

IN THE NEBRASKA COURT OF APPEALS

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CASE NO. A-24-0619

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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  
The Honorable Francis W. Barron, III, County Judge

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**BRIEF OF APPELLEE**

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## **BASIS OF APPELLATE JURISDICTION**

Appellee and Personal Representative Lance Knapp (the “Personal Representative”), accepts and does not dispute the Jurisdictional Statement included in the December 12, 2024 Brief of Appellant and Petitioner Barbara Knapp.

## **STATEMENT OF THE CASE**

### **1. Nature of the Case.**

This case arises out of a Petition for Allowance filed by Decedent Paul Knapp’s (“Decedent”) spouse, Barbara Knapp, (“Barbara”) following the Personal Representative’s disallowance of her Notice of Claim. Through her Petition, Barbara asked the Court to allow ten different claims, some of which were uncontested by the Personal Representative and some of which were withdrawn by Barbara at trial. The most significant claims made by Barbara, and those at issue on appeal, are a claim to forty percent (40%) of the net proceeds from the sale of Decedent’s personal residence and a claim to a family allowance under Neb. Rev. Stat. § 30-2324.

### **2. Issues Tried to the Court Below.**

A. Whether the premarital agreement entered into between Barbara and Decedent entitles her to 40% of the proceeds from the sale of Decedent’s home.

B. Whether subsequent to entry of the premarital agreement, Decedent and Barbara entered into an oral contract to convey 40% of the proceeds from the sale of Decedent’s home upon his death.

C. Whether in the premarital agreement Barbara waived her right to a family allowance under Neb. Rev. Stat. § 30-2324.

Other claims were brought forth by Barbara but are not at issue and not subject to this appeal.

### **3. Judgment of the District Court.**

On July 10, 2024, the County Court entered an order finding that the premarital agreement did not provide for Barbara to receive 40% of the proceeds from the sale of Decedent’s home. The Court further held that there was not clear and convincing evidence that Decedent and Barbara entered

into an oral contract to convey such proceeds upon Decedent's death. Finally, the County Court found that Barbara waived her right to a family allowance through execution of the premarital agreement.

#### **4. Scope of Appellate Review.**

"The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below." *White v. White*, 316 Neb. 616, 624, 6 N.W.3d 204, 211 (2024).

"An action to compel specific performance of an oral contract to devise real property by will is equitable in nature and is reviewed by an appellate court de novo on the record." *Eggers v. Rittscher*, 247 Neb. 648, 651, 529 N.W.2d 741, 743 (1995). "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." *Id.*

### **PROPOSITIONS OF LAW**

I. "[A] premarital agreement is governed by the same principles that are applicable to other contracts. . . . *White v. White*, 316 Neb. 616, 630, 6 N.W.3d 204, 214 (2024).

II. "A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms. 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." *Acklie v. Greater Omaha Packing Co., Inc.*, 306, Neb. 108, 116-17, 944 N.W.2d 297, 304-05 (2020).

III. Courts must "regard with grave suspicion any claim of an oral contract to convey property at death." *Eggers v. Rittscher*, 247 Neb. 648, 653, 529 N.W.2d 741, 744 (1995).

IV. To enforce an oral contract to convey property at death, a party must "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, 529 N.W.2d 741, 744-45 (1995).

V. “The right of election of a surviving spouse and the rights of the surviving spouse to a homestead allowance, exempt property, and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse.” Neb. Rev. Stat. § 30-2316

## STATEMENT OF FACTS

Decedent died on April 9, 2023. (T1). At the time of his death, Decedent was survived by his spouse from a second marriage, Barbara, and his two adult children from his first marriage, Lance and Angela. (T4). Decedent’s first wife, Diane Knapp, passed away on March 14, 2011. (T2). Decedent subsequently married Barbara in October 2016. (T10).

Prior to Decedent and Barbara’s marriage, both retained independent legal counsel to negotiate and ultimately execute a premarital agreement (the “Premarital Agreement”). (E1, 65:1-19). Through the Premarital Agreement, Decedent and Barbara both waived rights they would otherwise be entitled to under the law in each other’s separate property. (E1). Pertinent to the present dispute, Article 7.2 of the Premarital Agreement provides that “[u]pon death, the Separate Property of the deceased spouse shall descend to and vest in the deceased spouse’s beneficiaries, heirs at law, distributees, legatees, or devisees, and in such manner as may be prescribed by his or her Last Will and Testament, Codicil, Trust, title, or beneficiary designation (or in absence of such designations, by the statutory laws then in force), all as though no marriage had ever taken place between them.” (E1, p.5).

After marriage, Decedent and Barbara resided in Decedent’s personal residence but continued to maintain separate property and separate bank accounts. Decedent and Barbara split living expenses between the two of them, with Decedent generally making the mortgage payments and some

other payments (such as trash and cell phone bills) and Barbara paying other utilities. (86:21-87:10). Neither Decedent nor Barbara updated their Wills after marriage, allowing the waivers set forth in the Premarital Agreement and their pre-marriage intentions to control. (69:1-74:4). As contemplated by the Premarital Agreement, Decedent exercised his right to jointly title certain assets such as a vehicle and bank account. (67:16-68:9).

At trial, several witnesses testified that after Decedent became ill, he expressed a desire for Barbara to receive 40% of the proceeds from the sale of his residence. Notably, only one witness claimed Decedent expressed this desire to him prior to the marriage; however, his testimony was equivocal at best. (19:5-25). Critically, Barbara herself admitted that discussions regarding her receipt of any proceeds long after execution of the premarital agreement and in connection with Decedent's end-of-life illness. (83:8-14; 85:14-22).

After his death, a dispute arose between the Personal Representative and Barbara regarding ownership of Decedent's personal residence, which he owned prior to marriage and which was disclosed as his separate property in the Premarital Agreement. (E1, p. 14). Decedent never transferred title of the personal residence to Barbara, so it remained titled in his name alone. (E24). Decedent's Will devises all property to his children and two of his grandchildren. (E19).

On August 18, 2023, Barbara filed a Notice of Claim, asserting several claims, including a claim to 40% of the proceeds from the sale of Decedent's residence and a claim for a statutory family allowance in the amount of \$20,000. (T10). On August 23, 2023, Barbara filed an Amended Notice of Statement of Claim. (T14). On September 7, 2023, the Personal Representative filed a Notice of Disallowance of Claim, and thereafter, Barbara filed a Petition for Disallowance and Petition for Allowance. (T18, T25).

### **SUMMARY OF THE ARGUMENT**

This Court should affirm the County Court's July 10, 2024 Order. Contrary to Barbara's argument, the terms of the Premarital Agreement do not grant Barbara the right to receive 40% of the proceeds from the sale of Decedent's residence. Barbara waived her right to this separate property

through execution of the Premarital Agreement. This Court should reject Barbara's request to read terms into the agreement that do not exist. Similarly, this Court should find that Barbara has not sustained her burden to prove by clear and convincing evidence that she and Decedent entered into an oral contract to convey the proceeds upon his death. Barbara failed to present evidence both of sufficient contract terms and contemporaneous consideration. Finally, this Court should find that, by executing the Premarital Agreement, Barbara waived her right to any statutory family allowance.

## **ARGUMENT**

### **I. THE COUNTY COURT DID NOT ERR IN FINDING THAT THE PREMARITAL AGREEMENT DOES NOT ENTITLE BARBARA TO A SHARE OF THE SALES PROCEEDS**

Contrary to the arguments raised by Barbara, the language in the Premarital Agreement referencing “provisions regarding the personal residence” does not provide Barbara with an interest in 40% of the sales proceeds. (*see* E1, p.7). There is simply no evidence either within the four corners of the Premarital Agreement or extrinsically to support this interpretation. Under Nebraska law, “a premarital agreement is governed by the same principles that are applicable to other contracts. . . . In interpreting contracts, the court as a matter of law must first determine whether the contract is ambiguous. *White v. White*, 316 Neb. 616, 630, 6 N.W.3d 204, 214 (2024).

A contract written in clear and unambiguous language is not subject to interpretation or construction and must be enforced according to its terms. 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. The determination of whether a contract is ambiguous is to be made on an objective basis, not by the subjective contentions of the parties suggesting opposing meanings of the disputed language. A contract must receive a reasonable construction and must be construed as a whole, and if possible, effect must be given to every party of the contract.



*Acklie v. Greater Omaha Packing Co., Inc.*, 306, Neb. 108, 116-17, 944 N.W.2d 297, 304-05 (2020).

Here, the Premarital Agreement is not ambiguous because its provisions are not susceptible of at least two reasonable but conflicting interpretations or meanings. At primary issue is Article 11 of the Premarital Agreement, which states:

Each party is free to provide for disposition of their own estate at time of death in any way that he or she wishes and to anyone that he or she wishes. 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). The Premarital Agreement does not contain an Article 9.4, nor does it contain any other reference to provisions regarding the personal residence, a maintenance fund, or vehicle. (E1). Accordingly, the only reasonable interpretation of Article 11 is that because there are no provisions regarding these items, there are no further exceptions to the general rule that a surviving spouse has no claim against the estate of the other. This is supported by the other provisions of the Premarital Agreement, such as Article 7.2, which provides that upon death of either spouse, the separate property of the deceased spouse remains their separate property to pass through their Will or other designation. (E1, p.5).

Even if this Court finds that Article 11 creates an ambiguity in the Premarital Agreement, there is no evidence to support Barbara's theory that this missing provision was intended to provide her with 40% of the proceeds from the sale of Decedent's residence. Barbara presented no evidence of earlier draft agreements that contained this provision, nor did she present testimony from her attorney who drafted the agreement. Barbara acknowledged that her attorney's entire file had been subpoenaed and there was nothing in there "that told us what this 9.4 would have said or was

contemplated to say.” (74:22-75:6). Further, Barbara testified that she believed that provision was intended to provide her a place to live after Decedent’s passing and funds to care for the house (as opposed to an interest in sale proceeds). (50:18-25). Barbara also testified that she and Decedent did not begin discussion about the potential of her receiving an interest in the home or its proceeds until October 2017—after the parties’ marriage and execution of the Premarital Agreement. (49:18-25). Finally, the correspondence from Barbara’s attorney suggests that the parties’ intent, through the Premarital Agreement, was to waive all interest in their separate property, including the personal residence. (E15). Specifically, in Exhibit 15, Barbara’s attorney explains the impact of the Premarital Agreement, noting that “in the event of death of the first spouse, the survivor would receive any assets on which the deceased spouse had indicated the survivor as beneficiary or held title as joint tenants with rights of survivorship. In the event of death, nothing else is required to be given to the surviving spouse but either of you can always choose to leave additional assets to the spouse in your estate documents.” (E15, p.2). No mention is made of a carve out for the personal residence, maintenance fund, and vehicle. Simply, there is no evidence to suggest that the Premarital Agreement gives Barbara the right to 40% of the proceeds from the sale of the personal residence.

## **II. THE COUNTY COURT DID NOT ERR IN FINDING THAT DECEDENT AND BARBARA DID NOT ENTER INTO AN ORAL CONTRACT TO CONVEY THE SALE PROCEEDS UPON DECEDENT’S DEATH**

Similarly, Barbara failed to sustain her burden of proof to establish an oral contract between herself and Decedent to convey 40% of the house proceeds at death. The Nebraska Supreme Court directs courts to “regard with grave suspicion any claim of an oral contract to convey property at death.” *Eggers v. Rittscher*, 247 Neb. 648, 653, 529 N.W.2d 741, 744 (1995). These contracts ordinarily violate the statute of frauds. *Id.* As a result of the skepticism surrounding oral contracts to convey property at death:

[O]ne trying to enforce such a contract [must] 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.

*Id.* at 653-54, 529 N.W.2d at 744-45.

Barbara cannot sustain her burden to prove either of these elements. Barbara alleges that in exchange for her financial contribution to a remodel of the personal residence, Decedent agreed to convey 40% of the proceeds from the sale of the house at death. Initially, there is no clear and convincing evidence to support that the terms of this purported agreement were reached at the time of the alleged partial performance—the 2015 and 2016 remodel. Nearly every witness, including the Personal Representative, acknowledged that starting in 2022 and corresponding with Decedent’s illness, he began expressing a desire for Barbara to receive 40% of the proceeds from the sale of his house. (85:14-22). However, there is little to no evidence, let alone clear and convincing, that an agreement regarding a 40% figure was reached at the time Barbara purportedly contributed to the 2015 and 2016 remodel. Barbara’s own testimony does not support this assertion. (85:23-25). Barbara testified that the remodel project began in 2015 and most of it was complete by the time of her marriage to Decedent in October 2016. (78:19-79:1). However, Barbara also testified that the very first discussions regarding a sharing of the proceeds did not occur until around the time she sold her home. (22:12-23:8). Barbara sold her home in October 2017—one year after completion of the remodel. (76:1-2).) She also testified that these discussions were of a general nature, as opposed to concrete contractual terms, conceding that at that point in time they had not even “said 60/40 yet.” (22:12-23:7). Barbara also acknowledged that the serious more concrete discussions about her receipt of 40% of the proceeds coincided with Decedent’s illness in 2021 or

2022—far removed from the home remodel and her alleged contributions to this remodel. (83:12-14; 85:23-25). In short, there is simply no clear and convincing evidence of an oral contract in which Decedent agreed to convey 40% of the proceeds of the home in exchange for Barbara's contribution to the home remodel. Rather, the evidence suggests that as Decedent's illness worsened, he desired to provide additional funds for Barbara but failed to take the necessary steps (i.e. changing title to his property or updating his Will) to accomplish this stated goal.

In a similar vein, the performance alleged by Barbara (contribution to the remodel) cannot be tied solely to an agreement to receive 40% of the proceeds of the house. While Barbara may have had a hope or expectation to receive a portion of the sale proceeds, there is no clear and convincing evidence that at the time Barbara alleges she contributed to certain remodel expenses, she did so with the expectation Decedent provide her 40% of the proceeds of the house. In fact, Barbara's testimony suggests that rather than done for an expectation of receiving a portion of sale proceeds, Barbara hoped that Decedent would retitle the personal residence to grant her a joint or partial interest. (85:14-86:18). Barbara also acknowledged that it was Decedent who expended a significant amount of his own money towards the remodel. (77:20-78:12). In short, because there is no clear and convincing evidence of the agreement's terms or that partial performance was tied to those terms, the oral contract alleged by Barbara to exist is barred by the statute of frauds.

Finally, it should also be noted that Barbara likewise failed to present evidence to substantiate more than a nominal contribution to the home remodel further calling into question the credibility of her claim that contribution to the remodel was consideration for a promise to convey proceeds upon death. In support of her claimed contribution to the home remodel, Barbara offered Exhibit 2. The first page of Exhibit 2 is titled "Summary of House Remodel Expenses" and contains a listing of expenses totaling \$21,088.98. (E2, p.1). During her direct examination, Barbara acknowledged that the first line-item totaling \$5,000 should be removed because those amounts were not actually paid. (52:2-11). Further, on cross examination, Barbara conceded that many of the line items are unrelated to a

remodel of the home. (80-82). First, she admitted the amounts paid to West Gate Bank could have been for her own personal line of credit on her own residence as opposed to Decedent's mortgage. (81:20-82:15). She also acknowledged that the Diamond Window Cleaning invoices were for the cleaning of windows as opposed to a remodel, and that all the furniture expenses related to furniture she retained as her separate property. (80:24-81:4, 80:15-23). Subtracting out the above expenses, the amount remaining totals only \$13,194.57.

Barbara likewise did not present credible evidence that she invested the proceeds from the sale of her residence into the remodel. The final page of Exhibit 2 is a photocopy of a deposit slip dated October 6, 2017 in the amount of \$39,021.60. (E2). Barbara admitted that this deposit went into her personal checking account. (81:5-13). Initially, Barbara testified that this money was used to pay for remodel expenses, but she no longer had records of these expenses—in stark contrast to the detailed records in the remainder of Exhibit 2, p. 41). When questioned on cross examination, Barbara admitted that the remodel was essentially complete by the time of the sale of her house and testified that she was not sure what this money was used for but some of it probably covered the items listed on the first page of Exhibit 2. (78:22-79:1, 81:14-19). On redirect, Barbara once again changed her story, and upon a leading question from her counsel, testified that the money was “probably” used to refinance Decedent's mortgage, but again, no such records were entered into evidence. (95:23-96:4). At best, Barbara has evidence that she contributed a nominal amount of roughly \$13,000 to a very significant and expensive home remodel. However, Barbara has no clear and convincing evidence to tie this contribution to an agreement by Decedent to convey to her 40% of the sale proceeds from his residence. As a result, the County Court correctly found no contract existed between Barbara and Decedent.

### **III. BARBARA WAIVED HER RIGHT TO CLAIM A FAMILY ALLOWANCE UNDER NEB. REV. STAT. § 30-2324**

Under Neb. Rev. Stat. § 30-2316(a), “[t]he right of election of a surviving spouse and the rights of the surviving spouse to a homestead

allowance, exempt property, and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse. Subjection (d) further provides that “[u]nless it provides to the contrary, a waiver of ‘all rights,’ or equivalent language, in the property or estate of a present or prospective spouse . . . is a waiver of all rights to elective share, homestead allowance, exempt property, and family allowance by each spouse in the property of the other . . .”

In this case, the Premarital Agreement contains the requisite “all rights” or equivalent language amounting to a waiver of the family allowance. (E1, p.5). Specifically, Article 7.2 addresses the “Waiver of Spousal Rights to Separate Property of Other Property,” providing that such separate property can pass by Will or other beneficiary designation “as though no marriage had ever taken place between them.” Article 11 also iterates this principle. (E1, p.5). While Article 11 does have a carve out for a “maintenance fund,” as argued above, the section purportedly creating a maintenance fund is not included in the Premarital Agreement. (E1, p.7). Additionally, Barbara testified that she believed the “maintenance fund” was to help care for the house as opposed to the statutorily defined family allowance for \$20,000. (59:16-25). Accordingly, there is no evidence to support Barbara’s current interpretation of the Premarital Agreement as excepting a “maintenance fund” in the form of a statutory family allowance. As a result, the waiver language of Article 7.2 controls. Barbara waived her right to the family allowance, and this Court should affirm the Order of the County Court.

### **CONCLUSION**

For the foregoing reasons, Lance Knapp, Personal Representative, respectfully requests that this Court affirm the Order of the County Court on each of the Appellant’s assignments of error.

DATED February 12, 2025

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### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that this brief complies with the word count limitations within NECivR 7.1(d). Based on the word-count function of Microsoft Word®, a part of Microsoft Office 365, this brief contains 4246 words, including all portions of the brief.

/s/Sheila A. Bentzen  
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### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that, except to the extent that any of the following receive e-service (in which case service to such persons was solely by e-service), that I caused a true and correct copy of the foregoing to be sent by ordinary United States mail, first class postage prepaid, on February 12, 2025, addressed to:

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# Certificate of Service

I hereby certify that on Wednesday, February 12, 2025 I provided a true and correct copy of this *Brief of Appellee Lance K.* to the following:

Barbara Knapp represented by Mary L Hewitt (19826) service method: Electronic Service to **maryhewitt@mgwl.com**

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

Signature: /s/ Sheila Bentzen (25020)