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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-0150**

In re the Marriage of:

Thomas W. Ilstrup, petitioner,  
Appellant,

vs.

Kathleen McGuire Ilstrup,  
Respondent,

and

Carver County, intervenor,  
Respondent.

**Filed December 9, 2008  
Reversed and remanded  
Shumaker, Judge**

Carver County District Court  
File No. 10-FA-04-116

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Considered and decided by Stoneburner, Presiding Judge; Shumaker, Judge; and Stauber, Judge.

## UNPUBLISHED OPINION

**SHUMAKER**, Judge

Appellant-father challenges the district court's order affirming a child support magistrate's (CSM) determination of his motion to modify his support obligation, arguing that he has shown a substantial change in his income. Because the CSM's calculation of appellant's income is not supported by the evidence and is based on conjecture, it is clearly erroneous. The district court abused its discretion in affirming the CSM's order. We, therefore, reverse and remand.

### FACTS

A September 24, 2004 judgment dissolved the marriage of appellant-father Thomas W. Ilstrup and respondent-mother Kathleen McGuire-Ilstrup. They were granted joint legal and joint physical custody of their two minor children. The judgment required appellant to pay child support of \$1,200 each month during the school year and \$600 each month during the summer. Because of cost-of-living increases, the monthly school-year amount subsequently rose to \$1,268. The district court also ordered appellant to pay \$846 monthly as spousal maintenance, until August 2009.

At the time of the entry of the decree, appellant was self-employed as a construction contractor and had a gross monthly income of approximately \$5,700. Later appellant closed his business and filed for bankruptcy.

In 2006, appellant's gross annual income was \$34,046. This amount included the income from appellant's construction business, Tom Ilstrup Construction, which operated for only ten months during the year before closing.

Appellant remarried in December 2006, and he and his wife formed a limited liability company, TLC Renew Designs, LLC (TLC), a home-remodeling business. As one of its projects, TLC is remodeling one of the two homes owned by appellant and his wife. They plan to use the remodeled home as a rental property. TLC also does projects for other individuals.

Appellant's wife is a licensed contractor and apparently does some work for TLC. She is also a stay-at-home mother.

Through June 30, 2007, appellant had drawn \$45,171 from TLC. Between \$25,000 to \$30,000 of this amount was in cash; the remainder was taken from TLC by way of using business credit cards for personal expenses. Appellant's wife has drawn \$4,913 from TLC, and it is unknown how much of this amount was in cash. As of June 30, 2007, TLC's pre-tax income was \$31,268; the business also owed \$27,351 in credit card debt. In addition to using business credit cards for personal expenses, appellant and his wife also relied on personal credit cards to meet their family's living expenses.

In the summer of 2007, appellant moved to modify his child-support obligation. The CSM denied the motion, concluding that appellant failed to show a substantial change in circumstances that made the existing child-support order unreasonable and unfair and failed to show a change of at least 20% in his gross income pursuant to Minn. Stat. § 518A.39, subd. 2(j)(1) (2006).<sup>1</sup> In support of her conclusions, the CSM examined appellant's income from Tom Ilstrup Construction, as well as from TLC.

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<sup>1</sup> Minn. Stat. § 518A.39, subd. 2(j), expired January 1, 2008.

At the hearing on appellant's motion to modify his support obligation, appellant submitted his 2006 tax return, bank statements, and information relating to TLC's income and expenses through June 30, 2007, and monthly household expenses.

Appellant, his wife, and his accountant testified. Appellant's wife testified in detail about their household's monthly expenses. She also asserted that she was an equal partner in TLC, and that she is, therefore, entitled to half of the income generated by the business. Appellant and his accountant likewise testified that appellant and his wife are equal partners.

The CSM called appellant's wife "highly organized" and found "that the information submitted to the court by [appellant] is credible and reliable." Nonetheless, the CSM said that "[t]here was insufficient evidence presented to the court for the court to make a determination regarding whether or not [appellant] or his spouse were providing greater services to the business."

The CSM used two different methods of attempting to calculate appellant's income, but ultimately concluded that neither method provided an accurate computation of appellant's income. Accordingly, the CSM decided to average the results of her computations, which resulted in a calculation of income that, in the CSM's words, "remain[ed] little more than conjecture." Because this amount was approximately the same as appellant's income at the time of the dissolution, the CSM concluded that appellant had not met his burden of demonstrating a substantial change in circumstances or a change of at least 20% in his gross income.

Appellant sought review of the CSM's order by the district court. The district court slightly amended the language of three findings made by the CSM, affirmed the remaining provisions of the CSM's order, and otherwise denied appellant's motion for review and his request for a new hearing. In affirming the CSM's order, the district court explained that "it is impossible to determine [appellant's] current income from the facts presented" and that the court had "no choice but to estimate his income." This appeal follows.

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

Appellant challenges the denial of his motion to modify his child-support obligation. A decision to modify child-support obligations lies in the broad discretion of the trial court, and the trial court will not be reversed for an abuse of that discretion unless it has reached a "clearly erroneous conclusion that is against logic and the facts on record." *Putz v. Putz*, 645 N.W.2d 343, 347 (Minn. 2002). "The district court reviews the CSM's decision de novo." *Davis v. Davis*, 631 N.W.2d 822, 825 (Minn. App. 2001). A CSM's order that is confirmed by the district court becomes the district court's order. *Kilpatrick v. Kilpatrick*, 673 N.W.2d 528, 530 n.2 (Minn. App. 2004). And appellate courts review a district court's order confirming a CSM's order for an abuse of discretion. *Davis*, 631 N.W.2d at 826.

A party seeking a child-support modification bears the burden of showing that a modification is warranted due to a substantial change in circumstances. *Bormann v. Bormann*, 644 N.W.2d 478, 481 (Minn. App. 2002). Appellant moved for modification during the summer of 2007. When appellant sought modification based on changed

income, he was required to demonstrate a change of at least 20% before an existing child-support obligation could be modified. Minn. Stat. § 518A.39, subd. 2(j)(1) (2006).

Findings of fact regarding an obligor's income for the purpose of calculating child support will not be set aside unless they are clearly erroneous. Minn. R. Civ. P. 52.01; *Ludwigson v. Ludwigson*, 642 N.W.2d 441, 446 (Minn. App. 2002) ("Findings on net income for child support purposes will be affirmed on appeal if those findings have a reasonable basis in fact and are not clearly erroneous." (quotation omitted)). For child-support purposes, the income of a self-employed person "is defined as gross receipts minus cost of goods sold minus ordinary and necessary expenses required for self-employment or business operation." Minn. Stat. § 518A.30 (2006).

Appellant provided his 2006 tax return showing his gross income from Tom Ilstrup Construction; he also provided information to establish his income for the first half of 2007 from TLC. The CSM found this evidence to be credible and reliable. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) (stating that appellate courts defer to the district courts on matters of credibility). Indeed, the CSM's findings explain that appellant's gross income in 2006 was \$34,060 and that TLC "had income before taxes of \$31,268" for the first half of 2007.

Nonetheless, the CSM, being unable to determine appellant's gross monthly income, relied on conjecture. Income calculations based on conjecture are improper. *See Taflin v. Taflin*, 366 N.W.2d 315, 319 (Minn. App. 1985) (recognizing that courts "will not engage in speculation" when reviewing child-support obligations); *see also Justis v. Justis*, 384 N.W.2d 885, 891 (Minn. App. 1986) ("The trial court cannot speculate on

future income in setting child support.”), *review denied* (Minn. May 29, 1986). The CSM committed clear error when she based her calculation of appellant’s gross monthly income on conjecture. Despite the district court’s characterization of the CSM’s finding as an “estimate,” we hold that the CSM’s characterization of her own determination as speculative is accurate and the reason for our reversal. By our disposition, we do not mean to suggest that, in all instances, a reasonable estimate supported by the evidence would be improper.

The CSM attributed some of her difficulty in calculating appellant’s income to inability to assess the contribution to TLC by appellant’s wife. Instead of assigning some of the income from TLC to appellant’s wife, the CSM simply attributed all of it to appellant. But appellant, appellant’s wife, and appellant’s accountant each testified that appellant and his wife are equal partners. Although appellant is taking larger draws from the business, it is undisputed that appellant’s wife also has drawn cash from the business. Similarly, the record reveals that appellant’s wife has her contractor’s license and does some work as a designer for the business. This evidence is uncontroverted. Despite respondent’s question as to whether appellant’s wife actually does 50% of the work or is entitled to 50% of the income from the business, respondent offered no evidence that appellant’s wife does not contribute to TLC’s income. In light of the uncontroverted evidence in the record, the CSM committed clear error by attributing all business income from TLC to appellant and none to his wife. *See Putz*, 645 N.W.2d at 347 (explaining that an abuse of discretion occurs where the decision is “against . . . the facts on record”).

Because the CSM's findings are inconsistent with the record and were based on speculation, they are clearly erroneous. The district court abused its discretion by confirming the order. We therefore reverse and remand for a determination of appellant's income and resolution of his motion to modify his child-support obligations. The CSM may, in its discretion, reopen the record for additional evidence.

**Reversed and remanded.**