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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0102**

In re the Marriage of:
Lynae Dana Nahring, petitioner,
Respondent,

vs.

Curtis Norman Nahring,
Appellant.

**Filed February 19, 2008
Reversed and remanded
Wright, Judge**

Anoka County District Court
File No. F4-03-8780

Lynae D. Nahring, 15401 Germanium Street Northwest, Ramsey, MN 55303 (pro se respondent)

Susan M. Lach, Daniel J. Goldberg, Messerli & Kramer, P.A., 1800 Fifth Street Towers, 150 South Fifth Street, Minneapolis, MN 55402 (for appellant)

Considered and decided by Minge, Presiding Judge; Halbrooks, Judge; and Wright, Judge.

UNPUBLISHED OPINION

WRIGHT, Judge

In this challenge to the amount of child support and spousal maintenance awarded by the district court, appellant-husband argues that (1) the district court's decision to

calculate his income by using a seven-year average was clearly erroneous; (2) the record does not support a deduction of 13.5 percent of respondent-wife's gross income for retirement savings; and (3) the findings do not reflect that the district court considered the requisite statutory factors. We reverse and remand.

FACTS

Appellant-husband Curtis Nahring and respondent-wife Lynae Nahring were married in 1993 and have two minor children. When their marriage was dissolved in February 2005, the parties reserved a number of issues, including custody, child support, and spousal maintenance. The parties subsequently agreed to share joint legal and physical custody of the children, and they agreed to a parenting-time schedule. The district court amended its original decree to reflect the parties' stipulations on these issues. But the parties could not agree on child support or spousal maintenance. On August 24, 2006, a contested evidentiary hearing was held on these issues.

One of the primary disputes at the hearing was the amount of husband's current net income. A carpenter by trade, husband owns and operates a house-framing subcontractor business. Because he is not paid for his work until the sale of the house, there often is a substantial delay between completing a framing job and receiving payment for it. This delay can range from six months to two years. Moreover, husband's income is tied to the housing market, which affects both the availability of new jobs and the payment for completed jobs.

Husband's accountant testified that husband's income in the first half of 2006 was substantially less than it had been in previous years because of an industry-wide decrease

in housing sales. According to a report prepared at both parties' request, husband's average net income between 1999 and 2005 was \$179,765. But his net income for the first half of 2006 was \$134,413. Husband testified that he did not expect to receive any additional income before the end of 2006. Based on completed jobs on which he was awaiting payment at the time of the hearing, husband's projected net income for 2007 was \$49,550.

The district court ordered husband to pay \$806 in monthly child support. This amount was based on wife's current net income, which included a 13.5 percent deduction "for retirement," and on husband's seven-year average income from 1999 through 2005. The district court also awarded wife \$2,500 in temporary monthly spousal maintenance for a period of eight years. This appeal followed.

D E C I S I O N

I.

Because husband and wife share joint physical custody, the district court was required to use the *Hortis/Valento* formula when setting child support. *Blonigen v. Blonigen*, 621 N.W.2d 276, 282 (Minn. App. 2001), *review denied* (Minn. Mar. 13, 2001). When this formula is applied, each parent's child support is calculated for the period when the other parent has custody, and the lower child-support obligation is offset against the higher one. *Id.* Thus, to apply the *Hortis/Valento* formula, the district court must determine the income for each parent.

A.

Husband challenges the district court's determination of his income for purposes of child support. A district court's determination of a child-support obligor's income is a finding of fact, which we review for clear error. *Schallinger v. Schallinger*, 699 N.W.2d 15, 23 (Minn. App. 2005), *review denied* (Minn. Sept. 28, 2005). We will affirm the district court's findings if they "have a reasonable basis in fact and are not clearly erroneous." *Id.*

The guidelines set forth in Minn. Stat. § 518.551, subd. 5(b) (2004),¹ establish the "starting point[]" when setting child support. *Moylan v. Moylan*, 384 N.W.2d 859, 863 (Minn. 1986). Under the guidelines, the amount of child support is calculated as a percentage of the obligor's monthly net income. *Putz v. Putz*, 645 N.W.2d 343, 348 (Minn. 2002). The amount calculated under the guidelines is rebuttably presumed to be correct. Minn. Stat. § 518.551, subd. 5(i) (2004); *Putz*, 645 N.W.2d at 348. In addition to calculating the guidelines amount, the district court also must consider several enumerated factors, which may justify a deviation. Minn. Stat. § 518.551, subd. 5(c) (2004); *see also Moylan*, 384 N.W.2d at 865 (noting that consideration of enumerated factors is "expressly mandated by the legislature"). These factors include the parents' financial resources, the children's financial and educational needs, and the standard of living the children would have enjoyed had the marriage not been dissolved. Minn. Stat. § 518.551, subd. 5(c). Regardless of whether the district court deviates from the

¹ We refer to the earlier version of the child-support statutes because the current version applies only to cases initiated after January 1, 2007. 2006 Minn. Laws ch. 280, § 44, at 1145.

guidelines, it must make specific written findings of fact regarding the factors considered in formulating the child-support award. *Id.*, subd. 5(i); *Moylan*, 384 N.W.2d at 863.

Husband argues that, by setting his child-support obligation based on his average annual income for 1999 through 2005, the district court erroneously failed to consider evidence of his actual earnings for 2006 and projected earnings for 2007. When setting child support, the district court's first task is to determine each party's net monthly income. Minn. Stat. § 518.551, subd. 5(i) (requiring "written findings concerning the amount of the obligor's income used as the basis for the guidelines calculation"); *Knott v. Knott*, 358 N.W.2d 493, 496 (Minn. App. 1984). The precise parameters of what a district court may consider in determining income for child support may vary based on unique earning scenarios. *See Darcy v. Darcy*, 455 N.W.2d 518, 522 (Minn. App. 1990) (recognizing possibility of "unusual situations").

Because a child-support obligation is premised on the obligor's ability to pay, *Strandberg v. Strandberg*, 664 N.W.2d 887, 889 (Minn. App. 2003), ordinarily it must be based on the obligor's current income, *Thomas v. Thomas*, 407 N.W.2d 124, 127 (Minn. App. 1987). Setting the obligation based on current income requires the district court to consider the most recent financial information available. *Merrick v. Merrick*, 440 N.W.2d 142, 146 (Minn. App. 1989) (citing *Thomas*, 407 N.W.2d at 127). Therefore, when present income information is available, past income or earning capacity usually is an inappropriate measure of income. *Beede v. Law*, 400 N.W.2d 831, 835 (Minn. App. 1987). In both *Merrick* and *Thomas*, we held that it was error to determine the obligor's income based on tax returns for the previous year without considering information

provided regarding the obligor's earnings during the first half of the current year. *Id.*; *Thomas*, 407 N.W.2d at 127.

But a district court may consider past income or earning capacity when a party's current income is not an accurate reflection of the party's ability to pay child support. *Beede*, 400 N.W.2d at 835. Although husband suggests that the district court must find that he is voluntarily unemployed or underemployed before considering his past income, his argument is inconsistent with Minnesota law. *See, e.g., Veit v. Veit*, 413 N.W.2d 601, 606 (Minn. App. 1987) (permitting consideration of earning history to evaluate fluctuating income). Indeed, earning capacity is "commonly used" to determine a self-employed obligor's income. *Fulmer v. Fulmer*, 594 N.W.2d 210, 213 (Minn. App. 1999). In such cases, the difficulty of determining the obligor's actual income may justify using earning capacity as a substitute measure of net income. *Id.*; *see also Ferguson v. Ferguson*, 357 N.W.2d 104, 108 (Minn. App. 1984) ("[T]he opportunity for a self-employed person to support himself yet report a negligible net income is too well known to require exposition.").

We also have approved of calculating net income by averaging an obligor's income over a longer period of time in certain circumstances. *See, e.g., Swick v. Swick*, 467 N.W.2d 328, 333 (Minn. App. 1991) (approving use of five-year average when husband did not have "a steady, determinable flow of income"), *review denied* (Minn. May 16, 1991). For example, an average may provide a more accurate measure of income when the obligor's income regularly fluctuates. *Veit*, 413 N.W.2d at 606. In *Veit*, we rejected the argument that it was improper to use husband's average income over

42 months. *Id.* Although wife argued that the average distorted husband's current income because it included a "financially disastrous year" for his real-estate business, the average—including the anomalous year—more accurately measured husband's income because it accounted for its natural fluctuations. *Id.* But an average should not be used to account for changes in an obligor's income that reflect a steady trend. *Sefkow v. Sefkow*, 372 N.W.2d 37, 47-48 (Minn. App. 1985) (holding that average did not reflect obligor's current income, which had been steadily increasing), *remanded on other grounds*, 374 N.W.2d 733 (Minn. 1985); *Veit*, 413 N.W.2d at 606 (distinguishing *Sefkow* based on fluctuating rather than increasing income).

In the instant case, although husband introduced evidence of his business receipts and expenses during the first half of 2006, the district court set the child-support obligation based on husband's average net annual income between 1999 and 2005. Thus, under *Merrill* and *Thomas*, the district court clearly erred by failing to consider this more recent information in determining husband's current net income.

It is unclear, however, whether it was appropriate for the district court to consider husband's *average* past income during that seven-year period because husband's net *annual* income from year to year fluctuated between approximately \$5,000 and \$60,000. Had the average also included husband's 2006 income, it might be a more accurate measure of his actual income. *See Veit*, 413 N.W.2d at 606 (approving use of average to account for fluctuations). But husband also presented evidence of a substantial downward trend in his income, which indicated that he framed an average of 17 or 18 houses per year prior to 2005, 14 houses in 2005, and 3 houses in 2006. This evidence

demonstrated no framing prospects for the immediate future. Moreover, because of the delay between completing a framing job and receiving payment, husband's net income of \$134,413 for the first half of 2006 was from jobs completed the previous year. Husband testified that he did not expect to receive any additional income in 2006 because two of the three houses on which he was awaiting payment would not be completed before the end of the year. Finally, husband's accountant projected that husband's net income would be \$49,550 in 2007.

The district court's findings fail to explain why it determined husband's income by using a seven-year average. Without "thorough and accurate findings of fact regarding the obligor's monthly net income," meaningful appellate review cannot be performed. *Putz*, 645 N.W.2d at 348 (discussing importance of specific findings); *Merrick*, 440 N.W.2d at 146 (holding that appellate review of record is not substitute for specific district court findings). On remand, we direct the district court to make detailed findings that explain the basis for its calculation of husband's income. *Cf. Darcy*, 455 N.W.2d at 522 (requiring findings that specifically explain why and to what degree husband's past income was considered). If the district court determines that averaging husband's income is appropriate, such findings must include the most current information available in the average.² *Merrick*, 440 N.W.2d at 146; *Thomas*, 407 N.W.2d at 127.

² Although the decision whether to reopen the record on remand rests within the district court's sound discretion, *Duffey v. Duffey*, 432 N.W.2d 473, 476 (Minn. App. 1988), we observe that additional information about husband's income since the previous hearing may be available and appropriate to consider, *see Thomas*, 407 N.W.2d at 127 (observing that additional income information would be available on remand).

It also appears from the record that husband's average net income was calculated by subtracting overhead and operating expenses from gross receipts. Although this may accurately represent husband's net income for federal income-tax purposes, when calculating a child-support obligation, "net income" is calculated by subtracting federal and state taxes, social security, a reasonable pension contribution, union dues, health insurance, and child-support or maintenance obligations. Minn. Stat. § 518.155, subd. 5(b) (2004). Thus, when determining husband's net income on remand, the statutory formula must be applied.

B.

Husband argues that the district court erred in calculating wife's net income by deducting 13.5 percent of her gross income for retirement savings. Section 518.551, subdivision 5(b), permits a "reasonable pension deduction" when calculating net income for child-support purposes. *Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 118 (Minn. App. 2001). We have interpreted this "to allow deductions for reasonable, non-pension retirement contributions." *Id.* (citing *State ex rel. Rimolde v. Tinker*, 601 N.W.2d 468, 471 (Minn. App. 1999) (401K deduction), and *Mueller v. Mueller*, 419 N.W.2d 845, 847 (Minn. App. 1988) (IRA deduction)). But such contributions must be "part of a retirement plan." *See id.* (refusing to allow deduction for savings bonds or stock-purchase plan without evidence that they fit into statutory category).

Here, the district court failed to indicate whether the deduction is a contribution to a retirement plan within the meaning of Minn. Stat. § 518.551, subd. 5(b). Moreover, even if this is a proper pension deduction, the district court did not make findings as to

whether deducting 13.5 percent of wife's gross income for this purpose is reasonable. *See Rimolde*, 601 N.W.2d at 471 (remanding for specific finding as to reasonableness of husband's six-percent 401K contribution). On remand, we direct the district court to make findings that explain the factual basis for and reasonableness of any deductions permitted.³

II.

Husband also challenges the district court's award of \$2,500 in monthly spousal maintenance. Because a district court has broad discretion in awarding spousal maintenance, we will not disturb its decision absent an abuse of discretion. *LeRoy v. LeRoy*, 600 N.W.2d 729, 732 (Minn. App. 1999). An abuse of discretion will not be found unless the district court's decision is unsupported by logic and facts in the record. *Id.*

Notwithstanding the district court's broad discretion, an award of spousal maintenance must be supported by adequate findings. *Id.* at 733. Before awarding spousal maintenance, the district court must consider "all relevant factors" required to balance the "financial need of the spouse receiving maintenance and the ability to meet

³ We also observe that the findings fail to address other factors expressly mandated by the legislature for determining child support, such as the children's needs. *Moylan*, 384 N.W.2d at 865; *see* Minn. Stat. § 518.551, subd. 5(i); *Rouland v. Thorson*, 542 N.W.2d 681, 684 (Minn. App. 1996) (addressing extent of findings required in support matters). Ordinarily, we do not address issues that are not raised or briefed on appeal, *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982), but we have discretion to address any issue as justice requires, Minn. R. Civ. App. P. 103.04. In light of the state's interest in protecting the well-being of the parties' children, we also direct the district court to make findings that adequately address *all* of the requisite statutory factors on remand. *See Putz*, 645 N.W.2d at 350 (addressing waived child-support issue on merits).

that need . . . against the financial condition of the spouse providing the maintenance.” Minn. Stat. § 518.552, subd. 2 (2006) (nonexclusive list of mandatory factors); *Krick v. Krick*, 349 N.W.2d 350, 352 (Minn. App. 1984). Failure to make such findings requires a remand, even if the record supports the district court’s decision. *Stevens v. Stevens*, 501 N.W.2d 634, 637 (Minn. App. 1993).

Here, the district court found only that “[wife] needs \$2,500 per month temporary maintenance for a period of eight (8) more years, and [husband] has the ability to pay said amount.” There is no indication that the district court reached this conclusion by considering and balancing the requisite statutory factors, such as the standard of living established during the parties’ marriage. Minn. Stat. § 518.552, subd. 2(c). “We cannot stress enough the importance of having findings of fact that demonstrate the [district] court actually did take all relevant factors into consideration.” *Erickson v. Erickson*, 385 N.W.2d 301, 303 (Minn. 1986). We, therefore, direct the district court on remand to determine what, if any, amount of spousal maintenance is appropriate and to support its determination with detailed findings addressing all relevant factors.

Reversed and remanded.