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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0276**

In re the Marriage of:

Nicholas James Davis, petitioner,
Appellant,

vs.

Theresa Anne Davis,
Respondent.

**Filed December 31, 2018
Affirmed in part, reversed in part, and remanded
Smith, Tracy M., Judge**

Hennepin County District Court
File No. 27-FA-15-700

Kathryn A. Graves, Jaime Driggs, Henson & Efron, P.A., Minneapolis, Minnesota (for appellant)

Kristafer E. Skjervold, Skjervold Law Office, Shorewood, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Smith, Tracy M., Judge; and
Stauber, Judge.*

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

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Following a trial, appellant-husband Nicholas James Davis was ordered to pay respondent-wife Theresa Anne Davis permanent spousal maintenance and wife was ordered to pay husband child support. Husband was also ordered to pay wife's attorney fees. Husband appeals, challenging the spousal-maintenance award and the award of attorney fees. Regarding attorney fees, we conclude that the district court did not abuse its discretion in awarding wife need-based fees. Regarding spousal maintenance, we conclude that the district court did not clearly err in the factual findings challenged by husband but did make a legal error in calculating the amount of spousal maintenance by considering wife's child-support obligation as an expense in determining her need. We therefore affirm in part, reverse in part, and remand.

FACTS

Husband and wife married in 2004 and had four children, three of whom are minors. Husband is a licensed master electrician who owns his own residential electric business, Affordable Electric. Affordable Electric employs two other full-time electricians and two staff members who work in the office. Wife worked different jobs during the marriage, including as a waitress, as a dietary aide, and as a baker for a department store where she worked from 2009 to 2014.

In 2014, wife became addicted to prescription pain killers and, later, heroin. According to husband, by the fall of 2014, she was unable to maintain employment or provide care for the children. On Christmas Day in 2014, wife came home incoherent and

husband called the police. Wife was hospitalized, and a civil commitment proceeding was initiated. Wife was civilly committed for chemical dependency, but the commitment was stayed provided she remained in chemical-dependency treatment. Wife began at a treatment center but left, without staff consent. On January 26, 2015, the stay of commitment was vacated, but wife did not comply with the commitment order or tell husband her whereabouts.

In early February 2015, wife came to the parties' home unannounced and took one of their vehicles without husband's knowledge. Soon thereafter, she was involved in a car accident, in which she suffered injuries and which totaled the car.

That same month, husband started a dissolution proceeding against wife but could not locate her to serve her. Wife learned husband was trying to locate her and, in March, signed an admission of service. Through court-related processes, the parties reached a number of agreements, including that wife would have supervised parenting time; these agreements were recorded in early June. Shortly thereafter, wife had one supervised parenting visit—her first contact with the children since the previous Christmas.

On June 22, wife was found in a car, overdosed on a number of drugs. Wife was diagnosed with a major neurocognitive disorder as a result of the overdose, and the disorder caused short-term memory loss. Wife was again civilly committed, and she was sent to a state treatment facility to address her chemical-dependency and mental-health issues. During her time at that facility, she had several supervised visits with the children.

In December, wife was released from the state facility to a residential treatment facility. Within a day or two of arriving at the residential treatment facility, wife again left,

against staff advice, and went missing for four months. She did not see the children during this time period.

Wife again sought treatment in June 2016, entering an outpatient program. In August and September, wife participated in settlement conferences regarding the dissolution. The parties agreed on husband's sole legal and physical custody of the children, a division of property, and temporary support for wife.

Wife completed her outpatient program in October. She also took other steps to maintain her sobriety afterwards. At trial, she expressed her interest in obtaining a part-time job.

A trial was held on March 22, 2017, on the issues not settled by the parties. Pursuant to the judgment and decree filed on July 10, 2017, the district court ordered wife to pay husband child support of \$1,271 per month. It ordered husband to pay wife permanent spousal maintenance of \$3,500 per month and to pay wife's attorney fees of \$4,019. Husband moved for amended findings, which the district court denied.

Husband appeals, challenging the spousal-maintenance and attorney-fees awards.

D E C I S I O N

I. Spousal Maintenance

An appellate court reviews a district court's original award of maintenance for an abuse of the district court's broad discretion. *Curtis v. Curtis*, 887 N.W.2d 249, 252 (Minn. 2016). A district court abuses its discretion regarding maintenance if its findings of fact are unsupported by the record or if it improperly applies the law. *Dobrin v. Dobrin*, 569 N.W.2d 199, 202 & n.3 (Minn. 1997). A party challenging the district court's findings of

fact must show that they are “clearly erroneous.” *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000). Findings are clearly erroneous if the appellate court is “left with the definite and firm conviction that a mistake has been made.” *Id.* at 472 (quotation omitted). “[T]he appellate court views the record in the light most favorable to the trial court’s findings” when determining whether a clear error was made. *Id.*

A district court may award spousal maintenance if it finds that the spouse seeking maintenance “lacks sufficient property, including marital property apportioned to the spouse, to provide for reasonable needs of the spouse,” Minn. Stat. § 518.522, subd. 1(a) (2018), or “is unable to provide adequate self-support . . . through appropriate employment,” *id.*, subd. 1(b); *see also Lyon v. Lyon*, 439 N.W.2d 18, 22 (Minn. 1989) (stating that a maintenance award depends on a showing of need). If the court decides maintenance is appropriate, it then determines the amount and duration of maintenance after considering all relevant factors, including the financial resources of the party seeking maintenance and that party’s ability to meet needs independently, and the ability of the other spouse to pay maintenance while meeting needs. Minn. Stat. § 518.522, subd. 2 (2018). The district court thus considers the spendable income of the parties, *see Sefkow v. Sefkow*, 427 N.W.2d 203, 216 (Minn. 1988), and the parties’ reasonable expenses, *see Kampf v. Kampf*, 732 N.W.2d 630, 634 (Minn. App. 2007) (considering whether monthly savings were a reasonable expense). Determining the amount and duration of maintenance “is, in essence, a balancing of the recipient’s need against the obligor’s ability to pay.” *Prahl v. Prahl*, 627 N.W.2d 698, 702 (Minn. App. 2001).

A. The district court's factual findings are not clearly erroneous.

Husband does not dispute that spousal maintenance is appropriate; he challenges only the amount and duration. We first address husband's challenges to the district court's factual findings. He argues that the district court clearly erred in its findings regarding his income, his monthly expenses, and wife's income and that those errors had the effect of overstating his ability to pay, and wife's need for, spousal maintenance.

1. Husband's self-employment income

Husband argues that the district court erred in calculating his income by not appropriately considering his historical earnings. The district court found that husband's annual self-employment gross income was \$198,364 (\$16,530 per month). That finding was based on husband's income tax returns for years 2011 through 2015, which showed the following amounts:

Year	Self-Employment Gross Income
2011	\$123,767
2012	\$111,143
2013	\$28,348
2014	\$178,146
2015	\$218,582

The district court did not take into account husband's 2013 income because it found the figure to be an outlier and not reflective of his overall income over five years. The court also found that husband's income had been steadily increasing. Finally, it found that the last two years most accurately reflected husband's current income. The district court thus averaged the incomes from those years (\$178,146 and \$218,582) to \$198,364.

Husband argues that the district court's finding was clearly erroneous. He argues that the district court cherry-picked years and that, instead, all five years' incomes should be averaged, which would result in a gross income of \$131,997.

The only legal authority that husband cites in support of his argument is *Veit v. Veit*, 413 N.W.2d 601 (Minn. App. 1987). In *Veit*, this court held that the district court had properly included "a financially disastrous year" for the obligor's business in averaging his income. *Id.* at 606. As this court explained in *Veit*, average income over a long period of time can "take[] into account fluctuations and more accurately measure[] income." *Id.*

However, husband cites no authority requiring that a determination of income always be based on a long-term average. In *Sefkow v. Sefkow*, this court held that the calculation of average income did not constitute a determination of current income because the income was increasing substantially each year. 372 N.W.2d 37, 48 (Minn. App. 1985), *remanded on other grounds*, 374 N.W.2d 733 (Minn. 1985). When, as in *Sefkow*, there is a consistent trend of increasing income or decreasing income over the years, a district court does not abuse its discretion by not using an average income based on all of the years.

In this case, the district court found that, after removing the outlier of \$28,348 from the analysis, husband's annual self-employment income had been "steadily increasing." The court's finding is a reasonable reading of the data provided by husband. Husband's 2013 income is 82% less than the average of his income in the other four years. And, if the 2013 income is not taken into account, husband's income dropped 10% from 2011 to 2012 and then increased in subsequent years by 37% and 18%. That is a 15% annual increase on

average. On this record, the district court did not clearly err in finding that husband's annual self-employment income was \$198,364.

2. Husband's monthly expenses

Husband argues that the district court erred in not including health-insurance premiums in his reasonable monthly expenses. The district court found that husband's monthly expenses were \$9,095. Husband initially included in his budget premium payments totaling \$1,161.85 per month (\$376.09 for himself and \$785.76 for the minor children), as shown in an October 2016 billing statement from his private insurer. The district court, however, found that husband's corporation, not husband personally, was paying the premiums for him and his children, and removed the payments from his monthly expenses.

The district court relied on three pieces of evidence. First, the October 2016 billing statement identified Affordable Electric as the group under which husband, with dependents, was holding his private-insurance policy. Second, an explanation of benefits from his insurer, dated March 9, 2017, listed Affordable Electric as husband's "group." Third, and most importantly, husband did not claim any self-employment health-insurance deductions on his tax returns for years 2011 through 2015.

Husband points to two pieces of countervailing evidence. The first is his trial testimony that he was not obtaining insurance through his business in 2014 and 2015 because he and his family were on public health insurance. That testimony tends to explain why the tax returns did not show any self-employment health insurance deductions. However, that testimony does not establish whether, since 2016, husband has paid private-

insurance premiums personally, as he alleges. The second is his paystubs. He first offered the paystubs on his motion for amended findings. The paystubs showed that Affordable Electric deducted premium payments for the group private-insurance plan from husband's salary. The district court, however, declined to take this evidence into account because it was not part of the trial record. The district court's decision was correct. "When considering a motion for amended findings, a district court must apply the evidence as submitted during the trial of the case and may neither go outside the record, nor consider new evidence." *Zander v. Zander*, 720 N.W.2d 360, 364 (Minn. App. 2006) (quotation omitted), *review denied* (Minn. Nov. 14, 2006).

During the trial, husband failed to provide evidence that he personally paid the insurance premiums. Therefore, there is no clear error in the district court's finding that Husband's monthly expenses were \$9,095.

3. Wife's annual employment income

Husband challenges the district court's finding of wife's income. The district court found that wife would be able to work 15 to 20 hours a week, earning \$10 per hour. It therefore found wife's annual employment income to be \$9,096 (\$758 per month). Husband argues that the finding of \$758 gross per month was a clear error because it was not based on evidence in the record.

Husband does not argue that there is no evidence supporting the district court's finding. He concedes that the district court relied on some evidence in the record: wife's past employment with Target and her subsequent brain injuries. From 2009 to 2014, wife worked as a baker for Target earning \$13 per hour. In 2014, wife became addicted to

controlled substances and subsequently sustained brain injuries that were found, through a neuropsychological evaluation, to prevent her from maintaining significant employment. Based on these pieces of evidence, the district court rejected husband's argument that wife would be able to work 20 hours a week earning \$13 per hour. The court specifically found that wife would no longer be able to earn \$13 per hour because she is no longer able to work in a relatively skilled position such as baker.

Given that the prevailing minimum wage was \$9.50 in Minnesota, the district court estimated wife's hourly rate to be \$10. Husband challenges this estimation, arguing that the court had no basis to pinpoint the \$10 figure. Husband's argument is correct in that the court, based on the same evidence, could have picked \$11 or \$12 instead. But the fact that "the record might support findings other than those made by the trial court does not show that the court's findings are defective." *Vangness*, 607 N.W.2d at 474. In order to successfully challenge a district court's findings of fact, "the party challenging the findings must show that despite viewing that evidence in the light most favorable to the trial court's findings . . . , the record still requires the definite and firm conviction that a mistake was made." *Id.* The record did not require the district court to conclude that wife would be able to work for \$11 or \$12 per hour.

Therefore, there was no clear error in the district court's finding that wife's annual employment income would be \$9,096.

B. The district court erred in determining wife's need.

Husband also argues that the district court made an error of law by considering wife's child-support obligation in determining the amount of wife's need for spousal maintenance.

The district court factored in the spousal-maintenance award of \$3,500 to its income and expense findings and netted the tax consequences to see if the balance was struck. The results were as follows:

Variable	Amount
Husband's annual net income	\$109,954 (\$9,163 per month)
Husband's monthly expenses	\$9,095
Wife's annual net income	\$45,443 (\$3,787 per month) ¹
Wife's monthly expenses	\$2,468

As shown in the table, spousal maintenance of \$3,500 would result in wife having a surplus of \$1,319 every month. The district court justified the surplus by taking into account the child-support obligation of \$1,271 that it imposed on wife. Husband argues that child-support payments should not be considered part of wife's budget in calculating the amount of spousal maintenance.

Spousal maintenance is "an award made in a dissolution . . . 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 (2018) (emphasis added). A district court may

¹ Wife's annual net income reflects the subtraction of \$3,916 for FICA tax, calculated based on gross income of \$51,186. Wife's FICA tax must be recalculated on remand because, as husband argues, FICA tax is imposed only on "wages" received by an individual "with respect to employment." 26 U.S.C. § 3101(a), (b) (2012 & Supp. III 2015).

award spousal maintenance if it finds that the party seeking maintenance lacks sufficient property to provide for the “reasonable needs *of the spouse*” or sufficient income to provide “adequate *self-support*.” Minn. Stat. § 518.552, subd. 1(a)-(b) (emphasis added). The statutory spousal-maintenance provisions thus require consideration of the needs of the spouse, not the needs of the children. Children’s needs are instead accounted for in the child-support calculation.² See Minn. Stat. §§ 518A.26-.79 (2018).

Husband cites two unpublished opinions of this court, in which we reversed a district court for considering children’s expenses in determining a spouse’s needs. In *Pnewski v. Pnewski*, the district court included the children’s “haircuts, school lunches, daycare, activities and equipment, and cell-phone expenses” in the husband’s monthly expenses when it calculated the amount of his spousal-maintenance award. No. A17-1521, 2018 WL 2470362, at *5 (Minn. App. June 4, 2018). We held that the district court had improperly applied the spousal-maintenance statute because the “statute only refers to the needs of the spouse, not the needs of the children.” *Id.* (citing Minn. Stat. §§ 518.003, subd. 3a, .552, subd. 1(a)). The case was remanded for recalculation of spousal maintenance. *Id.*

Similarly, in *Hermer v. Cisek*, the child’s private-school tuition was included in the wife’s monthly expenses when the court calculated the amount of her spousal-maintenance award. No. A16-0482, 2017 WL 958473, at *1 (Minn. App. Mar. 13, 2017). *Hermer* is

² The spousal-maintenance statute indicates that some child-support payments can be considered in determining the financial needs of the party seeking maintenance. Minn. Stat. § 518.552, subd. 2(a) (2018) provides: “[T]he financial resources of the party seeking maintenance . . . includ[e] the extent to which a provision for support of a child living with the party includes a sum for that party as custodian.” This circumstance, however, is not present here.

even more akin to the instant case because, there, the wife's monthly expenses were increased, accounting for the share of the child's tuition that the husband had agreed to pay. *Id.* at *2. Essentially, the husband was required to pay his share of the child's tuition as part of the spousal-maintenance obligation. He challenged this arrangement on appeal, arguing that "using permanent spousal maintenance as the vehicle for enforcement of his obligation to pay half of Child's private-education expenses [wa]s improper." *Id.* We remanded the case for recalculation for the same reasons explained in *Pnewski*. *Id.*

Although unpublished opinions of this court are not precedential, Minn. Stat. § 480A.08, subd. 3(c) (2018), we find *Pnewski* and *Hermer* persuasive. The only difference in this case is that a child-support obligation, as opposed to a specific child-rearing expense, was included in wife's monthly expenses. But that difference does not provide a reason to distinguish this case from *Pnewski* or *Hermer*.

Husband also asserts that the district court should have determined spousal maintenance before calculating child support. In determining basic child support, the district court must determine each parent's gross income. Minn. Stat. § 518A.34(b)(1). As part of this determination, spousal maintenance is added to the maintenance recipient's income, Minn. Stat. § 518A.29(a), and subtracted from the maintenance payor's income, Minn. Stat. § 518A.29(g). Once the parents' incomes are determined, the district court then computes and determines appropriate child support. Minn. Stat. §§ 518A.34-.36.

Husband argues that, by "conflating the concepts of spousal maintenance and child support," the district court inappropriately shifted the burden from wife to husband to address the emancipation of the parties' children. He asserts that, normally, the child-

support obligor would be incentivized to bring a motion to reduce support to reflect the emancipation of each child, but here, because wife's maintenance award funds her child-support obligation, she will not be as incentivized to reduce her support obligation. Instead, husband will have to bring motions to reduce wife's child support upon emancipation of the children in order to reduce his spousal-maintenance obligation. We agree that the district court's order prejudicially results in this burden shifting. It is noteworthy that, in *Hermer*, we also found the husband's burden-of-making-a-motion argument persuasive. 2017 WL 958473, at *2. He argued that the district court's decision was "unfair to him because he w[ould] have to move the district court for modification of maintenance to eliminate the private-education expense from respondent's maintenance award after Child graduates high school," while "[a] child support obligation, by contrast, expires by operation of law." *Id.*

Because the district court erred in taking into account wife's child-support obligation in calculating the amount of spousal maintenance to award her, it abused its discretion on this issue.

C. The district court did not err regarding wife's alleged "destructive behavior."

Husband also argues that the district court erroneously failed to "factor in the damage . . . Wife's destructive behavior [had] caused to the marital estate and Husband's financial resources as required by Minn. Stat. § 518.552, subd. 2(h)." The "destructive behavior" referred to here is the fact that, in 2014, wife withdrew funds totaling \$52,000 from the parties' joint bank account and the Affordable Electric account to purchase drugs.

However, the district court did consider that fact. The court specifically found that the reduction in value of the marital assets caused by wife was unfortunate but irrelevant to the outcome. That was because husband had “substantial yearly income from which he can afford to pay [wife] a modest amount of maintenance.” In other words, the loss of assets did not substantially diminish husband’s income-producing capacity. The district court did not abuse its discretion on this issue.

D. The district court did not err in making maintenance permanent.

Husband also argues that the district court erred in making spousal maintenance permanent. Under Minn. Stat. § 518.552, subd. 3 (2018), “[w]here there is some uncertainty as to the necessity of a permanent award, the court shall order a permanent award leaving its order open for later modification.” In this case, the district court found that “there is uncertainty as to whether [wife] will eventually become self-supporting, as she suffers from substantial memory loss stemming from her traumatic brain injuries which has impaired her ability to work and earn an income to be fully self-supporting.” The court elaborated:

[Wife] provided substantial credible evidence that she suffers from serious memory loss that has impaired her ability to work and earn a fully self-supporting income. [Wife] was found by the Social Security Administration to qualify for Social Security Disability Income benefits, which are awarded where the recipient’s disabilities are severe and the recipient is prevented from doing work over a substantial period.

Husband does not dispute any of these facts. There was more than “some uncertainty” that a permanent award would be necessary in this case. Minn. Stat. § 518.552, subd. 3. The district court did not err.

E. Conclusion regarding spousal maintenance

In sum, the spousal-maintenance award must be recalculated in accordance with this opinion. Because the new maintenance award may significantly impact the parties' financial positions, the district court should also decide whether the award of child support should be adjusted.

II. Attorney Fees

“The standard of review for an appellate court examining [a need-based] award of attorney fees is whether the district court abused its discretion.” *Gully v. Gully*, 599 N.W.2d 814, 825 (Minn. 1999). In a proceeding under the marriage-dissolution and the child-support statutes,

the court shall award attorney fees, costs, and disbursements in an amount necessary to enable a party to carry on or contest the proceeding, provided it finds:

- (1) that the fees are necessary for the good faith assertion of the party's rights in the proceeding and will not contribute unnecessarily to the length and expense of the proceeding;
- (2) that the party from whom fees, costs, and disbursements are sought has the means to pay them; and
- (3) that the party to whom fees, costs, and disbursements are awarded does not have the means to pay them.

Minn. Stat. § 518.14, subd. 1 (2018).

Husband takes issue with the district court's findings of fact regarding wife's and his respective abilities to pay. Again, in order to successfully challenge a district court's findings of fact, the party challenging the findings must show that they are “clearly erroneous.” *Vangsness*, 607 N.W.2d at 474.

First, husband argues that it was clearly erroneous to find that wife lacked the means to pay her attorney fees because the district court was unsure of how much was remaining from wife's earlier settlement award of \$32,000. Wife testified she had \$5,000 left, but there was some inconsistency between wife's trial testimony and her earlier deposition testimony. Acknowledging this inconsistency in the evidence, the district court nonetheless found that wife had insufficient liquid assets to pay her attorney fees. The district court must have found that wife had used most of her settlement funds, although she might have had more than \$5,000 remaining. We see no clear error in the district court's finding. See *Straus v. Straus*, 94 N.W.2d 679, 680 (Minn. 1959) ("Conflicts in the evidence . . . are to be resolved by the [district] court.").

Second, husband argues that the district court clearly erred in ascertaining his liquid assets and monthly income. The district court found that various assets of husband's could be used to pay wife's attorney fees. Husband disagrees on the grounds that the assets either belong to his corporation, are his share of the property division, or are reserved for other uses. However, even assuming that those assets are off limits, we do not conclude that the district court clearly erred in finding him able to pay wife's attorney fees. As the district court specifically noted, husband "was employed by his corporation at the time of the trial, making \$198,360 per year conservatively." Husband's substantial monthly income was sufficient to justify the district court's finding of his ability to pay.

Our reasoning is further bolstered by the fact that wife "was unemployed and[,] based on the record, it [was] unlikely she [would] be able to work any more than a part-time retail position." The district court's determinations regarding wife's need and

husband's ability to pay were reasonable in light of the record, although the court did not describe in detail how husband could comfortably pay the \$4,019 fee. *See Ludwigson v. Ludwigson*, 642 N.W.2d 441, 448-49 (Minn. App. 2002) (“[A] court does not always need to make separate findings to award attorney fees based on need.”). The award of attorney fees is affirmed.

Affirmed in part, reversed in part, and remanded.