

## NOT DESIGNATED FOR PUBLICATION

No. 95,086

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

ROBERT B. DASHIELL,  
*Appellant,*

and

CARLA E. EIDEMILLER (formerly CARLA E. DASHIELL),  
*Appellee.*

## MEMORANDUM OPINION

Appeal from Sedgwick District Court; JOHN J. KISNER, JR., judge. Opinion filed September 1, 2006. Reversed and remanded.

*John C. Nodgaard*, of Arn, Mullins, Unruh, Kuhn & Wilson, LLP, of Wichita, for appellant.

No appearance by appellee.

Before MALONE, P.J., HILL, J., and BRAZIL, S.J.

*Per Curiam*: Robert B. Dashiell appeals the district court's decision ordering his

military disability benefits be divided under the property settlement following his divorce from Carla Dashiell, now Carla Eidemiller.

Robert argues that unlike military retirement benefits, disability benefits are not divisible property. We agree and reverse and remand.

Robert and Carla were divorced in January 2000. The property settlement agreement was incorporated into the divorce decree and included paragraph 10, military retirement, which provided:

"The Respondent [Carla] shall be awarded all right, title, and interest in forty percent (40%) of the gross value of the Petitioner's [Robert's] military retirement, less the car payment (the full payout scheduled to be completed with the July 1, 2001, payment or sooner payoff of car), effective May 1, 2000, as property division and not as spousal maintenance by an appropriate Military Order for Division of Retirement Pay to be submitted by counsel for the Respondent providing for payment to the Respondent through the Clerk of the District Court. The Respondent shall be responsible for any tax liability with regard to her distributive share of said retirement benefit.

"The Petitioner shall be awarded all right, title, and interest in the remaining sixty percent (60%) of the gross value of the Petitioner's military retirement."

On August 8, 2003, Carla filed a motion requesting an income withholding order for "her portion of the Petitioner's disability retirement benefits and judgment for unpaid disability retirement benefits or, in the alternative, for an order granting relief with regard to the Journal Entry pursuant to 60-260(a) or (b)." Robert had been paying Carla money which included both military retirement pay and disability pay but stopped the payments in May 2002.

On September 1, 2004, the district court issued a decision by e-mail to the parties' attorneys, but no journal entry was ever prepared. The court ordered its minutes sheet as the journal entry. Robert was never informed of the court's decision that his military disability benefits were divisible and considered part of his "military retirement" as described in paragraph 10. Consequently, Carla filed a motion in contempt for Robert's failure to pay her the divided disability benefits. Robert filed a motion to set aside the judgment.

On June 20, 2005, a hearing was held. Robert's motion was denied. The court reiterated that Robert's disability benefits would be "included in the division set forth in paragraph 10," and continued the issue of whether Robert was in contempt for his failure to pay Carla. Robert timely appealed.

*Analysis*

On appeal, Robert argues disability benefits are not divisible property as decided in *Mansell v. Mansell*, 490 U.S. 581, 104 L. Ed. 2d 675, 109 S. Ct. 2023 (1989). As such, disability benefits are treated differently than military retirement benefits, and the district court erred in finding his disability benefits divisible. Robert also relies on the holding of *In re Marriage of Pierce*, 26 Kan. App. 2d 236, 982 P.2d 995, *rev. denied* 268 Kan. 887 (1999).

In *Pierce*, the court made the distinction between military retirement pay and waived amounts of retirement pay provided by 10 U.S.C. § 1408 (1994), which are ultimately received by the veteran as disability pay or benefits. 26 Kan. App. 2d at 239. Citing to *Mansell*, the court stated:

"[I]t [is] perfectly clear that the state trial courts have no jurisdiction over disability benefits received by a veteran. The trial court in this case cannot order [the veteran] to change the payments back to retirement benefits, and it cannot order him to pay his disability benefits to [the ex-spouse]. We conclude the court may not do indirectly what it cannot do directly." *Pierce*, 26 Kan. App. 2d at 240.

Although Carla did not submit a brief to this court, it appears she concedes, at least in part:

"[T]he Respondent acknowledges that current Kansas case law holds the military disability is indivisible and not subject to the jurisdiction of the Court. (See *In [re] Marriage of Wherrell*, 58 P.3d 734, Kan. 12-6-2002). 10 U.S.C. Section 1408(a)(4)(c)). However, it is Respondent's position that the Court is not barred from considering receipt of such benefits when equitably dividing marital property. (*In [re] Marriage of Bahr*, 29 Kan. App. 2d 846, 2001). This, together with the apparent initial understanding and belief of both parties (as evidenced by the Petitioner's voluntary payments) that a portion of the Petitioner's disability benefits were to have been paid to the Respondent, would allow the Court to set aside the Journal Entry and Decree of Divorce in order to consider the Petitioner's disability benefits in determining a maintenance award for the Respondent from the Petitioner's other property."

Carla is correct in that pursuant to *In re Marriage of Bahr*, 29 Kan. App. 2d 846, 849, 32 P.3d 1212 (2001), *rev. denied* 273 Kan. 1035 (2002), Robert's disability benefits can be considered when calculating the need for maintenance. However, the district court clearly could not include Robert's disability benefits as divisible property within paragraph 10 of the property settlement. Because there is a very clear distinction between military retirement payments which are divisible and disability benefits which are not divisible, the court erred in ordering Robert to pay Carla *any* percentage of the amount he receives as disability.

Reversed and remanded.