

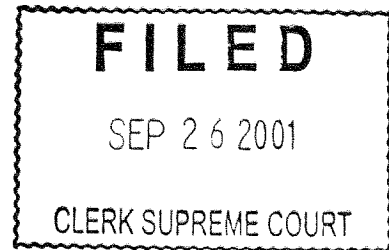
IN THE COURT OF APPEALS OF IOWA

No. 1-144 / 00-1377
Filed September 26, 2001

IN RE THE MARRIAGE OF TARA M. LANE
AND CLAIRE E. LANE, JR.

Upon the Petition of
TARA M. LANE,
Petitioner-Appellee/Cross-Appellant,

And Concerning
CLAIRE E. LANE, JR.,
Respondent-Appellant/Cross-Appellee.



Appeal from the Iowa District Court for Chickasaw County, James L.
Beeghly, Judge.

The respondent appeals, and petitioner cross-appeals, from a district court order modifying the parties' dissolution decree to establish the respondent's child support obligation. **AFFIRMED AS MODIFIED AND REMANDED.**

James E. Smith of Noah, Smith & Schuknecht, P.L.C., Charles City, for
appellant.

Rodney E. Mulcahy of Eggert, Erb, Frye & Mulcahy, P.L.C., Charles City,
for appellee.

Considered by Sackett, C.J., and Zimmer and Miller, JJ.

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MILLER, J.

Following a second modification proceeding, Claire and Tara Lane appeal from the district court's order modifying the respondent/appellant, Claire Lane's child support obligation. Claire claims the court erred in not averaging his income over a three-year period. Tara claims the court significantly understated Claire's net monthly income and erred in deviating from the child support guidelines. We affirm as modified and remand to the district court to determine each party's net monthly income and to apply the child support guidelines to determine Claire's support obligation.

Background

Claire and Tara married in 1978 and divorced in 1997. They had four children, the eldest of whom is an adult and not involved in this case. Following the dissolution, the children resided with Tara and Claire paid child support. In 1998 Claire filed a petition for modification because the middle two children had moved in with him. The court modified the decree and ordered Tara to pay Claire child support. In 1999 Tara filed this modification action because the youngest two children were living with her again. The second-oldest child is attending a local community college, but not living with either parent.

Tara earns approximately \$39,000 annually including overtime. Claire is a part-time farmer and independent contractor electrician. He works about forty hours per week at \$21.50 per hour as an electrician, owns twenty-two acres and rents over 200 more for his farming operation. In 1999 his net profit as an electrician was \$31,902. He lost money on his farming operation each of the

three years prior to this modification action. Claire assists his daughter in college on average about \$350 per month.

Modification proceeding

Claire argued his average gross annual income over the three years preceding this action was \$5,905 and his monthly child support should be \$50. Tara attributed annual income of \$12,168 to Claire in her child support guidelines worksheet, but asked the trial court to attribute more income to him. The district court determined that “[w]hile Claire’s [farm] operation is not exactly a ‘hobby’, it is secondary to his ability to be a full-time electrician” It attributed gross annual income to Claire in the amount of \$25,000, with a resulting monthly child support obligation of \$522.72 for both children or \$367.13 for one child. It also ordered Claire and Tara each to pay \$442 as an annual post-secondary education subsidy to their daughter in college. Claire appeals and Tara cross appeals.

Claims on appeal

Claire claims the court erred in not determining his gross income for child support purposes by offsetting his profits as an electrician by his losses as a farmer, averaged over the last three years. He contends he has an average gross annual income of \$5,905, resulting in a child support obligation under the guidelines of \$50 per month. Tara claims the court erred in not imputing enough income to Claire. She argues his gross annual income is \$60,000.

Analysis

We review de novo a district court’s decision in actions to modify a decree of dissolution. Iowa R. App. P. 4.

In fixing child support we generally consider as gross income what is referred to as "total income" on form 1040 of the U.S. individual income tax return and "net income" on form IA 1040 of the Iowa individual income tax return. See *In re Marriage of McKaney*, 522 N.W.2d 95, 98 (Iowa Ct. App. 1994). In determining what we should consider Claire's gross income to be for child support purposes we have ignored such one-time and older items as a 1998 net operating loss carried forward to 1999, and an income tax refund, capital gain, and gain on the sale of business property, all of which were received in 1997, but have otherwise started with such "total income" and "net income" as shown on his income tax returns for 1997, 1998 and 1999.

We have, in the past, used a three-year average for a farmer's income because of annual fluctuations. *In re Marriage of Cossel*, 487 N.W.2d 679, 681 (Iowa Ct. App. 1992). We also have refused to decrease a parent's net monthly income because of farming losses from a "hobby" farming operation. *In re Marriage of Starcevic*, 522 N.W.2d 855, 856-57 (Iowa Ct. App. 1994). The facts of this case fall between those we addressed in *Cossel* and *Starcevic*. The district court apparently tried to find some balance between simply averaging Claire's income, as in *Cossel*, and not considering at all his reasonably necessary business expenses from farming, as in *Starcevic*. We are unable, however, to determine the basis the court used for attributing gross annual income of \$25,000 to Claire.

Claire's child support worksheet, supported by his income tax returns, provides these figures:

	Net Profit as Electrician	Farm Losses
1997	\$ 14,467	\$ (13,733)
1998	\$ 3,440	\$ (5,847)
1999	\$ 31,902	\$ (16,495)

In determining what is gross income for applying the guidelines, we note Claire is basically employed full-time as an electrician. He is capable of and does earn a good income as an electrician. He owns twenty-two acres and rents more than 200 acres. But his farm clearly is not his primary source of income. It is not his means of support. He is able to conduct his farming operation outside the full-time work schedule he maintains as an electrician. Although his farm is not a hobby farm, we find it would be inequitable to allow a full deduction of his farm losses under circumstances of this case. Key to our decision is Claire's full-time non-farm employment with good income. We conclude these circumstances are somewhat analogous to *Starcevic* rather than *Cosset*. We do not consider Claire's farm losses to be a voluntary reduction in income for purposes of calculating his child support obligation under the current guidelines.

Claire had a net profit as an electrician in 1999 of \$31,902. This is the best evidence of his present gross income and earning capacity as an electrician. With that figure as a starting point, we find it equitable under the circumstances before us to average his farm losses for the years 1997 through 1999 and allow Claire a deduction of one-half that average amount in determining his gross annual income. This results in gross annual income of \$25,890 and we modify the district court's decision accordingly.

The record contains conflicting evidence concerning Tara's net monthly income. The trial court made no finding as to either Tara's net income or Claire's net income. We therefore remand this case to the district court so that it may determine the net incomes of the parties consistent with this opinion and set Claire's child support obligation by application of the guidelines to those net incomes. See Iowa Code § 598.21; *In re Marriage of Will*, 602 N.W.2d 202, 205-06 (Iowa Ct. App. 1999). We find no basis for deviation from the guidelines.

Tara requests appellate attorney fees. Appellate attorney fees are not a matter of right. We consider the needs of the requesting party, the ability of the other party to pay, and whether the requesting party was obligated to defend the district court's decision on appeal. *In re Marriage of Thielges*, 623 N.W.2d 232, 240 (Iowa Ct. App. 2000). We do not award any attorney fees.

AFFIRMED AS MODIFIED AND REMANDED.