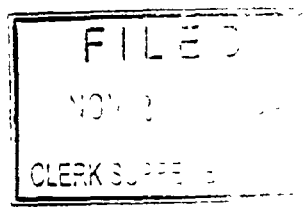
IN THE COURT OF APPEALS OF IOWA

No. 1999-262 (9-492) / 98-1475
Filed November 23, 1999

IN RE THE MARRIAGE OF SHYRL A. LOEHR and CLYDE D. LOEHR



Upon the Petition of
SHYRL A. LOEHR,
Petitioner-Appellee/Cross-Appellant,

And Concerning
CLYDE D. LOEHR,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County, Darrell Goodhue, Judge.

Clyde Loehr appeals the property provisions and the child support provisions of the parties' dissolution decree. Shyrl Loehr cross-appeals and contends the court erred in not granting her $6000.00 in attorney fees. She also requests an award of appellate attorney fees. **AFFIRMED AS MODIFIED.**

Leslie Babich of Babich, McConnell & **Renzo, P.C., Des** Moines, for **appellant.**

Harlan M. Hockett and Joseph G. Bertogli, **Des Moines, for appellee.**

Heard by Huitink, P.J., and Mahan and Hecht, JJ.

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HECHT, J.

Appellant, Clyde Loehr ("Clyde"), appeals from the property division and child support provisions of a dissolution decree entered July 16, 1998. Appellee, Shyrl Loehr ("Shyrl"), cross-appeals, claiming entitlement to an award of attorney fees. We affirm as modified.

I. Factual and Procedural Background. The parties were married on January 31, 1987. Each had been married and divorced previously. Clyde has a child support obligation of $410 per month for a teenage daughter from his prior marriage. Shyrl has two teenage children from her prior marriage and has a judgment of approximately $36,000 against their father for unpaid child support.

Clyde is forty-two years of age. He is a high school graduate and an Army veteran. He has been employed by U.P.S. since March of 1979, first as a delivery driver and since 1988, in various managerial positions. At the time of trial, his gross salary was $67,500. If recommended by his supervisor, Clyde is also eligible for an annual U.P.S. stock distribution which has averaged between $9,000 and $10,000 annually. In addition, Clyde has historically received an annual bonus at the end of the year equal to one-half of his monthly salary. However, this bonus is not guaranteed.

Shyrl is also forty-two years of age. After graduating from high school, she achieved the L.P.N. designation. During the marriage, and while working as a nurse, she took further nursing education. She received the R.N. certification and is

currently working toward a Bachelor of Science degree. In 1997, she earned $37,456.35 from her work as an R.N. at Mercy Pain Center in Des Moines and an additional $9,255.87 from a second job with Hawkeye Health Services, Inc. The record indicates she also worked part-time for Kimberly Quality Care, but the amount of her earnings in 1997 from that position is not shown in the record.

The marriage of Clyde and Shyrl produced two children: Nicholas, born September 5, 1989; and Christopher, born March 15, 1995.,

The parties were divorced on July 16, 1998. In the decree, the district court divided the assets and liabilities of the parties such that Clyde retained a net worth of $120,130 and Shyrl left the marriage with a net worth of $108,737. On appeal, Clyde assigns as error the district court's (1) award to Shyrl of stock valued at $52,000 from the U.P.S. Managers Stock Trust, (2) failure to equitably divide Shyrl's pension, (3) failure to equitably divide Shyrl's judgment of approximately $36,000 for child support from her ex-husband, (4) failure to reduce Shyrl's share of the assets taken from the marriage in an amount equal to property damage alleged by Clyde to have been inflicted by Shyrl and the children upon the parties' residential real estate after the parties separated, and (5) award of child support in the amount of $1180 per month for two children and $805 per month for one child. Shyrl cross-appeals claiming both trial and appellate counsel fees.

II. Property Division Issues.

A. U.P.S. Stock. Clyde accumulated stock in his U.P.S. Managers Stock Trust fund from annual distributions made by his employer during the marriage. He claims the transfer of the stock from the fund will diminish his standing in U.P.S. because he will not be perceived as a team player with a substantial stake in the company. He further asserts the transfer of the stock to Shyrl will result in a decrease of approximately $1300 per year because his "incentive pay" is proportionate to the amount of stock he holds in the stock trust. Shyrl prefers to have the stock itself rather than the $52,000 value which the district court assigned to it because she believes the value of the shares may actually exceed $52,000.

We conclude Clyde should not be required to transfer U.P.S. stock to Shyrl under the circumstances of this case. We are persuaded such a transfer would decrease Clyde's annual incentive pay earning capacity and diminish his standing as a manager within the company. Accordingly, he should not be required to transfer the U.P.S. stock, but, in lieu thereof, should pay Shyrl the sum of $52,000 within ninety days of the filing of this decision.

B. Shyrl's Pension. The district court found Shyrl's pension did not have significant value. Shyrl estimated her pension to be worth approximately $1800 but presented no other evidence as to its value. Clyde concedes the record does not clearly establish the actual value of this asset, but submits it may nonetheless be equitably divided by awarding one-half to him. We find the district court's

disposition of this asset should not be disturbed. In making this finding, we note Clyde received in excess of $11,000 more of the net assets of the parties. Under the circumstances, Shyrl should retain the entire value of her pension.

C. Shyrl's Child Support Judgment From Prior Marriage. The district court found Shyrl's ex-husband presently owes her approximately $36,000 for past child support; but it should not be considered a marital asset because there is no reasonable likelihood the judgment is collectible. No testimony or documentary evidence exists in the record to support a contrary finding. Since Clyde receives a greater allocation of the net assets of the parties, we find no error in the district court's failure to divide Shyrl's child support judgment between the parties.

D. Damage to Marital Homestead. Clyde claims the value of the homestead decreased by $10,000 after he moved out in April of 1997. In support of this assertion, he relies upon comments made by an appraiser who observed a combination of deferred maintenance (*e.g.*, water damaged ceiling, missing shingles, cracked floor tile) and poor house keeping (*e.g.*, crayon marks on the walls, two to four foot piles of litter on the floor blocking access to the furnace and air conditioner) on the premises in February 1998. Clyde blames Shyrl for the alleged decrease in market value of home and claims her share of the parties' assets should be debited by $5000 to reflect the damage she caused or permitted at the homestead. Even if we were to assume the deficiencies noted by the appraiser resulted in a diminution in value of $10,000 (and we are not inclined to do so because the expert did not opine as to the

value of the house without the deficiencies), we are unable on the record before us to determine: (1) what correlation exists between the deferred maintenance (for which Clyde and Shyrl would be equally responsible) and the appraised value, (2) how long the needed maintenance has been deferred, and (3) what correlation exists between the consequences of poor housekeeping (as distinguished from deferred maintenance) and the appraised value. Thus, the district court correctly declined to debit Shyrl's asset allocation for alleged damage to the marital homestead.

III. Child Support Issue. The district court set child support at $1180 for two children and $805 for one child. Clyde assigns this as error, contending (1) the district court assumed he (Clyde) had greater earnings than he does due to the expected loss of incentive pay resulting from the transfer of U.P.S. stock to Shyrl, (2) the district court included speculative "incentive pay" of approximately $10,000 per year in his gross income, and (3) the district court should not have assumed Shyrl's income would be limited to earnings from her primary employment, and should have included her earnings from part-time employment in her gross income.

The first of Clyde's contentions with respect to child support is moot as we hold Clyde will not be required to transfer U.P.S. stock to Shyrl. His income will not be adjusted downward because he will not lose bonus pay which is received in proportion to his U.P.S. stock holdings.

Secondly, we believe Clyde's claim his incentive pay should be excluded from gross income is without merit. All income that is not anomalous, uncertain, or

speculative should be included when determining a party's child support obligations. *In re Marriage of Brown*, 487 N.W.2d 331, 333 (Iowa 1992); *In re Marriage of Russell*, 511 N.W.2d 890, 893 (Iowa App. 1993). Though it is in the form of stock rather than cash, and is not "guaranteed," the record indicates Clyde's incentive pay is predictably received. The district court correctly included his incentive pay in his gross income of $80,000 per year.

Shyrl has demonstrated she is, commendably, a hard worker and a good provider for the children. In 1997, she earned in excess of $9000 from her part-time employment. The district court excluded Shyrl's earnings from part-time employment on the ground her responsibilities as primary caretaker of the children after the dissolution would make it more difficult for her to work extra hours outside the home. The court may utilize a party's earning capacity rather than their actual earnings to avoid substantial injustice, or if adjustments would be necessary to provide for the needs of the children and to do justice between the parties. *See In re Marriage of Nelson*, 570 N.W.2d 103, 106 (Iowa 1997); *In re Marriage of Bergfeld*, 465 N.W.2d 865, 870 (Iowa 1991). We believe the district court properly excluded Shyrl's earnings from part-time employment from her gross earnings because use of her actual earnings would create a substantial injustice. Shyrl will have increased parenting responsibilities as primary custodial parent of four children, and she plans to continue pursuit of an undergraduate degree. Therefore, it will become more

difficult for her to continue working a second job and, like the district court, we do not assume that she will do so.

On these facts, we hold the district court correctly determined Shyrl's earning capacity and set Clyde's monthly child support obligation at $1180 per month for two children and $805 per month for one child.

IV. Attorney Fees. Shyrl assigns the district court's failure to award her attorney fees at trial and requests attorney fees for this appeal. Attorney fees, both at the trial level and on appeal, are not allowable as a matter of right. *See In re Marriage of Willcoxson*, 250 N.W.2d 425, 427 (Iowa 1977); *In re Marriage of Erickson*, 228 N.W.2d 57, 59 (Iowa 1975). The allowance depends on the financial condition of the parties and their respective ability to pay. We conclude the district court did not err in finding each party should pay their own attorney fees. Each party shall pay their own attorney's fees on appeal, as well.

The costs of the appeal are taxed equally to the parties.

AFFIRMED AS MODIFIED.