

NOT DESIGNATED FOR PUBLICATION

No. 89,678

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

JODY CORDRAY,
Appellant,

and

TERRY L. CORDRAY,
Appellee.

MEMORANDUM OPINION

Appeal from Johnson District Court; LAWRENCE E. SHEPPARD, judge. Opinion
filed May 28, 2004. Affirmed.

Cindy L. Whitton, of Southlake, Texas, for appellant.

H. Reed Walker, of the Law Offices of H. Reed Walker, P.A., of Mission, for
appellee.

Before MARQUARDT, P.J., PIERRON and GREEN, JJ.

Per Curiam: Jody Cordray (now Grisby) appeals the trial court's order granting Terry L. Cordray the income from his early retirement at Burlington Northern Santa Fe (BNSF), his former employer. We affirm.

Jody and Terry were married in 1985. Two children were born of the marriage. Jody filed for separate maintenance in January 2000, which was later amended to a petition for divorce.

Terry started working for BNSF on December 1, 1978. Due to downsizing, he was offered early retirement and was separated from BNSF on June 30, 1999. When Terry retired from BNSF, he acquired three different funds: (1) railroad retirement (Tier I), which is the equivalent of Social Security and is not divisible under any circumstances; (2) a pension from BNSF, from which Jody will receive \$859.20 per month (Tier II); and (3) an early retirement "buyout" from BNSF (Tier III).

Before retiring, Terry was given three options for the Tier III payout, which were: (1) receive a lump sum severance payment of \$88,391.88; (2) receive a monthly payment of \$2,378 with no survivor benefit for Jody; or (3) receive a monthly payment of \$2,230 with 66 2/3 percent survivor benefit to be paid to Jody upon Terry's death. Terry chose the option that gave Jody the survivor's benefit.

Terry started receiving the Tier III income in August 1999. The Tier III income has no cash surrender value, loan value, redemption value, lump sum value, or death benefit for Terry.

Terry and Jody signed a settlement agreement; however, they could not agree on the disposition of Terry's Tier III income, maintenance, child support, ownership of the grandfather clock, and whether Terry would receive credit for payments he made on Jody's behalf during the pendency of the divorce.

At trial, Jody claimed that she was entitled to a percentage of Terry's monthly Tier III income. Terry requested that the Tier III income be included in his monthly income and then used to calculate child support and maintenance. After hearing 2 days of testimony on all of the issues in this divorce, the trial court "approved, adopted and confirmed" the settlement agreement and then decided the issues not included in the agreement. On the issue of Terry's Tier III income, the trial court held:

"the particular asset [BNSF early retirement income], Exhibit S, has no immediate cash surrender value, has no loan value, has no redemption value, has no lump sum value, or value realizable after the death [sic] of the retiree.

"To the contrary, the election that he made assured himself and the

petitioner benefits that will be payable over a period of both of their lifetimes, and to her as his successor on the annuity account.

"And so, the court recognizes that this particular annuity has both property and income aspects, but that it is to be treated by the court in this case as having the primary feature of income for the respondent during his lifetime per the terms of the annuity under the plan and a stream of economic benefit to the petitioner if she survives him. All of which is defined and controlled by the plan document that determines the benefits that are presently vested and that he is receiving."

Jody appeals only the issue of the Tier III income of which she claims she should receive a percentage.

K.S.A. 2003 Supp. 60-1610(b)(1) governs financial matters in a divorce action. In relevant part, the statute provides:

"The decree shall 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, by: (A) a division of the property in kind; (B) awarding the property or part of the property to one of the spouses and requiring the other to pay a just and proper sum; or (C) ordering a sale of the property, under conditions prescribed by the court, and dividing the proceeds

of the sale."

Jody claims that our standard of review is de novo because the issue on appeal is one of statutory construction.

Appellate courts generally apply an abuse of discretion standard when reviewing the trial court's determination of the property rights of parties involved in divorce actions. See *In re Marriage of Sadecki*, 250 Kan. 5, 8, 825 P.2d 108 (1992).

K.S.A. 2003 Supp. 60-1610(b)(3) requires the trial court to decide all the issues in a divorce case as a whole in a valid, just, and equitable manner. When the parties have an agreement on the disposition of some issues, it does not vitiate the court's duty to scrutinize the agreement and make a decision on whether it is valid, just, and equitable. See *In re Marriage of Kirk*, 24 Kan. App. 2d 31, Syl. ¶ 1, 941 P.2d 385, *rev. denied* 262 Kan. 961 (1997).

This is not a case of statutory interpretation subject to de novo review as Jody claims, but rather a division of property issue subject to the abuse of discretion standard. The language of the statute is clear; the trial court is to divide the real and personal property, which includes retirement and pension plans. The flaw in Jody's argument is that she is

asking us to consider Terry's Tier III income as an isolated asset without consideration of the other property of the parties.

The question then is whether the trial court abused its discretion by granting Terry the Tier III income.

Trial courts have broad discretion to fashion an equitable division of the parties' property in a divorce proceeding. See *Clark v. Clark*, 236 Kan. 703, 707, 696 P.2d 1386 (1985). Also, K.S.A. 2003 Supp. 60-1610(b)(1)(B) makes it clear that the trial court may award the property or part of the property to one of the parties. The trial court in its exercise of discretion in dividing the property is not required to divide the property on a 50-50 basis. *In re Marriage of Sadecki*, 250 Kan. at 8.

"In a divorce action the district court is vested with broad discretion in adjusting property rights, and its exercise of that discretion will not be disturbed on appeal absent a clear showing of abuse.' [Citations omitted.] '[D]iscretion is abused only where no reasonable [person] would take the view adopted by the trial court. If reasonable [persons] could differ as to the propriety of the action taken by the trial court then it cannot be said that the trial court abused its discretion. [Citation omitted.]" *Bohl v. Bohl*, 232 Kan. 557, 561, 657 P.2d 1106, *aff'd after remand* 233 Kan. 725, 665 P.2d 775 (1983).

After a thorough review of the record on appeal, we find that the trial court did not abuse its discretion on the issue of Terry's Tier III income.

Affirmed.

PIERRON, J., dissenting: I respectfully dissent. K.S.A. 2003 Supp. 60-1610(b)(1) reads in part: "The [divorce] decree shall 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" (Emphasis added.)

K.S.A. 23-201(b) states in part: "All property owned by married persons, including the present value of any vested or unvested military retirement pay, . . . shall become marital property at the time of commencement by one spouse against the other of an action in which a final decree is entered for divorce, separate maintenance or annulment."

The present version of 23-201(b), defining marital property, was apparently passed to reverse the ruling of *Grant v. Grant*, 9 Kan. App. 2d 671, 685 P.2d 327, *rev. denied* 236 Kan. 875 (1984), which held that military retirement pay was not an asset to be divided. *In re Marriage of Sommers*, 246 Kan. 652, 660, 792 P.2d 1005 (1990).

In re Marriage of Monslow, 259 Kan. 412, 912 P.2d 735 (1996), noted the change in law effected by the new language in K.S.A. 60-1610(b)(1). L. 1996, ch. 186, sec. 2.

The monthly benefits received by the husband in our case have the same qualities as military retirement pay. By amending 23-201(b) to include military retirement pay, it appears the legislature intended to include assets such as the pension benefit here. See *In re Marriage of Sadecki*, 250 Kan. 5, 12, 825 P.2d 108 (1992); *In re Marriage of Sommers*, 246 Kan. 652, 660, 792 P.2d 1005 (1990); *In re Marriage of Sedbrook*, 16 Kan. App. 2d 668, 676, 827 P.2d 1222, *rev. denied* 251 Kan. 938 (1992).

The trial court failed to do what our statutes and precedent require in dividing property. The appropriate action would be to remand this matter for a determination of the value of the asset and a proper division of it in the context of the entire case.

The majority states: "After a through review of the record on appeal, we find that the trial court did not abuse its discretion on the issue Terry's Tier III income." The statement is apparently based on the cite from *Bohl v. Bohl*, 232 Kan. 557, 561, 657 P.2d 1106 (1983), noting the broad discretion given trial judges in these matters.

This statement begs the question. It assumes without any demonstration of fact that the trial court's error had no effect on the resulting decision. This cannot be assumed. The Tier III income is a very significant portion of the marital assets. Its exact value was

not presented as the trial court ruled as a matter of law that it would not be divided.

Therefore, no evidence of the precise value was heard.

The Tier III income is substantial. Only a small part of it was subject to any kind of order to Jody's benefit. We cannot assume, as the majority has, that it made no difference. Although the majority claims to have made a thorough review which showed no abuse of discretion, there are no particulars presented to establish that. This is especially significant considering that the value of the income stream, which must be quite substantial, has not yet been determined.