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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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<i>In re</i> ESTATE OF ALFRED E. SMITH, deceased,	)	Appeal from the Circuit Court of Lake County.
	)	
	)	No. 10-P-428
	)	
(Janice Smith, Plaintiff-Appellant, v. Sara C. Smith, <i>et al.</i> , Defendants-Appellees).	)	Honorable Diane E. Winter, Judge, Presiding.

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JUSTICE HUDSON delivered the judgment of the court.  
Presiding Justice Jorgensen and Justice Birkett concurred in the judgment.

**ORDER**

¶ 1 *Held:* (1) Premarital agreement does not fail for lack of consideration; (2) lack of the decedent's will does not render the premarital agreement unclear, indefinite, or incomplete; (3) the decedent's children did not have the burden of producing the decedent's will; (4) trial court properly determined that townhome, condominium, and proceeds of life insurance policy belong to the probate estate and, by virtue of the enforceable premarital agreement, pass to the decedent's children; but (5) trial court should have apportioned value of automobile purchased with both marital funds and the proceeds of a non-marital asset.

¶ 2 Defendants, Sara C. Smith (Sara) and Lance D. Smith (Lance), filed a petition for declaratory relief seeking a determination regarding the proper distribution of five assets of the estate of their father, decedent, Alfred E. Smith (Alfred). Plaintiff, Janice Smith (Janice), Alfred's surviving

spouse and the supervised administrator of Alfred's estate, appeals from an order of the circuit court of Lake County in favor of Sara and Lance. For the reasons set forth below, we affirm in part, reverse in part, and remand for further proceedings.

¶ 3

### I. BACKGROUND

¶ 4 Alfred married Janice, his third wife, on June 29, 2005. On the day of their marriage, Alfred and Janice executed a premarital agreement. The premarital agreement was drafted by attorney Phillip Stephen Miller at Alfred's request. The premarital agreement states that each party shall have "full control" of any "non-marital property" he or she owned as of the date of the premarital agreement. The premarital agreement then lists each party's non-marital property. Among the assets listed in the premarital agreement as Alfred's non-marital property are the following: (1) a three-bedroom townhome in Wauconda, Illinois (Wauconda Townhome); (2) a two-bedroom condominium in Hallandale, Florida (Florida Condominium); (3) "[l]ife insurance cash value;" (4) a 2003 BMW 325 automobile (2003 BMW); and (5) a 2000 Harley Davidson motorcycle. Paragraph two of the premarital agreement reads in relevant part as follows:

"Except as otherwise expressly provided, each of the parties hereby waives, relinquishes, \*\*\* surrenders and releases, and hereby agrees to waive, relinquish, \*\*\* surrender and release, to the other all of the following:

(a) Any and all of his or her right, title and interest of every kind and description, which he or she may have, acquire, enjoy or be seized by reason of, or on or after, their marriage, as the wife, husband, widow or widower of the other party, in the non-marital property of the other party, whether real, personal and mixed and wherever located; and

(b) Any and all rights to any non-marital property of the other party as defined in this agreement; and

\* \* \*

Except as otherwise expressly provided, it is the intent of the parties that this paragraph shall be construed so that each party may deal with his or her non-marital property and any trust in which he or she may have an interest as if their marriage had not taken place, and on the death of either party his or her estate and any trust in which he or she may have an interest will be administered, descend and be distributed in exactly the same way and to the same heirs, next of kin, devisees or legatees as if the other party had predeceased the party so dying. Nothing contained in this paragraph or in this agreement, however, is intended to preclude either party from voluntarily making provision for, or granting powers or rights to, the other party in and by the formers [*sic*] last will, a codicil thereto or otherwise.”

In addition, paragraph eight of the premarital agreement provides that “all property acquired by each party in exchange for or with the proceeds of any non-marital property shall be deemed to be part of their [*sic*] non-marital estate and by the terms hereof, each party hereby waives and relinquishes all claim to the non-marital estate of the other. Likewise, all other property acquired during the marriage shall be deemed marital property.”

¶ 5 The premarital agreement also indicates that contemporaneously with its execution, each party prepared a will. With respect to these wills, paragraphs three through five of the premarital agreement provide as follows:

“(3) The parties have each executed a Last Will and Testament, copies of which are attached hereto as Exhibits C and D. The parties agree that these Wills are in conformity with the provisions of this agreement,, [sic] and, as consideration for this agreement, each party does hereby waive any and all objection to the terms of the said Last Will and Testament of the other and each party agrees not to contest or renounce the terms of thereof [sic]. Likewise, each party agrees not to contest or renounce any future Wills or Codicils, which are in conformity with the terms of this agreement.

(4) The fact that either party (without being obligated to do so) may give, devise or bequeath to the other party non-marital property or an interest therein, or otherwise confer rights or powers on the other party, in trust or by gift or will, shall not be construed as a waiver of any provision hereof or as evidence that there is or was an agreement or understanding between the parties other than as specifically expressed herein.

(5) The Husband’s will[,], among other things, grants the wife substantial non-marital assets and the right to reside in his non[-]marital townhouse and condominium until her death or remarriage. These will provisions are not in any way consideration for this premarital agreement. While the husband has no present intention to change these provisions of his will, the husband is free, by the terms of this premarital agreement, to alter his will with regard to any of his non-marital property if he elects. In other words, the husband may make any provision he wishes with respect to his non-marital financial assets and townhouse or condominium in his will.”

¶ 6 During the course of the marriage, Alfred designated Janice as a joint owner of some of his assets. In addition, Alfred took steps to name Janice as a beneficiary of certain assets. In May 2009,

Alfred purchased a 2008 BMW 528i (2008 BMW) for approximately \$47,000. The 2008 BMW was titled in Alfred's name alone. To pay for the 2008 BMW, Alfred made a down payment of \$20,000 from a checking account and he traded in the 2003 BMW, which was valued at \$10,000. The remainder of the purchase price was financed.

¶ 7 Alfred died on March 23, 2010. In addition to Janice, Alfred was survived by Lance, his son by his first marriage, as well as Sara and Margaret H. Smith (Margaret), his daughters by his second marriage. No will executed by Alfred was found after his death. On May 20, 2010, Janice was appointed independent administrator of Alfred's estate. Upon a petition filed by Sara and Lance, Alfred's estate was converted to supervised administration by order entered on June 28, 2010, with Janice serving as the supervised administrator. On October 7, 2010, Janice filed an inventory of the estate. Among the assets listed in the inventory were the Wauconda Townhome, the Florida Condominium, the 2008 BMW, and the 2000 Harley Davidson motorcycle.

¶ 8 Prior to his marriage to Janice, Alfred worked for Discover Financial Services (Discover). Alfred was still employed with Discover at the time of his death. As an employee of Discover, Alfred had a life insurance policy administered in conjunction with Aetna U.S. Healthcare (Discover/Aetna Life Insurance Policy). After Alfred passed away, Janice received a letter from Discover informing her, *inter alia*, that "basic life insurance proceeds" were payable as a result of Alfred's death. The letter indicated that no insurance beneficiary designation was on file. Thus, pursuant to a default provision, the life insurance proceeds would be paid to Alfred's spouse or, if none, to Alfred's children in equal proportions. Janice received a life insurance death benefit of \$50,000. During the pendency of these proceedings, the trial court entered an order prohibiting Janice from spending the proceeds of the Discover/Aetna Life Insurance Policy.

¶ 9 On March 18, 2011, Sara and Lance filed a petition for declaratory relief in the circuit court of Lake County requesting that the court determine the proper distribution of five assets of Alfred's estate, namely: (1) the Wauconda Townhome; (2) the Florida Condominium; (3) the proceeds of the Discover/Aetna Life Insurance Policy; (4) the 2008 BMW; and (5) the 2000 Harley Davidson motorcycle. In their petition, Sara and Lance argued that the two parcels of real estate should be deeded to them and Margaret in equal shares because the premarital agreement classified those assets as Alfred's separate, non-marital property and Janice waived and relinquished her rights to an intestate share by signing the premarital agreement. Similarly, Sara and Lance argued that Alfred's three children are the beneficiaries of the Discover/Aetna Life Insurance Policy because the life insurance was in place prior to Alfred's marriage to Janice, Janice was not a named beneficiary on the policy, and Janice waived and relinquished any rights she may have had to be a beneficiary of the policy pursuant to the premarital agreement. Finally, Sara and Lance argued that according to the terms of the premarital agreement, Janice relinquished her right to inherit the 2008 BMW and the 2000 Harley Davidson, and thus, the two vehicles belong to Alfred's three children.

¶ 10 On April 18, 2011, Janice filed her response to the petition for declaratory relief, and on July 20, 2011, she filed a supplemental response and a counter petition for declaratory relief. Janice insisted that the proceeds of the Discover/Aetna Life Insurance Policy were not Alfred's non-marital property. She argued that the premarital agreement only references the "cash value" of life insurance, not the value of the death benefit itself. Janice also alleged that the 2008 BMW was not Alfred's non-marital property because it was purchased during the marriage and it was paid for in part with marital assets. Moreover, Janice argued that the terms of Alfred's will are essential to an understanding of the premarital agreement. While acknowledging that an executed copy of Alfred's

will was never found, she claimed that pursuant to the best-evidence rule, testimony and other indirect evidence may be used to prove the terms of the will. Janice asserted that various paragraphs of the premarital agreement “describe[] important terms of [Alfred’s will].” She claimed, for instance, that pursuant to paragraph five of the premarital agreement, she was entitled to a life estate in both the Wauconda Townhome and the Florida Condominium. Janice further asserted that both parties are in possession of various unsigned drafts of Alfred’s will. She claimed that one of these drafts granted her the Wauconda Townhome outright. Janice argued that to the extent the evidence is insufficient to prove the terms of Alfred’s will, then the premarital agreement should be rescinded. Janice also argued that the court should consider applying a constructive trust in her favor under a promissory estoppel theory. In this regard, Janice asserted that, in reliance on a promise by Alfred that she would be allowed to live in the Wauconda Townhome and the Florida Condominium until her death or remarriage, she did not invest in other properties or prepare to move.

¶ 11 An evidentiary hearing on Sara’s and Lance’s petition for declaratory relief was held on July 20, 2011. At the hearing, Janice testified that both she and Alfred signed the premarital agreement on June 29, 2005. Janice further stated that at the time the premarital agreement was executed she signed what she thought was her will and she saw Alfred sign what she thought was his will. Janice testified that she would not have signed the premarital agreement if the wills were not attached. After Alfred’s death, Janice located the premarital agreement in the Wauconda Townhome. However, Janice testified that the wills were not attached to the premarital agreement and she was not aware what happened to the wills. Janice also testified that the \$20,000 down payment for the 2008 BMW as well as the finance payments were made from a joint checking account she had with Alfred. Among the other witnesses called at the hearing were Sara and Lance, who testified

regarding their relationship with Alfred, and Miller, the attorney who, at Alfred's request, drafted the premartial agreement as well as various drafts of Alfred's will. On September 15, 2011, the trial court entered an order granting declaratory relief in favor of Sara and Lance. The court held that the premarital agreement is enforceable and that the five disputed assets were probate assets. Janice subsequently filed a motion to reconsider the September 15, 2011, order. On February 2, 2012, the trial court denied the motion to reconsider. On March 2, 2012, Janice filed a notice of appeal.

¶ 12

## II. ANALYSIS

¶ 13 On appeal, Janice cites two reasons why she believes the premarital agreement is not enforceable. First, she argues that the premarital agreement fails for lack of consideration. Second, Janice asserts that the premarital agreement is not clear, definite, and complete. Janice also claims that the trial court erroneously construed the premarital agreement to her detriment because Sara and Lance failed to bear their burden of producing "the complete agreement." Janice contends that even if the validity of the premarital agreement is upheld, the trial court's rulings as to certain assets are erroneous. We address each contention in turn.

¶ 14

### A. Enforceability of the Premarital Agreement

¶ 15

#### 1. Consideration

¶ 16 Janice first argues that the premarital agreement fails for lack of consideration. At the outset, we note that Janice did not raise this issue in her response to Sara's and Lance's petition for declaratory relief, her supplemental response/counter-petition for declaratory relief, or the closing argument she filed with the trial court after the hearing on the petitions. Thus, we find that Janice has forfeited this argument by failing to raise it in the trial court. See *In re Estate of Walsh*, 2012 IL App (2d) 110938, ¶ 37; *J.R. Sinnott Carpentry, Inc. v. Phillips*, 110 Ill. App. 3d 632, 639 (1982).

¶ 17 Forfeiture notwithstanding, we find Janice’s argument unconvincing. Premarital agreements are contracts. *In re Marriage of Best*, 387 Ill. App. 3d 948, 949 (2009). As such, the rules governing the interpretation of contracts apply to the interpretation of premarital agreements. *In re Marriage of Best*, 387 Ill. App. 3d at 949. A contract is formed when there is an offer, acceptance, and consideration. *Steinberg v. Chicago Medical School*, 69 Ill. 2d 320, 329 (1977). Prior to the passage of the Illinois Uniform Premarital Agreement Act (Premarital Agreement Act) (750 ILCS 10/1 *et seq.* (West 2004)), the law in this state recognized that the marriage itself was sufficient consideration for a premarital agreement. *In re Marriage of Sokolowski*, 232 Ill. App. 3d 535, 542 (1992); see also *In re Marriage of Barnes*, 324 Ill. App. 3d 514, 519 (2001). However, the Premarital Agreement Act dispensed with the need for consideration as a prerequisite for the enforcement of premarital agreements entered into on or after its effective date of January 1, 1990. 750 ILCS 10/3 (West 2004) (“A premarital agreement must be in writing and signed by both parties. It is enforceable without consideration.”); see also 750 ILCS 10/11 (West 2004) (noting the effective date of the Premarital Agreement Act).

¶ 18 Although the premarital agreement at issue was executed after January 1, 1990, Janice nevertheless contends that she and Alfred explicitly identified “specific consideration” in their premarital agreement. In particular, Janice asserts that pursuant to paragraph three of the premarital agreement, she and Alfred provided that their respective waivers of all objections to the terms of each other’s wills constituted consideration for the premarital agreement. Sara and Lance disagree. They assert that paragraph three of the premarital agreement does not support Janice’s claim. Further, they cite to paragraph five of the premarital agreement, which, they contend, expressly provides that Alfred’s will was not intended to be consideration for the premarital agreement.

¶ 19 The primary goal of contract interpretation is to decide and give effect to the intent of the parties as expressed through the words of the contract. *In re Marriage of Rosenbaum-Golden*, 381 Ill. 2d 65, 72 (2008). In ascertaining the intent of the parties, a court must consider the contract as a whole and not focus on isolated portions of the document. *The Richard W. McCarthy Trust v. Illinois Casualty Co.*, 408 Ill. App. 3d 526, 535 (2011). If the language of a contract is clear and unambiguous, the parties' intent must be determined solely from the language of the contract itself, which should be given its plain and ordinary meaning. *The Richard W. McCarthy Trust*, 408 Ill. App. 3d at 535. However, if the contract language is ambiguous, a court may consider extrinsic evidence. *Westfield Insurance Co. v. FCL Builders, Inc.*, 407 Ill. App. 3d 730, 736 (2011). The mere fact that the parties disagree on the interpretation of a contract does not render the document ambiguous. *The Richard W. McCarthy Trust*, 408 Ill. App. 3d at 535. Rather, a contract is ambiguous if it is susceptible to more than one *reasonable* interpretation. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). Whether a contract term is ambiguous is a question of law and therefore subject to *de novo* review. *In re Marriage of Best*, 369 Ill. App. 3d at 266. Similarly, when the terms of a contract are unambiguous, construction of the contract is also a matter of law. *In re Marriage of Best*, 369 Ill. App. 3d at 266.

¶ 20 As noted above, Janice relies on paragraph three of the premarital agreement for her claim that her and Alfred's respective waivers of all objections to the terms of the other's will constituted consideration for the premarital agreement. Paragraph three provides in its entirety:

“(3) The parties have each executed a Last Will and Testament, copies of which are attached hereto as Exhibits C and D. *The parties agree that these Wills are in conformity with the provisions of this agreement,, [sic] and, as consideration for this agreement, each*

*party does hereby waive any and all objection to the terms of the said Last Will and Testament of the other and each party agrees not to contest or renounce the terms of thereof* [sic]. Likewise, each party agrees not to contest or renounce any future Wills or Codicils, which are in conformity with the terms of this agreement.” (Emphasis added.)

Sara and Lance assert that Janice misreads paragraph three. According to them, paragraph three of the premarital agreement “states that Alfred and Janice agreed their wills were in conformity with the Premarital Agreement, and as *consideration for their agreement that their wills were in conformity*, they waived objections to the terms of each other’s wills—the waiver of objections was the consideration for the agreement that their wills were in conformity.” (Emphasis in original.) We reject Sara’s and Lance’s tortured reading of paragraph three.

¶ 21 The first sentence of paragraph three states that Alfred and Janice each executed a will and attached his or her will to the premarital agreement. As Sara and Lance correctly point out, the first clause of the second sentence of paragraph three notes each party’s agreement that his or her will is in conformity with “this agreement.” The parties do not dispute that the phrase “this agreement” in the first clause of the second sentence is a reference to the premarital agreement itself. However, Sara and Lance would have us believe that the next reference to “this agreement” in the second sentence of paragraph three refers not to the premarital agreement itself, but to an “agreement” that the parties’ wills are in conformity with the premarital agreement. Sara’s and Lance’s interpretation not only ignores the plain language of paragraph three, it also renders the clause internally inconsistent. It would allow the same phrase to have two distinct meanings within the same paragraph. Moreover, as noted above, a court must consider the contract as a whole and not focus on isolated portions of the document. *The Richard W. McCarthy Trust*, 408 Ill. App. 3d at 535.

Janice points out that the phrase “this agreement” appears in the premarital agreement on more than 20 separate occasions. A review of each of these appearances establishes that the term “this agreement” is consistently a reference to the premarital agreement itself.

¶ 22 Sara and Lance also contend that paragraph five of the premarital agreement provides that Alfred’s will is not consideration for the premarital agreement. Paragraph five states in relevant part that “[t]he Husband’s will, among other things, grants the wife substantial non-marital assets and the right to reside in his non[-]marital townhouse and condominium until her death or remarriage. *These will provisions are not in any way consideration for this premarital agreement.*” (Emphasis added.) Contrary to Sara’ and Lance’s position, paragraph five does not provide that Alfred’s *will* is not consideration for the premarital agreement. Rather, the plain language of the paragraph states that *the provisions of the will pertaining to the disposition of his non-marital assets and providing for the right to reside in the Wauconda Townhome and the Florida Condominium* are not consideration for the premarital agreement.

¶ 23 Accordingly, we find that the parties intended their respective waivers of all objections to the terms of the other’s will to constitute consideration for the premarital agreement. Janice reasons that because no validly executed will for Alfred was found, “then a part of the consideration that the parties specifically relied upon—waiving any objection to the wills—is rendered illusory and no enforceable agreement exists.” We disagree. “ ‘Consideration is any act or promise which is of benefit to one party or disadvantageous to the other.’ ” *United City of Yokville v. Village of Sugar Grove*, 376 Ill. App. 3d 9, 22 (2007), quoting *Ahern v. Knecht*, 202 Ill. App. 3d 709, 715 (1990). In this case, one of the recitals to the premarital agreement states, “NOW, THEREFORE, *in consideration of the parties and of their mutual promises and agreements*, they agree with the other

as follows[.]” (Emphasis added.) The premarital agreement then lists these mutual promises, including mutual promises that each party have full control of his or her own non-marital property and each party waive, relinquish, surrender, and release to the other any and all rights to any non-marital property of the other. Thus, part of the consideration of the premarital agreement was the mutual promises of Alfred and Janice. Therefore, even if we were to assume that the lack of a validly executed will would render the consideration provided for in paragraph three illusory, there would be, at most, a partial failure of consideration. Since there was some consideration for the premarital agreement, it could not fail for want of consideration. *In re Estate of Parker*, 171 Ill. App. 3d 538, 545 (1988); see also *Harllee v. Harllee*, 565 S.E. 2d 678, 683 (N.C. App. Ct. 2002) (holding that partial failure of consideration would not invalidate premarital agreement). As such, we reject Janice’s argument that the premarital agreement fails for lack of consideration.

¶ 24

2. Clear, Definite, and Complete

¶ 25 Janice next argues that the premarital agreement is unenforceable because it is not clear, definite, and complete. According to Janice, a contract may be composed of “several writings” where the terms of the instruments do not conflict. See *Rafferty-Plunkett v. Plunkett*, 392 Ill. App. 3d 100, 106 (2009). Janice notes that the premarital agreement specifically refers to the parties’ wills, but those documents are missing and were never produced to the trial court. Janice contends that without the wills, the premarital agreement “cannot be clear and definite because it is not complete.” Thus, she reasons, the trial court erred because it construed only a part of the parties’ agreement. Sara and Lance respond that Janice’s argument fails by virtue of the plain language of the premarital agreement. We agree with Sara and Lance.

¶ 26 Assessing the parties' positions again requires us to interpret the premarital agreement. In doing so, we are guided by the same contract-interpretation principles set forth in the previous section of this disposition. Here, Janice correctly noted that the premarital agreement references wills drafted by the parties. However, Janice cites no provision in the premarital agreement that required either party to have a will. To the contrary, paragraph one of the premarital agreement provides that each party "shall have and hereby is given the right to lease, sell, convey, mortgage or otherwise dispose of his or her non-marital property and receive all monies, rents, issues, income or profits thereof *without any restrictions whatsoever* and without interference from the other party." (Emphasis added.) Moreover, as noted previously, paragraph five of the premarital agreement provides that any provision in Alfred's will which granted Janice non-marital assets was not consideration for the premarital agreement. Paragraph five further provides that Alfred was free to alter his will with regard to any of his non-marital property if he elected to do so. Thus, pursuant to the plain language of the premarital agreement, each party was permitted to dispose of his or her non-marital property as he or she deemed fit. The fact that the premarital agreement permitted each party to dispose of his or her non-marital property as he or she wished and that it allowed Albert to alter his will establishes that the terms of the wills were not essential to the contract between Janice and Alfred or necessary to make the premarital agreement complete. See *First National Bank of Oak Lawn v. Minke*, 99 Ill. App. 3d 10, 14 (1981) (noting that the lack of nonessential details will not render a contract unenforceable). Janice cites several cases for the proposition that documents executed "at the same time, by the same parties, for the same purpose, and in the course of the same transaction" are regarded as one contract and should be construed together. See, e.g., *Gallagher v. Lenart*, 226 Ill. 2d 208 (2007); *Rafferty-Plunkett*, 392 Ill. App. 3d 100; *International Supply Co. v.*

*Campbell*, 391 Ill. App. 3d 439 (2009); *First National Bank of Geneva v. Lively*, 211 Ill. App. 3d 1 (1991); *Sudeikis v. Chicago Transit Authority*, 81 Ill. App. 3d 838 (1980). However, none of the cases cited by Janice involve a document that allowed a party to alter one of the referenced instruments. Accordingly, we reject Janice’s argument that the premarital agreement is unenforceable because it is not clear, definite, and complete.

¶ 27 B. Burden to Produce

¶ 28 Janice next contends that the trial court could have ruled as it did only by examining the terms of the “incomplete agreement” that Sara and Lance presented and ignoring the terms of documents that were “explicitly referenced” in the premarital agreement, but which Sara and Lance failed to produce to the court, *i.e.*, Alfred’s and Janice’s wills. Thus, Janice reasons, the trial court erroneously construed the “incomplete premarital agreement” to her detriment, even though it was Sara’s and Lance’s burden to produce “the complete agreement.” We disagree.

¶ 29 The burden of proof in a civil proceeding generally rests upon the party seeking relief. *Farmers Automobile Insurance Ass’n v. Gitelson*, 344 Ill. App. 3d 888, 896 (2003). In this case, Sara and Lance sought declaratory relief. Therefore, they had the burden of proving their case. That being said, however, we are not persuaded by Janice’s contention that Sara and Lance had the burden to produce the wills that Alfred and Janice allegedly executed and attached to the premarital agreement. In this regard, we note that Sara and Lance have argued throughout these proceedings that the premarital agreement is complete and enforceable, and the fact that Alfred did not have a will at the time of his death had no effect on the enforceability of the premarital agreement and the terms contained therein. Moreover, the record suggests that it was Janice who was in possession of any relevant documentation regarding Alfred’s estate. She testified at the evidentiary hearing that

she located the premarital agreement in a “personal file” at the Wauconda Townhome. Indeed, Sara testified that she was not even aware of the premarital agreement until after Alfred’s death, when Janice produced it during discovery. For these reasons, we reject Janice’s argument on this point.

¶ 30 C. Distribution of Disputed Assets

¶ 31 Alternatively, Janice asserts that if the premarital agreement is enforceable, the trial court erred in determining that four of the disputed assets belong to the probate estate. In particular, Janice contests the status of the Wacounda Townhome, the Florida Condominium, the 2008 BMW, and the proceeds of the Discover/Aetna Life Insurance Policy.<sup>1</sup> Resolution of this issue requires us to interpret the premarital agreement in accordance with the contract-interpretation principles set forth previously.

¶ 32 1. Wauconda Townhome and Florida Condominium

¶ 33 The trial court concluded that the Wauconda Townhome and the Florida Condominium were assets of Alfred’s estate and therefore subject to probate. Relying on paragraph five of the premarital agreement and the terms of section 4(a)(3) of the Premarital Agreement Act (750 ILCS 10/4(a)(3) (West 2004)), Janice insists that she is entitled to a life estate in these two assets. Sara and Lance respond that Janice failed to offer any evidence that she would receive a life estate in Alfred’s non-marital real properties.

¶ 34 Section 4(a)(3) of the Premarital Agreement Act provides that parties to a premarital agreement “may contract with respect to \* \* \* the disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event.” 750 ILCS 10/4(a)(3)

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<sup>1</sup>Janice makes no argument with respect to the 2000 Harley Davidson motorcycle and therefore has forfeited any claim that the trial court’s ruling with regard to this asset was improper.

(West 2004). Thus, as Janice notes in her brief on appeal, the disposition of property upon death can be accomplished by a premarital agreement. Nevertheless, the plain language of the premarital agreement at issue does not support Janice's claim that it provided her with a life estate in either the Wauconda Townhome or the Florida Condominium.

¶ 35 The premarital agreement clearly states that “[e]ach party shall have full control of his or her own [non-marital] property.” Further, paragraph two of the premarital agreement provides that nothing contained in the premarital agreement “is intended to preclude either party from voluntarily making provision for, or granting powers or rights to, the other party in and by the formers [*sic*] will, a codicil thereto or otherwise.” Thus, Alfred could choose to do what he wanted with his non-marital assets. Paragraph five of the premarital agreement provides in relevant part that “[t]he Husband’s *will*, among other things, grants the wife substantial non-marital assets and the right to reside in his non[-]marital townhouse and condominium until her death or remarriage.” (Emphasis added.) In other words, pursuant to the plain language of the premarital agreement, Alfred initially elected to dispose of the Wauconda Townhome and the Florida Condominium via will, not the premarital agreement itself. As noted above, however, no validly executed will existed upon Alfred’s death that actually gave Janice a life estate in either of these two parcels of real estate. Moreover, there were no other legal instruments granting Janice any interest in the disputed non-marital assets. Indeed, Janice could not reasonably rely on any of Alfred’s non-marital assets passing to her upon Alfred’s death as paragraph five of the premarital agreement also states that Alfred was free to to alter his will with respect to his non-marital property. Thus, the premarital agreement by itself does not establish an obligation on the parties to award Janice a life estate in these two properties, and we affirm the trial court’s ruling with respect to them.

¶ 36

2. 2008 BMW

¶ 37 The trial court noted that although the 2008 BMW was purchased during the marriage partially using cash from both Alfred's and Janice's joint checking account, it was titled in Alfred's name alone. Thus, the court concluded, the 2008 BMW "is a probate asset and its character as marital property has no effect on intestate distribution." Janice contests the trial court's characterization of the 2008 BMW as a probate asset. According to Janice, a "fair application" of paragraph eight of the premarital agreement leads to the conclusion that the value of the 2008 BMW should be apportioned because it was acquired using both Alfred's non-marital property (the trade-in value of the 2003 BMW) and marital funds. Sara and Lance respond that because the 2008 BMW was titled solely in Alfred's name and it was purchased with the proceeds of non-marital property, it passes to them as Alfred's non-marital property by virtue of paragraph eight of the premarital agreement.

¶ 38 Both parties agree that the characterization of the 2008 BMW is governed by paragraph eight of the premarital agreement. That provision provides as follows:

"(8) During the course of the marriage, all property acquired by each party in exchange for or with the proceeds of any non-marital property shall be deemed to be part of their non-marital estate and by the terms hereof, each party hereby waives and relinquishes all claim to the non-marital estate of the other. Likewise, all other property acquired during the marriage shall be deemed to be marital property."

Pursuant to the plain language of paragraph eight, it is not the manner in which a particular asset is titled that determines whether it is a marital or non-marital asset. Rather, it is the manner in which the asset is acquired that determines its nature. Thus, property acquired in exchange for non-marital

property or with the proceeds of non-marital property is considered non-marital property. All other property acquired during the marriage is marital property.

¶ 39 In this case, the evidence establishes that at the time the parties executed the premarital agreement, Alfred owned a 2003 BMW. Paragraph one of the premarital agreement lists the 2003 BMW as Alfred's non-marital property. In May 2009, during the marriage, Alfred purchased the 2008 BMW. Although the 2008 BMW was titled solely in Alfred's name, the down payment for the vehicle came from two distinct sources: (1) Alfred's non-marital property, *i.e.*, the \$10,000 trade-in value of the 2003 BMW, and (2) \$20,000 in funds from a checking account. Janice testified that the \$20,000 portion of the down payment as well as the money to make the finance payments on the remainder of the purchase price came from her and Alfred's joint checking account. In other words, the 2008 BMW was acquired partially in exchange for the proceeds of a non-marital asset and partially with marital funds. Accordingly, based on the plain language of paragraph eight, we agree with Janice that the value of the 2008 BMW should have been apportioned because it was not acquired solely in exchange for or with the proceeds of non-marital property. Rather, it was purchased using both the proceeds of a non-marital asset (the \$10,000 trade-in value of the 2003 BMW) and marital funds from Alfred's and Janice's joint checking account. Therefore, we reverse the trial court's finding that the 2008 BMW is a probate asset. On remand, the trial court is instructed to apportion the current value of the 2008 BMW based on the percentage of non-marital and marital funds used to originally purchase the vehicle in May 2009.

¶ 40 3. Discover/Aetna Life Insurance Policy

¶ 41 Next, Janice challenges the trial court's ruling with respect to the proceeds of the Discover/Aetna Life Insurance Policy. The trial court concluded that because Alfred did not

designate a beneficiary for the Discover/Aetna Life Insurance Policy, the policy's default provision applied. Under the default provision, the proceeds of the life insurance policy are payable to the decedent's spouse or, if none, to any children in equal shares. The trial court noted that pursuant to paragraph two of the premarital agreement, Janice waived any rights to Alfred's non-marital property as if she had predeceased him. The court further noted that no exception was made for the death benefits payable on Alfred's non-marital property. Thus, the trial court concluded the proceeds of the Discover/Aetna Life Insurance Policy were payable to Alfred's children.

¶ 42 In the premarital agreement, Alfred listed the "cash value" of his life insurance as his non-marital property and valued the asset at \$14,000. Janice does not dispute that this is a reference to the Discover/Aetna Life Insurance Policy. However, she notes that when Alfred passed away, the "cash value" of the policy was not "realized." Instead, a "death benefit" was paid. Janice contends that there is a distinction between the "cash value" of a life insurance policy and the policy's "death benefit." Therefore, she reasons, the trial court's ruling with respect to the proceeds of the Discover/Aetna Life Insurance Policy is erroneous because the premarital agreement does not mention or otherwise encompass the death benefit which only became payable upon Alfred's death. Janice asserts that, as Alfred's surviving spouse, and pursuant to the default provision of the Discover/Aetna Life Insurance Policy, she should receive the entire death benefit. Sara and Lance respond that the trial court properly ruled that the proceeds of the Discover/Aetna Life Insurance Policy was Alfred's non-marital property because it "derive[d]" from a non-marital asset, *i.e.*, the cash value of the policy. Sara and Lance further assert that because Janice was not named a beneficiary of the policy, the proceeds of the Discover/Aetna Life Insurance Policy pass to them and Margaret as a non-marital asset.

¶ 43 Paragraph eight of the premarital agreement provides that during the course of Alfred’s and Janice’s marriage, “all property acquired by each party in exchange for or with the proceeds of any non-marital property shall be deemed to be part of their non-marital estate and by the terms hereof, each party hereby waives and relinquishes all claim to the non-marital estate of the other.” Here, the record establishes that Alfred began working for Discover prior to his marriage to Janice. The life insurance policy at issue was a benefit offered by Discover in conjunction with Aetna. Alfred listed the “cash value” of the life insurance policy as his non-marital asset in the premarital agreement. Although Discover paid a “death benefit” when Alfred passed away, both the “death benefit” and the “cash value” derived from the funds paid to secure the Discover/Aetna Life Insurance Policy. As such, we conclude that pursuant to paragraph eight of the premarital agreement, and because Janice was not designated as a beneficiary on the policy, she waived and relinquished any rights she may have had to be a beneficiary of the policy. Accordingly, the trial court properly found that the proceeds of the Discover/Aetna Life Insurance Policy were a non-marital asset to be divided amongst Alfred’s children in equal shares.

¶ 44

### III. CONCLUSION

¶ 45 For the reasons set forth above, we affirm the judgment of the circuit court of Lake County is affirmed in part and reversed in part and the cause is remanded for further proceedings.

¶ 46 Affirmed in part and reversed in part; Cause remanded.