

NOT DESIGNATED FOR PUBLICATION

No. 109,367

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

CAROL EINSEL,  
*Appellant,*

v.

RODNEY EINSEL, individually; NANCY E. HAAS; CHARLENE EINSEL; RODNEY EINSEL, as  
Executor of the Estate of Anna Louise Einsel; *et al.*,  
*Appellees.*

MEMORANDUM OPINION

Appeal from Comanche District Court; E. LEIGH HOOD, judge. Opinion filed May 2, 2014.  
Reversed and remanded with directions.

*John T. Bird and Carol M. Park*, of Glasman, Bird, Schwartz & Park, L.L.P., of Hays, for  
appellant.

*Charles H. Herd*, of Coldwater, for appellee Rodney Einsel.

Before MCANANY, P.J., STANDRIDGE and STEGALL, JJ.

*Per Curiam:* When Carol and Rodney Einsel divorced in 1994, the Ellis County District Court awarded Carol 40 percent of a remainder interest in certain real estate that Rodney had received by inheritance during the marriage. Carol later filed a partition action in Comanche County, alleging that the award entitled her to 40 percent of Rodney's interest in the real property as opposed to a money judgment for the value of the real estate. The district court denied Carol's request for partition, ruling that the award instead entitled her to 40 percent of the value of the property at the time of the divorce, a money judgment in the amount of \$27,521.18. Carol appeals this ruling, claiming the

district court erred in interpreting the Ellis County award. We agree, and therefore we reverse and remand with directions to grant Carol relief on her claim for partition as set forth in her petition.

#### FACTS

Rodney and Carol were married on May 30, 1966. Rodney worked a variety of jobs during the marriage. While Carol worked outside the home at times, she spent most of the marriage as a homemaker.

Rodney's father, Victor Einsel, died on April 7, 1992. Victor's will gave his wife, Anna Lou Einsel, a life estate in his interest in certain real estate in Comanche County and mineral interests in Comanche and Kiowa Counties, with the remainder to his three children (Rodney and his two sisters) in equal shares. Victor's estate was distributed according to his will on January 15, 1993.

Rodney and Carol separated in October 1992. Rodney moved out of the family home and left his job as a real estate broker to work as a cowboy on a ranch. On December 14, 1992, Carol filed a motion for separate maintenance, requesting future support from Rodney. Rodney counter-petitioned for divorce. In 1994, Ellis County District Court Judge Edward E. Bouker granted the parties a divorce and entered orders on child custody, division of property, and an award of monthly maintenance to Carol. Rodney appealed the district court's property and maintenance orders, which were affirmed by this court in *In re Marriage of Einsel*, No. 71,367, unpublished opinion filed May 12, 1995.

Anna Lou died on October 15, 2008, making Rodney's remainder interest from Victor's estate possessory. On January 28, 2010, Carol filed a petition for partition in Comanche County, claiming an undivided 40 percent of the one-third interest in real

estate Rodney inherited from Victor's estate. Carol's claim was based on the following provision in Judge Bouker's journal entry of divorce:

"That [Carol] shall be awarded forty percent (40%) of the remainder interest of the inheritance received by [Rodney] during the marriage, on the condition that [Rodney] may opt to pay [Carol] the sum of \$22,500.00 within six (6) months of the date of hearing, in which case [Rodney] shall receive all of the remainder interest."

Rodney answered, claiming in part that the language in the journal entry was too vague and uncertain to effectively convey an interest in real property. In the alternative, Rodney argued that any interest he acquired was contingent at the time of the divorce, and that Carol's claim should be limited to the value of the remainder interest on the date the journal entry was filed.

Following argument by the parties and a review of the files and documents in the Ellis County divorce case, the district court denied Carol's request for partition and held that she was entitled to a money judgment rather than an interest in real estate. In so doing, the court rejected Rodney's claim that the journal entry was too vague and the interest asserted was too contingent to effectively convey an interest in real property because the property was clearly identified in the Ellis County case file and the parties had stipulated to evidence establishing the value of Rodney's remainder interest in the property to be \$68,802.95. The court construed Judge Bouker's order as awarding Carol a money judgment for 40 percent of this amount, or \$27,521.18, if Rodney did not purchase the full remainder interest back at a discount price of \$22,500 within 6 months. Because Rodney did not purchase the remainder interest from Carol, the district court granted a money judgment to Carol in the full amount of \$27,521.18. Based on oral statements made by Judge Bouker from the bench, the district court held that no interest was due or accruing on the money judgment.

## ANALYSIS

On appeal, Carol argues the district court erred in interpreting the journal entry of divorce by awarding her a money judgment rather than an interest in real property that became possessory following Anna Lou's death. In order to resolve this issue, we must construe Judge Bouker's journal entry of divorce. It is a well-settled rule of law that the interpretation and effect of written instruments are matters of law over which an appellate court exercises unlimited review. *National Bank of Andover v. Kansas Bankers Surety Co.*, 290 Kan. 247, 263, 225 P.3d 707 (2010). Thus, we have the same authority as the district court to construe the following provision in the journal entry of divorce:

"That [Carol] shall be awarded forty percent (40%) of the remainder interest of the inheritance received by [Rodney] during the marriage, on the condition that [Rodney] may opt to pay [Carol] the sum of \$22,500.00 within six (6) months of the date of hearing, in which case [Rodney] shall receive all of the remainder interest."

From this provision, we conclude Judge Bouker intended to award Carol an interest in real property, conditioned on Rodney's failure to pay her a lump sum of cash within 6 months of the order. Although both parties support their respective positions by citing various oral statements made by Judge Bouker when he initially announced his decision from the bench, there simply is no indication in the subsequent written journal entry that Judge Bouker intended the award to be a monetary judgment. And, of course, it is the written journal entry that controls. See K.S.A. 2013 Supp. 60-258 (district court's findings of fact and conclusions of law set forth in journal entry control over any oral statements from bench).

To that end, the language in the written journal entry set forth above reflects that Judge Bouker provided Rodney with two alternatives from which to choose. Rodney could pay a lump sum of cash right away (\$22,500) and then wait until his mother died to enjoy the benefit of that payment, if he survived her. Or he could choose not to pay the

lump sum and take the risk that Carol's 40 percent share of his remainder interest in the property would be worth more than \$22,500 when the remainder became possessory at Anna Lou's death. It is clear that Judge Bouker's ruling was designed to benefit Carol no matter which option Rodney chose. If he paid the lump sum, that would satisfy Carol's immediate need for money. If Rodney chose not to pay the lump sum, it would satisfy the equities of Carol having a low income-earning capacity at the time of the divorce but presumably would give her a larger benefit in the future. Rodney chose not to pay, which resulted in the condition being met, leaving Carol with 40 percent of Rodney's remainder interest in real property and not a money judgment.

Reversed and remanded with directions to grant Carol's request for partition as set forth in her petition.