

IN THE COURT OF APPEALS OF IOWA

No. 6-990 / 06-0819
Filed January 18, 2007

IN RE THE MARRIAGE OF TAMI L. SCHMITT AND TIMOTHY J. SCHMITT

Upon the Petition of
TAMI L. SCHMITT,
Petitioner-Appellee/Cross-Appellant,

And Concerning
TIMOTHY J. SCHMITT,
Respondent-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Clayton County, John J. Bauercamper, Judge.

Timothy Schmitt appeals from the property distribution provisions of the decree dissolving his marriage to Tami Schmitt. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS.**

Robert L. Day of Day & Hellmer, P.C., Dubuque, for appellant.

Kevin C. Neylan of Neylan Law Office, Guttenberg, for appellee.

Heard by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

EISENHAUER, J.

Timothy Schmitt (Tim) appeals from the property distribution provisions of the decree dissolving his marriage to Tami Schmitt. Specifically, Tim appeals the portion of the decree relating to a \$210,000.00 equalization payment he owes to Tami. He does not contest the amount awarded, but rather how the district court ordered it paid. On cross-appeal, Tami contends the district court erred in dividing the marital property and requests her equalization payment be increased to \$246,996.50. We review these claims de novo. *In re Marriage of Campbell*, 623 N.W.2d 585, 586 (Iowa Ct. App. 2001).

The bulk of the parties' net worth consisted of their interest in three parcels of real estate, all of which the district court awarded to Tim. As a result, the court ordered Tim pay Tami a \$210,000.00 payment to equalize the property distribution. In its April 6, 2006 decree, the court ordered Tim to make the payment by October 1, 2006. If not timely paid, the court ordered ten percent interest to accrue on the payment. To secure the judgment, the court ordered a judicial lien on all of Tim's real estate "equivalent to a judgment lien" and provided that in the event of subsequent execution to enforce the lien, Tami could recover costs and reasonable attorney fees incurred.

Tim first contends the court erred in ordering him to pay one lump sum payment of \$210,000.00. He argues the court did not consider the tax consequences of such a payment, claiming he has no liquid assets to pay the equalization payment and therefore would have to sell some of his real estate to realize the payment. He asks this provision of the decree be modified to allow

him to pay Tami the award in yearly installments of \$30,000.00, commencing on April 6, 2007.

In dividing property the court is to consider the tax consequences to each party. Iowa Code § 598.21(1)(j) (2005); *In re Marriage of Hoak*, 364 N.W.2d 185, 193 (Iowa 1985). Where a payment of a lump sum of cash to a spouse will in all probability require the liquidation of capital assets, the income tax consequences of such sale should be considered by the trial court in assessing the equities of the property and spousal support awards. See *In re Marriage of Hogeland*, 448 N.W.2d 678, 680-81 (Iowa Ct. App. 1989). Here, however, liquidation of capital assets was not certain. Tim testified he would like to be awarded all the real estate in exchange for a cash settlement with Tami. His attorney indicated to the court that although Tim did not have any liquid assets to pay Tami a cash settlement, he could borrow from his parents. Tim's father testified he would loan Tim the money to make a cash settlement and that he would need ninety days to get the money. The district court then awarded Tami the cash settlement and provided Tim nearly six months in which to pay it. Based on the evidence presented at trial, the court properly determined this would be enough time for Tim to borrow the money for the payment.

Tim next contends the court erred in providing that after October 1, 2006, interest would accrue on the equalization payment at the rate of ten percent. Iowa Code section 535.3 states, "Interest shall be allowed on all money due on judgments and decrees of courts at a rate calculated according to section 668.13" Section 668.13(3) provides:

Interest shall be calculated as of the date of judgment at a rate equal to the one-year treasury constant maturity published by the federal reserve in the H15 report settled immediately prior to the date of the judgment plus two percent.

We reverse the portion of the decree awarding a ten percent rate of interest and remand to the district court for the entry of a proper rate of interest as calculated under section 668.13(3).

Tim also contends the district court erred in providing that any future execution by Tami against the real estate owned by Tim to enforce her judgment would permit her to recover her attorney fees and costs. Although attorney fees are available in dissolution proceedings under chapter 598, executions are governed by chapter 626, which does not authorize awards of attorney fees. Generally, a party has no claim for attorney fees as damages in the absence of a statutory or written contractual provision allowing such an award. *Williams v. Van Sickel*, 659 N.W.2d 572, 579 (Iowa 2003). Whether to grant common law attorney fees rests in the court's equitable powers. To obtain common law attorney fees, a party must prove "that the culpability of the [opposing party's] conduct exceeds the 'willful and wanton disregard for the rights of another'" standard required to prove punitive damages. Because this is a determination to be made by the execution court when and if an execution action is brought, we reverse the portion of the decree allowing for the recovery of costs and reasonable attorney fees in any future action to enforce the judgment.

Tami contends the district court's property distribution was not equitable. She argues the court's valuation of the parties' assets and debts was improper because the court used the lower end of the valuation spectrum provided by Tim

and allocated a debt owed by Tim's parents to Tim. The valuation found by the trial court was well within the permissible range of evidence. See *In re Marriage of Williams*, 449 N.W.2d 878, 881 (Iowa Ct. App. 1990). We will not disturb it on appeal.

Finally, Tami requests an award of her appellate attorney fees. An award of attorney fees on appeal is not a matter of right, but rests within the discretion of the court. See *In re Marriage of Gonzalez*, 561 N.W.2d 94, 99 (Iowa Ct. App. 1997). We are to consider the needs of the party making the request, the ability of the other party to pay, and whether the party making the request was obligated to defend the district court's decision on appeal. See *In re Marriage of Maher*, 596 N.W.2d 561, 568 (Iowa 1999). We decline to award Tami her appellate attorney fees.

Costs of this appeal are taxed to Tim.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS.