

NOT DESIGNATED FOR PUBLICATION

No. 100345

IN THE MATTER OF THE MARRIAGE OF:

DEANNA JEANNE GRAHAM,
Appellant,

and

FRANCIS JAY GRAHAM, III,
Appellee.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; MURIEL Y. HARRIS, judge. Opinion filed March 6, 2009. Reversed and remanded.

Kevin W. Kenney, of Kevin W. Kenney, P.A., of Prairie Village, for appellant.

Judith C. Hedrick, of Barnett Law Firm, Chartered, of Kansas City, for appellee.

Before McANANY, P.J., PIERRON and STANDRIDGE, IT.

Per Curiam: This appeal involves the district court's disposition of retirement benefits in a divorce action. Deanna Graham claims the district court erred in treating the retirement benefits of her former husband, Frank Graham, as income rather than property, and in setting it over to him.

Frank began working for the Kansas City, Missouri Police Department in July 1973. He and Deanna married in May 1982. In May 2003, after about 29 years on the police force, Frank retired and began collecting his pension of \$2,733 per month. The pension apparently has no provision for survivor benefits for a former spouse in the event of Frank's death.

In September 2007, Deanna filed her petition for divorce. Deanna is in good health and works part-time administering a preschool program. She earns approximately \$21,000 per year. Frank is in ill health. His income consists of his pension and social security benefits. In 2007, this amounted to \$32,972.43 from his pension and \$15,160 in social security benefits. Frank's health and age make it difficult for him to find employment. At the time of the final hearing Deanna was 58 years of age and Frank was approximately 64 years of age. Deanna has no private pension benefits of her own but eventually will be entitled to social security benefits based upon her own employment.

The parties entered into a property settlement agreement in which they equally divided most of their property. Deanna received the family home worth \$45,000 and \$3,000 for half the value of Frank's automobile. Frank received \$45,000 from a fire insurance settlement and his automobile with a net value of \$3,000. In addition, each party received half of the balance of the fire insurance settlement and half of Frank's deferred compensation account. The record is silent as to the value of Frank's deferred compensation. The parties left for the court the disposition of Frank's pension and the issue of maintenance.

With respect to Frank's pension, the district court found:

“(a) [Frank] is already receiving benefit distributions from the pension plan. The Court cannot distinguish between [Deanna's] situation and that of someone who had married a pension-participant after he was retired and receiving benefits, who would not be entitled to division of the pension. Instead, such a person would be entitled to maintenance.

“(b) The Court cannot require the employer to change its contract with the participant governing how the pension is distributed,

“(c) The best that the Court could do is to somehow figure out a percentage and have [Frank] pay [Deanna] monthly, but this approach defeats the purpose of [Deanna] having a retirement in the future she could look forward to in her old age. The Court cannot do that at this late date and the best that can be done is to liquidate the pension currently.

“(d) In divorce cases where a pension plan participant is already retired and receiving pension distributions, the Court always treats the pension as income and not as personal property and will not change its approach for the present case.

“(e) [Frank's KCPJ] pension shall be awarded to him.¹”

The court awarded Deanna maintenance which equaled 15% of the difference between Frank's social security and pension income and Deanna's earned income for a total maintenance award of \$333.23 per month for 121 months. The court reserved jurisdiction to continue Deanna's maintenance at the end of this 121-month term.

Deanna appeals.

The essence of Deanna's claim is that the district court abused its discretion in its order setting over the pension benefits to Frank and ordering Frank to only pay maintenance. Abuse of discretion is the standard by which we measure whether the district court erred in its decision. See *In re Marriage of JWherrell*, 274 Man. 984-986, 58 P.3d 734 (2002). The district court abuses its discretion when no reasonable person would adopt the district court's position. See *In re Marriage of Bradley*, 282 Kan. 1, 7, 137 P.3d 1030 (2006). Further, the district court abuses its discretion when, in making its decision, it goes outside the applicable legal standards or statutory limitations. *Dragon v. Vanguard Industries, Inc.*, 277 Kan. 776, 779, 89 P.3d 908 (2004). In other words, no reasonable person would agree with a decision premised upon erroneous principles of law.

K.S.A. 60-1610(b)(1) requires the district court to divide the marital property of the parties in the divorce decree. Marital property includes all real and personal property owned by the parties, jointly or individually~ at the time the divorce action is commenced. K.S.A. 23-201(b). K.S.A. 60-1610(b)(1) specifically instructs the court to include in its division of marital property “any retirement and pension plans.”

While an equitable division of the marital property does not require a 50/50 split of pension benefits, the district court is required to take into account a marriage partner’s pension in making its division, See *In re Marriage of Sedbrook*, 16 Kan. App. 2d 668, 684-85, 827 P.2d 1222, *reversed* 251 Kan. 938 (1992).

In *In re Marriage of Sadecki*, 250 Kan. 5, 8, 825 P.2d 108 (1992), the district court awarded the husband a former professional baseball player, his pension from major league baseball. The wife claimed the district court erred in not dividing the pension. The value of the nonpension assets set over to the wife was nearly nine times the value of the nonpension assets set over to the husband. 250 Kan. at 9. Further, the district court opined~ that this disproportionate division of nonpension assets adequately compensated the wife for her contribution to creation of husband’s pension. Under the circumstances, our Supreme Court was satisfied that the district court “not only recognized the baseball retirement plan as an asset but specifically considered it as such in making the division of property.” 250 Kan. at 10.

In contrast, the district court here specifically found:

“[Frank] is already receiving benefit distributions from the pension plan. The Court cannot distinguish between [Deanna’s] situation and that of someone who had married a pension-participant after he was retired and receiving benefits~ who would not be entitled to division of the pension. Instead, such a person would be entitled to maintenance.”

Further, the court found that in cases like this where the pensioner is already retired, “the Court always treats the pension as income and not as personal property.” This approach fails to consider the pension as marital property subject to an equitable division, even though about 20 years of Frank’s pension benefits accrued during the marriage. The district court’s decree was predicated upon legal principles that are contrary to the plain language of the statute and the case authorities that require the district court to treat such benefits like any other marital property in making an equitable division. Accordingly, the district court abused its discretion in its disposition of Frank’s pension.

Despite this conclusion, there is the possibility that setting over the pension income stream to Frank was the right decision, albeit for the wrong reason. Such an analysis will save an otherwise erroneous ruling. *Bradley*, 282 Kan. at 8. After all, the district court is not required to make an equal division of the marital property, only an equitable division, or, in the words of the statute, a “just and reasonable division.” K.S.A. 60-1610(b)(1); *Sadecki*, 250 Kan. at 13; *Seabrook*, 16 Kan. App. 2d at 677.

The parties did not provide the district court with a current value analysis of the pension. Nevertheless, we can roughly determine that since about 2/3 of Frank’s pension was earned during the course of the marriage and since his current benefit is about \$2,700 per month, an

income stream of about \$1,800 per month constitutes marital property, An even division of this income stream would result in about \$900 per month being paid to each party. Under the district courts decree, Deanna received none of the pension proceeds but received \$333 per month maintenance. Do the relative circumstances of the parties warrant such an unequal distribution?

In making its division of the marital property the district court must consider (1) the age of the parties; (2) the duration of the marriage; (3) the property owned by the parties; (4) the earning capabilities of the parties; (5) when, how, and from whom the marital property was acquired; (6) family ties and obligations; (7) what maintenance will be paid, if any; (8) whether a party dissipated marital assets; (9) the tax consequences of the division, and (10) any other necessary factors. K.S.A. 60-1610(b)(1). There are differences between the circumstances of the parties that should be taken into account in determining an equitable disposition of the marital property. Those circumstances include the differences in the parties' ages, conditions of health, and employment status and prospects. A substantial, portion of Deanna's marital assets are in the marital home. Frank's assets are, for the most part, liquid in nature. We surmise that the parties have somewhat different monthly living expenses. There are, no doubt, other distinguishing circumstances. However, for us to do a "right for the wrong reason" analysis would require us to delve into factual issues that properly should be resolved by the district court, the factfinder in this case.

Under the circumstances, a "right for the wrong reason" analysis with respect to so fact-intensive an issue is inappropriate. Accordingly, we must set aside the district court's decree with respect to Frank's pension. Further, since the district court's calculation of maintenance was predicated upon the entirety of Frank's pension being set over to him, we must also set aside the order for maintenance and remand the case to the district court for reconsideration of Frank's pension consistent with K. S .A. 60-161 0(b)(1) and reconsideration of the issue of maintenance consistent with K.S.A. 60-1610(b)(2),

Reversed and remanded.