

NOT DESIGNATED FOR PUBLICATION

No. 95,900

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

HENRY WILLIAM LANGE,
Appellee,

v.

NINA LOUISE LANGE,
Appellant.

MEMORANDUM OPINION

Appeal from Atchison District Court: PHILIP C. LACEY, judge. Opinion filed February 23, 2007. Reversed and remanded with directions.

Gerald R. Kuckelman, of Garrity & Kuckelman, of Atchison, for appellant.

Edward S. Dunn, of Holton, for appellee.

Before RULON, C.J., GREENE and HILL, JJ.

Per Curiam: Petitioner Henry Lange and Respondent Nina Lange were granted separate maintenance as to their property in order to resolve disputes regarding which of

their children should receive certain real property when Petitioner and Respondent died. After Petitioner's death, Respondent filed spousal claims against Petitioner's estate. Petitioner's executor filed a motion asking the district court to issue a nunc pro tunc order stating the decree of separate maintenance severed Petitioner's and Respondent's rights of inheritance from each other. The order was issued and Respondent appealed. We reverse.

In 2000, Petitioner filed a petition for separate maintenance requesting the district court equitably divide all property owned by Petitioner and Respondent. At a hearing on the matter, Petitioner testified he was 94 years old and he and the Respondent had been married for 65 years. Petitioner testified he was seeking separate maintenance, not to actually separate from Respondent, but because Respondent was withholding permission to make certain transactions relating to their family farm. Respondent testified she was refusing permission because Petitioner was essentially giving all of their property to their son, Leonard Lange, who was involved in the family farming business. The Respondent testified she felt that some of the property should go to their other children as well. The district court granted the decree of separate maintenance, which stated the property at issue was to be given to Respondent and Petitioner as "Tenants in Common, not as Joint Tenancy."

In 2003, a nunc pro tunc order was issued, at the request of the parties, setting out descriptions of the real estate included in the separate maintenance order. This order provided the real property owned by the parties was awarded to the parties as tenants in common, not in joint tenancy.

Petitioner died on April 2, 2005. Shortly thereafter, Respondent filed a claim for spousal allowance, homestead allowance, and a demand against the estate. Acting as the executor for Petitioner's estate, Leonard filed a motion seeking a second nunc pro tunc order clarifying the decree of separate maintenance to specifically state that Petitioner and Respondent had no right to inherit from each other. The district court granted the order.

We conclude the district court erred when entering the second nunc pro tunc order. This case is controlled by *Linson v. Johnson, Executrix*, 1 Kan. App. 2d 155, 563 P.2d 485 (1977), *aff'd* 223 Kan. 442, 575 P.2d 504 (1978). In *Linson*, a married couple filed for divorce. The district court denied the divorce and instead granted a decree of separate maintenance. When the husband died a few years later, the wife filed her election as a surviving spouse. The couple's daughter, who was to receive the husband's assets under a will, objected asserting the separate maintenance decree cut off the wife's right to inherit from her husband. 1 Kan. App. 2d at 155-57. In *Linson*, the separate maintenance decree at issue, similar to the one at issue in this case, did not address rights of inheritance

specifically, but did provide that the real property of the couple was to be vested in each of them as tenants in common. 1 Kan. App. 2d at 156. The *Linson* court concluded the separate maintenance decree was not sufficient to terminate the wife's right of inheritance.

"Nothing in the decree of separate maintenance indicates any clear intent of the trial court at that time to terminate rights of inheritance by either of these parties in the estate of the other, and we hold that . . . [wife's] right to inherit from the estate of her deceased husband was not barred by the decree of separate maintenance" 1 Kan. App. 2d at 162-63.

Here, there is no evidence the district court intended to terminate Respondent's right to inheritance at the time the decree was entered. As such, the second nunc pro tunc order was a modification of the decree as opposed to a mere clarification, and was therefore improper.

We reverse and remand with directions that the district court vacate the second nunc pro tunc order.