NOT DESIGNATED FOR PUBLICATION

No. 97,123

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of the Marriage of

KAREN S. WOOD,
Appellee,

and

DANIEL A. WOOD,
Appellant.

MEMORANDUM OPINION

Appeal from Miami District Court; RONALD D. INNES, judge. Opinion filed October 26, 2007. Affirmed.

Ronald W. Nelson and *Joseph W. Booth*, of Nelson & Booth, of Shawnee Mission, for appellant.

Scott H. Kreamer and *Allan E. Coon*, of Norton, Hubbard, Ruzicka & Kreamer L.C., of Olathe, for appellee.

Before MARQUARDT, P.J., BUSER, J., and LARSON, S.J.

Per Curiam: This appeal involves the construction of the terms of a postnuptial agreement involving a 215-acre parcel of real estate located in Linn County, Kansas (Linn County property), which was an issue in contested divorce proceedings where other property rights were divided.

While the facts are well known to the parties, they will be set forth in detail for an understanding of the issues and the result we reach.

Daniel A. Wood and Karen S. Wood were married January 7, 1989. They purchased the Linn County property in April 1990 for approximately $65,000. It is uncontroverted that Daniel provided the funds to purchase the Linn County property with premarital money that he had in a money market account.

On August 29, 1990, Daniel and Karen executed a postnuptial agreement relating to the Linn County property. The agreement was prepared by Daniel's attorney. Karen was advised she had the right to have counsel of her own choice, chose not to do so, and acknowledged in signing the agreement that it was "approved by her as being fair and equitable and not unconscionable."

The first page of the agreement legally described the property and said it had been

"jointly acquired." A "WHEREAS" clause on page 2 stated the following:

"WHEREAS, each of the parties desire for himself or herself, and is willing for the other of them to have, complete freedom in the management, control, enjoyment and disposition of certain present accumulations and, in addition thereto, all the rights, privileges and immunities expressed in this Agreement."

The agreement further stated:

"1. Agreement in the Event of Divorce. In the event of the institution of proceedings subsequent to the marriage of the parties for divorce, dissolution of marriage, legal separation, separate maintenance and/or similar actions, the parties hereto covenant and agree that: (a) Daniel Adair Wood shall receive and retain full ownership of the Subject Real Estate free of any claim of ownership on the part of Karen S. Wood and Karen S. Wood shall relinquish any claim to the Subject Real Estate; (b) Daniel Adair Wood shall be required to pay Karen S. Wood a sum equal to one-half of actual costs of all improvements made to the Subject Real Estate after April 14, 1990; (c) Daniel Adair Wood shall relinquish any claim to any jewelry acquired by the parties before or during the marriage; and (d) No other marital rights shall be affected by this Agreement (e) that the parties acknowledge that Daniel Wood had over $65,000 in premarital cash that he used to purchase said realty."

Karen filed for divorce in November 2004 requesting an equal division of the parties' real and personal property and indebtedness. She listed the Linn County property as a marital asset in her domestic relations affidavit. Daniel answered and asserted the applicability of the postnuptial agreement that addressed the division of certain property between the parties.

In February 2005, Daniel asked the court for summary judgment holding the Linn County property be set aside in its entirety to him and that Karen be awarded her jewelry and one-half of the actual costs expended in improving the Linn County property. Karen first argued the postnuptial agreement should be invalidated because she had not freely and voluntarily executed the agreement and Daniel had used duress and undue influence to obtain her signature. Karen later withdrew these defenses and acknowledged she was no longer alleging duress and undue influence.

However, Karen contended the postnuptial agreement contained no provision relating to the appreciation of the Linn County property and argued that any appreciation in property that occurs during a marriage is divided between the divorcing parties. Karen further argued that postnuptial agreements must be fair, just, and equitable. Karen maintained that to allow Daniel to have the entire value of the Linn County property and to exclude the entire value from consideration when dividing the marital estate would not

meet the fair, just, and equitable test. To the contrary, Daniel maintained that the postnuptial agreement was fair at its inception and that the Linn County property should be set aside to him.

In October 2005, the trial court ruled that the parties' postnuptial agreement was a valid contract and would be upheld. The trial court awarded the jewelry referenced in the postnuptial agreement and one-half of the actual costs of improvements to the Linn County property to Karen. And, the trial court awarded the Linn County property in its entirety to Daniel. The trial court noted that if the case proceeded to trial and it was "required to review the relative placement of the parties with respect to their earning potential and their assets, these items need to be on each party's balance sheet." In response to a question from Karen's counsel, the trial court confirmed that the value of the Linn County property would need to be under Daniel's column in the balance sheet and that the value of the jewelry and one-half of the improvements would need to be under Karen's column.

Daniel moved for clarification, contending that because the postnuptial agreement had been upheld in its entirety, the Linn County property was nonmarital property with no value assigned to him. Daniel's motion was denied with the court stating that any clarification would be an advisory opinion which is prohibited.

The divorce case was tried in February 2006 before a different trial judge. At trial, both parties argued that the postnuptial agreement was unambiguous. Daniel contended that under the postnuptial agreement, the Linn County property was to be set aside to him free from any claim by Karen. Karen argued that under the postnuptial agreement, the Linn County property was to be set aside to Daniel but that the value of the property was to be considered when dividing the parties' marital property. Before the parties presented any evidence, the trial court agreed the agreement was unambiguous and held the Linn County property should be set aside to Daniel. The trial court indicated that $65,000 of the value of the property would be given to Daniel but that the appreciated value of the property would be subject to division.

Karen presented evidence of the significant increase in the value of the Linn County property from the date of purchase to the time of the divorce. There was expert testimony that the present market value of the property was $400,000. There was also testimony of a February 2006 offer to purchase the property with closing within 30 days for $400,000. Karen testified the value of her jewelry was $1,900. Daniel presented evidence he had spent $5,000 on the jewelry, and he estimated the present value of the jewelry was $10,000.

Evidence presented showed that since the purchase, Daniel had built a cabin and a

dock and had installed some fencing on the Linn County property. Moreover, a lake had been dug on the property. Daniel submitted evidence that the total actual costs of the improvements to the property were $85,466. Karen's evidence estimated the total actual costs of the improvements to be $114,930.

In rendering a decision, the trial court repeated its earlier finding that the postnuptial agreement was not ambiguous. It further stated:

> "It is clear that the general intent of the agreement was to exclude as marital assets, in the event of divorce, etc., certain property. It precluded [Karen] from claiming, in the event of divorce, etc., any ownership interest in the Linn County acreage purchased or to be purchased by the parties and the Respondent from claiming any interest in or to [Karen's] jewelry. It is the further judgment of the Court that the parties' intent was to permit [Daniel] to retain and exclude as marital property the land costs of $65,000 and his one-half of the cost of improvements. The agreement further anticipated that if a divorce, etc. occurred [Daniel] could acquire [Karen's] contribution to the improvement of the property by paying her for one-half of the costs of improvements."
>
> "The Court finds that agreement does not specify whether the appreciation of the value of the property in the event of divorce, etc. is to be considered marital property. Because Paragraph 1 (d) provides that no other marital rights shall be affected by the agreement, it is the judgment of the

> Court that the provisions of K.S.A. 60-1610(b) are applicable. Accordingly, the Court concludes that the appreciation must be treated as marital property and subject to division under that section."

The court set up the valuation date for all the marital property at the time the divorce was filed and discounted the value of the Linn County property to $395,000 on the date of filing. The court found the total cost of improvements made to the Linn County property was $95,000 and that Karen was entitled to one-half of that amount or $47,500.

The trial court divided the remaining marital assets of the parties mostly as the parties proposed with no consideration of brokerage fees or tax liabilities as neither party was liquidating any of the assets. In the ultimate division of the property, the trial court awarded all of the market appreciation of the Linn County property to Daniel ($395,000 value less $95,000 improvements and premarital land cost of $65,000 or $235,000). Daniel was awarded other assets resulting in the award of property valued at $240,834 less liabilities of $1,614 for a net award of $239,220.

Karen was awarded Miami County real property with a stipulated value of $276,500 less debt of $99,333 for a value of $177,167. She was awarded other assets resulting in a total award to her of property valued at $286,692.

In order to balance the property division and make it an equal division of assets between the parties, Daniel was credited with and allowed to retain the $47,500 which he owed to Karen under the postmarital agreement for the cost of improvements to the Linn County property. This resulted in Daniel receiving property with a net value of $286,720 and Karen receiving property with a net value of $286,692.

From this decision, Daniel has appealed.

Daniel focuses on the wording of the postnuptial agreement that he "shall receive and retain full ownership of [the Linn County property] free and clear of any claim of ownership" in Karen and that Karen "shall relinquish any claim to [the Linn County property]" as requiring him to receive title, possession, and any value of the Linn County property subject only to Karen's reimbursement of one-half of the cost of improvements thereto.

Karen contends the trial court correctly construed the postnuptial agreement as unambiguously preserving her right to a just and equitable allocation of all marital property which includes the appreciation in value of the Linn County property. Karen further argues that if the agreement is construed as Daniel requests, the division of the parties' marital property will no longer be just and equitable as required by K.S.A. 60-

1610(b)(1).

The standards of review in this case are those involving the interpretation of the provisions of a postnuptial agreement as well as a judgment adjusting the property rights of parties involved in a divorce action.

We must view the postnuptial agreement as we are taught by Short, Settlement Agreements, Practitioner's Guide to Kansas Family Law, § 8.1 (Kan. Bar Ass'n [1997 edition]) that

> "any postnuptial agreement . . . which is presented for judicial approval in a divorce or separate maintenance action will be treated as a separation agreement and tested for 'valid, just and equitable' characteristics, even though the agreement was entered into many years earlier and long before any actual separation."

The same standard was stated in *Ranney v. Ranney*, 219 Kan. 428, Syl. ¶ 1, 548 P.2d 734 (1976), in the following wording:

> "[C]ontracts, made either before or after marriage, the purpose of which is to fix property rights between a husband and wife, are to be liberally interpreted to carry out the intentions of the makers, and to uphold such

> contracts where they are fairly and understandingly made, are just and equitable in their provisions and are not obtained by fraud or overreaching."

The primary rule for interpreting written instruments is to ascertain the parties' intent. When a contract is clear and unambiguous, the parties' intent is determined from the language of the contract without applying rules of construction. *Anderson v. Dillard's, Inc.*, 283 Kan. 432, 436, 153 P.3d 550 (2007). The interpretation and legal effect of written instruments are matters of law over which an appellate court exercises unlimited review. *Davis v. Miller*, 269 Kan. 732, 738, 7 P.3d 1223 (2000). "Regardless of the construction given a written contract by the district court, an appellate court may construe a written contract to determine its legal effect. [Citation omitted.]" *Unrau v. Kidron Bethel Retirement Services, Inc.*, 271 Kan. 743, 763, 27 P.3d 1 (2001).

Because the parties both point to particular phrases as evidencing the result we should reach, we must remember that

> "[a]n interpretation of a contractual provision should not be reached merely by isolating one particular sentence or provision, but by construing the entire instrument from its four corners. The law favors reasonable interpretations, and results which vitiate the purpose of the terms of the agreement to an absurdity should be avoided. [Citation omitted.]" *Johnson County Bank v. Ross*, 28 Kan. App. 2d 8, 10-11, 13 P.3d 351 (2000).

In looking at this appeal as one involving the distribution of property in a divorce,

> "'[T]he rule in Kansas is that in divorce cases the trial court is vested with broad *discretion* in adjusting property rights. [Citations omitted.] That rule applies in cases where a separation agreement is submitted to the district court for approval. [Citations omitted.]" *In re Marriage of Kirk*, 24 Kan. App. 2d 31, 35-36, 941 P.2d 385, *rev. denied* 262 Kan. 961 (1997).

In the decision below, the trial court determined that the postnuptial agreement was not ambiguous. In addition, although the parties argue different interpretations of the postnuptial agreement, both Daniel and Karen maintain that the agreement is unambiguous.

We have previously set forth in its entirety paragraph 1 of the postnuptial agreement which we now repeat to analyze its provisions. It reads as follows:

> "In the event of institution of proceedings subsequent to the marriage of the parties for divorce, dissolution of marriage, legal separation, separate maintenance and/or similar actions, the parties hereto covenant and agree that: (a) Daniel Adair Wood shall receive and retain full ownership of the Subject Real Estate free of any claim of ownership on the part of Karen S. Wood and Karen S. Wood shall relinquish any claim to the Subject Real Estate; (b) Daniel Adair Wood shall be required to pay Karen S. Wood a sum equal to one-half of actual costs of all improvements made to the

> Subject Real Estate after April 14, 1990; (c) Daniel Adair Wood shall relinquish any claim to any jewelry acquired by the parties before or during the marriage; and (d) No other marital rights shall be affected by this Agreement; and (e) that the parties acknowledge that Daniel Wood had over $65,000 in premarital cash that he used to purchase said realty."

When we look at the wording of subparagraphs (a) and (c) it seems clear that in a divorce, Daniel is to receive ownership of the Linn County property and has given up any claim to any jewelry acquired by either Daniel or Karen before or during the marriage. Karen is obligated by subparagraph (a) to relinquish any claim to the Linn County property but the agreement is silent as to whether it covers the value of the Linn County property in the event of a divorce of the parties.

The agreement does contain provisions relating to several monetary interests in the property. Subparagraph (b) makes it clear that Karen retains the right to receive a sum of money equal to one-half of the actual cost of all future improvements to the property. This provision, coupled with the language of subparagraph (e) that Daniel used his premarital funds in the amount of $65,000 is significant only if Daniel expected to retain this amount as his separate money in the event the parties divorced. This interpretation is consistent with the language within the "whereas clause" on page 2 of the agreement that each party desired to maintain control of "certain present accumulations."

The language of subparagraphs (b) and (e) appear to require that in a divorce a monetary division of the value of the Linn County property is anticipated with Daniel's $65,000 purchase price being protected and each to receive equal benefit of the improvement costs. However, despite these provisions, they do not in any way contain any agreement about the appreciation to the property.

The explicit language of subparagraph (d) that "[n]o other marital rights shall be affected by this Agreement" clearly reserves in both parties all of their marital rights. This is important to the result we reach as issues relating to marital property and the rights of spouses are controlled by K.S.A. 2006 Supp. 23-201 which in applicable part states:

> "(b) All property owned by married persons, . . . whether described in subsection (a) or acquired by either spouse after marriage, and whether held individually or by the spouses in some form of co-ownership, such as joint tenancy or tenancy in common, shall become marital property at the time of commencement by one spouse against the other of an action in which a final decree is entered for divorce, separate maintenance, or annulment. Each spouse has a common ownership in marital property which vests at the time of commencement of such action, the extent of the vested interest to be determined and finalized by the court, pursuant to K.S.A. 60-1610 and amendments thereto."

Kansas courts have consistently applied K.S.A. 23-201 as creating in each spouse

upon the filing of a divorce action a vested but undetermined interest in all property individually or jointly owned which must ultimately be determined by the trial court pursuant to K.S.A. 60-1610(b). See *Cady v. Cady*, 224 Kan. 339, 344, 581 P.2d 358 (1978) (quoted extensively in *Nicholas v. Nicholas*, 277 Kan. 171, 177-78, 83 P.3d 214 [2004]).

The language of subparagraph (d) had the effect of maintaining Karen's rights under K.S.A. 2006 Supp. 23-201(b) resulting in all property owned by both Daniel and Karen becoming marital property upon the filing of the divorce. The language in subparagraphs 1(a), (b), (c), and (e) controlled Daniel's right to receive full ownership of the Linn County property in a divorce action, preserved his $65,000 initial investment in the property, and required him to pay Karen one-half of the cost of improvements to the property.

But, Karen's right to have the Linn County property to be considered as marital property was clearly maintained by the language of subparagraph (d). The ultimate value of the Linn County property remained a proper subject for consideration in the division of assets as required by K.S.A. 2006 Supp. 60-1610(b)(1).

We will not write into the postnuptial agreement language that is not found therein.

It has been our long time rule that courts may not

> "rewrite a contract or make a new contract for the parties under the guise of construction. *Wood v. Hatcher*, 199 Kan. 238, 428 P.2d 799 (1967). Words cannot be written into a contract which import an intent wholly unexpressed when it was executed. *Duffen v. Patrick*, 212 Kan. 772, 778, 512 P.2d 442 (1973)." *Quenzer v. Quenzer*, 225 Kan. 83, 85, 587 P.2d 880 (1978).

There is no mention of appreciated value in the contract. We will not interpret the agreement to not apply to the substantial increase in the value of the Linn County property over the period of the parties' marriage when the agreement is silent as to how it is to be considered in a divorce action.

We affirm the trial court's construction and interpretation of the postnuptial agreement and hold that appreciation of the Linn County property was correctly considered as marital property subject to division between the parties.

The language of K.S.A. 2006 Supp. 60-1610(b)(1) concerning division of property in a divorce action is extensive but clearly covers all property including that acquired prior to and during the marriage. The factors which are to be considered by the trial court and the result sought to be reached are clearly stated as follows:

> "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 apparent from reading the trial court's decision that the statutory factors were considered and the court (although it did not explicitly say so) found the terms of the postnuptial agreement to be just and equitable.

However, if we interpret the postnuptial agreement as Daniel requests and give him all of the increase in the value of the Linn County property, especially in contravention to the language of subparagraph 1(d) that no other marital rights are to be effected by the agreement, the postnuptial agreement is no longer just and equitable and the division of property made by the court is no longer just and reasonable.

Under our standard of review, the trial court had broad discretion in adjusting the property rights of Daniel and Karen and we are not justified in disturbing the exercise of that discretion absent a clear showing of abuse which has not been shown here. *In re*

Marriage of Wherrell, 274 Kan. 984, 986, 58 P.3d 734 (2002).

For all of the reasons we have stated, the trial court correctly interpreted the postnuptial agreement of the parties and divided their property in a just and reasonable manner.

Affirmed.

MARQUARDT, J.: I respectfully dissent from the majority. The trial court and the majority recognize that Daniel is to have full ownership free and clear of any claim by Karen, and that she also relinquished any claim to the real property.

The majority correctly state that the standard of review for interpretation of postnuptial agreements is to fix property rights and the court is to liberally interpret the contract to carry out the intention of the parties and to uphold the terms of the contract when the contract is fairly and understandingly made. *Ranney v. Ranney*, 219 Kan. 428, Syl. ¶ 1, 548 P.2d 734 (1976).

In addition to the full ownership provision in the postnuptial agreement, the 5th "WHEREAS" paragraph states:

> "[E]ach of the parties desire for himself or herself, and is willing for the other of them to have, complete freedom in the management, control, enjoyment and disposition of certain present accumulations and, in addition thereto, all the rights, privileges and immunities expressed in this Agreement."

Paragraph 1 detailed the disposition of the real property in the event of the filing of a divorce and stated the Daniel would "receive and retain full ownership" and acknowledged that it was Daniel's money that was used to purchase the real estate. Finally, paragraph 6 states:

> "Entire Agreement and Amendments. This Agreement contains the entire Agreement of the parties and there are no representations, warranties, promises, covenants or undertakings, or otherwise, other than those expressly set forth herein. This Agreement shall not be varied in any particular or respect except by a written instrument executed in the same manner and formality as this Agreement is executed."

The majority state that they "will not write into the postnuptial agreement language that is not found therein," however, that is exactly what they are doing. Daniel was granted "full ownership" of the property, Karen "relinquish[ed] any claim" to the property, and the agreement states that it could not be varied except by "written instrument executed in the same manner and formality as this Agreement is executed."

There was nothing to vary the terms of the postnuptial agreement.

Karen granted Daniel "full ownership." Such a declaration in the agreement precludes Karen from asking for and being granted a portion of the appreciated value of the real estate. The trial court had the power to divide all marital property; however, this real property cannot be included in the divisible marital property. Karen gave up the right to any interest in the real property except for her one-half of the costs of the improvements.

The trial court erred in its decision and I would reverse on this issue.