

NOT DESIGNATED FOR PUBLICATION

No. 99,417

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF THE MARRIAGE OF  
TESSA R. LASH,  
NOW TESSA MERRELL,  
*Appellant,*

and

MARK E. LASH,  
*Appellee.*

MEMORANDUM OPINION

Appeal from Jefferson District Court; GARY F. NAFZIGER, judge. Opinion filed November 21, 2008. Affirmed in part, reversed in part, and remanded with directions.

*Susan D. Szczucinski*, of Szczucinski Law Firm, of Overland Park, for appellant.

*Dan K. Wiley and Pamela Campbell Burton*, of Murray, Tillotson & Wiley, Chartered, of Leavenworth, for appellee.

Before GREENE, P.J., GREEN and CAPLINGER, JJ.

*Per Curiam:* In this divorce action, Tessa R. Lash, now Tessa Merrell, appeals the district court's decision denying her spousal maintenance and its division of marital property.

*Factual and procedural background*

Tessa and Mark E. Lash were married in 1993. Together, they had three children, and Mark adopted Tessa's child from a previous marriage. In 1998, Tessa was diagnosed with systemic lupus and a congenital heart defect. Tessa had complications during heart surgery to install a pacemaker. Tessa and Mark jointly filed a medical malpractice claim and received a settlement, which they used to pay off marital debts and make a down payment on a new home. Prior to her heart surgery, Tessa had worked as a licensed day-care provider. In 2000, Tessa began receiving Social Security disability benefits, which she continues to receive to date. During their marriage, Mark maintained a full-time job, and Tessa was the primary care giver for the children.

Tessa filed for divorce in December 2005. While the divorce was pending, Tessa moved to Missouri to live near her parents. Prior to trial, the parties agreed to sell their

house, use the proceeds to pay off marital debts, and divide any remaining proceeds. Tessa requested that the remaining proceeds be divided proportionally based on the income of each party. Mark requested that the remaining proceeds be divided equally. Each party requested primary residential custody of the children.

Following a 2-day trial, the district court issued a memorandum decision granting the divorce, giving primary residential custody of the children to Mark, declining to award spousal maintenance to Tessa, distributing the marital property, and dividing the proceeds from the sale of the house based on the parties' proportionate shares of income with Tessa receiving about two-thirds of the proceeds. The district court also ordered Tessa to pay \$158 per month in child support.

Tessa filed a motion for reconsideration challenging the district court's refusal to award spousal maintenance and the division of the proceeds from the sale of the house. She later filed an amended motion for reconsideration, and following a hearing on that motion, the district court denied the motion for reconsideration. Tessa timely appeals, challenging the denial of spousal maintenance and the division of property.

*Denial of Spousal Maintenance*

Tessa first contends the district court abused its discretion when it refused to award spousal maintenance based upon erroneous findings regarding Tessa's employability and earning capacity.

We will not reverse a district court's decision denying an award of spousal maintenance under K.S.A. 2007 Supp. 60-1610(b)(2) absent a clear abuse of discretion. *In re Marriage of Day*, 31 Kan. App. 2d 746, 758, 74 P.3d 46 (2003). Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable. If reasonable persons could differ as to the propriety of the action taken by the district court, then it cannot be said that the district court abused its discretion. *In re Marriage of Bradley*, 282 Kan. 1, 7, 137 P.3d 1030 (2006). The party asserting an abuse of discretion bears the burden of showing such abuse. *Vorhees v. Baltazar*, 283 Kan. 389, 394, 153 P.3d 1227 (2007).

The district court's refusal to award spousal maintenance was based entirely upon its finding that Tessa "is able-bodied and able to maintain gainful employment and based upon her education and work experience should have approximately the same earning capacity as [Mark] once she is gainfully employed."

While the parties' present and future earning capacity is certainly a factor for the court to consider in determining spousal maintenance, it is not the only factor. See *In re Marriage of Day*, 31 Kan. App. 2d at 758 (in determining maintenance, the court may consider "age of the parties, present and future earning capacities, the length of the marriage, the property owned by each party, the parties' needs, the time, source, and manner of acquisition of property, family ties and obligations, and the parties' overall financial situation"). Moreover, our review of the record reveals that the district court's statement regarding Tessa's present and future earning capacity is not supported by the evidence.

Tessa did not present any evidence at trial of her ability to maintain employment or of her present or future earning capacity. Further, Mark did not suggest that Tessa could or should be employed or that income should be imputed to her. Instead, it appears the parties recognized that since 2000 Tessa had been unemployed and receiving Social Security disability benefits, which at the time of trial were \$553.50 per month. In fact, the domestic relations affidavits filed by the petitioner and the respondent both indicate Tessa was unemployed with her only source of income being Social Security disability benefits. Mark's maintenance and child support worksheets also show Tessa receiving Social Security disability benefits of \$553 per month and further impute \$500 to Tessa as income from "parents."

The fact that neither party felt it was necessary to put on evidence regarding Tessa's medical condition is evidenced by the "stipulation" agreed to by Mark's counsel at the pretrial conference. At the end of the conference, the district judge asked "Is there any issues about – as I recall, she, lady, mother, has medical, a medical problem." Mark's counsel responded, "Judge, we would stipulate that [Tessa] does have a medical condition. I don't think that's an issue." The judge then stated, "Okay, good. That's what I want to know. As to residency and child care and custody and all that stuff?" Again, Mark's counsel responded, "We'll stipulate that she does have the medical condition."

While Mark now argues that this stipulation was not meant to relate to Tessa's employability or earning potential, it is difficult to separate these concepts. It was undisputed that Tessa received Social Security disability benefits because she was unable to engage in substantial work activity due to her medical conditions. Thus, a stipulation as to Tessa's medical conditions might well be perceived as recognition of her continued inability to obtain employment.

In any event, at the close of the evidence at trial, the trial court asked to have Tessa recalled in order for the court to ask her "a couple questions," and the following colloquy occurred:

"THE COURT: Ma'am, now we've probably skirted around this, and it wasn't your fault, but with this medical condition that you've got can you tell me what it is so that I understand.

"A: Well, I had a diagnosis for a heart, it was a congenital heart defect in 1998.

THE COURT: Okay.

"A: I think I was about 28 at the time and what it causes are arrhythmias.

THE COURT: Okay.

"A: And I went for treatment and the doctor that I was seeing recommended an ablation.

.....

"A: I was diagnosed in late 1998 with systemic lupus. I had a blood clot in my, one of my lungs. I had previously before that, that summer I had chronic mouth ulcers and had been to the dentist and to numerous doctors.

THE COURT: Okay. So are you considered disabled now or not disabled?

"A: I'm on disability right now and it's like reviewed every year to two years to see -

THE COURT: Disability by whom? Social Security?

"A: Social Security.

THE COURT: Okay. And are there any restrictions by your doctor on your – I understood there are not. Is that right?

"A: No, there's, as long as it's treated more like symptomatically and it's more, you know – there's times where you might have a flare, like a, what they call a flare-up where –

THE COURT: You're talking about the lupus; right?

"A: Yes.

THE COURT: Okay.

"A: You know, and it's – they're kind of like flu-like symptoms usually.

THE COURT: I know. I understand. Yes, I know. Okay. So is it your testimony, then, that you cannot work or can work or what? I don't understand that.

"A: Well, the work that I was doing, I was doing – I had a licensed day care and it was, the day care got to be too much at the time, you know. I had gone through the heart problem and lifting the children, I had a pacemaker put in –



THE COURT: Okay, I'm talking about now, though, about now.

"A: I could prob—, you know, if— my health is, as the years have gone, since I've been on disability it get, it's gotten better and better.

THE COURT: Okay.

"A: And so, you know, I'd say, you know — *I don't know. I could, you know, there could be a chance I could go get a part-time job, you know. I, I go, you know, in for check-ups like every six months and the doctor looks me over.*"

The district court ultimately denied spousal maintenance for the sole reason that Tessa "is able-bodied and able to maintain gainful employment and based upon her education and work experience should have approximately the same earning capacity as [Mark] once she is gainfully employed." This factual finding, however, is contrary to the evidence—evidence that showed Tessa had been receiving Social Security disability benefits since 2000 as a result of her medical conditions and underwent periodic evaluations by a physician to determine her continued qualification for such benefits.

In order to receive Social Security disability benefits, Tessa must have been found to be, and must continue to be, unable to engage in substantial gainful work activity by reason of a medically determinable physical or mental impairment. See 42 U.S.C. §

423(d)(2000); 20 C.F.R. § 404.1572 (2008). The court's finding—*i.e.*, that Tessa was able-bodied and able to maintain gainful employment"—simply cannot be squared with Tessa's Social Security disability determination. Moreover, while it appears the court may have relied upon Tessa's testimony that she was able to perform her daily activities, including caring for the children and doing housework and running errands, that evidence did not necessarily establish that Tessa was able to maintain full-time employment. See, *e.g.*, 20 C.F.R. § 404.1572(c) (activities such as caring for oneself, household tasks, hobbies, clubs, and social activities not considered substantial gainful work activity).

Further, and perhaps most importantly, the court's finding was contrary to Tessa's testimony that although her condition had improved, she might, at best, have "a chance" of working part-time depending upon her physician's evaluation.

We conclude the district court abused its discretion in denying spousal maintenance based solely upon the erroneous determination that Tessa was "able-bodied and able to maintain gainful employment." Accordingly, we remand this case to the district court to make a determination of spousal maintenance based upon the existing evidence. On remand, the court may, in its discretion, hear additional evidence regarding

Tessa's ability to maintain employment and her present and future and earning potential or it may simply rule based upon the existing record.

*Division of marital property*

Tessa also contends that the district court abused its discretion in distributing the marital property. Specifically, Tessa claims she was entitled to a larger share of the proceeds from the sale of the parties' residence because (1) the down payment was made with the proceeds of the settlement of her medical malpractice action and (2) the district court inaccurately calculated the parties' proportionate shares of income. Tessa also claims the district court erred in failing to divide Mark's 401(k) retirement account.

The district court has broad discretion in adjusting the property rights of parties involved in a divorce action, and we will not disturb the exercise of that discretion absent a clear showing of abuse. *In re Marriage of Wherrell*, 274 Kan. 984, 986, 58 P.3d 734 (2002).

In a divorce proceeding, the district court is required to "divide the real and personal property of the parties, including any retirement and pension plans, whether

owned by either spouse prior to marriage, acquired by either spouse in the spouse's own right after marriage or acquired by the spouses' joint efforts," and the division of property must be "just and reasonable." K.S.A. 2007 Supp. 60-1610(b)(1).

Factors to be considered in making the division of property are "the age of the parties; the duration of the marriage; the property owned by the parties; their present and future earning capacities; the time, source and manner of acquisition of property; family ties and obligations; the allowance of maintenance or lack thereof; dissipation of assets; the tax consequences of the property division upon the respective economic circumstances of the parties; and such other factors as the court considers necessary." K.S.A. 2007 Supp. 60-1610(b)(1).

As a result of complications with Tessa's heart surgery, the parties jointly filed a medical malpractice lawsuit and were awarded a settlement. The parties agreed to use the settlement money to pay off marital debts and make a down payment on a new house. Nevertheless, by the time Tessa filed for divorce in 2005, the parties had two mortgages on the house, substantial credit card debt, and unpaid medical bills. The parties agreed to sell their house, use the proceeds to pay off marital debts, and divide the remaining proceeds.

Tessa initially asserted that the remaining proceeds should be awarded inversely based on the parties' proportionate shares of income, while Mark asserted that the proceeds should be divided equally. Ultimately, the district court divided the proceeds from the sale of the house 66.1% to 33.9% in favor of Tessa. The district court noted that it derived these percentages from the proportionate shares of income reported on a child support worksheet submitted by Mark.

The worksheet relied upon by the court indicated monthly income for Tessa as \$1,053, which included her Social Security disability benefits and \$500 in imputed income from Tessa's parents. In comparison, the child support worksheet attached to the final divorce decree and relied upon to award Mark child support indicated monthly income for Tessa as \$753, and the parties' proportionate shares of income as 81.9% for Mark to 18.1% for Tessa.

Tessa appears to argue that the district court abused its discretion in awarding the proceeds from the sale of the house in a 66.1/33.9 split instead of a 81.9/18.1 split. Tessa further contends she was entitled to receive most or all of the proceeds from the sale of the house "to assure her future medical care." Tessa's argument fails for several reasons.

First, the district court was not required to use figures from child support worksheets to determine the just and equitable division of property. See K.S.A. 2007 Supp. 60-1610(b)(1) (listing factors to be considered when making the division of property). The only mandate for the district court in dividing marital property is to make a just and reasonable division of property. K.S.A. 2007 Supp. 60-1610(b)(1).

Second, assets arising from a personal injury settlement constitute marital property subject to division in a divorce proceeding. *In re Marriage of Powell*, 13 Kan. App. 2d 174, 180, 766 P.2d 827 (1988), *rev. denied* 244 Kan. 737 (1989). In this case, the district court found that a greater portion of the settlement money was intended to compensate Tessa for medical treatment and future medical expenses incident to her use of a pacemaker. The district court further found that "a fair, just, and equitable division" of the parties' assets would be to apply proceeds from the sale of the parties' house to pay off all marital debts and divide the remaining proceeds two-thirds to one-third in favor of Tessa. Thus, the district court essentially complied with Tessa's request to divide the proceeds from the sale of the house based on the parties' proportionate shares of income.

Tessa also argues the district court erred in failing to divide Mark's 401(k). In support of this argument, Tessa claims, "had the sum of \$8408.47 in his 401(k) at the time of the hearing." However, Tessa's argument ignores the fact that Mark had taken out a

\$3,200 loan against his 401(k), leaving the net value of the 401(k) at approximately \$5,000. Pursuant to the divorce decree, Mark was awarded the entire 401(k) and also became solely responsible for the outstanding loan. When viewed in light of the court's division of all marital property, we conclude the district court did not abuse its discretion in refusing to divide Mark's 401(k).

Finally, we note that the factors to be considered when distributing marital property are essentially the same factors considered by the court in determining spousal maintenance. See K.S.A. 2007 Supp. 60-1610(b)(1); *In re Marriage of Day*, 31 Kan. App. 2d at 758. Because we are remanding this case to the district court to reconsider its denial of spousal maintenance, the district court should, upon remand, also consider the effect, if any, its determination as to spousal maintenance has upon the division of marital property.

Affirmed in part, reversed in part, and remanded with directions.