

**CASE NO. A-24-0619**

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**IN THE COURT OF APPEALS OF THE STATE OF NEBRASKA**

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**IN RE ESTATE OF PAUL A. KNAPP**

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**APPEAL FROM THE COUNTY COURT OF  
DODGE COUNTY, NEBRASKA**

**Case No. PR 23-100**

**Honorable Francis W. Barron, III, County Judge**

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**BRIEF OF PETITIONER - APPELLANT BARBARA KNAPP**

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## TABLE OF CONTENTS

TABLE OF CONTENTS .....	2
TABLE OF AUTHORITIES .....	4
JURISDICTIONAL STATEMENT .....	6
STATEMENT OF THE CASE .....	7
A.    Nature of the Case.....	7
B.    The Relevant Issues Actually Tried in the Court Below ...	7
C.    How the Relevant Issues Were Decided .....	8
D.    Scope of Review.....	9
ASSIGNMENTS OF ERROR .....	9
PROPOSITIONS OF LAW .....	10
STATEMENT OF FACTS.....	12
A.    Events Prior to the Marriage of the Parties .....	13
B.    Prenuptial Agreement.....	14
C.    Events After the Marriage .....	15
D.    Admissions by Paul .....	16
E.    Petition for Claim Against the Estate .....	18
F.    The County Court Order .....	18
SUMMARY OF THE ARGUMENT.....	20
I.    THE COUNTY COURT ERRED IN FINDING THE PREMARITAL AGREEMENT CLEAR AND UNAMBIGUOUS WHEN SPECIFIC LANGUAGE PRESERVED THE RIGHT OF THE SURVIVING SPOUSE TO MAKE A CLAIM AGAINST THE ESTATE OF THE FIRST TO DIE FOR PROVISIONS REGARDING THE PERSONAL RESIDENCE AND A	

MAINTENANCE FUND, BUT THE DETAILS OF THOSE PROVISIONS WERE OMITTED.....	20
II. THE COUNTY COURT ERRED IN FINDING THE TERMS OF THE ORAL CONTRACT WERE NOT ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE AND SUPPORTED BY THE PARTIES’ PERFORMANCE.....	23
III. THE COUNTY COURT ERRED IN HOLDING THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE PREMARITAL AGREEMENT DEMONSTRATED THAT BARBARA WAIVED HER RIGHT TO MAINTENANCE .....	25
CONCLUSION.....	27
CERTIFICATE OF COMPLIANCE .....	28

## TABLE OF AUTHORITIES

### STATE CASES

<i>Bierman v. Benjamin</i> , 305 Neb. 860 (2020) .....	9, 10
<i>Bohaty v. Kobza</i> , No. A-20-863, 2022 Neb. App. LEXIS 2 (Ct. App. Jan. 4, 2022) .....	9, 11
<i>Brush &amp; Co. v. W. O. Zangger &amp; Son</i> , 991 N.W.2d 294 (Neb. 2023) .....	10, 11, 20, 21
<i>City of Scottsbluff v. Waste Connections of Neb., Inc.</i> , 282 Neb. 848 (2011) .....	11, 21
<i>Diedra T. v. Justina R.</i> , 313 Neb. 417 (2023) .....	9, 11
<i>Eggers v. Rittscher</i> , 247 Neb. 648 (1995) .....	12, 24
<i>Estate of McConnell v. Rajendran</i> , 28 Neb. App. 303 (2020) .....	12, 27
<i>Gerdes v. Klindt</i> , 253 Neb. 260 (1997) .....	9, 11
<i>In re Estate of Layton</i> , 212 Neb. 518 (1982) .....	12, 23
<i>In Re Estate of McKillip</i> , 284 Neb. 367 (2012) .....	6
<i>In re Estate of Stephenson</i> , 243 Neb 890 (1993) .....	9, 10
<i>Knights of Columbus Council 3152 v. KFS Bd, Inc.</i> , 280 Neb. 904 (2010) .....	9, 10
<i>Matthews v. Matthews</i> , 215 Neb. 744 (1983) .....	12, 23
<i>Stitch Ranch, LLC v. Double B.J. Farms, Inc.</i> , 21 Neb. App. 328 (2013) .....	11, 12, 21, 22
<i>W. Ethanol Co., LLC v. Midwest Renewable Energy, LLC</i> , 305 Neb. 1 (2020) .....	6

### STATE STATUTES

Neb. Rev. Stat. § 25-1902 (Reissue 2016) .....	6
Neb. Rev. Stat. § 25-1902(1)(b) (Reissue 2016) .....	6

Neb. Rev. Stat. § 30-1601(1) (Reissue 2016) .....	6
Neb. Rev. Stat. § 30-2324 (Reissue 2016) .....	18

## **STATE RULES**

Neb. Ct. R. § 2-103 .....	28
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## **OTHER AUTHORITIES**

Restatement (Second) of Contracts § 33 .....	11, 21
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## JURISDICTIONAL STATEMENT

The Nebraska Court of Appeals has jurisdiction over this appeal pursuant to Neb. Rev. Stat. § 30-1601(1) (Reissue 2016) which provides for appeals in all matters in county court arising under the Nebraska Probate Code in the same manner as an appeal from the district court. The order sought to be reviewed was entered by the Dodge County Court (“county court”) on July 10, 2024 (the “Order”). (T77). On August 8, 2024, Barbara Knapp (“Barbara”) filed her Notice of Appeal, deposited the docket fee of \$250 with the county court clerk and paid the estimated costs for the Bill of Exceptions. (T91,95)

The Order is a final appealable order under Neb. Rev. Stat. § 25-1902(1)(b) (Reissue 2016) because it is an order affecting a substantial right made during a special proceeding. *See In Re Estate of McKillip*, 284 Neb. 367, 372 (2012) (holding that a proceeding under the Nebraska Probate Code is a special proceeding); see also *W. Ethanol Co., LLC v. Midwest Renewable Energy, LLC*, 305 Neb. 1, 8-9 (2020) (“A substantial right is affected if an order affects the subject matter of the litigation, such as diminishing a claim or defense that was available to an appellant before the order from which an appeal is taken. Substantial rights under § 25-1902 include those legal rights that a party is entitled to enforce or defend.”)

Specifically, the underlying proceeding was initiated through a Petition for Allowance of Amended Statement of Claim filed by Barbara, the surviving spouse of Paul A. Knapp (“Paul”). The Petition requested the court determine, among other claims, Barbara’s entitlement to 40% of the net proceeds from the sale of the personal residence after Paul’s death, based either on their Premarital Agreement or their oral agreement, and her entitlement to a maintenance fund based on the Premarital Agreement which did not waive her statutory right. (T18).

The Order denied Barbara’s claim for 40% of the proceeds from the sale of the personal residence and her right to a maintenance fund

in compliance with the Prenuptial Agreement and her statutory marital right. (T77). Consequently, the lower court entered the Order during a special proceeding which Order affected Barbar's substantial rights.

## **STATEMENT OF THE CASE**

### **A. Nature of the Case**

This appeal arises out of the county court's denial of a claim filed by a widow against her deceased husband's estate. This claim was based on the terms of an agreement (the "Premarital Agreement"), which was to provide the surviving spouse with "provisions regarding the personal residence" and for a "maintenance fund" against the estate of the first spouse to die, which provisions were to be set out in a separate section of the agreement – a separate section which did not exist. The Premarital Agreement terms were intended to affirm an oral agreement, expressed both before and after marriage, for the surviving spouse to remain in the marital home, receive a percentage of the net proceeds upon the sale of the residence after the death of the first spouse, and to receive a maintenance fund.

### **B. The Relevant Issues Actually Tried in the Court Below**

1. Whether the Premarital Agreement created an enforceable right for Barbara, as the surviving spouse, to receive 40% of the net proceeds from the sale of the personal residence after the death of her late husband Paul.
2. Alternatively, whether the verbal agreement between Paul and Barbara created an enforceable oral contract for Barbara to receive 40% of the net proceeds from the sale of the personal residence after Paul's death.
3. Whether the language in the Premarital Agreement entitled Barbara to a maintenance fund in accordance with the statutory marital rights of a spouse upon the death of Paul.

Other claims either admitted or decided in favor of Barbara included reimbursement for: life insurance proceeds she loaned the estate to pay for Paul's funeral; credit card payments she made on Paul's behalf; and mortgage payments she made on behalf of the estate. While the lower court found that Barbara's claim for reimbursement of remodeling expenses was barred by the statute of limitations, no such claim was brought by Barbara. None of these other claims are the subject of this appeal.

### **C. How the Relevant Issues Were Decided**

On July 10, 2024, the county court denied Barbara's claim for 40% of the proceeds from the sale of the personal residence after the death of her late husband Paul. The county court found the facts were generally undisputed. However, the court went on to state that Barbara testified the 40/60 split was first discussed when she sold her home after the Premarital Agreement was signed, and the missing section of the Premarital Agreement which was to contain the details for the personal residence and maintenance fund could have been omitted intentionally or by mistake. The county court went on to find the contract was clear and unambiguous, Paul and Barbara (the "Parties") signed it and Barbara could not add terms to the contract after it was signed. (T78-80).

With regard to the Parties' oral agreement for Barbara to receive 40% of the proceeds from the sale of the personal residence, the county court held that it could not find by clear and convincing evidence that the terms of the contract were clear and enforceable. The county court's reasoning appears to be that the oral agreement was not enforceable because it was made either two years after the remodeling project was started, or one year after the Parties' marriage, that Barbara did not provide money to Paul until after she sold her home, that Barbara had made past loans to Paul which he had paid back, and that the court could not find that the money given by Barbara to Paul was for this project or for a different contract. (T81-82).



#### **D. Scope of Review**

The interpretation of a contract and whether the contract is ambiguous are questions of law subject to independent review by the appellate court. *Bierman v. Benjamin*, 305 Neb. 860, 863 (2020).

A premarital agreement is subject to the general principles of contract law. The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below. *In re Estate of Stephenson*, 243 Neb. 890, 896 (1993)(*overruled on other grounds by Knights of Columbus Council 3152 v. KFS Bd, Inc.*, 280 Neb. 904, 927 (2010)).

“The meaning of a contract ordinarily is a question of law; however, when the terms of an oral contract are in conflict, the fact finder must determine what the terms are or were.” *Bohaty v. Kobza*, No. A-20-863, 2022 Neb. App. LEXIS 2, \*12-13 (Ct. App. Jan. 4, 2022) (not designated for permanent publication) (*citing Gerdes v. Klindt*, 253 Neb. 260 (1997)). In a de novo review:

an appellate court reaches a conclusion independent of the trial court. However, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another.

*Diedra T. v. Justina R.*, 313 Neb. 417, 422 (2023). When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Id.*

#### **ASSIGNMENTS OF ERROR**

1. The county court erred in finding the Premarital Agreement was clear and unambiguous for which extrinsic evidence could not be considered to determine the meaning of the missing Article 9.4.

2. The county court erred in determining that the undisputed facts were not clear and convincing evidence of an enforceable oral contract which was supported by the performance of the Parties.

3. The county court erred in holding the language of the Premarital Agreement constituted a waiver by Barbara for a right to proceeds from the marital home and a maintenance fund.

### PROPOSITIONS OF LAW

1. A premarital agreement is subject to the general principles of contract law. The construction of a contract is a matter of law, in connection with which an appellate court has an obligation to reach an independent, correct conclusion irrespective of the determinations made by the court below. *In re Estate of Stephenson*, 243 Neb 890, 896 (1993)(*overruled on other grounds by Knights of Columbus Council 3152 v. KFS Bd, Inc.*, 280 Neb. 904, 927 (2010)).

2. The interpretation of a contract and whether the contract is ambiguous are questions of law subject to independent review by the appellate court. *Bierman v. Benjamin*, 305 Neb. 860, 863 (2020).

3. “In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous. A contract must receive a reasonable construction and must be construed as a whole. If possible, effect must be given to every part of a contract. A contract which is written in clear and unambiguous language is not subject to interpretation or construction; rather, the intent of the parties must be determined from the contents of the contract, and the contract must be enforced according to its terms. *Brush & Co. v. W. O. Zangger & Son*, 991 N.W.2d 294, 301-02 (Neb. 2023):

4. “A contract found to be ambiguous presents a question of fact and permits the consideration of extrinsic evidence to determine the meaning of the contract. A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least

two reasonable but conflicting interpretations or meanings. When a contract is ambiguous, the court may consider all facts and circumstances leading up to the contract's execution, the nature and situation of the subject matter, and the apparent purpose of the contract.” *Brush & Co. v. W. O. Zangger & Son*, 991 N.W.2d 294, 301-02 (Neb. 2023):

5. “The meaning of a contract ordinarily is a question of law; however, when the terms of an oral contract are in conflict, the fact finder must determine what the terms are or were.” *Bohaty v. Kobza*, No. A-20-863, 2022 Neb. App. LEXIS 2, \*12-13 (Ct. App. Jan. 4, 2022) (not designated for permanent publication) (*citing Gerdes v. Klindt*, 253 Neb. 260 (1997)).

6. In a de novo review, “an appellate court reaches a conclusion independent of the trial court. However, where credible evidence is in conflict on a material issue of fact, the appellate court considers and may give weight to the fact that the trial court heard and observed the witnesses and accepted one version of the facts rather than another”. *Diedra T. v. Justina R.*, 313 Neb. 417, 422 (2023). When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. *Id.*

7. In limited circumstances, if the parties fail to specify an essential term, such failure does not prevent the formation of a contract. *Stitch Ranch, LLC v. Double B.J. Farms, Inc.*, 21 Neb. App. 328, 329-330 (2013); *see also City of Scottsbluff v. Waste Connections of Neb., Inc.*, 282 Neb. 848, 861 (2011) (quoting Restatement (Second) of Contracts § 33 cmt. a) (“The Restatement (Second) of Contracts provides that ‘the actions of the parties may show conclusively that they have intended to conclude a binding agreement, even though one or more terms are missing or are left to be agreed upon.’”).

8. When an essential term is missing, a court can also ascertain the meaning of a party's promise by referring to the parties' course of dealing with each other, or a general reasonableness

standard. *Stitch*, 21 Neb. App. at 345. The circumstances must still show that the parties manifested an intent to be bound by a contract. Their manifestations are usually too indefinite to form a contract if the essential terms are left open or are so indefinite that a court could not determine whether a breach had occurred or provide a remedy. For an agreement to be binding, the party seeking to enforce the contract has the burden to establish the existence of a valid, legally enforceable contract which “must be definite and certain as to the terms and requirements” and “must identify the subject matter and spell out the essential commitments and agreements with respect thereto.” *Id.*

9. Nebraska courts “regard with grave suspicion any claim of an oral contract to convey property by will...” *Matthews v. Matthews*, 215 Neb. 744, 746 (1983); *see also In re Estate of Layton*, 212 Neb. 518, 529 (1982). Such a contract is normally void on its face as violative of the statute of frauds. *Matthews*, 215 Neb. at 750. For those reasons, the courts “require one trying to enforce such a contract to prove by clear and convincing evidence the existence of the contract and its terms and that because of partial performance, the agreement is outside the effect of the statute of frauds. Specifically, a plaintiff must prove (1) an oral contract the terms of which are clear, satisfactory, and unequivocal and (2) that the thing done constituting performance is such as is referable solely to the contract sought to be enforced, and not such as might be referable to some other or different contract.” *Eggers v. Rittscher*, 247 Neb. 648, 653-54 (1995).

10. A waiver in a premarital agreement may be broad or may be limited to specific assets. *See Estate of McConnell v. Rajendran*, 28 Neb. App. 303, 327-38 (2020)

## **STATEMENT OF FACTS**

The Parties signed a Premarital Agreement on September 27, 2016. (23:9-17; E1, pp.1,27). The Parties were subsequently married on

October 8, 2016 (23:18-19) and remained happily united in marriage until Paul's death at the age of 75 on April 9, 2023 (T1).

**A. Events Prior to the Marriage of the Parties.**

Prior to their marriage, the Parties each owned a separate home as identified on Exhibits A and B to the Premarital Agreement. (E1, pp.13,14). The Parties began a major remodel to Paul's residence in 2015 in anticipation it would become their home after their marriage (the "Marital Home."). (21:19- 22:2). The remodel consisted of a large addition including a new master bedroom and bathroom on the main floor, 4 season sunroom, expanded living room, sewing room for Barbara, landscaping, tiling off the lake and the building of a water wall. (43:4-45:6; E3, pp.1,2).

Barbara agreed with Paul that she would sell her separate home and use the proceeds for the Marital Home (27:21-28:12), she would assist in the physical labor for the remodel of the Marital Home (43:7-13), she would assist in refinancing the Marital Home (46:7-47:25; 95:23-97:5) and she would contribute to the expenses of the Marital Home by paying certain remodeling and repair costs, all monthly utilities for electricity, gas and water, monthly internet and security fees, lawn care and annual HOA dues (37:6-39:17). In turn, Paul was to pay the monthly mortgage. (38:20-21).

Testimony and exhibits offered at trial confirmed that prior to their marriage, Barbara helped to paint the entire first floor of the original home as well as paint and stain the new addition. (43:5-13). In addition to paying off Paul's large credit card debt prior to their marriage, Barbara also paid remodeling expenses in the amount of \$7,368.14 for updating kitchen cabinets, paint, hardware, miscellaneous expenses and payment on a debt owed to Paul's contractor. (E2, pp.1-36).

## **B. Premarital Agreement**

While considering the terms of the Premarital Agreement, Paul and Barbara discussed that if one of them should die, the other would be able to live in the Marital Home for as long as he or she wanted and the proceeds from the sale of the Marital Home would be split when it was sold after the first to die. The initial split discussed was 60% to Paul or his children and 40% to Barbara or her children. (22:13-23:5; 29:9-30:4).

Prior to finalizing the Premarital Agreement, a letter from the attorney drafting the agreement confirmed the Parties had indeed discussed Barbara's intention to sell her home after their marriage and use the sale proceeds to help fund the addition to Paul's home. (E15, p.1) The letter also reflected the Parties intentions that after their marriage and after the sale of Barbara's home, the Parties would either jointly title the Marital Home or would create a trust to provide for a percentage of the proceeds from sale of the Marital Home to be divided among them or their respective children. (Id.)

Exhibit B to the Premarital Agreement, captioned Assets and Liabilities of Paul A. Knapp, demonstrates that just prior to their marriage, the value of the Marital Home was \$273,600. (E1, p.14). In turn, Paul owed a mortgage debt in the amount of \$126,192, a line of credit in the amount of \$90,993, and carpet, plumbing and electrical expenses in the amount of \$35,836 for total debt relating to the Marital Home in the amount of \$253,021, resulting in net equity valued at slightly more than \$20,500. (E1, p.14). This Marital Home debt was in addition to \$31,253 Paul owed to Barbara for paying off his credit card debt prior to their marriage. (Id.)

The Premarital Agreement signed by the Parties expressly did not waive and disclaim all assets of the other upon the estate of the first to die. (E1, p.7). Rather, the last paragraph of Article XI of the Premarital Agreement, relating to rights of the surviving spouse to the estate of the first spouse to die, includes the following statement:

“Except for property which is titled between the two parties as joint tenants with rights of survivorship, and the provisions regarding the personal residence, maintenance fund, and vehicle as set forth in Article 9.4 above, the survivor of the two of them has no claim against the estate of the other due to their relationship as husband and wife.” (E1, p.7)

Article IX of the Premarital Agreement contains Article 9.1, addressing separate property, Article 9.2, addressing the effect of joint tenancy, and Article 9.3 relating to checking accounts. (E1, p.6). Article IX fails, however, to include Article 9.4 - which Article purportedly was to contain the details reserved for the surviving spouse in the personal residence, a maintenance fund, and a vehicle. (E1, p.6).

### **C. Events After the Marriage**

The Parties were subsequently married on October 8, 2016. (23:18-19). After their marriage, and prior to the sale of her home, Barbara paid \$8,720.84 for additional remodeling expenses for the Marital Home as evidenced by receipts and checks for blinds, cabinet hardware, additional paint, plumbing, gutters, electrical work and other miscellaneous expenses. (E2, pp.1-36). In 2023, after Paul's death, Barbara paid the final amount owed on the lake front wall in the amount of \$5,901.84. (E2, pp.37-39). During their marriage, Barbara also provided additional funds for remodeling the Marital Home which she had charged on her credit card but the credit card records were no longer available and she could not quantify the amount of those additional expenses she paid. (29:9-13).

Consistent with Article XI of the Premarital Agreement, Paul titled a vehicle in the names of the Parties, jointly with rights of survivorship. (25:15-20; E12).

Barbara sold her separate home in 2017 for which she received proceeds in the amount of \$39,021.60 on October 6, 2017. (28:9-20; E2, p.41). As she had promised prior to their marriage, Barbara used the

proceeds from the sale of her home to invest in the Marital Home. (28:16-24). (E2, p.1; E18, pp.5,7). Upon the sale of her separate home, Barbara and Paul again discussed their intention – which discussion began prior to their marriage and was substantiated by the letter from the attorney drafting the Premarital Agreement – which confirmed their agreement to split the proceeds on the sale of the Marital Home if one of them should die. These discussions solidified their agreement to split the proceeds 60% to Paul or his children and 40% to Barbara or her children. (22:7-23:8).

After the sale of her home, Barbara co-signed a first loan on the Marital Home in 2017 and co-signed a second loan in 2020 in the amount of \$217,000. Barbara co-signed both loans under the mistaken belief her name had been added to the title to the Marital Home. (46:7-47:25; E7, pp.1-10). Barbara's belief was based on statements made by Paul, references in the loan refinance documents which identified Paul and Barbara, husband and wife, as the borrowers on the loans and the "Deed of Trust" which Barbara believed was the deed on the house. All the refinance documents refer to "Paul and Barb" or "Paul A. Knapp and Barb A. Knapp" and describe the refinance as a transfer of a loan on "your home" to West Bank. None of the refinance documents disclosed that the Marital Home was still titled solely in Paul's name. (E7, p.10).

#### **D. Admissions by Paul**

Frank Kment, a local banker, friend, and golf partner of Paul testified Paul told him that when he died, Barbara would be able to stay in their house and when it sold, the proceeds were to be split 60-40% between Paul's children and Barbara. (16:5-25). Mr. Kment further testified he overheard Paul tell many people about the Parties' agreement and Paul stated his son Lance Knapp and his daughter Angie both knew about the agreement. Mr. Kment testified the conversations about the 60-40% split occurred many times: when the remodel began prior to the Parties marriage, after their marriage,



when Barbara sold her home in 2017, and in the month prior to Paul's death in 2023. (17:1-18:17; 19:11-16).

Mica Jacobs, Barbara's daughter, testified that shortly after the Parties' marriage in 2016, she initiated a conversation with Paul as to what would happen to her mother if something were to happen to Paul, to which Paul replied that Barbara would be able to stay living in their home and would receive 40% of the proceeds of the home's sale and his children would receive the other 60%. (112:9-23; 113:5-114:3).

In October 2022, Rebecca Westphalen, a family friend of the Parties, testified she was staying with Paul while Barbara was running an errand. During this time, Paul initiated a conversation as they were going through a photo album in which Paul stated Barbara was to receive 40% of proceeds from the sale of their home and his children would receive 60%. (108:9-109:17).

Lance Knapp, Paul's son, testified the remodel nearly doubled the size of the home. (129:5-8). Lance Knapp further admitted that in December of 2022, approximately six months prior to his father's death, Paul informed Lance that Barbara was to receive 40% of the proceeds on the sale of the home and Lance and his sister Angie were to receive the other 60% of the proceeds. (127:21-128:13).

James Mendlik, Barbara's brother, testified Paul had initiated a conversation in March 2023 that Paul "had it all planned" so that Barbara could stay in their home as long as she wanted and if the home were sold, the proceeds were to be split 60-40 with 60% going to Paul's children and 40% to Barbara. (101:18-102:15; 104:19-105:22). When Mr. Mendlik asked Paul how they came up with a 60-40 split, Paul told Mr. Mendlik it was based on the added value to the house from the remodel. (*Id.*)

The Marital Home was sold after Paul's death for \$525,000 from which deductions were withheld for closing costs in the amount of

\$32,158 and payoff of secured debt in the amount of \$200,005.95 resulting in net proceeds in the amount of \$292,836.05. (Supp. T8).

#### **E. Petition for Claim Against the Estate**

On August 23, 2023, Barbara filed a claim against Paul's estate in which she sought, among other things, a 40% cash distribution from the net proceeds upon the sale of the marital home as contemplated by the parties Premarital Agreement and their oral agreement, and for \$20,000 as the maintenance fund contemplated by the Premarital Agreement which is the minimum statutory allowance under Neb. Rev. Stat. § 30-2324 (Reissue 2016). (T10,14). Barbara testified that her claim for the maintenance fund promised in the Premarital Agreement in the amount of \$20,000 was related to the Nebraska minimum family allowance which she needed to cover the unexpected costs incurred to hire movers, purchase boxes, put down a deposit on new utilities and a new residence since she was being forced out of the Marital Home and for legal fees to pursue her claim. (60:3-22).

Lance Knapp, Paul's son and Personal Representative of the Estate, filed a Notice of Disallowance of Claim on September 7, 2023, in the entirety, after which Barbara filed a Petition for Allowance of Amended Notice on November 3, 2023. (T18,25).

The lower court held an evidentiary hearing on March 1, 2024, in which exhibits were offered, received or withdrawn and the following witnesses testified on behalf of Barbara Knapp: Frank Kment, James Mendlik, Rebecca Westphalen, Mica Jacobs and Barbara. The Personal Representative of the estate testified on behalf of the estate but did not call any other witnesses. (T45).

#### **F. The County Court Order**

On July 10, 2024, the county court issued its Order finding, in relevant part, that Article II of the Premarital Agreement "states that except for property which is titled between the two parties as joint

tenant with rights of survivorship and the provision regarding the personal residence, maintenance fund and vehicle as set for in Article 9.4 above, the survivor of the two of them has no claim against the estate of the other due to their relationship.” (T80). Despite recognizing this express exception to the Parties’ waiver of rights to make a claim against the estate of the first to die, the missing section 9.4, and the consistent testimony of every witness, the county court went on to find “there is no section 9.4 and there is no evidence provided that is was not done intentionally or by mistake.” (T80,81). Instead, the county court found that the Premarital Agreement was “written in clear and unambiguous language and there is no word, phrase or provision in the contract that is susceptible of, at least two reasonable but conflicting interpretations or meanings.” (*Id.*)

With regard to Barbara’s claim to enforce the oral contract to receive 40% of the sale proceeds from the Marital Home, the lower court noted that the remodel started in 2015, the parties married in 2016, Barbara didn’t sell her home until 2017, Barbara didn’t give Paul money until after she sold her home in 2017, and Barbara had at other times loaned money to Paul which had been paid back. (T81). Based on these findings, the county court stated that “it cannot find by clear and convincing evidence that at the time the terms of the contract were clear.” (*Id.*)

## SUMMARY OF THE ARGUMENT

### **I. THE COUNTY COURT ERRED IN FINDING THE PREMARITAL AGREEMENT CLEAR AND UNAMBIGUOUS WHEN SPECIFIC LANGUAGE PRESERVED THE RIGHT OF THE SURVIVING SPOUSE TO MAKE A CLAIM AGAINST THE ESTATE OF THE FIRST TO DIE FOR PROVISIONS REGARDING THE PERSONAL RESIDENCE AND A MAINTENANCE FUND, BUT THE DETAILS OF THOSE PROVISIONS WERE OMITTED.**

The familiar principles regarding interpretation of a contract were recently reinforced by the Supreme Court in *Brush & Co. v. W. O. Zangger & Son*, 991 N.W.2d 294 (Neb. 2023):

In interpreting a contract, a court must first determine, as a matter of law, whether the contract is ambiguous. A contract must receive a reasonable construction and must be construed as a whole. If possible, effect must be given to every part of a contract. A contract which is written in clear and unambiguous language is not subject to interpretation or construction; rather, the intent of the parties must be determined from the contents of the contract, and the contract must be enforced according to its terms.

A contract found to be ambiguous presents a question of fact and permits the consideration of extrinsic evidence to determine the meaning of the contract. A contract is ambiguous when a word, phrase, or provision in the contract has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings. When a contract is ambiguous, the court may consider all facts and circumstances leading up to the contract's execution, the nature and situation of the subject matter, and the apparent purpose of the contract.

*Id.* at 301-02.

Before this court is a Premarital Agreement which expressly states the surviving spouse is entitled to make a claim against the estate of the first spouse to die for “provisions regarding the personal residence” and for a “maintenance fund” which provisions were to be set out in a separate section of the agreement – a separate section which was not included in the document. The county court acknowledged this separate section was missing, questioned whether the missing section could have been omitted intentionally or by mistake, but found the contract was otherwise clear and unambiguous and additional terms to the contract could not be added after it was signed. This finding was in error. The very fact the parties expressly reserved the right of a surviving spouse to make a claim against the estate of the first to die, as was to be further explained in a specifically identified but ultimately non-existent section, creates an inherent ambiguity.

Moreover, in limited circumstances, if the parties fail to specify an essential term, such failure does not prevent the formation of a contract. *Stitch Ranch, LLC v. Double B.J. Farms, Inc.*, 21 Neb. App. 328, 329-330 (2013); *see also City of Scottsbluff v. Waste Connections of Neb., Inc.*, 282 Neb. 848, 861 (2011) (quoting Restatement (Second) of Contracts § 33 cmt. a) (“The Restatement (Second) of Contracts provides that ‘the actions of the parties may show conclusively that they have intended to conclude a binding agreement, even though one or more terms are missing or are left to be agreed upon.’”). In *Stitch*, the appellate court held that “a court can also ascertain the meaning of a party's promise by referring to the parties' course of dealing with each other, or a general reasonableness standard. *Stitch*, 21 Neb. App. at 345.

The circumstances must still show that the parties manifested an intent to be bound by a contract. Their manifestations are usually too indefinite to form

a contract if the essential terms are left open or are so indefinite that a court could not determine whether a breach had occurred or provide a remedy.

*Id.* For an agreement to be binding, the party seeking to enforce the contract has the burden to establish the existence of a valid, legally enforceable contract which “must be definite and certain as to the terms and requirements” and “must identify the subject matter and spell out the essential commitments and agreements with respect thereto.” *Id.*

Here, Barbara provided substantial, definitive and overwhelming evidence showing Paul intended to be bound by his agreement to provide Barbara with 40% of the proceeds upon the sale of the Marital Home after his death. Paul not only stated such a promise to Barbara, which promise is referenced in their Premarital Agreement, he reaffirmed the promise on multiple occasions to Barbara and others prior to their marriage (17:12-24), shortly after their marriage in 2016 (112:20-113:21), when Barbara sold her home in 2017 (19:11-16; 23:2-8); in the year prior to his death (103:2-106:6) and on at least three separate occasions in the months just prior to his death. (16:16-25; 108:19-109:9; 127:24-128:4). No testimony or evidence was offered which contradicted either Paul’s admissions or the terms of their agreement. Indeed, Lance Knapp, the Personal Representative who disallowed Barbara’s claim for 40% of the net proceeds from the Marital Home, admitted his father had personally informed him in December 2022 that Barbara was to receive 40% of the net proceeds. No contradictory testimony or evidence was before the lower court. As such, there were no separate versions of facts for the lower court to choose among nor was there evidence which created a conflict on a material issue of fact.

Barbara also provided substantial consideration for the promise of 40% of the proceeds: waiving certain statutory marital rights in the Prenuptial; directly paying for remodeling costs prior to and during

their marriage; paying remodeling costs after Paul's death; providing labor in the form of painting and staining; foregoing ownership of her own separate home and its equity by selling and reinvesting the proceeds into the Marital Home; paying all monthly utilities and other expenses as agreed to with Paul; co-signing two refinanced loans under the mistaken belief the documentation and the "Deed of Trust" was a deed to the title of the real estate including her as an owner.

Every witness, including the Personal Representative challenging the division of proceeds, consistently testified to the exact same terms, essential commitment and the agreement: upon Paul's death, the proceeds from the sale of the Marital Home were to be split 60% to Paul's children and 40% to Barbara.

**II. THE COUNTY COURT ERRED IN FINDING THE TERMS OF THE ORAL CONTRACT WERE NOT ESTABLISHED BY CLEAR AND CONVINCING EVIDENCE AND SUPPORTED BY THE PARTIES' PERFORMANCE.**

Nebraska appellate courts have frequently noted that the courts "regard with grave suspicion any claim of an oral contract to convey property by will..." *Matthews v. Matthews*, 215 Neb. 744, 746 (1983); *see also In re Estate of Layton*, 212 Neb. 518, 529 (1982). Such a contract is normally void on its face as violative of the statute of frauds. *Matthews*, 215 Neb. at 750. For those reasons, the courts:

require one trying to enforce such a contract to prove by clear and convincing evidence the existence of the contract and its terms and that because of partial performance, the agreement is outside the effect of the statute of frauds. Specifically, a plaintiff must prove (1) an oral contract the terms of which are clear, satisfactory, and unequivocal and (2) that the thing done constituting performance is such as is referable solely to the contract sought to be enforced, and not such as might be referable to some other or different contract

*Eggers v. Rittscher*, 247 Neb. 648, 653-54 (1995).

Barbara met her burden of proof. Paul's promise was unequivocal, that upon his death, Barbara was to receive 40% of the proceeds from the sale of the Marital Home and his children would receive 60%. Paul not only made verbal promises to Barbara, he also admitted and reinforced the promise to his banker, friend and fellow golfer, his son, his brother-in-law, his daughter-in-law and a family friend. These admissions by Paul were clear and consistent across each and every conversation and consistent with the written expression of intentions in Article XI of the Premarital Agreement.

These admissions were repeated on multiple occasions both before the marriage, shortly after their marriage, when Barbara sold her home in 2017, when his health began to fail in October 2022, when speaking to his son in December 2022, when speaking to his brother-in-law in March of 2023 and in speaking to his banker, friend and fellow golfer in the month prior to his death. Each witness testified to the exact same terms. None of the witnesses provided contradictory testimony nor were there any key terms which had yet to be determined: Barbara was to receive 40% of the proceeds from the sale of the Marital Home.

Moreover, these admissions were consistent with Barbara's actions. Specifically, in reliance on these promises, Barbara waived certain statutory marital rights, paid for ongoing remodeling and household expenses both before and after their marriage, sold her own home and reinvested the proceeds in the Marital Home, co-signed two mortgages to refinance the home loan and paid the final remodeling expense for the home after Paul's death.

Despite the overwhelming evidence, the lower court erroneously stated that any money Barbara gave to Paul did not occur until after Barbara's home was sold. (T81). However, this finding by the lower court is unsupported by the undisputed evidence at the trial: Barbara paid remodeling expenses in the amount of \$7,368.14 for updating



kitchen cabinets, paint, hardware, miscellaneous expenses and payment on a debt owed to Paul's contractor prior to their marriage (E2, pp.1-36). Barbara also paid \$8,720.84 for blinds, cabinet hardware, additional paint, plumbing, gutters, electrical work and other miscellaneous expenses after their marriage and prior to the sale of her home. (E2, pp.1-36).

The lower court also erred in pondering whether Barbara may have been repaid for the remodeling expenses. (T81,82). No records of any such repayments were offered or received. No testimony was sought or introduced to support this conjecture. Indeed, the final remodeling payment made by Barbara was for the lake front wall in the amount of \$5,901.84; a payment made by Barbara on April 28, 2023, after Paul's death. (E2, pp.37-39).

More importantly, as the testimony of the multiple witnesses confirms, Paul's admissions beginning prior to their marriage and continuing up through the month before he died, demonstrated Paul's intention, belief and admission that Barbara's contributions to the Marital Home were sufficient to entitle her to 40% of the sale proceeds.

As such, Barbara has met her burden of proving, by clear and convincing evidence, the existence of their oral contract, the terms of which are clear, satisfactory and unequivocal, and her actions related solely to the Parties agreement which constitute performance to remove the effect of the statute of frauds.

### **III. THE COUNTY COURT ERRED IN HOLDING THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE PREMARITAL AGREEMENT DEMONSTRATED THAT BARBARA WAIVED HER RIGHT TO MAINTENANCE**

The terms of the Premarital Agreement expressly stated that a surviving spouse could make a claim against the estate of the first spouse to die for a maintenance fund. (E1, p.7) The Parties mutually

agreed to this provision and it was an express reservation of a right for Barbara's benefit which she did not waive.

In its findings, the lower court referred to Article 7.2 of the Premarital Agreement to find Barbara had waived any rights to the personal residence or a maintenance fund. (T83,84). However, the actual language of Article 7.2 does not support the lower court's finding. The first sentence of Article VII, Section 7.2 states in total as follows:

7.2. Waiver of Spousal Rights to Separate Property of Other Party. *Except as specifically provided to the contrary elsewhere in this Agreement*, neither Barbara nor Paul shall, by virtue of the marriage, acquire or have any right, title or claim in or to the other's Separate Property during lifetime or upon termination of the marriage for any reason.

(E1, p.5) (Emphasis added).

Article X refers solely to waivers of claims made by either Barbara or Paul during the marriage or upon divorce. (E1, pp.6-7). In turn, the final sentence of Article XI limits the waiver of claims against the estate of a deceased spouse, stating in total:

*Except for property which is titled between the two parties as joint tenants with rights of survivorship, and the provisions regarding the personal residence, maintenance fund, and vehicle as set forth in Article 9.4 above*, the survivor of the two of them has no claim against the estate of the other due to their relationship as husband and wife.

(E1, p.7)(Emphasis added).

This sentence in Article XI specifically designates an exception to the waiver of claims against the estate of the first spouse to die, as contemplated by 7.2, which exception confirms that Barbara's right to maintenance was not waived. As such, Section 7.2 cannot form the

basis for finding Barbara waived her right to either 40% of the proceeds from the sale of the Marital Home or her right to a maintenance fund.

A waiver in a premarital agreement may be broad or may be limited to specific assets. *See Estate of McConnell v. Rajendran*, 28 Neb. App. 303, 327-38 (2020) (finding the language of a Premarital agreement was narrow rather than broad and did not bar the surviving spouse from recovering a share of wrongful death settlement proceeds despite a pending divorce). Here, the waiver in the Premarital Agreement of the Parties was limited to specific assets and expressly included language to provide either surviving spouse with provisions regarding the personal residence, a maintenance fund and a vehicle from the estate of the first spouse to die. While these provisions were to be more fully detailed in a separate section of the agreement, and the referenced section did not exist, such an omission does not nullify the scope of the limited waiver in Article XI.

## CONCLUSION

Paul and Barbara Knapp entered into a Premarital Agreement which promised that the survivor of the two could make a claim against the estate of the other for the personal residence and a maintenance fund. While the details of these promises were omitted from the Premarital Agreement, substantial and undisputed extrinsic evidence provided the missing terms. In addition, the verbal agreement of Paul and Barbara Knapp – substantiated by the overwhelming, undisputed, uncontradicted and consistent admissions by Paul over many years – confirmed his promise that upon his death, Barbara was entitled to 40% of the net proceeds from the sale of the marital residence.

As more fully articulated above, the lower court erroneously found the Premarital Agreement was clear and unambiguous, erroneously found the verbal agreements and performance of the

Parties did not create an enforceable oral contract and erroneously found the terms of the Premarital Agreement constituted a waiver of Barbara's right to 40% of the net proceeds from the home and to a maintenance fund. Such findings were in error, contrary to Nebraska rules of contract construction and contrary to the undisputed evidence which proved by clear and convincing evidence the Parties had an enforceable oral contract.

Accordingly, Petitioner-Appellant Barbara A. Knapp respectfully requests this Court reverse the decision of the county court and enter an order finding Barbara A. Knapp is entitled to 40% of the net proceeds from the sale of the Marital Home and for an award of a maintenance fund in the amount of \$20,000.

Dated this 12th day of December, 2024.

BARBARA KNAPP, Appellant

By: s/ Mary L. Hewitt  
Mary L. Hewitt, #19826  
ATTORNEYS FOR APPELLANT

#### **CERTIFICATE OF COMPLIANCE**

I hereby certify that the foregoing brief contains 7,613 words as calculated by Microsoft Word, the typestyle for the body of the brief is 12 pt. Century spaced at 1.2 with extra space between paragraphs, and the brief in all other ways conforms to the requirements of Neb. Ct. R. App. P. 2-103.

s/ Mary L. Hewitt

# Certificate of Service

I hereby certify that on Thursday, December 12, 2024 I provided a true and correct copy of this *Brief of Appellant Barbara K.* to the following:

Lance Knapp represented by Ramzi Jewel Hynek (23650) service method: Electronic Service to **rhynek@remboltlawfirm.com**

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Simanek Storage (Self Represented Litigant) service method: **No Service**

Signature: /s/ Hewitt,Mary,L (19826)