NOT DESIGNATED FOR PUBLICATION

No. 92,807

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

JENNY ANN HAYNES,
Appellant,

and

WILLIAM MARTIN HAYNES,
Appellee.

MEMORANDUM OPINION

Appeal from Johnson District Court; GERALD T. ELLIOTT, judge. Opinion filed July 15, 2005. Reversed and remanded with directions.

Louis S. Wexler, of Louis S. Wexler, P.A., of Overland Park, for appellant.

William Colvin, of the Law Office of William Colvin, of Leawood, for appellee.

Before ELLIOTT, P.J., MARQUARDT and McANANY, JJ.

Per Curiam: Jenny Ann Haynes appeals from the denial of her motion to amend an apportionment order.

Jenny and her former husband, William Martin Haynes, were married on September 5, 1970. Their divorce action was filed in 1992. An issue at trial was the value of William's retirement benefit with the federal government where he had been employed as an air traffic controller for many years. William started working for the Federal Aviation Administration after the parties married. He continued to work there for 19 ½ years through the remainder of the marriage. William testified that the present value of his retirement annuity was $135,000. Neither party calculated what William's monthly retirement benefits would be as of the time of the divorce. William testified that if he continued working until his normal retirement date at age 56 in 2000 he would receive $1,950 per month. Following a trial, the district court's ruling was memorialized in a journal entry on August 2, 1993, which stated:

> "The petitioner is awarded one half of the retirement benefit payable to respondent, to a maximum of $975.00 per month, *before taxes*, to be paid monthly when said benefits are payable to respondent. The parties shall

prepare a separate qualified domestic relations order to implement this portion of the award." (Emphasis added)

As directed by the court, the parties submitted to the court, and the court entered, an apportionment order for William's civil service retirement benefit. The order, filed August 20, 1993, provided:

"Jenny Haynes is entitled to a pro rata share of William M. Haynes[']*net* annuity under the civil service retirement system. The marriage began on September 5, 1970. The marriage ended on June 11, 1993. The United States Office of Personnel Management is directed to determine the amount of Jenny Haynes[']share as of the date of this Order and not to apply COLA's to that amount.

. . . .

"The Court shall retain jurisdiction to amend this Order only for the purpose of establishing or maintaining this Order as a[n] approved apportionment Order; and the Court may amend this Order to revise or conform its terms so as to effectuate the Decree of Divorce." (Emphasis added.)

In 1998, Jenny moved to modify the apportionment order to include a surviving spouse benefit that would extend her monthly payments beyond William's death, should

she survive him. She also sought a provision for periodic cost of living allowance (COLA) adjustments to her share of the retirement benefits. William conceded the issue of the surviving spouse benefit but contested the change regarding COLAs. The district court amended the apportionment order to permit Jenny to negotiate a surviving spouse benefit, provided she pay the annuity costs for extending her benefits beyond William's death. The court denied her request for COLA adjustments.

An amended apportionment order reflecting this change was entered. The amended order repeated the language in the original apportionment order that Jenny was entitled to a pro rata share of William's "net monthly annuity" and the reference to the court's ongoing jurisdiction over the terms of the order.

In neither the court's original decree, the original apportionment order, nor the amended apportionment order was there a clear statement of the amount of benefits Jenny could expect to receive upon William's retirement. William retired in January 2000 and the parties began receiving retirement benefits. Jenny's share was only $293 per month, not the $975 she expected. This discrepancy in the amount of her monthly benefit can be explained by three factors.

First, Jenny elected to receive a survivor annuity which reduced her monthly benefit by $239.

Second, the $975 described at trial was one-half of William's ultimate retirement benefit based upon him continuing to work for the F.A.A. for an additional 6 ½ years following the divorce. The apportionment orders contain "pro rata" language that was not contained in the original decree. Nevertheless, this was wholly appropriate since the role of the district court was to divide the marital property, not property that William later would generate through his individual efforts after the marriage had ended. The marital portion of William's retirement benefit represented 19 ½ years of employment out of the 26 years he worked for the F.A.A. Thus, prorating William's total retirement benefit to exclude the portion that would accrue after the divorce results in Jenny receiving only half of 75% of Williams retirement benefit rather than half of all of it. This reduced Jenny's benefit by about $244 per month.

Third, Jenny's monthly payments are apparently net of taxes, rather than before taxes as the court ordered in its August 2, 1993, journal entry. If we subtract the survivor annuity and pro rata factors from the $975 payment Jenny anticipated, the difference of $492 is still $199 greater than the $293 Jenny receives. This $199 may simply be the taxes withheld on her monthly benefit. If taxes are computed based upon the value of her

monthly payment ($293) and the value of her survivor annuity ($239), the $199 represents about 27% of the $731 total, which is within the possible range of amounts that might be withheld for taxes.

Jenny moved to amend the apportionment order to restore her share of the retirement benefits to pretax monthly distributions on half of William's entire pension benefit, rather than an after-tax distribution of a pro rata share. Following a hearing, the court dismissed the motion without prejudice after finding that the court was without jurisdiction to amend the apportionment order.

On December 12, 2003, Jenny filed another motion to amend the apportionment order. She noted the specific language in the apportionment orders which she interpreted as allowing the court to retain jurisdiction over the order. She claimed that the requested revisions of the apportionment order were in the nature of an order nunc pro tunc. Following another hearing, the court again overruled the motion based upon four findings and conclusions: (1) the amendments Jenny sought could not be accomplished through an order nunc pro tunc under K.S.A. 60-260(a); (2) Jenny's motion was untimely under K.S.A. 60-260(b); (3) the amended apportionment order is a property distribution order that cannot now be amended; and (4) the court already ruled against Jenny on an earlier motion to include a COLA provision in the apportionment order.

Jenny now appeals. She does not argue item (4) of the court's order, so we will consider only the other aspects of the district court's ruling.

Continuing Jurisdiction

We first consider the district court's ruling (3) on the nature of the apportionment order. This is an issue over which we have de novo review. While it is true, as stated in *In re Marriage of Boldridge*, 29 Kan. App. 2d 581, 582, 29 P.3d 454, *rev. denied* 272 Kan. 1418 (2001), that "[a] court has no continuing jurisdiction to change or modify the division of property after entering an original divorce decree," this is not what Jenny here sought to accomplish. The decree of divorce divided between the parties William's retirement benefit. In order to effectuate that division in a manner that complies with ERISA and that can be readily carried out by the administrator of the employer's benefit plan, the parties typically obtain from the court and provide the plan administrator with a Qualified Domestic Relations Order (QDRO), here denominated an apportionment order. Because changes in the law may affect the manner in which the plan administrator deals with payees, such as the parties here, the apportionment order provided that the court retains jurisdiction to amend the apportionment order. It also reserved to the court the jurisdiction to revise the apportionment order in order to effectuate the terms of the original decree. Jenny did not seek to amend the underlying division of property

contained in the 1993 decree, but rather the apportionment order that is the instrument for effectuating that decree. Thus, the district court has jurisdiction to consider Jenny's requested amendment.

K.S.A. 60-260(b)

We now turn to ruling (2) which relates to K.S.A. 60-260(b). Our review is unlimited in interpreting this statute. *Cooper v. Werholtz*, 277 Kan. 250, 252, 83 P.3d 1212 (2004). However, since the district court has discretion in granting relief under K.S.A. 60-260(b), we will not reverse its ruling absent a showing of abuse of that discretion. *In re Marriage of Hampshire*, 261 Kan. 854, 862, 934 P.2d 58 (1997).

K.S.A. 60-260(b) states:

> "*Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just, the court may relieve a party or said party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under K.S.A. 60-259 (b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct

> of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subsection (b) does not affect the finality of a judgment or suspend its operation. This section does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in K.S.A. 60-309 or to set aside a judgment for fraud upon the court. Writs of *coram nobis*, *coram vobis*, *audita querela*, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in this article or by an independent action."

Jenny claims that the amended apportionment order does not accurately reflect the judgment in the divorce decree and, therefore, relief is warranted pursuant to K.S.A. 60-260(b)(6). If the plaintiff's claim falls within K.S.A. 60-260(b)(6), then the 1-year limitation does not apply, but the claim still must have been made within a reasonable time.

The first five grounds listed in K.S.A. 60-260(b), which are specific, and the more general sixth ground are mutually exclusive. *State ex rel. Secretary of SRS v. Keck*, 266 Kan. 305, 307, 969 P.2d 841 (1998). The upshot of Jenny's claim is that the language in the apportionment order is a mistake. Thus, it falls within the 1-year limitation of K.S.A. 60-260(b)(1). A party cannot use K.S.A. 60-260(b)(6) to circumvent the 1-year limitation of K.S.A. 60-260(b)(1). 266 Kan. at 307. Thus, K.S.A. 60-260(b) is not the appropriate vehicle for relief from a mistake in the apportionment order. The district court did not abuse its discretion in refusing to grant relief on this basis.

K.S.A. 60-260(a)

Gross vs. Net Benefits

Finally, we turn to ruling (1) of the district court: that the amendments Jenny sought could not be accomplished through an order nunc pro tunc under K.S.A. 60-260(a). As before, this issue of legal interpretation is one which we review de novo. *Cooper*, 277 Kan. at 252.

K.S.A. 60-260(a) states:

"*Clerical mistakes.* Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the record on appeal is filed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court."

For guidance on what constitute clerical mistakes we turn to *Book v. Everitt Lumber Co., Inc.*, 218 Kan. 121, 125, 542 P.2d 669 (1975), in which the court stated:

"The general rule in testing clerical errors versus judicial errors is set out in the recent case of *Wallace v. Wallace*, 214 Kan. 344, 520 P.2d 1221 [(1974)]. A *nunc pro tunc* order may not be made to correct a judicial error involving the merits, or to enlarge the judgment as originally rendered, or to supply a judicial omission, or an affirmative action which should have been, but was not, taken by the court, or to show what the court should have decided, or intended to decide, as distinguished from what it actually did decide. The power of the court is limited to making the journal entry speak the truth by correcting clerical errors arising from oversight or omission and it does not extend beyond such function. [Citation omitted.]"

In *Mathey v. Mathey*, 175 Kan. 446, 264 P.2d 1058 (1953), *overruled in part on other grounds by Garver v. Garver*, 184 Kan. 145, 149, 334 P.2d 408 (1959), the district

court did not err in issuing a nunc pro tunc order specifying the amount of alimony awarded to the wife when previous journal entries did not accurately reflect the amount of the judgment to be considered alimony. The court observed:

> "If the journal entry fails to accurately reflect the judgment actually rendered it is the duty of the court to make it speak the truth [citations omitted] and that may be done after the term in which the judgment is rendered [citations omitted] even though it be fifty-five years thereafter. [Citations omitted.]" *Mathey*, 175 Kan. at 450-51.

The court further stated:

> "Briefly stated, the purpose of a *nunc pro tunc* order is not to change or alter an order or judgment actually made. In other words its function is not to make an order now for then, but to enter now for then an order previously made. [Citations omitted.]" 175 Kan. at 451.

In *Wallace v. Wallace*, 214 Kan. 344, 520 P.2d 1221 (1974), the district court entered an order nunc pro tunc changing what had originally been denominated alimony in the court's decree to a sum to be treated as part of the division of property, reasoning that the award was really a division of property that was structured as alimony for tax

purposes. On appeal, the husband successfully claimed that the district court did not have jurisdiction to change the award. 214 Kan. at 344-45, 349.

In reversing the district court, the supreme court noted:

> "The purpose of a *nunc pro tunc* order is to provide a means of entering the actual judgment of the trial court which for one reason or another was not properly recorded. The right to make the order is based on the failure to accurately record the court's decision." 214 Kan. at 348-49.

Jenny directs our attention to *In re Marriage of Allen*, 343 Ill. App. 3d 410, 798 N.E.2d 135 (2003), a persuasive case which presents facts close to those now before us. In *Allen*, the divorce decree ordered that husband's pension fund be divided using a specific formula. The QDRO entered to implement the judgment used a different formula, resulting in wife receiving less in benefits. Wife filed a motion to amend the QDRO to reflect the formula used in the judgment. The district court allowed the amendment. On appeal, the court found that the trial court had jurisdiction to amend the QDRO. In making this determination, the court stated:

> "The amendment to the QDRO changed the formula to conform to the judgment. This change did not impose new or different obligations on the parties. The rights and obligations of the parties vested when the judgment

> became final. [Citation omitted.] The amendment to the QDRO was necessary to enforce the petitioner's rights and obligations with respect to the pension. Since the amended order only enforced the provisions of the judgment, the court had jurisdiction to make the modifications." 343 Ill. App. 3d at 413.

In the case before us, the change from a "before taxes" distribution in the August 2, 1993, journal entry to a net distribution in the apportionment orders is the result of a clerical mistake that satisfied the standards of K.S.A. 60-260(a). Counsel for the parties used a form of apportionment order that apparently was acceptable to the plan administrator. The form referred to a net distribution rather than a pre-tax gross distribution. Counsel simply failed to catch this language in the form and to change it to "before taxes" as directed by the court.

The insertion of the word "net" instead of the word "gross" in the apportionment order was a clerical mistake that may be corrected by an order nunc pro tunc. Because, as stated in *Mathey*: "If the journal entry fails to accurately reflect the judgment actually rendered it is the duty of the court to make it speak the truth," we remand for the district court to correct the apportionment order in this respect pursuant to K.S.A. 60-260(a). 175 Kan. at 450-51.

Pro Rata

We reject Jenny's claim that insertion of the reference to a pro rata distribution in the apportionment orders was also a clerical mistake. The district court did not award Jenny half of William's $1,950 retirement benefit that would accrue on the date of his retirement, 6 ½ years after the divorce. The court had no authority to do so under K.S.A. 60-1610(b)(1) or K.S.A 23-201(b). Since the court could not determine from the evidence how much of the $1,950 would be attributable to William's post-divorce employment, the court awarded Jenny half of Williams retirement benefit "to a maximum of $975.00 per month." The calculation of Jenny's share in the retirement benefit required the pro rata formula specified in the apportionment orders. Inclusion of that reference was not a clerical mistake. Jenny is not entitled to an order nunc pro tunc with respect to the pro rata language in the apportionment orders.

Finally, we were surprised to learn in oral argument that no information has been obtained with which to determine exactly what deductions have been made from William's gross pension benefit to arrive at the current distributions. The parties agree that William's gross pension benefit at the time of retirement was to be $1,950. Jenny is entitled to know if that amount is accurate and, if not, what the gross amount is and what occurred after the divorce to reduce this amount from $1,950. Further, she is entitled to

know what deductions from that gross amount have been made that result in her current $239 monthly benefit. On remand, the district court should direct William to take prompt action, with Jenny's cooperation, to obtain this information and disclose it to Jenny.

Reversed and remanded for entry of an order nunc pro tunc consistent with this opinion.