CASE NO. A-24-0619

IN THE COURT OF APPEALS OF THE STATE OF NEBRASKA

IN RE ESTATE OF PAUL A. KNAPP

APPEAL FROM THE COUNTY COURT OF
DODGE COUNTY, NEBRASKA

Case No. PR 23-100

Honorable Francis W. Barron, III, County Judge

REPLY BRIEF OF PETITIONER - APPELLANT BARBARA KNAPP

Prepared and submitted by:

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PROPOSITIONS OF LAW

Appellant incorporates the Propositions of Law in her original Brief and provides the additional Propositions of Law for the Court's benefit.

1. In construing a contract containing both general and specific provisions which relate to the same thing, the specific provisions will control over the general provisions. *State v. Commercial Casualty Ins. Co.,* 125 Neb. 43, 49, 248 N.W. 807, 810 (1933); *Panwitz v. Miller Farm-Home Oil Service,* 228 Neb. 220, 223, 422 N.W.2d 63, 66 (1988). Also, a contract must be construed as a whole, and if possible, effect must be given to every part thereof. *Mercy_Midlands Emple. Bens. Plan & Trust v. Junge*, 3 Neb. App.1, 17 (1994).

2. A written instrument is open to explanation by *parol* evidence when its terms are susceptible of two constructions, or where the language employed is vague or ambiguous, or when there is fraud or a mistake. Such evidence is admitted, not for the purpose of contradicting the terms of the contract, but for ascertaining and giving effect to the true intent of the parties. *State v. Commercial Casualty Ins. Co.,* 125 Neb. 43, 49, 248 N.W. 807, 810 (1933); *Label Concepts v. Westendorf Plastics*, 247 Neb. 560, 566, 528 N.W.2d 335, 339-340 (1995).

3. There appears to be no precise statement as to what constitutes consideration for an agreement other than the general declaration that in order for there to be consideration for an agreement there must be a benefit to one of the parties or a detriment to the other. *Commuter Developments & Investments, Inc. v. Gramlich*, 203 Neb. 569, 571, 279 N.W.2d 394, 395 (1979).

4. Nebraska courts have long held that what a benefit/detriment must be or how valuable it must be varies from case to case. It is clear, however, that even 'a peppercorn' may be sufficient. *Walker v. Probandt*, 25 Neb. App. 30, 902 N.W.2d 468 (2017); See *Kissinger v. Genetic Eval. Ctr.*, 260 Neb. 431, 439, 618 N.W.2d 429, 436 (2000). A valuable consideration to support a contract need not be one translatable into dollars and cents; it is sufficient if it consists of the performance, or promise thereof, which the promisor treats and

considers a value to him. *Buckingham v. Wray*, 219 Neb 807, 810, 366 N.W.2d 753,756 (1985). A valuable consideration may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other. *In re Estate of Griswold*, 113 Neb. 256, 202 N.W. 609 (1925); *Asmus v. Longenecker*, 131 Neb. 608, 611, 269 N.W. 117, 119 (1936); *Phelps v. Blome*, 150 Neb. 547, 555, 35 N.W.2d 93, 97 (1948); ; *Omaha Nat. Bank v. Goddard Realty, Inc.,* 210 Neb. 604, 316 N.W.2d 306 (1982*); Pruss v. Pruss*, 245 Neb. 521, 534, 514 N.W.2d 334, 345 (1994).

CORRECTED STATEMENT OF FACTS

Appellant Barbara Knapp incorporates the defined terms set forth in her original brief. Because the Statement of Facts in the Appellee's Brief misrepresents the terms of the Premarital Agreement, misrepresents and/or completely disregards the testimony of multiple witnesses in the record, and inserts conclusionary and subjective opinions, none of which are undisputed "facts," Barbara submits the following Corrected Statement of Facts.

Contrary to the Appellee's misrepresentation of the language of the Premarital Agreement, Paul and Barbara did not waive all their rights to which they were entitled under the law in each other's separate property. Rather, they both agreed that on the death of the first of them, the surviving spouse retained the rights to "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." (E1, p7).

Appellee's citation to Section 7.2 of the Premarital Agreement misleadingly omits the first sentence of Section 7.2, which begins: "[e]xcept as specifically provided to the contrary elsewhere in this Agreement." (E1, p5). This qualifying first sentence renders an entirely

different meaning to Appellee's citation when the Premarital Agreement is read as a whole.

Appellee's assertion that Paul and Barbara did not update their Wills after their marriage therefore "allowing the waivers set forth in the Premarital Agreement and their pre-marriage intentions to control" is merely a conclusory and erroneous argument which was not supported by the evidence as will be more fully explained in the argument below.

Appellee's Statement of Fact also misleadingly states: that only one witness claimed that, prior to the marriage, Paul mentioned his desire that Barbara was to receive a percentage of the proceeds from the sale of the home; that such testimony was "equivocal at best;" that Barbara "admitted" the split of sale proceeds discussion began "long after the execution of the premarital agreement and in connection with Decedent's end-of-life illness." Such statements are not facts but rather mere conclusions, and argumentative subjective opinions which misrepresent the record as will be more fully set forth in Appellant's argument below.

ARGUMENT

I. APPELLEE'S ARGUMENT TO DISREGARD CERTAIN LANGUAGE IN THE PREMARITAL AGREEMENT RELIES UPON AN INCOMPLETE AND MISLEADING CITATION TO THE AGREEMENT AND IS CONTRARY TO THE RULES OF CONTRACT CONSTRUCTION.

A. Incomplete and Misleading Citations to the Agreement.

Appellee asserts that the language of the Premarital Agreement does not support a finding that Barbara is entitled to a share of the Marital Home proceeds. This argument is based on Appellee's incomplete and misleading citation to the Premarital Agreement. Appellee misrepresents the language of Section 7.2 and then misinterprets and asks the court to ignore the language of Article XI.

With regard to Section 7.2, Appellee omits the first sentence which states:

> "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, p5).

Appellee's omission of this first sentence in 7.2 - which omission was first introduced to the court during Appellee's opening statement (12:2-6; 14:1-5) and then repeated by the lower court in its opinion - leads to an interpretation that disregards the language and intent of Article XI: the right of the surviving spouse to retain "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." (E1, p7)

B. Misapplication of the Rules of Contract Construction

Appellee argues that the "only reasonable interpretation" of Article XI is "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."

Appellee's "reasonable interpretation" turns the law of contract construction on its head. In contract interpretation, a contract must receive a reasonable construction, must be construed as a whole, and must give effect, where possible, to every part of the contract. The language of Article XI is neither boiler plate nor general terms; rather, the language is a unique provision to preserve rights of a surviving spouse to specifically identified property: a personal residence, a vehicle and a maintenance fund.

In construing a contract containing both general and specific provisions which relate to the same thing, the specific provisions will

control over the general provisions. *State v. Commercial Casualty Ins. Co.,* 125 Neb. 43, 248 N.W. 807 (1933). Also, a contract must be construed as a whole, and if possible, effect must be given to every part thereof. *Mercy_Midlands Emple. Bens. Plan & Trust v. Junge*, 3 Neb. App.1, 17-18 (1994).

The essence of Appellee's argument is that the Court should strike out and ignore the specific language of Article XI, which limits the general waiver in Section 7.2, because Article XI refers to another section of the agreement which does not exist. While Article 9.4 does not exist, such oversight does not render Article XI nonexistent or superfluous, as Appellee would like this Court to hold. Such an interpretation is neither reasonable nor supported by the rules of contract construction. The specific limitations of the parties' waiver in Article XI must control over the general waiver in Section 7.2: language which confirms that neither party intended to waive their entire rights to the personal residence.

C. The Premarital Agreement is Vague, Ambiguous or Contains a Mistake for Which the Court May Consider Parol Evidence As to the Parties Intentions.

At most, the inconsistency of the general waiver in 7.2 and the specific exceptions to such a waiver in Article XI are vague, ambiguous or contain a mistake. A written instrument is open to explanation by *parol* evidence when its terms are susceptible of two constructions, or where the language employed is vague or ambiguous, or when there is fraud or a mistake. Such evidence is admitted, not for the purpose of contradicting the terms of the contract, but for ascertaining and giving effect to the true intent of the parties. *State v. Commercial Casualty Ins. Co.,* 125 Neb. 43, 49, 248 N.W. 807, 810 (1933); *Label Concepts v. Westendorf Plastics*, 247 Neb. 560, 566, 528 N.W.2d 335, 339-340 (1995).

As more fully set forth in the Appellant's original brief, when a contract is found to be ambiguous, it presents a question of fact

permitting the court to 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.

In this instance, the facts leading up to the contract's execution include a letter to Barbara from her attorney, approximately five weeks prior to their marriage, which sets out the attorney's understanding of the parties intentions: "I understand that you and Paul are adding an addition to his home that will be eventually funded by sale proceeds from the sale of your home." (E15, p1). This same letter set out potential options for Paul and Barbara to consider, such as either retitling the home in joint tenancy with rights of survivorship or setting up a trust with instructions for the trustee to sell the home and distribute the proceeds equally between their surviving children after they were both deceased. (E15, p1-2).

Ten days prior to their marriage, and shortly after the execution of the Premarital Agreement, Barbara's attorney sent a letter to Paul's attorney in which she states: "Thanks for reviewing it for Paul. I urged him to consult with you regarding a trust to be set up after the wedding and closing on the home." (E16, p1).

At minimum, these two letters confirm the intentions of Paul and Barbara, after their marriage and after Barbara sold her home, to create a trust to provide rights for the two of them and their respective children for when the house is later sold. Furthermore, the actions and admissions of both Paul and Barbara after their marriage, and at the time Barbara sold her home, align with these stated intentions surrounding the circumstances leading up to the execution of the Premarital Agreement, the nature and situation of the subject matter and the apparent purpose of their agreement.

The undisputed facts include testimony by Frank Kment, Paul's banker, friend and golf partner. Mr. Kment testified to multiple conversations he had with Paul in which Paul told him that when he died and the home was sold, Barbara was to receive 40% of the sale

proceeds. Mr. Kment stated these conversations occurred many times, including prior to their marriage. While Mr. Kment could not identify the exact date of any of the conversations (which Appellee apparently construes as making his testimony "equivocal at best"), Mr. Kment was able to tie the admissions by Paul to timeframes relating to specific events: 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).

The evidence of these pre-marriage intentions, post-marriage actions and admissions, and the language of Article XI of the Premarital Agreement are contrary to Appellee's assertion that Paul and Barbara intended to waive any rights in the home upon the death of one or both of them. Rather, consistent with the stated pre-marriage intentions as outlined in the attorney letter to Barbara, the letter to Paul's attorney and the testimony of Frank Kment, Barbara assisted in the remodel of the home by painting and staining multiple rooms and by personally paying multiple constructions costs prior to their marriage. The undisputed evidence further confirms that after their marriage, Barbara assumed all costs for utilities and other recurring home expenses, did in fact sell her home, and that after the closing, she did in fact assist Paul in refinancing the home in 2017 and again in 2020 and assumed joint liability for such debt.

In particular, during the second refinancing of the home in 2020, Barbara signed multiple documents which identified "Paul and Barb" or "Paul A. Knapp and Barb A. Knapp," as husband and wife, which described the refinance as a transfer of a loan for "your home" and which included a "Deed of Trust," containing both of their names – a document which Barbara believed was a deed to the home in trust for both of them. (46:7-47:25; E7, pp.1-10). Barbara further testified that she would not have co-signed the obligations nor used the proceeds from the sale of her home for the Marital Home if her name was not on the title. (48:7-9).

II. APPELLEE'S ARGUMENT THAT THE ORAL AGREEMENT WAS NOT SUPPORTED BY VALUABLE AND CONTEMPORANEOUS CONSIDERATION MISREPRESENTS THE PROMISES, TIMING AND ONGOING CONSIDERATION AGREED TO BY BARBARA AND PAUL.

Appellee argues that the oral agreement between Paul and Barbara is unenforceable for lack of "contemporaneous consideration." Appellee argues that the remodel was nearly complete by the time of their marriage and that Barbara's payments of construction costs were "nominal." Appellee argues, therefore, that Barbara did not provide any consideration at the time the Premarital Agreement was signed to support an oral agreement.

Appellee's argument overlooks the fact that while the construction was nearly complete at the time of their marriage, Paul had incurred substantial debt for the remodel which had not yet been paid and that Paul had very little cash at his disposal to service such obligations. See financial statement to the Premarital Agreement (E1, p 14).

Appellee's argument further disregards Barbara's testimony that she could not find all of the receipts for other remodeling payments she had made nor could she access the details for costs she had charged on her credit card. (29:9-13). Moreover, contributing to the costs of the remodel was just a portion of the promises Barbara and Paul had made to each other with regard to their Marital Home. Barbara promised to assume the majority of the monthly utilities and recurring household expenses. (37:6-39:17). Barbara also promised to sell her home and assist in the Marital Home: promises which Barbara kept in 2017 and again in 2020 by assuming and joining in the refinancing debt obligations – which assumption of liability she assumed under the mistaken belief her name had been added to a trust for the Marital Home. (46:7-47:25; 95:23-97:5).

Appellee's argument as to sufficient consideration is contrary to Nebraska law. In Nebraska, there is no precise statement as to what constitutes consideration for an agreement other than the general declaration that in order for there to be consideration for an agreement there must be a benefit to one of the parties or a detriment to the other. *Commuter Developments & Investments, Inc. v. Gramlich*, 203 Neb. 569, 279 N.W.2d 394 (1979); *Dorland v. Dorland*, 175 Neb. 233, 121 N.W.2d 28 (1963). What that benefit/detriment must be or how valuable it must be varies from case to case. It is clear, however, that even 'a peppercorn' may be sufficient. *Walker v. Probandt*, 25 Neb. App. 30, 902 N.W.2d 468 (2017); See *Kissinger v. Genetic Eval. Ctr.*, 260 Neb. 431, 439, 618 N.W.2d 429, 436 (2000). A valuable consideration to support a contract need not be one translatable into dollars and cents; it is sufficient if it consists of the performance, or promise thereof, which the promisor treats and considers a value to him. *Buckingham v. Wray*, 219 Neb 807, 810, 366 N.W.2d 753,756 (1985). A valuable consideration may consist either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other. *In re Estate of Griswold*, 113 Neb. 256, 202 N.W. 609 (1925); *Asmus v. Longenecker*, 131 Neb. 608, 611, 269 N.W. 117, 119 (1936); *Phelps v. Blome*, 150 Neb. 547, 555, 35, N.W.2d 93, 97 (1948); ; *Omaha Nat. Bank v. Goddard Realty, Inc.,* 210 Neb. 604, 316 N.W.2d 306 (1982*); Pruss v. Pruss*, 245 Neb. 521, 534, 514 N.W.2d 334, 345 (1994).

While Appellee questions the value of the consideration provided by Barbara, Appellee's personal belief as to what is sufficient value is irrelevant. The proper inquiry is whether Paul and Barbara, the parties to the agreement, believed Barbara's contributions were of sufficient value to entitle her to 40% of the Marital Home proceeds. As demonstrated by the testimony of Frank Kment, Mica Jacobs, Rebecca Westphalen, Jim Mendlik and the Appellee himself, each and every time Paul confirmed his intention for Barbara to receive 40% of the proceeds from the sale of the Marital Home.

At the request of Appellee's counsel, other than Barbara and the Appellee, the witnesses were sequestered during the hearing. (5:19-6:24). Nonetheless, the testimony of the sequestered witnesses substantiated Paul's intentions and belief that he and Barbara had a binding agreement:

> "He had told me that everything was taken care of…it was going to be a 60/40 split and everybody knew it." Testimony of Frank Kment. (16:21-22).
>
> "And he said, you know, I don't know what's going to go on from here. But everything is all cut and dried. And this is what I want. These are my wishes, and, you know, Barb is supposed to get 40 percent. And Diane's children are supposed to get 60." Testimony of Rebecca Westphalen. (109:5-9).
>
> "… he said, "and besides that, if the house ever sells, Barb knows that she's going to get 40 percent of the proceeds and the rest of the family will get 60 percent."" Testimony of Jim Mendlik (105: 13-16).
>
> "He said mom can live there. Barb can live there, as long as she wants. When the house is sold, he would like the proceeds to be split 60/40 with my mom getting 40." Testimony of Mica Jacobs. (113: 19-21).
>
> This testimony was also substantiated by the Appellee:
>
> "He just said that when the house was sold that she [Barbara] should get 40 percent of the proceeds and the family should get the rest." Testimony of Lance Knapp (128:2-4).

Appellee further misconstrues the testimony at the hearing by arguing that Paul's statements about splitting the proceeds did not begin until after Barbara sold her home in 2017 or until Paul's illness progressed in 2021 or 2022, events which the Appellee argues are too far removed from the home remodeling done in 2015 and 2016 to support an oral contract.

This argument once again misinterprets the agreement of the Parties and misrepresents the record as established by the testimony of Barbara:

> "Q. And so, prior to your marriage, did you have any discussions with Paul about a prenuptial agreement?
>
> A. Yes.
>
> . . .
>
> Q. And what were those discussions generally?
>
> A. That we would split everything that we had. I would try to pay half of -- or close to half of whatever needed to be paid in the house. And he would do the same. And after the – if something happened to either of us, we would stay in the house for as long as we wanted. And then the house would be split.
>
> Q. It would be sold, and you mean the proceeds would be split?
>
> A. Yes.
>
> Q And what was your understanding of how those proceeds were to be split?
>
> A. At that time, I'm not sure we said 60/40 yet.
>
> Q. Had there been discussions and negotiations going back and forth on that split?
>
> A. Not a lot of discussion. Just – we thought that it would be 60/40 but we hadn't decided.
>
> Q. And at some point, did you decide on the 60/40?
>
> A. Yes.
>
> Q. And when was that point?
>
> A. Oh, it was probably – I think around the time that I sold my house. So, that was in 2017." (22:7-23:8).

In addition to overlooking this relevant testimony by Barbara – testimony which was substantiated by Frank Kment - the Appellee also ignores the following facts: (1) the home remodel had yet to be paid for and was not yet complete at the time of the Parties marriage; (2) the home remodel continued throughout the marriage of Paul and Barbara; (3) the home remodel included the installation of a lake front wall in 2022 for which Barbara paid the final amount of $5,901.84 after Paul's death; (4) Barbara promised and provided additional consideration in support of their oral agreement by selling her home and assuming joint liability for the Marital Home refinancings in 2017 and 2020; and (5) Barbara assumed the ongoing responsibility for payment of all monthly utilities and other recurring home expenses.

In addition, the testimony of Frank Kment and Barbara that the 60/40 split was discussed again when Barbara sold her home in 2017, expressly relates back to the language in the attorney letters in 2016 when the Premarital Agreement was being drafted and shortly after it was executed:

> "I understand that you and Paul are adding an addition to his home that will be eventually funded by sale proceeds from the sale of your home." (E15, p1).
>
> "Thanks for reviewing it for Paul. I urged him to consult with you regarding a trust to be set up after the wedding and closing on the home." (E16, p1).

Taken altogether, the undisputed evidence supports, by clear and convincing evidence, that 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. Although Appellee questions the value and timing of the consideration provided by Barbara, Appellee did not offer any testimony or evidence which contradicted either Paul's admissions and intentions or the various forms of consideration which Barbara promised and provided. As set forth in Barbara's

original brief, 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.

III. APPELLEE'S ARGUMENT THAT THE LOWER COURT CORRECTLY FOUND BARBARA WAIVED HER RIGHT TO MAINTENANCE BECAUSE SECTION 7.2 OF THE PREMARITAL AGREEMENT WAS A GENERAL WAIVER OF "ALL RIGHTS" IS BASED ON INCOMPLETE AND MISLEADING CITATIONS TO THE LANGUAGE OF THE PREMARITAL AGREEMENT

Appellee once again omits the first sentence of Section 7.2 to assert Barbara waived "all rights" to a family allowance. This erroneous omission was repeated by the lower court in its decision. As set forth above, the qualifying language of the first sentence of 7.2, in conjunction with Article XI, demonstrates the exact opposite of what Appellee advocates and the lower court held.

Article XI of the Premarital Agreement expressly states 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 right which was an express reservation of a right for Barbara's benefit which she did not waive.

Appellee attempts to discredit Barbara's right to a maintenance fund by referencing Barbara's understanding that the purpose of the maintenance fund was to help her care for the Marital Home after Paul was gone. Appellee suggests Barbara's understanding is contrary to the right of a surviving spouse to a "family allowance" as if such statutory right must be used for some other purpose. There is no requirement that a family allowance must be designated or spent in any particular way and such argument cannot form a basis to disregard the express reservation for a maintenance fund in Article XI.

CONCLUSION

As more fully set forth in the original brief and in this Reply Brief, 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, the undisputed evidence leading up to the execution of the agreement, shortly after the agreement was signed and the actions and admissions of the parties during their marriage provide the missing intentions and terms.

In addition, the verbal agreement between Paul and Barbara Knapp – substantiated by the overwhelming, undisputed, uncontradicted and consistent admissions by Paul over many years and as supported by the ongoing promises and consideration provided by Barbara (consideration which was, in part, referenced in attorney letters just prior to and after the execution of the Premarital Agreement) confirm the oral agreement of the parties for Barbara to receive 40% of the net proceeds from the sale of the marital residence and a maintenance fund.

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, contrary to Paul's repeated assertions which confirm his belief that Barbara had provided sufficient consideration to entitle her to such proceeds 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 renews her requests that 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 24th day of February, 2025.

BARBARA KNAPP, Appellant

By: s/ Mary L. Hewitt
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ATTORNEYS FOR APPELLANT

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing reply brief and Appellant's opening brief filed on December 12, 2024, contain 12,493 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 Monday, February 24, 2025 I provided a true and correct copy of this *Reply Brief of Appellant Barbara K* to the following:

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