NOT DESIGNATED FOR PUBLICATION

No. 96,686

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

LINDA S. MACKEY,
Appellee,

and

STEVEN L. MACKEY,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; JOHN J. KISNER, JR., judge. Opinion filed April 11, 2008. Affirmed.

Rachel Mackey, of Law Office of Rachel Mackey, of Topeka, for appellant.

Stephen J. Blaylock, of Law Office of Stephen J. Blaylock, Chtd., of Wichita, for appellee.

Before McANANY, P.J., CAPLINGER and BUSER, JJ.

Per Curiam: Steven L. Mackey appeals the denial of his motion for relief from judgment in this divorce case. Mackey disputes the payment of half of his "Tier II" disability benefits under the Railroad Retirement Act (RRA) of 1974, 45 U.S.C. § 231 (2000) *et seq.*, to his former wife, Linda S. Mackey. We affirm.

Factual and Procedural Background

Because the parties are familiar with the facts, we summarize by noting Steven's acknowledgment on appeal that the contested payments are proper under the RRA, and that they are not directly contrary to a 1998 Settlement Agreement or a 1999 Amended Qualified Domestic Relations Order (AQDRO), the latter of which gave Linda "50% of Steve[n's] . . . Tier 2 monthly divisible benefits." The parties agree that neither they nor their former counsel considered the distinction between Steven's Tier II *disability* benefits and Tier II *retirement* benefits at the time of the divorce.

This failure occurred despite the fact that both former counsel received a handbook from the Railroad Retirement Board (RRB) which explained that "[u]nless [a qualified domestic relations order] expressly exempts a disability annuity from partition, the [RRB]

will apply an award to either a retirement or disability annuity." The booklet provided specific language to "avoid partition of a disability annuity," and the RRB noted this language in further correspondence with counsel.

After Steven became disabled in late 2003, the RRB began paying half of his Tier II disability benefits to Linda. In June 2004, Steven moved for an order nunc pro tunc, which the district court construed as a motion for relief from judgment under K.S.A. 60-260(b)(6). This was not challenged below and is not argued on appeal.

In April 2006, a hearing was held at which the parties presented deposition transcripts and exhibits. In his deposition Steven admitted to knowing about the disability benefits generally, but that he had not discussed them with his former counsel because "I hired [him] to represent all that stuff." In their depositions both former counsel acknowledged they had not understood RRB benefits, including the Tier II disability benefits.

The district court denied Steven's motion. In its order the district court found "the disability component of [Steven's Tier II benefits] was not considered or addressed by either party in their negotiations, in their [1998] Settlement Agreement, or in the [qualified domestic relations orders] in this case." The district court also found Steven

"was aware of this disability component," but that he "was not well versed on how it was administered and did not clearly recognize these benefits to be an asset." The district court found Tier II disability benefits "are paid in part to replace the loss of . . . payments that would be paid if the employee . . . was not disabled," and that Steven's "disability . . . and the . . . loss of Tier II payments during this period of time is a financial burden on both parties."

The district court thought it "impossible to know how the inclusion of possible disability benefits would have impacted the division of assets agreed to by the parties." Moreover, the court found it "unlikely that any re-allocation including those benefits would result in a more equitable result." As a result, the court held Steven had "not shown allocation of these disability benefits . . . to be so unfair, unjust and/or inequitable as to justify relief under K.S.A. 60-260(b)(6)." Steven appeals.

Tier II Disability Benefits

K.S.A. 60-260(b)(6) provides that "upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceedings for . . . (6) any other reason justifying relief from the operation of the judgment." The law is equitable in purpose. *Vogeler v. Owen*, 243 Kan. 682, 687, 763 P.2d 600 (1988). It should be

'"liberally construed to preserve the delicate balance between the conflicting principles that litigation be brought to an end and that justice be done in light of all the facts.'" *In re Marriage of Laine*, 34 Kan. App. 2d 519, 522, 120 P.3d 802 (2005), *rev. denied* 281 Kan. 1378 (2006) (quoting *Wirt v. Esrey*, 233 Kan. 300, Syl. ¶ 2, 662 P.2d 1238 [1983]).

"A ruling on a motion for relief from judgment filed pursuant to K.S.A. 60-260(b) rests within the sound discretion of the trial court. The trial court's ruling will not be reversed in the absence of a showing of abuse of discretion. [Citations omitted.]" *In re Marriage of Leedy*, 279 Kan. 311, 314, 109 P.3d 1130 (2005); see also *In re Marriage of Reinhardt*, 38 Kan. App. 2d 60, 62, 161 P.3d 235 (2007); *In re Marriage of Laine*, 34 Kan. App. 2d at 522. It is Steven's burden to show abuse of discretion. See *In re Marriage of Beardslee*, 22 Kan. App. 2d 787, 790, 922 P.2d 1128, *rev. denied* 260 Kan. 993 (1996).

Steven and Linda agreed to divide their marital property at the time of the divorce, but they did not consider or decide on the division of the Tier II disability benefits. Given the language of the 1999 AQDRO, however, the division was accomplished by operation of law. Steven wishes to revisit that division, but neither he nor Linda adequately address the fact that this would, inevitably, implicate the overall division of property under the 1998 Settlement Agreement.

For example, Steven's complaints over the 50/50 split of the Tier II disability payments are tied to the existing property division. On appeal he asserts that Linda received "much more than 50% of the marital assets, including 50% of [Steven's] 401k." Considering the parties cannot agree on the Tier II disability benefits in isolation, any point of compromise, if it exists, must of necessity include in the bargain other marital property, *i.e.*, property covered by the 1998 Settlement Agreement.

Steven does not suggest how a proper understanding of the RRA might have changed the negotiations at the time of the divorce. He does not identify what he would have sought in compensation for the risk that he might become disabled and consequently have half of the Tier II disability payments provided to Linda. Steven also does not state what he would have given up to maintain his rights to all of the Tier II disability payments. Moreover, Steven does not address what Linda might have agreed to under either scenario. Finally, there was no evidence presented on any of these points.

As a result, and as the district court found, it was not possible to determine how consideration of the Tier II disability benefits would have changed the agreed-to division of marital property. Steven bore the burden here, and he did not provide an evidentiary basis for his claimed relief. Accordingly, we are unable to find an abuse of discretion.

Moreover, if the parties could not agree and resolution were imposed by court order, the district court would have been required to justly and reasonably apportion the marital property based on statutory factors such as the parties' ages, the duration of the marriage, the property owned by the parties, and others. See K.S.A. 2007 Supp. 60-1610(b)(1); *In re Marriage of Roth*, 28 Kan. App. 2d 45, 49, 11 P.3d 514 (2000). Consequently, although Steven sought relief only with respect to the Tier II disability benefits, those benefits could be justly and reasonably apportioned only with reference to the overall property division.

Steven, once again, fails to address adequately the overall property division. Although he alleges in general terms that he is receiving less than half, he does not make a showing based on the factors the district court would be obliged to consider. Considering the evidence produced below, a reasonable person could agree that, as the district court found, it was unlikely that a redivision would produce a more equitable result.

In support, we briefly review the equities of the existing division. The record contains a document from 2004 showing that Steven receives all of the Tier I disability payments, which total $1,676.00 per month. The Tier II benefits total $782.56 per month, with half going to Linda as already described. But Steven could earn $400.00 per month

without losing any disability payments. When asked at his deposition why he did not earn this amount, which would more than cover the payments to Linda, he answered "because I chose not to at this point."

Furthermore, Steven's Tier II retirement benefits, to which Linda was awarded a 50% interest under the 1998 Settlement Agreement, are based on his rail industry service and earnings. Given that Steven is now disabled, the Tier II retirement benefits will not be as great as if he had continued working until retirement. While the record does not support a comparison of actual amounts or even percentages, the current payments to Linda compensate at least in part for the reduction of future payments from Steven's Tier II retirement benefits. This is what the district court meant in finding the Tier II disability payments are intended in part to replace payments "that would be made if the employee . . . was not disabled," and that Steven's disability imposed a financial burden on Linda.

We also note that Steven was a union officer for 12 years. He knew he was eligible for disability payments, even testifying that among union members "there's very few people that retire, and a large majority of people with disabilities." Steven's former counsel approved the 1999 AQDRO after every opportunity to familiarize himself with

the applicable law, and a party is generally bound by the actions of counsel. See *Meyer v. Meyer*, 209 Kan. 31, 39, 495 P.2d 942 (1972).

Without deciding the relative responsibility of Steven and his former counsel, these facts taken together support the district court's ruling. See *Jones v. Reliable Security, Inc.*, 29 Kan. App. 2d 617, 632, 28 P.3d 1051, *rev. denied* 272 Kan. 1418 (2001) (equity aids the vigilant).

Finally, we also consider that Steven sought relief approximately 6 years after the 1998 Settlement Agreement, and the district court was presented with the case for decision almost 2 years later. The district court held that Steven moved for relief within a "reasonable time" under K.S.A. 60-260(b), and this is not challenged on appeal. But the district court was still obliged to consider the principle that litigation be brought to an end. For example, our court has stated its reluctance to "tinker with" a division of property which had been in place for 4 years. *In re Marriage of Pierce*, 26 Kan. App. 2d 236, 242, 982 P.2d 995, *rev. denied* 268 Kan. 887 (1999). Additionally, the Kansas Supreme Court has affirmed the denial of a motion under K.S.A. 60-260(b) for modification of paternity and child support orders "rendered nine years prior to the filing of the motion." *Meyer*, 209 Kan. at 39.

In the present case, Linda's portion of Steven's Tier II disability payments is obviously more valuable now than it was at the time of the divorce, when Steven was still working and disability was only a possibility. In this regard, a division of property is generally not reexamined due to the change in value of an asset. See *In re Marriage of Pierce*, 26 Kan. App. 2d at 242. A district court also has jurisdiction only over marital property, meaning property owned at the time of the divorce. See *In re Marriage of Crane*, 36 Kan. App. 2d 677, 681-82, 143 P.3d 87 (2006). It is unknown what marital property is available for redistribution, even if that were to be attempted. Steven has failed to meet his burden here as well.

In summary, Steven has not shown that the equities weigh in his favor. Any inequities which might exist were preventable, and Steven has not identified a comprehensive remedy. Enough time has passed that reopening the division of property would risk the creation of new inequities. For these reasons and after a review of the entire record, we conclude that the district court did not abuse its discretion by denying Steven's motion.

Tier II Retirement Benefits

We will also address Steven's argument concerning the valuation date for the Tier II retirement benefits. Steven raised this issue in his motion and in a memorandum filed September 22, 2004, but it was omitted from the district court's order. Linda, pointing out that Steven appealed from this order, maintains that we lack jurisdiction over the issue.

The district court's order does not reserve a question for future action. It is captioned: "Order Overruling [Steven's] Motion." It is concluded by the statement: "[Steven's] Motion for Relief from the previous order in this case is overruled." Because the motion raising the valuation date issue was denied without reservation, we conclude the district court declined to set a valuation date.

The RRB materials explained how a qualified domestic relations order could divide retirement benefits according to the length of railroad service, length of the marriage, or in a fixed amount. Even if this language would have set a valuation date, there was no evidence on the parties' intentions in this regard. We cannot assume the failure to include such language was "an omission or oversight of counsel," as Steven asserts.

Steven also fails to show that the 1999 AQDRO "did not comply" with the 1998 Settlement Agreement. Given the 1998 Settlement Agreement set valuation dates for the Kansas Public Employees Retirement System account and the Wal-Mart stock, and a valuation in a specific amount for the 401K account, and yet did not restrict the division of Steven's Tier II retirement benefits, we may infer that the 1999 AQDRO complied with the 1998 Settlement Agreement. As with the prior issues, Steven has failed to designate a record affirmatively showing error. See *State ex rel. Stovall v. Alivio*, 275 Kan. 169, 172, 61 P.3d 687 (2003).

Affirmed.