NOT DESIGNATED FOR PUBLICATION

No. 112,006

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

LYNNE B. THREATT (F/K/A HOLLINQUEST),
Appellee,

and

LAMONT B. HOLLINQUEST,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; KEVEN M.P. O'GRADY, judge. Opinion filed August 28, 2015. Affirmed.

Joseph W. Booth, of Booth Family Law, of Lenexa, and *Janine D. Hassler*, of Olathe, for appellant.

Ronald W. Nelson and *Ashlyn L. Yarnell*, of Ronald W Nelson, PA, of Lenexa, for appellee.

Before MALONE, C.J., HILL and BUSER, JJ.

BUSER, J.: This is an appeal in a divorce case. Lamont B. Hollinquest challenges the district court's approval of a Qualified Domestic Relations Order (QDRO) directing Lamont's former employer, the National Football League, to pay 50% of his disability benefits to his former wife, Lynne B. Threatt. The district court approved the QDRO, in keeping with a separation agreement that was incorporated into the district court's divorce decree. Finding no error, we affirm the district court's order.

FACTUAL AND PROCEDURAL BACKGROUND

In 1996, Lamont married Lynne in Las Vegas, Nevada. At the time, Lamont was apparently a player in the National Football League (NFL) and a member of the NFL Players Association.

As a result of his employment, Lamont is a participant in the Bert Bell/Pete Rozelle NFL Player Retirement Plan (Retirement Plan). According to an exhibit referenced in the district court—an information booklet for Retirement Plan participants dated November 12, 2001 (information booklet)—the Retirement Plan is an IRS-qualified, defined benefit pension plan and provides retirement, disability, and death benefits to players and their spouses or other beneficiaries.

Lynne filed for divorce on April 20, 2004. In March 2005, Lamont and Lynne executed a separation agreement that Lynne's counsel notarized. Lamont simultaneously executed an affidavit that provided that Lamont understood he had a right to independent counsel but he "freely and voluntarily decided to represent myself in the negotiation of a Separation Agreement without the assistance of legal counsel."

Under terms of the separation agreement, both parties waived support and maintenance rights. Under the heading "Division of Net Worth," the separation agreement identified as Lynne's sole and separate property, free and clear of any right, title or interest in Lamont: "[o]ne-half of [Lamont's] 401k, pension plan, annuity or *other retirement programs* that are in existence through the NFL due to [Lamont's] participating in the NFL which will be set aside by way of a [QDRO] to be prepared after the execution of the [Separation] Agreement." (Emphasis added.) Similarly, the separation agreement identified as Lamont's sole and separate property, free and clear of any right, title or interest in Lynne: "[t]he remaining portion of [Lamont's] 401k, pension plan, annuity or other retirement programs after assigning [Lynne] fifty percent (50%) of

all said plans in accordance with the [QDROs] to be prepared subsequent to the execution of the [Separation] Agreement."

Finally, under the heading "Miscellaneous," each party released the other "from any claim of any kind, and specifically relinquishes any right, title or interest in or to any of the earnings, accumulations, future investments, money or property of the other . . . except as otherwise provided in this [Separation] Agreement."

In May 2004, Lynne's counsel scheduled a default divorce hearing in Johnson County District Court. After several scheduling attempts, Lynne appeared with her counsel on March 23, 2005; Lamont did not appear. At that hearing, the district court approved and filed the separation agreement and incorporated it into the divorce decree, which Lamont had approved pro se.

At some time before May 10, 2011, Lamont applied for total and permanent disability benefits under the Retirement Plan. The Retirement Plan's Disability Initial Claims Committee (disability committee) denied the application. The disability committee sent its letter to Lamont at his Tempe, Arizona, address, which was the same address used for service on Lamont during the divorce proceedings.

On June 15, 2011, Lynne filed a Motion to Compel Execution of QDROs. Lynne's counsel asserted that Lamont had started receiving benefits from his retirement plan and the QDROs needed to be filed with the Court and forwarded to the NFL Plan Administrators for implementation. The motion was sent to Lamont's Tempe address. The nature of the benefits from the retirement plan referenced in the motion is unclear.

On August 15, 2011, the district court held a hearing on Lynne's motion. Lynne appeared with counsel, but Lamont did not appear. The district court approved three QDROs and filed them the same day (2011 QDROs). Two of the 2011 QDROs dealt with

NFL benefits that are not at issue here—the NFL Player Annuity Program and the NFL Player Second Career Savings Plan. The third 2011 QDRO dealt with the Retirement Plan (Retirement Plan QDRO). Its language was taken from a model QDRO form attached to the information booklet. According to the information booklet:

> "The attached form has been prepared for use as a guide in drafting a court order to divide benefits under the Bert Bell/Pete Rozelle NFL Player Retirement Plan (the 'Retirement Plan') in divorce and certain other domestic relations law situations. If this form is properly completed (including approval by a judge), the Retirement Plan will accept it as a . . . 'QDRO.'"

The Retirement Plan QDRO dealt with retirement and disability benefits under separate headings. Under the "Disability Benefits" heading, the Retirement Plan QDRO awarded Lynne

> "fifty (50%) of any disability benefits otherwise payable to [Lamont] on or after the date of this order under the Retirement Plan. [Lynne] may only receive disability benefits when and if [Lamont] becomes eligible to receive such disability benefits under the Retirement Plan. In the event that [Lamont] becomes ineligible to receive disability benefits, [Lynne's] right to receive such benefits will cease. If [Lynne] predeceases [Lamont], [Lynne's] disability benefits will revert to [Lamont] during the lifetime of [Lamont]."

Lamont did not execute the Retirement Plan QDRO, and the record does not show service on him. The Retirement Plan QDRO did state that it would be "promptly served on the [Retirement] Plan, who shall, within a reasonable period after receipt, determine whether this order is a [QDRO] and notify the appropriate parties of its determination."

On September 14, 2011, the Benefits Coordinator for the Retirement Plan sent a letter to Lynne's counsel, stating it had received and accepted the 2011 QDROs. The letter stated: "The material aspects of each order will be implemented according to [its]

terms." The letter shows that a copy of the correspondence was faxed to Lamont on September 14, 2011.

At some time prior to November 11, 2013, Lamont reapplied under the Retirement Plan seeking total and permanent disability benefits. On that date, the disability committee awarded Lamont disability benefits effective April 1, 2013. The disability committee explained in a letter to Lamont, dated November 18, 2013:

> "By virtue of this award, you are entitled to receive a combined monthly benefit of $10,000 from the Retirement Plan and NFL Supplemental Disability Plan . . . . In accordance with the [Retirement Plan QDRO], 50% of your monthly disability benefit from the Retirement Plan is to be paid to . . . [Lynne]. Therefore, your adjusted gross combined monthly benefit will be $8,000."

This letter contains the first reference in the record to an NFL Supplemental Disability Plan (Disability Plan). Based on the language of the letter, the Disability Plan is not another name for the Retirement Plan. This is also shown by the disability committee's benefit computations. If the total award from both plans was $10,000, and 50% of the monthly disability benefit from the Retirement Plan was paid to Lynne, and the amount paid to Lamont after this subtraction was $8,000, then the Retirement Plan disability benefit was $4,000, and the Disability Plan benefit was $6,000. By giving Lynne only $2,000 of the $10,000 total, and not $5,000, the disability committee treated the Retirement Plan QDRO as applying only to the Retirement Plan disability benefits, and not to the Disability Plan benefits.

On December 3, 2013, Lynne filed a Motion to Compel Execution of QDRO. She recited the language from the Retirement Plan QDRO and asserted that the same language applied to the Disability Plan, which she identified as an additional monthly benefit to Lamont's NLF Player Retirement Benefit. Lynne advised the court that she had sent a QDRO to obtain her share of the benefits under the Disability Plan. Lamont was

served at his Tempe address.

On December 19, 2013, the NFL sent Lamont's counsel a Domestic Relations Order Preapproval Notice. Like the information booklet on the Retirement Plan already discussed, it attached a model QDRO form. The model form referred to "the NFL Player Supplemental Disability Plan," which was the terminology referenced in the disability committee's letter to Lamont dated November 18, 2013. The NFL showed that Lamont was served on December 19, 2013.

On January 6, 2014, the district court held a hearing on Lynne's motion. Lynne appeared by counsel, and Lamont appeared pro se. Lamont first challenged the Retirement Plan QDRO, alleging that Lynne served it fraudulently by sending it to a place she knew he did not live. Lamont told the district court he lived in Las Vegas. Lamont also contested the propriety of Lynne's receipt of his disability payments.

Lynne's counsel informed the district court, "The NFL has advised me that they needed a separate QDRO to divide that disability," apparently meaning the disability benefits already dealt with in the Retirement Plan QDRO. The district court continued the hearing so Lamont could retain counsel.

On March 6, 2014, the hearing recommenced with Lynne appearing with counsel, and Lamont appearing only through counsel. No testimony was offered by either party. Instead, both counsel argued based on several exhibits—mostly communications or other documents provided by the NFL.

Lynne's counsel argued from the Retirement Plan's references to disability benefits. He maintained that all disability payments to Lamont were "part and parcel a retirement benefit that he received by participating in the NFL. Clearly my client under the separation agreement is entitled to one-half of any retirement programs that are

available to [Lamont].

Lynne's counsel clarified: "For whatever reason, Judge, the language that [the NFL] suggested I use, which I did back on August 15, 2011, they wanted a separate domestic relations order as it relates to that disability benefit. So I prepared a separate order based on the language they sent to me." Lynne's counsel provided the district court with another QDRO (Disability Plan QDRO), which counsel said was based on "the letter dated December 19, 2013, that I received from the NFL giving me preapproval of the qualified domestic relations order that I have prepared as it relates to the disability portion of his retirement account." Following the model form attached to the letter from the NFL dated December 12, 2013, the Disability Plan QDRO stated that it divided the benefits and rights between Lamont and Lynne with respect to the NFL Supplemental Disability Plan (Disability Plan), in which Lamont had an interest.

The district judge responded: "I'm still not understanding why they need another order. What was wrong with the first one?" Lynne's counsel interrupted:

> "Judge, I don't know. The language that I put in August 15, 2011, they told me was not sufficient for their approval, even though they approved that order which had that language that I pulled off of their form. I could only tell you that they asked me to prepare a separate document as it relates to this disability payment. So that's what I have done."

Lamont's counsel countered that the separation agreement did not cover *any* disability benefits. Like Lynne's counsel, she relied on the Retirement Plan, which did separate each type of retirement program, so the disability benefits had its own paragraph. Lynne's counsel argued, however, that disability insurance was different than a retirement account. Insurance was based upon an unrealized event which may or may not be available, so a disability benefit was not automatic to all NFL players.

A colloquy between the district judge and Lamont's counsel focused on the issue critical to the district court's ruling:

> "THE COURT: All right. Well, Exhibit 1 [information booklet], which is a plan summary, for lack of a better term, dated November 12 of 2001. On page four, first full paragraph, it says, The retirement plan also pays a monthly disability benefit.
>
> "So are you telling me you don't think the disability benefit was part of the NFL retirement plan?
>
> "MS. HASSLER: It was a supplemental policy taken out on each player.
>
> "THE COURT: So what evidence do you have of that? It just seems like to me the evidence I have in front of me says it's part and parcel of the NFL player retirement plan.
>
> "MS. HASSLER: The payments themselves come from—again, 6,000 from the policy, the disability insurance policy, and 4,000 from the pension.
>
> . . . .
>
> "THE COURT: But it's still all under the NFL retirement plan, isn't it? Regardless of how they internally manage it and fund it, isn't it all under the retirement plan?
>
> "MS. HASSLER: *The disability is addressed in the retirement plan as a separate benefit.*
>
> "THE COURT: And the separation agreement states that [Lynne] is to receive one-half of . . . retirement programs that are in existence through the NFL due to [Lamont's] participating in the NFL. And the disability payment, disability insurance, whatever you want to call it is part of the retirement plan, is it not? The retirement program?
>
> "MS. HASSLER: *It is.*
>
> "THE COURT: And then in 2011 Mr. Hollinquest had the opportunity to address this issue." (Emphasis added.)

The district court began its ruling by finding: "Exhibit 1 clearly shows that the NFL player retirement program has multiple benefits. It has a retirement benefit, death benefit and a disability benefit at the bare minimum. That document is dated November of 2001."

The district judge noted that the parties were divorced in 2005 and recited the provision in the separation agreement giving Lynne one-half of Lamont's retirement programs in existence through the NFL due to Lamont's participation in the NFL. The judge then observed: "The disability benefit is clearly part of the retirement plan or retirement program, if you will. It certainly seems to me the plain language of the [separation] agreement would contemplate including the disability benefit." The district judge also rejected Lamont's assertion that he had not received notice of the 2011 QDROs.

The district judge concluded: "So I think the qualified domestic relations order that's been proposed today implements the clear intention of the parties as set forth in the separate agreement and will be approved." The district court clarified that the payments to Lynne would be $5,000, or one-half of Lamont's benefits. The Disability Plan QDRO was signed and filed the same day.

Lamont moved for a new trial, acknowledging that the disability program through the NFL was part of the NFL's retirement plan but arguing that the benefit did not exist at the time of the divorce and had no value. The district court denied the motion stating:

> "[Lamont's] argument that the disability benefit could not be divided because it did not 'exist' at the time he and [Lynne] signed the Separation Agreement was rejected at trial and is rejected again at this time.
>
> . . . .
>
> ". . . [Lamont] acknowledges that the disability benefit is part of the retirement plan. . . . The disability plan existed at the time of the divorce."

Lamont appeals the order approving the Disability Plan QDRO and denying the motion for new trial. Both parties are represented by new counsel on appeal.

ARE THE 2011 QDROS VOID BECAUSE THE DISTRICT COURT'S JUDGMENT DIVIDING LAMONT'S NFL RETIREMENT PROGRAM BENEFITS WAS EXTINGUISHED?

Raising an issue for the first time on appeal, Lamont contends that all QDROs in this case are void because the divorce decree's judgment dividing Lamont's NFL retirement program benefits was extinguished. Lynne counters that this issue was not preserved for appeal. Alternatively, she acknowledges the division of property became dormant in 2010, but she argues the judgment was not extinguished because it was revived within 2 years by the filing of the 2011 QDROs. On appeal, both parties argue regarding the dormancy statute, K.S.A. 60-2403, and our court exercises unlimited review over statutory interpretation. *Cady v. Schroll*, 298 Kan. 731, 734, 317 P.3d 90 (2014).

We first address the preservation issue. Supreme Court Rule 6.02(a)(5) (2014 Kan. Ct. R. Annot. 41), requires an appellant to begin each issue with "a pinpoint reference to the location in the record on appeal where the issue was raised and ruled on. If the issue was not raised below, there must be an explanation why the issue is properly before the court." Lamont does not comply with any part of this rule. Moreover, our review of the district court proceedings convinces us that Lamont did not raise or argue this issue below. As a result, the district court was not afforded an opportunity to consider or rule on the applicability of the dormancy statute to the 2011 QDROS.

Lamont failed to address in the district court his appellate claim that the QDROs are void because the divorce decree's judgment dividing Lamont's NFL retirement program benefits was extinguished. This failure to raise the issue and obtain a ruling from the district court is consequential. As a general rule, issues not raised in the district court are generally not considered on appeal. See *Wolfe Electric, Inc. v. Duckworth*, 293 Kan. 375, 403, 266 P.3d 516 (2011).

Of course, there are exceptions to the general rule that a new legal theory may not be asserted for the first time on appeal. See *In re Estate of Broderick*, 286 Kan. 1071, 1082, 191 P.3d 284 (2008), *cert. denied* 555 U.S. 1178 (2009) (listing three exceptions); Rule 6.02(a)(5) (2014 Kan. Ct. R. Annot. 40). But Lamont does not inform us about the applicability of any particular exception relevant to this case. By not explaining why this issue is properly before our appellate court, Lamont has not fully briefed the issue on appeal.

Our Supreme Court has pointedly warned that parties should "comply with Rule 6.02(a)(5) by explaining why an issue is properly before the court if it was not raised below—or risk a ruling that an issue improperly briefed will be deemed waived or abandoned." *State v. Williams*, 298 Kan. 1075, 1085, 319 P.3d 528 (2014). For the reasons discussed, we conclude the issue of whether the 2011 QDROs are void was not preserved for appellate review.

There is one more preservation matter. In the district court, Lamont claimed Lynne failed to obtain lawful service upon him regarding the 2011 QDROs. On appeal, however, Lamont does not argue lack of service. The district court found that Lamont was served, and Lamont's failure to contest and brief this finding amounts to a waiver or abandonment of any challenge to it on appeal. See *Superior Boiler Works, Inc. v. Kimball*, 292 Kan. 885, 889, 259 P.3d 676 (2011). As a result, we will not consider any due process issues previously raised by Lamont regarding notice and an opportunity to be heard.

DID THE SEPARATION AGREEMENT PROVIDE DISABILITY PLAN QDRO BENEFITS TO LYNNE?

Alternatively, Lamont contends the district court erred because the separation agreement (which was subsequently incorporated into the divorce decree) did not provide

disability benefits as set forth in the Disability Plan QDRO. Lynne responds that the Disability Plan QDRO was simply a "reformatting" of the earlier Retirement Plan QDRO which was required because the NFL wished to comply with the court's orders, which had divided the account per the terms of the parties' separation agreement.

We first review Kansas law pertaining to settlement agreements incorporated into divorce decrees. "In divorce proceedings, K.S.A. 60-1610(b)(3) provides that if the parties have entered into a separation agreement that the court finds to be valid, just, and equitable, the agreement shall be incorporated into the divorce decree." *In re Marriage of Traster*, 301 Kan. 88, Syl. ¶ 2, 339 P.3d 778 (2014). "Separation agreements are subject to the same rules of law applicable to other contracts." 301 Kan. 88, Syl. ¶ 6. Absent a finding of ambiguity—which the district court did not make and neither party argues on appeal—this court exercises unlimited review over the interpretation and legal effect of separation agreements. See 301 Kan. at 98; *In re Marriage of Strieby*, 45 Kan. App. 2d 953, Syl. ¶ 2, 255 P.3d 34 (2011).

In framing this issue, Lamont does not focus on the particular language of the separation agreement. Rather, he argues that disability payments compensating an individual for ongoing lost wages are not property. The significance of this argument, given the agreed-upon language in the separation agreement, is unclear.

In support, Lamont cites *In re Marriage of Buetow*, 27 Kan. App. 2d 610, 3 P.3d 101 (2000), where a work-place accident occurred 2 weeks before the divorce was filed. The question in that case was not whether the eventual disability award was property, but whether it was *marital* property, *i.e.*, "part of the marital estate." 27 Kan. App. 2d at 610. The remaining cases cited by Lamont were resolved on similar grounds. See *In re Marriage of Wherrell*, 274 Kan. 984, Syl. ¶ 1, 58 P.3d 734 (2002) ("divisible military retirement" versus "indivisible military disability"); *In re Marriage of Pierce*, 26 Kan. App. 2d 236, Syl. ¶ 2, 982 P.2d 995, *rev. denied* 268 Kan. 887 (1999) ("state courts do

not have the power to treat veterans' disability benefits as marital property divisible under state law"); *In re Marriage of Knipp*, 15 Kan. App. 2d 494, 495, 809 P.2d 562, *rev. denied* 248 Kan. 995 (1991) (trial court erred in dividing social security disability benefits because of federal anti-assignment statute). Lamont cites no authority for the proposition that disability benefits are not "property" as a matter of law.

Lamont also seems to argue that his disability benefits were his separate property under the separation agreement, not marital property. See, *e.g.*, *In re Marriage of Gurganus*, 34 Kan. App. 2d 713, 715, 124 P.3d 92 (2005) ("The trial court then found that under the terms of the parties' settlement agreement, the military retirement pay was marital property.").

The separation agreement identified as marital property: "[Lamont's] 401k, pension plan, annuity or *other retirement programs* that are in existence through the NFL due to [Lamont's] participating in the NFL." (Emphasis added.) This language is broad enough to include the Retirement Plan, and the parties do not dispute that the Retirement Plan was in existence in 2005. Importantly, the Retirement Plan had *both* retirement and *disability* components, evidencing the parties' intent to divide the disability benefits. In this regard, the parties' intent controls in these matters: "It has long been held that contracts, including those governing property settlement rights in a divorce, are to be liberally interpreted to carry out the intention of the persons making them." *Traster*, 301 Kan. 88, Syl. ¶ 8.

Lamont attempts to distinguish retirement and disability benefits based on *Buetow*, urging our court to apply an analytical approach. But *Buetow* and the Kansas case it cited, *In re Marriage of Powell*, 13 Kan. App. 2d 174, 766 P.2d 827 (1988), *rev. denied* 244 Kan. 737 (1989), considered divisions of property *by the district court*, meaning the district court identified and characterized the marital property. In the present case, however, Lamont and Lynne identified and defined their marital property in their

separation agreement. This is fully consistent with Kansas law: "Kansas law allows the parties to enter into a separation agreement . . . . Because the parties are in the best position to know the extent and value . . . of their property, it is usually in the interest of both parties to try to obtain an agreement on property issues." 2 Elrod, Kansas Law and Practice, Kansas Family Law § 10:2 (2014-2015 ed.).

Moreover, contrary to Lamont's suggestions on appeal, retirement benefits and disability benefits are not necessarily exclusive or contrary by nature. "To the extent a particular benefit was acquired in compensation for prior service and not in compensation for a work-related injury, it will be treated as a retirement benefit, even if it takes the form of disability pay." 2 Turner, Equitable Distribution of Property § 6:52, p. 306 (3d ed. 2005). That appears to be the case here. Lamont became disabled about 15 years after his NFL career ended. The November 18, 2013, letter from the disability committee to Lamont classified him as Inactive A, which did not require that the disability arise out of NFL activities. Lamont also complained to the district court at the January 6, 2014, hearing, that in 2005 he was an able-bodied young man, and he would have never agreed to disability 10 years before he knew he would be disabled.

This statement by Lamont to the district court raises the additional matter of his intent, but Lamont presented no evidence of his intent beyond the plain language found in the separation agreement. "On appeal, error below is never presumed and the burden is on the appellant to make it affirmatively appear." *First Nat'l Bank & Trust Co. v. Lygrisse*, 231 Kan. 595, Syl. ¶ 8, 647 P.2d 1268 (1982).

On a related matter, Lamont's counsel also argued in the district court that the disability benefits were not in existence at the time of the separation agreement because they were inchoate. But Lamont does not renew this argument on appeal, and issues not briefed are deemed waived or abandoned. See *Superior Boiler Works, Inc.*, 292 Kan. at 889.

Even if Lamont had renewed this argument regarding the inchoate nature of his disability benefits, precedent supports the district court's action. In *Dial v. NFL Player Supplemental Disability Plan*, 174 F.3d 606 (5th Cir. 1999), an NFL player retired from the league in 1968, was divorced in 1977, and received total and permanent disability benefits in 1980. The court found that his disability benefits were in existence at the time of the divorce:

> "Dial's disability benefit was in existence by the 1977 divorce, insofar as he had already finished his NFL career, thereby earning his right to the benefits, and had nothing left to do but wait for his benefits to vest. The disability benefit did not yet exist in 1977 only if Dial's later act of 'becoming disabled' could be said to have earned or created the benefit. Dial did nothing after 1977 to earn disability benefits. Instead, a contingent disability benefit—contingent upon the development of the disabling condition from injuries already assumed while Dial played football—belonged to Dial as of the time he ended his football career." 174 F.3d at 613.

Another factor showing the connection between Lamont's retirement and disability benefits under the Retirement Plan is the fact that, according to the exhibits in the record, the disability benefits end when the retirement benefits begin. "To the extent that [disability insurance] policies are intended as retirement support, to be paid when the insured is no longer able or willing to work as a result of age, the proceeds are properly characterized as marital property." 4 Rutkin, Family Law and Practice, § 45.04 (2014). Indeed, Lamont and his counsel have repeatedly referred to his disability benefits under the Retirement Plan as his "pension," which is consistent with our analysis.

"Separating retirement and disability pay is not always an easy process." 2 Turner, Equitable Distribution of Property § 6:52, p. 307. Lamont knowingly and voluntarily entered into a separation agreement which did not attempt to separate these benefits but lumped them together as marital property. Our review of the record persuades us that the district court did not err in its interpretation of the separation agreement regarding the

Retirement Plan.

With regard to the Disability Plan, the record does not contain an information booklet for the Disability Plan comparable to Petitioner's Exhibit 1. Judging from its name, the Disability Plan's benefits are limited to disability, though the record does not show they are substantively different from the disability benefits under the Retirement Plan. Whether the Disability Plan was in existence when the parties executed the separation agreement is uncertain.

As referenced earlier in the factual background of this opinion, Lamont's counsel conceded in the district court that her client's disability benefits generally were provided under the retirement plan. If this is taken as a factual stipulation, it is arguable that Lamont may not now maintain that the Disability Plan benefits are substantively different from the disability benefits under the Retirement Plan. See *C.M. Showroom, Inc. v. Boes*, 23 Kan. App. 2d 647, 649, 933 P.2d 793 (1997) (a party is bound by counsel's stipulation of fact).

Moreover, published cases seem to confirm Lamont's counsel's concession. For example, the Fifth Circuit Court of Appeals described the plans as follows:

> "In July 1993, the NFL Management Council and the NFL Players Association entered into a collective bargaining agreement ('CBA') that increased player benefits and restructured existing benefits plans. The Bell Plan was merged with the Pete Rozelle NFL Player Retirement Plan to form the Bert Bell/Pete Rozelle NFL Player Retirement Plan (the 'Bell/Rozelle Plan'). . . . The CBA also required the NFL to create the new NFL Player Supplemental Disability Plan (the 'Disability Plan'). The Disability Plan provided the bargained-for benefits increase, paying additional disability benefits to certain disabled players. The Disability Plan apparently came into existence only because, owing to IRS regulations, the NFL could not offer under the existing Bell/Rozelle Plan all the player benefits resulting from the CBA. The Disability Plan pays benefits only to players

> who . . . *were already entitled to receive benefits* under the Bell/Rozelle Plan." (Emphasis added.) *Dial*, 174 F.3d at 609.

The United States Court of Appeals for the Third Circuit provided a similar account, stating after a description of the Retirement Plan, that a player qualifying under certain of its provisions "is automatically entitled to an additional monthly benefit under the *NFL Player Supplemental Disability Plan*[, t]he purpose of [which] is to provide additional disability benefits to certain players who also receive total and permanent disability benefits under the *Player Retirement Plan*." *Courson v. Bert Bell NFL Player Retirement Plan*, 214 F.3d 136, 140 (3d Cir. 2000).

And if we were only to consider the record on appeal, which does not unambiguously show that the Disability Plan was in existence when the parties divorced in 2005, the Fifth Circuit has treated Disability Plan benefits as the marital property of a player who divorced before the plan's creation. *Dial*, 174 F.3d at 613. Under these circumstances, the court reasoned that the creation of the Disability Plan did not change "the fact or existence of the disability benefit, but merely the benefit's payment size and the source from which the payments came." 174 F.3d at 613.

In conclusion, we are persuaded that the Disability Plan was part of Lamont's 401k, pension plan, or other retirement programs in existence through the NFL due to his participation in the NFL when the parties executed the separation agreement. Given the plain language of the settlement agreement, the Retirement Plan QDRO and the later Disability Plan QDRO dealt with property that Lamont and Lynne agreed was marital property subject to division. Lamont does not show the district court erred in approving the Disability Plan QDRO.

Affirmed.