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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1550**

In re the Marriage of:  
Sherrie Lynette Foss, petitioner,  
Respondent,

vs.

Michael Clifton Foss,  
Appellant.

**Filed July 30, 2012  
Reversed and remanded  
Ross, Judge**

Goodhue County District Court  
File No. 25-FA-10-842

Steven M. Dittrich, Dittrich & Lawrence, P.A., Rochester, Minnesota (for respondent)

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appellant)

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

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

## UNPUBLISHED OPINION

**ROSS**, Judge

Michael and Sherrie Foss's marriage was dissolved by a judgment and decree in 2011. The district court ordered Michael to pay Sherrie \$2,698 in monthly child support and \$500 in permanent spousal maintenance and allocated a majority of the parties' marital debt to Michael. Michael appeals from the judgment, arguing that the district court abused its discretion by not using his current income to calculate child support and by awarding spousal maintenance. He also disputes the district court's allocation of a majority of the marital debts to him. Because the district court abused its discretion by failing to calculate child support using current income, and because it failed to make adequate findings of the parties' monthly expenses, we reverse and remand.

### FACTS

Michael and Sherrie Foss were married in September 1996 and divorced in May 2011. They have two children, who now live with Sherrie.

Michael is employed as an operations specialist. His 2011 base pay was \$125,000 and he is eligible for annual discretionary bonuses. From 2006 to 2010 Michael reported the following income on his tax returns:

2006:	\$124,988
2007:	\$175,559
2008:	\$244,591
2009:	\$80,200
2010:	\$185,334

He also received \$30,000 in 2010 for consulting work, bringing his total 2010 income to \$215,334. His actual 2009 income was about \$60,000 higher than he reported. Michael

also previously received expense reimbursements from his employer for his cellular telephone bill and business expenses for about \$1,000 every two weeks.

Sherrie was employed at the time of the dissolution as an administrative assistant working 32 hours per week and earning \$22.29 hourly for a monthly income of about \$3,000. Her gross income for 2006 through 2010 was as follows:

2006:	\$30,285
2007:	\$28,783
2008:	\$28,607
2009:	\$30,726
2010:	\$28,558

The parties had a relatively high marital standard of living, but it was largely funded on debt. They enjoyed expensive vacations and vehicles. They built a four-bedroom, five-bathroom, 3,976 square foot home on a 20-acre lot. At the dissolution trial, the house was listed for sale at \$539,000. A first mortgage encumbers the property on a \$330,000 loan and a second mortgage secures a \$150,000 loan. The parties purchased 35 additional acres of adjacent land. The additional lot was listed for sale for \$199,900 at the time of the dissolution proceeding. That lot has a mortgage securing two loans and two lines of credit, totaling \$180,217. The monthly mortgage payments for both properties total roughly \$4,400.

At trial, Sherrie predicted monthly expenses of \$6,919 for herself and the two children after the home sells. Michael claimed monthly expenses of \$5,295.

After the parties separated in the fall of 2009, Michael continued to pay certain family expenses. He paid both mortgages on the home, Sherrie's car loan, snow plowing expenses, gas and electricity for the home, and Sherrie's cellular telephone bill. Michael

also purchased three cars during the parties' separation—a 2010 BMW X5, a Ford F-150 pick-up truck, and a 2011 Kia sport utility vehicle. And he traveled to Colorado, Utah, and Wyoming for snowmobiling.

Sherrie petitioned for dissolution in April 2010 and sought \$1,800 in permanent spousal maintenance. The district court issued its judgment and decree in May 2011. It ordered Michael to pay \$2,698 in monthly child support and \$500 in permanent spousal maintenance. It divided the real property and associated debt as follows: Sherrie is to make half the payment for the first mortgage and Michael must pay the other half plus the entire payment on the second mortgage, and he was awarded the 35 acres of land and assigned its accompanying debt. It also assigned most of the parties' other debt of about \$50,000 to Michael, and it ordered him to pay Sherrie \$5,000 in conduct-based attorney fees because he did not fully disclose requested financial information before trial.

Michael appeals.

## **D E C I S I O N**

### **I**

Michael argues that the district court abused its discretion when it calculated his child-support obligation. The district court has broad discretion when determining child support. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). It abuses its discretion if its decision is against logic and the facts. *Id.*

Michael maintains that the district court erroneously averaged his income over several prior years instead of calculating child support based on his current income. The argument is factually and legally supported. The district court found that Michael's

yearly average income from 2006 to 2010 (excluding 2009) was \$190,118 or \$15,843 monthly. It then subtracted \$500 for spousal maintenance to find that his income available for child-support purposes is \$15,343 each month. Michael argues that his current annual income is actually \$125,000 annually, as proven by a January 2011 letter from his employer and corroborated by a 2011 pay stub.

Michael is correct that the district court must use current income, when available, to calculate child support obligations. *See Merrick v. Merrick*, 440 N.W.2d 142, 146 (Minn. App. 1989) (holding that district court erroneously relied on prior year's tax return to calculate child support when check stubs were available for the current year); *Thomas v. Thomas*, 407 N.W.2d 124, 127 (Minn. App. 1987) (holding that "the [district] court must determine *current* . . . income for the purposes of setting child support") (emphasis in original). A child support obligation is calculated based on a parent's gross income. Minn. Stat. § 518A.34 (2010). Gross income "includes any form of periodic payment to an individual, including, but not limited to, salaries, wages, [and] commissions" and expense reimbursements "if they reduce personal living expenses." Minn. Stat. § 518A.29(a), (c) (2010). Because the district court was required to use Michael's current gross income and it had received uncontested documentary verification of that income, it abused its discretion by basing the obligation on prior income averaging.

The other apparent error is the calculation that Michael's income available for base child support is \$190,000 annually. Not only does that calculation assume that Michael will receive a bonus of at least \$65,000 (an assumption not reasonably supported

on the facts presented concerning current circumstances), but it is also erroneous because the district court already accounted for any bonuses for child-support purposes by requiring Michael to pay 20 percent of any bonus as child support. So including the \$65,000 assumed bonus in the base child-support calculation is redundant.

We recognize that it is sometimes appropriate for the district court to look to an obligor's earning history in setting child support. *See Veit v. Veit*, 413 N.W.2d 601, 605–06 (Minn. App. 1987). But here, Michael is not “voluntarily unemployed, underemployed, or employed on a less than full-time basis” and there is direct evidence of his current income. *See* Minn. Stat. § 518A.32, subd.1 (2010); *Veit*, 413 N.W.2d at 605. Contrary to Sherrie's assertion, this is not a situation where an averaging of income would more accurately measure his income. *See Veit*, 413 N.W.2d at 606 (holding that it was proper to average obligor's income because based on the nature of his real estate business an average would take into account fluctuations and more accurately measured his income). The district court found that Michael's employer had changed, and it did not explain why averaging from prior years' total income should prevail over the documented evidence of Michael's reduced current income.

The district court therefore abused its discretion by failing to calculate Michael's child-support obligation based on his current income and by including the speculative bonus amount as part of Michael's base obligation after having already assigned a percentage of the potential bonus as automatic child support. On remand, the district court should order child support based on the parties' current income; and it may not

assign additional support based on predicted estimates of annual bonuses that are already used to calculate automatic additional child support on a percentage formula.

## II

Michael next challenges the district court's award of permanent spousal maintenance. We review a district court's award of spousal maintenance for an abuse of discretion. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 (Minn. 1997). The district court abuses its discretion if its findings are unsupported by the record or if it improperly applies the law. *Id.* We will uphold a district court's findings of fact unless they are clearly erroneous. *Schallinger v. Schallinger*, 699 N.W.2d 15, 22 (Minn. App. 2005), *review denied* (Minn. Sept. 28, 2005). Issues of law are reviewed de novo. *Melius v. Melius*, 765 N.W.2d 411, 414 (Minn. App. 2009).

Michael argues that the district court abused its discretion by awarding spousal maintenance. The district court may award spousal maintenance if, based on the standard of living established during the marriage, the spouse seeking maintenance lacks sufficient property to provide for her reasonable needs or if she is unable to provide adequate self-support through appropriate employment. Minn. Stat. § 518.552, subd. 1 (2010). If the district court determines that spousal maintenance is needed, it then considers eight factors to determine the amount and duration of the award, including the ability of the spouse from whom maintenance is sought to pay spousal maintenance and still meet his own needs. *Id.*, subd. 2 (2010). The district court determined that spousal maintenance is appropriate in this case based on the high standard of living established during the marriage and Sherrie's lack of sufficient property and employment to support herself and

the two children at the marital standard. Michael contends that Sherrie is able to meet her own reasonable needs through her income and child support. He also asserts that the district court failed to make sufficiently detailed findings regarding Sherrie's monthly expenses. We conclude that we do not have sufficient findings to adequately review the spousal-maintenance award.

The district court considered that Sherrie claimed monthly expenses of \$6,919 and noted that her expenses must be lowered to be deemed reasonable. But it made no finding as to what Sherrie's reasonable expenses are. Without findings of Sherrie's reasonable monthly expenses, we cannot determine whether the district court properly exercised its discretion by determining that Sherrie cannot meet those reasonable expenses on her own. *See Stich v. Stich*, 435 N.W.2d 52, 53 (Minn. 1989); *Cummings v. Cummings*, 376 N.W.2d 726, 731 (Minn. App. 1985).

Michael also argues that he does not have the ability to pay spousal maintenance while meeting his own reasonable needs. *See* Minn. Stat. § 518.552, subd. 2(g). He maintains that with his net annual income of \$87,500, he would face an annual \$41,975 deficit based on a \$32,000 child-support obligation, \$6,000 spousal-maintenance obligation, \$12,806 first-mortgage obligation, \$15,129 second-mortgage obligation, and \$63,540 in reasonable living expenses. The district court found that Michael has the ability to pay maintenance based on an average annual income of \$190,118. And it observed that he has proven the ability to pay because, up until trial, he continued to pay both the first and second mortgage on the home; two lines of credit, the mortgage, and the personal loan on the 35 acres; snow plowing expenses; Sherrie's car loan; utilities for the

home; and Sherrie's cellular telephone bill. Also during the separation, he was able to purchase a BMW sport utility vehicle, a Ford F-150 truck, a Kia sport utility vehicle, and he continued to go on vacations. The district court also found that Michael's estimated monthly expenses of \$5,295 may have to be reduced for reasonableness. But it made no findings as to what Michael's reasonable monthly expenses are.

On these limited findings, we cannot assess the challenge on appeal. The district court erroneously relied on the average prior years' income of \$190,118 for Michael rather than his current reduced and documented income, and it failed to make any findings of either party's reasonable monthly expenses. Without these findings, we cannot begin to review the decision that Michael has the current ability to pay spousal maintenance after meeting his own reasonable needs.

When the district court's findings are insufficient to determine whether it properly applied section 518.552, the district court has abused its discretion and we must remand the case for further findings. *Stich*, 435 N.W.2d at 53. We therefore remand the issue of spousal maintenance for the district court to make the necessary findings of Sherrie's and Michael's reasonable expenses and to calculate spousal maintenance, if any, based on Michael's actual current income. Given that the passage of time may have answered the uncertainty at trial concerning whether Michael would continue to receive sizable bonuses, the district court may reopen the record to make the needed findings if it deems it useful.

### III

Michael argues that the district court abused its discretion when it divided the parties' debt. "A trial court's apportionment of marital debt is treated as a property division." *Berenberg v. Berenberg*, 474 N.W.2d 843, 848 (Minn. App. 1991), *review denied* (Minn. Nov. 13, 1991). District courts have broad discretion when dividing marital property, and we will not disturb that division unless there is a clear abuse of discretion or a mistake of law. *Sirek v. Sirek*, 693 N.W.2d 896, 898 (Minn. App. 2005). In other words, this court will affirm a district court's property division unless it stands "against logic and the facts on record." *Rutten*, 347 N.W.2d at 50.

The district court must "make a just and equitable division of the marital property" and "base its findings on all relevant factors including the length of the marriage, any prior marriage of a party, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, needs, opportunity for future acquisition of capital assets, and income of each party." Minn. Stat. § 518.58, subd. 1 (2010). We again cannot determine whether the district court abused its discretion. Without findings of Michael's and Sherrie's reasonable monthly expenses and Michael's current income, we cannot review whether the district court properly ascribed most of the debt to Michael. We remand the issue of the debt division to the district court to make the necessary findings.

Michael also argues that the district court abused its discretion by including a provision in its conclusions of law that the debt assigned to each party is nondischargeable in bankruptcy. Similar provisions have been upheld. *See Nelsen v.*

*Nelsen*, 444 N.W.2d 302, 304 (Minn. App. 1989). But because we have remanded for a calculation of the debt division to be based on complete findings, we do not decide this issue.

**Reversed and remanded.**