N.W.2d 664, 667 (Minn. 1987)).

Spousal maintenance is defined by statute as “an award made in a dissolution or legal separation proceeding of payments from the future income or earnings of one spouse for the support and maintenance of the other.” Minn. Stat. § 518.003, subd. 3a (2010). The purpose of a spousal-maintenance award is to enable the recipient and the obligor to maintain a standard of living that approximates the marital standard of living to the extent this goal can be equitably achieved. *Peterka v. Peterka*, 675 N.W.2d 353, 358 (Minn. App. 2004). Spousal maintenance may be awarded if the district court finds that the recipient lacks sufficient property to provide for reasonable needs when considering the standard of living established during the marriage, or the recipient “is unable to provide adequate self-support, after considering the standard of living established during the marriage and all relevant circumstances, through appropriate employment.” Minn. Stat. § 518.552, subd. 1 (2010). When the district court awards spousal maintenance, both the recipient's reasonable needs that comport with the parties' circumstances and

living standards at the time of the divorce and the obligor's financial capacity must guide the district court's determination as to the amount of spousal maintenance and the duration of the obligation. *Lee v. Lee*, 775 N.W.2d 631, 642 (Minn. 2009); *Erlandson*, 318 N.W.2d at 39-40; *Botkin v. Botkin*, 247 Minn. 25, 29, 77 N.W.2d 172, 175 (1956).

The district court considers several factors regarding the party seeking spousal maintenance, including the financial resources of the party; the likelihood that the party will become fully or partially self-supporting given the party's age, skills, and education; the standard of living established during the marriage; the duration of the marriage and, in the case of a homemaker, the length of absence from employment and the extent to which the party's earning capacity has been diminished; the earnings, seniority, retirement benefits, and other employment opportunities forgone by the party; and the age, physical condition, and emotional condition of the party. Minn. Stat. § 518.552, subd. 2 (2010). Also relevant are the ability of the prospective obligor to meet his or her needs while also meeting the needs of the party seeking spousal maintenance and the contribution of each party to the marital property and to the advancement of the other's employment or business. *Id.* Of these relevant factors, none is determinative. *Kampf v. Kampf*, 732 N.W.2d 630, 634 (Minn. App. 2007), *review denied* (Minn. Aug. 21, 2007). Rather, the district court weighs the particular facts and circumstances presented to determine whether spousal maintenance is appropriate and, if so, the proper amount and duration. *Id.* at 633-34. The district court must examine the current situation of each party because, in essence, the statute balances each party's financial condition against that of the other. *Erlandson*, 318 N.W.2d at 39-40.

Regarding husband's financial condition, the district court found that he has the ability to meet his own needs and to pay spousal maintenance. Specifically, the district court determined that husband has a monthly surplus of \$478.¹ In reaching this conclusion, the district court expressly excluded from husband's expenses his child-support obligation. This is contrary to our caselaw, which considers a spouse's ability to meet his or her needs while providing the ordered spousal maintenance and child support. *See id.* at 40. In light of the district court's child support order, which currently requires husband to pay \$782 monthly, we conclude that husband does not have the ability to meet his needs and to pay spousal maintenance.

Regarding wife's financial condition, the district court found that wife does not have the means to maintain the standard of living that the parties achieved during their marriage. Specifically, the district court determined that, when providing for herself and the children, wife has a monthly deficit of \$672.² But the district court failed to consider its child support order. When augmented by husband's monthly child support payment, wife's monthly salary is adequate to meet her and the children's budgeted expenses.

On this record, we conclude that the district court abused its discretion by awarding wife spousal maintenance. We reverse the award. Because an award of spousal maintenance affects the parents' child-support obligations, we remand to the

¹ The district court found that, excluding the in-kind payments and the housing expenses they offset, husband has a net monthly income of \$2,043 and monthly expenses of \$1,565.

² The district court found that wife has a gross monthly income of \$1,279 and that she and the children have combined monthly expenses of \$1,951. Although the district court found wife's *gross* income, not her *net* income, the record establishes that in 2010, wife had zero dollars in taxable income.

district court to determine the correct amount of child support in light of our decision. See Minn. Stat. § 518A.29 (a), (g) (2010).

IV.

Husband next argues that the district court erred in its property division. In a dissolution proceeding, the district court has broad discretion when dividing marital property; we will not reverse this determination absent an abuse of that discretion. *Gottsacker v. Gottsacker*, 664 N.W.2d 848, 852 (Minn. 2003). An abuse of discretion occurs when the district court resolves the issue in a manner “that is against logic and the facts on record.” *Rutten*, 347 N.W.2d at 50. The determination of whether property is marital or nonmarital is a legal question, which we review de novo, but we accord deference to the district court’s findings of fact. *Gottsacker*, 664 N.W.2d at 852. Because the district court is better able to assess witness credibility, we will not disturb such determinations on appeal. *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

A.

Husband first argues that the district court erred by dividing property that belongs to his siblings, not to the parties. In a dissolution proceeding, because the district court lacks personal jurisdiction over a nonparty, it cannot adjudicate a nonparty’s property rights. *Danielson v. Danielson*, 721 N.W.2d 335, 339 (Minn. App. 2006). When a nonparty may have an interest in marital property but the existence of the nonparty’s interest is disputed, the district court has three options. *Id.* at 339-40. One option, if the district court makes sufficient findings of fact and conclusions of law, is to divide the property between the parties, recognizing that if a nonparty is later determined to have an

interest in the property, the dissolution judgment may be reopened and adjusted.³ *Id.* at 340.

Here, the disputed property includes a bedroom set, a push lawn mower, a snow blower, and a riding lawn mower.⁴ Husband, who was awarded three of the four items, argues that the property's ownership was not disputed during trial. But in wife's proposed Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree, wife considered each of these items marital property. Observing that if husband's siblings have a claim to any of the disputed property, "they may bring their own claims," the district court found that, "[w]hile [husband] claimed that a number of the items belonged to his sister or his brother, [wife] disputed this and [husband] provided no evidence." Because the district court sufficiently explained its decision, we conclude that the district court did not abuse its discretion by dividing the four items at issue. Husband is not entitled to relief on this ground.

B.

Husband next argues that the district court erred by assigning him a debt without considering it in the final property division. In a dissolution proceeding, the district court "shall make a just and equitable division of the marital property of the parties." Minn.

³ Alternatively, the district court may initially exclude the contested property and later, after the relevant third-party dispute is resolved, divide the property as "omitted property," or it may award the parties a percentage interest "in whatever may later be determined to be the marital interest in the asset." *Id.*

⁴ In its September 13 order, the district court refers to annexed property schedules. But these schedules are not attached to the order. Because the parties do not dispute that the schedules attached to a prior order reflect the district court's intent on September 13, for purposes of this review we refer to the schedules attached to the prior order.

Stat. § 518.58, subd. 1 (2010). Marital property is real or personal property “acquired by the parties, or either of them” during their marriage. Minn. Stat. § 518.003, subd. 3b (2010). Marital debt is treated in the same manner as marital property. *Justis v. Justis*, 384 N.W.2d 885, 889 (Minn. App. 1986), *review denied* (Minn. May 29, 1986).

If a party willfully fails to make court-ordered payments, the district court may find the party in civil contempt of court. *Mower Cnty. Human Servs. ex rel. Swancutt v. Swancutt*, 551 N.W.2d 219, 222-23 (Minn. 1996). Civil contempt “is failing to obey a court order in favor of the opposing party in a civil proceeding.” *Minn. State Bar Ass’n v. Divorce Assistance Ass’n, Inc.*, 311 Minn. 276, 285, 248 N.W.2d 733, 741 (1976). Accordingly, an appropriate sanction is designed to induce future performance of the district court’s order, not to punish past failure to perform. *Engelby v. Engelby*, 479 N.W.2d 424, 426 (Minn. App. 1992).

In a temporary order, the district court acknowledged that the parties were allegedly in debt for a van and ordered husband to “pay and keep current the monthly installment debt payments . . . during the pendency of this proceeding.” Without objecting to this aspect of the temporary order, husband willfully refused to comply. The record reflects that, after the district court’s temporary order, the only payment made on this debt was a \$1,597 lump sum apportioned by the district court from the parties’ joint 2009 tax refund. In its final judgment, the district court found that,

[d]ue to [husband’s] refusal to follow the [district] court’s temporary order, the parties owe [husband’s sister] the remaining sum of \$2,500 for the purchase of the 2003 Chrysler van. This is [husband’s] debt and should have been paid. As it is a regular debt payment that should have been

made, it is not included as part of [husband's] final property division.

The district court ordered husband to pay his sister “the remaining \$2,500 debt” owed on the van. The district court did not include this debt in husband’s marital or nonmarital debt schedule.

We conclude that the district court’s decision to exclude the van debt from the parties’ property division is an authorized sanction for husband’s failure to comply with the district court’s temporary order. The district court did not formally hold husband in contempt, but the district court’s sanction is clearly premised on husband’s failure to obey a court order in favor of wife and is designed to facilitate compliance with the order, in vindication of wife’s rights. Under these circumstances, husband is not entitled to relief on this ground.

V.

Finally, husband challenges the district court’s award of need-based attorney fees, arguing that the district court clearly abused its discretion when it determined that he had the means to pay wife’s attorney fees.

Generally, a party may not recover attorney fees without specific statutory or contractual authorization. *Barr/Nelson, Inc. v. Tonto’s, Inc.*, 336 N.W.2d 46, 53 (Minn. 1983). In a dissolution case, Minn. Stat. § 518.14, subd. 1 (2010), supplies a legal basis to award attorney fees. A district court “shall” award need-based attorney fees if it finds that (1) the attorney fees are necessary to a party’s good-faith claim and will not unnecessarily contribute to the proceeding’s length and expense; (2) the party from whom

attorney fees are sought has the means to pay them; and (3) the party who seeks attorney fees does not have the means to pay them. Minn. Stat. § 518.14, subd. 1. “But there is neither a mandate nor discretion to award such fees without those findings and the evidence to sustain them.” *Mize v. Kendall*, 621 N.W.2d 804, 810 (Minn. App. 2001), *review denied* (Minn. Mar. 27, 2001). Conclusory findings on the statutory factors are inadequate to support an attorney-fee award. *Geske v. Marcolina*, 624 N.W.2d 813, 817 (Minn. App. 2001). When an order lacks specific findings on the statutory factors for a need-based attorney-fee award under Minn. Stat. § 518.14, subd. 1, we must remand unless “review of the order reasonably implies that the district court considered the relevant factors.” *Id.* at 817-19 (quotation omitted).

Here, citing Minn. Stat. § 518.14, subd. 1, the district court made the following findings regarding attorney fees:

[Husband] has incurred \$16,499.85 in reasonable attorney fees and costs through May 10, 2011 (including a projected 10.0 hours of post-trial work). [Wife] has incurred \$15,780.00, in attorney fees and costs through May 11, 2011. Neither party has significant property apportioned to them in this Dissolution Decree. However, [husband] has a higher income and lower expenses. The court finds that [husband] has the means to pay [wife’s] attorney fees.

These findings do not address either the first or the third statutory factor. *See* Minn. Stat. § 518.14, subd. 1 (requiring district court to make findings regarding both the nature of the attorney fees and the party to whom the fees are awarded). Moreover, the district court’s conclusion regarding the second statutory factor is conclusory, particularly in light of the district court’s finding that the parties’ marital standard of living “was by all

accounts a modest standard of living that included using the income of [husband], the income of [wife], and also including public assistance in the form of Minnesota Care, Food Stamps, and heating fuel assistance.” We reverse and remand to the district court to make specific findings on the statutory factors for a need-based attorney-fee award.

Affirmed in part, reversed in part, and remanded.