NOT DESIGNATED FOR PUBLICATION

No. 96,259

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

STEPHANIE KAY AWTREY,
Appellee,

and

CARY EUGENE AWTREY,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; TERRY L. PULLMAN, judge. Opinion filed April 6, 2007. Reversed and remanded with directions.

Charles F. Harris, of Kaplan, McMillan and Harris, of Wichita, for appellant.

Ross D. Alexander, of Wichita, for appellee.

Before MARQUARDT, P.J., PIERRON, J., and KNUDSON, S.J.

Per Curiam: Cary Awtrey appeals the trial court's division of assets in a divorce proceeding. We reverse and remand with directions.

Stephanie Kay and Cary Awtrey were married in 1992. Prior to their marriage, the parties signed a prenuptial agreement.

The prenuptial agreement stated, *inter alia:*

"1. Each party hereby waives, releases, and relinquishes any and all claims and rights of every kind nature or description that he or she may acquire by reason of the marriage in the other person's property or estate under the present or future laws of the state of Kansas or any other jurisdiction . . . .

. . . .

"3. Each party during his or her lifetime shall keep and retain sole ownership control enjoyment of all of his or her property real and personal free of any claim of the other.

"4. Each party acknowledges that the other has made full disclosure of his or her means and resources and that he or she is entering into this agreement freely, voluntarily, and with full knowledge.

. . . .

"6. This agreement contains the entire understanding of the parties. There are no representations, warranties, or promises other than those expressly set forth herein.

. . . .

"I, Cary Awtrey, with certain property that I am bringing into the marriage both real and personal is identified as follows:

"1. Home located at R.R. 1, Box 127 C, Augusta, KS 67010.

"2. Any bank accounts or retirement accounts in my name.

"3. One means of transportation.

"In the event of divorce, I am entitled to the real estate listed above. I am also entitled to one half of the equity plus $6,500.00 which represents the equity in the property prior to the marriage.

. . . .

"I, Stephanie Clutter, with certain personal property that I am bringing into the marriage is identified as follows:

"1. Any bank accounts or retirement accounts in my name.

"2. One means of transportation.

"I, Stephanie Clutter, will retain this property in the event of a divorce. I am also entitled to one half of the equity in the real property listed above, less $6,500.00 which represents the equity in the property prior to the marriage."

"I wish to and understand that by signing this prenuptial agreement, that I am deciding on how various real and personal property shall be divided upon when and if a divorce occurs between the parties."

The prenuptial agreement did not include a list of assets or liabilities; however, the parties stated that each had made full disclosure of "his or her means and resources."

Stephanie filed a petition for divorce in 2005. In the decree of divorce, the trial court

designated the parties' retirement accounts as premarital property not subject to division by the trial court. The remainder of the parties' assets and debts was divided by the trial court.

Prenuptial Agreement

Cary argues that the trial court performed a de facto reformation of the prenuptial agreement when it divided the martial property. "The interpretation and legal effect of written instruments are matters of law, and an appellate court exercises unlimited review. Regardless of the construction given a written contract by the trial court, an appellate court may construe a written contract and determine its legal effect. [Citation omitted.]" *Unrau v. Kidron Bethel Retirement Services, Inc.*, 271 Kan. 743, 763, 27 P.3d 1 (2001).

If a contract has clear and definite language, it should be applied as written. See *Decatur County Feed Yard, Inc. v. Fahey*, 266 Kan. 999, 1005, 974 P.2d 569 (1999).

"Antenuptial [prenuptial] agreements are generally looked upon by the courts with favor, and are to be liberally interpreted to carry out the intentions of the persons engaging in them." *Boxberger v. Cotten, Executor*, 206 Kan. 456, Syl. ¶ 2, 479 P.2d 869 (1971).

During the pendency of the divorce, Stephanie filed a pretrial motion asking the trial

court to find that "the Prenuptial Agreement entered into between the parties is clear and unambiguous in addressing only bank accounts, retirement accounts and one means of transportation owned when the parties were married." Cary also filed a motion claiming that the prenuptial agreement is unambiguous. The trial court agreed and stated: "I . . . will deem all accumulated retirement assets premarital property under the prenuptial agreement and take them off the table for division in the divorce."

The trial court did not designate any other property that was to be set aside to each party under the prenuptial agreement. Cary appeals.

The questions in this appeal are: What assets should have been set aside to each party before the trial court made a division, and what is left for the trial court to divide?

"One Means of Transportation"

The prenuptial agreement stated that each party was to receive "[o]ne means of transportation." The value of the vehicles owned by the parties prior to their marriage is not included in the record on appeal. Stephanie testified that she had a white two-door car and Cary had a Chevy Blazer. At the time of the divorce, the parties owned a 2003 Saturn, a 1993 GMC pickup, and a 2000 BMW. Stephanie testified that the value of the GMC pickup

was comparable to the value of the Chevy Blazer Cary owned before the marriage. The trial court awarded Stephanie the Saturn and Cary the GMC pickup and BMW. Cary was awarded the BMW as an offset of his equity in the house.

Cary claims that he should have been given the right to choose which vehicle he wanted as his "[o]ne means of transportation." The prenuptial agreement did not state that the party would be able to choose. Since the method of selecting "[o]ne means of transportation" was not designated in the agreement, we cannot say that the trial court abused its discretion by awarding Cary the GMC pickup. Such a designation by the trial court, however, does not affect the fact that the Saturn and GMC pickup should not have been included in the marital assets to be divided by the trial court, and the court erred in doing so.

Real Estate

Before marriage, Cary owned a house at R.R. 1, Augusta, Kansas, that was listed in the prenuptial agreement. During the marriage, the parties sold Cary's house at R.R. 1 and purchased a house at 1331 Aldrich Drive in Andover. At the time of the divorce, the parties had $73,232 net equity in their house at 1331 Aldrich Drive. The trial court awarded Stephanie the house at Aldrich Drive as part of the division of property.

Cary filed a motion to alter the judgment, asking the trial court to award him equity of $43,387.50 in the house, which he claimed he was entitled to under the terms of the prenuptial agreement. The trial court denied the motion and found that "by transferring a part of the equity from his original premarital residence into the marital residence at 1331 Aldrich, Andover, Kansas that is being awarded to the Petitioner, the Respondent altered the terms of the prenuptial agreement as to that portion of the equity in the premarital residence."

Cary argues on appeal that the trial court abused its discretion by awarding more equity in the home to Stephanie.

Even though the prenuptial agreement did not state that real estate acquired with proceeds from the sale of the R. R. 1 house should be considered outside of the division of assets by the trial court, we find that the clear intent of the agreement was for Cary to receive the first $6,500 of the equity and the remainder of the equity was to be divided equally between the parties. Therefore, the trial court's conclusion that Cary was not entitled, by contract, to $6,500 plus half of the equity in the 1331 Aldrich house at the time of the divorce was erroneous.

Individual Bank Accounts

The prenuptial agreement stated, *inter alia,* that each party was to receive bank

accounts in that party's name. The trial court erred when it included the parties' individual bank accounts in its division of property.

Division of Property Outside of the Prenuptial Agreement

K.S.A. 60-1610(b)(1) enumerates several factors the trial court must consider when dividing property upon divorce:

> "In making the division of property the court shall consider the age of the parties; the duration of the marriage; the property owned by the parties; their present and future earning capacities; the time, source and manner of acquisition of property; family ties and obligations; the allowance of maintenance or lack thereof; dissipation of assets; the tax consequences of the property division upon the respective economic circumstances of the parties; and such other factors as the court considers necessary to make a just and reasonable division of property."

It is true that the trial court has discretion over the division of property; however, that discretion does not extend to items covered by a prenuptial agreement.

If the assets subject to the prenuptial agreement are deleted from the assets subject to division, there is a much different result than that awarded by the trial court. Because of the

unambiguous prenuptial agreement, the only items left for division by the trial court are joint bank and credit card debts, and jointly owned personal property, which includes the BMW, not covered by the prenuptial agreement. The trial court needs to make the division of the assets fair, just, and equitable without figuring in the assets that are subject to the prenuptial agreement. The case is remanded to the trial court for a determination of these issues.

Reversed and remanded with directions consistent with this opinion.