

NO. A05-1794

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State of Minnesota  
IN SUPREME COURT

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In re the Estate of Howard C. Kinney, Deceased,

James H. Kinney,  
As Personal Representative of the Estate of Howard Kinney,  
*Petitioner,*

vs.

Lillian M. Kinney,  
*Respondent*

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**RESPONDENT'S BRIEF  
AND APPENDIX**

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## STATEMENT OF THE ISSUES

### INTRODUCTION

When reviewing antenuptial agreements in Minnesota, courts employ both a procedural and substantive analysis. Because of the intimate and trusting nature of the parties to such agreements, they must be procured following procedural safeguards, and must also be substantively fair both at the time of execution and at the time of enforcement. *McKee-Johnson v. Johnson*, 444 N.W.2d 259, 265 (Minn.1989). *McKee-Johnson* states the current law for all antenuptial agreements, whether signed before or after the common law rules were codified into statute. In the case now before this court, the district court invalidated the agreement because it was procedurally unfair, and therefore did not conduct a substantive analysis.

## ISSUES

**1. Antenuptial agreements must be procured in a procedurally fair manner, with no duress or coercion. When she signed the antenuptial agreement, was Lillian Kinney acting of her own free will, or was she in reality acting pursuant to the will of Howard Kinney?**

The district court held that the antenuptial agreement was procedurally unfair because Lillian Kinney did not have an opportunity on her wedding day, when she was first presented with the antenuptial agreement, to review it with independent counsel, and therefore the agreement was invalid.

Most Apposite Cases:

*McKee-Johnson v. Johnson*, 444 N.W.2d 259, 265 (Minn. 1989).

*Estate of Serbus v. Serbus*, 324 N.W.2d 381 (Minn. 1982)

*Stanger v. Stanger*, 189 N.W.2d 402 (Minn. 1922)

**2. Antenuptial agreements must be substantively fair at the time of execution. Did the agreement make a fair and reasonable provision for Lillian Kinney?**

The district court did not address this issue in its decision since it invalidated the agreement for being procedurally unfair, although the issue of

substantive fairness was argued to the Court. See Memorandum of Law in Response to Respondent's Motion for Summary Judgment.

Most Apposite Cases:

*McKee-Johnson v. Johnson*, 444 N.W.2d 259, 265 (Minn.1989).

*Slingerland v. Slingerland*, 115 Minn. 270, 132 N.W. 326 (Minn. 1911).

**3. Antenuptial agreements must also be fair at the time of enforcement. Should Lillian Kinney, devoted wife of Howard Kinney for 34 years, and sole caretaker during his final years with dementia, receive a fair portion of his \$1,485,000.00 estate? Should she be allowed to remain in the marital home?**

The district court did not address this issue in its decision since it invalidated the agreement for being procedurally unfair, although the issue of substantive fairness was argued to the Court. See Memorandum of Law in Response to Respondent's Motion for Summary Judgment, pp.1-3.

Most Apposite Cases:

*McKee-Johnson v. Johnson*, 444 N.W.2d 259, 265 (Minn.1989).

*Slingerland v. Slingerland*, 115 Minn. 270, 132 N.W. 326 (Minn. 1911).

## STATEMENT OF THE FACTS

### *A. The parties:*

Howard Kinney was 55 years old when he married Lillian Kinney, and he had been previously married. RA-1. He was a manager of a group of insurance salesmen, and he had an estate in excess of \$200,000.00. A-17, RA-30.

Lillian Kinney was ten years younger than Howard when she married him, and she had never been married before. She had a high school education, and had worked as a maid and then as a secretary. A-32, RA-15. She helped support her widowed mother, and they lived together in an apartment. She had very little in assets. A-31, RA-11.

Lillian and Howard's courtship lasted about a year, when Howard proposed. They set the wedding date. Family members were invited. While Howard had been previously married, this was Lillian's first marriage and she was very excited and busy preparing for her wedding day. A-46, RA-9.

During their courtship and marriage, Howard had the control in their relationship. RA-19. Lillian was such a passive person that she did whatever Howard said she should do. RA-19. Prior to their marriage, Lillian did not even inquire into Howard's finances (other than knowing that he had a share

of a farm in Illinois). RA-12. She simply trusted him to do what was best for her. A-41, RA-19.

*B. Surprise Antenuptial Agreement on the Wedding Day:*

On their wedding day in 1969, Howard surprised Lillian by coming to her apartment and taking her to his lawyer's office. RA-9, 12. He said they had to sign some papers. When they arrived at Howard's lawyer's office, Lillian was handed a document entitled "Antenuptial Agreement". Howard said to Lillian "I need to have you sign this before we get married." RA-12, A-40. Lillian had never met Howard's lawyer and had never heard of him. Prior to their wedding day, Howard had never said to Lillian that he wanted all of his estate to go to his children or that he had asked his attorney to prepare an antenuptial agreement. RA-9,12, 20.

Lillian was shocked and confused during the meeting with Howard's attorney. She was anxious to prepare for her wedding later that day, which her mother and other relatives and friends were attending, and consequently felt rushed to sign the document without studying it carefully. Nevertheless, she signed the agreement because she trusted Howard and did what he said to do. RA-9, 12-13, 19, A-41.

Lillian did not understand much of the agreement that was presented to her on her wedding day, nor what widow's rights she was giving up. For instance, she did not know that the term "descent of homestead" in the agreement meant she was giving up her legal right to live in the marital home for the rest of her life. Apparently, Howard did not understand that term either since he frequently assured her she could live in their marital home for the rest of her life. RA-18, 20, A-54-55.

In addition to using the element of surprise, neither Howard nor his attorney advised Lillian at any time that she should ask another lawyer to review the document before signing it, nor did they explain to her what rights she was giving up. The meeting was so secretive that they did not even give Lillian a copy of the agreement after she signed it, and she did not see the agreement again for over twenty years. On her wedding day, Lillian did not think of taking the agreement to a lawyer. Lillian did not know any lawyers to call, would not have known who to call, and would have had to cancel the wedding that day in order to have it reviewed. RA-9, 12.

Lillian was given \$10,000 in the agreement; Howard was given his estate worth in excess of \$200,000, according to the agreement. A-16. Lillian was not told if Howard really had much more than that, or what type of assets he had. RA-12. The agreement stripped Lillian of all widow's

rights including right of election and the right to live in the marital home for the rest of her life (descent of homestead). A-16-17. She clearly did not understand that she was giving up possibly half of his estate, plus a life estate in the home. RA-18-20. She was under great pressure because this was all happening on her wedding day, she trusted Howard and would do whatever he told her to do, and he told her to sign the legal document. RA-9.

*C. Lillian's Devoted Care of Howard During 34 Years of Marriage:*

Howard retired a few years after the wedding, but Lillian worked full-time for 14 more years. RA-4. This allowed her the income to pay for many of their household expenses, including all of their groceries and household supplies. RA-6. They lived a frugal life, spent very little on household furnishings or improvements, and seldom went on vacations, thereby significantly increasing the value of the estate. RA-6.

During the 34 years of their marriage, Lillian did all of the house cleaning in the marital home, cooked and served all of their meals and did all of the dishes and all of the laundry and all of the grocery shopping. RA-4. Howard demanded this care, and Lillian provided it, even though she was also working full-time and he was not working at all.

In the last 7 to 8 years of his life, Howard became increasingly ill with dementia. RA-4. Lillian cared for Howard selflessly during these years, and actually kept him out of the nursing home for a long time. She cleaned up after Howard when he was incontinent (he resisted wearing diapers), and dressed, fed and bathed him when he could no longer do so independently. RA-4. Howard's doctors were amazed at Lillian's fortitude and determination to keep Howard at home and out of the nursing home. RA-6. It was Howard's wish to stay at home and Lillian was determined to make that happen for him. Lillian kept Howard out of the nursing home until he was almost 90 years old. RA-4, 5.

Unfortunately, Howard's children did not help Lillian to care for Howard, either financially, with visits, respite, or otherwise. RA-5, 6. Finally, after many years of caring for Howard alone in their home, Howard was so heavy and so incontinent that Lillian could no longer do so alone, and Howard was placed in a nursing home. He died several months later. In addition to likely prolonging Howard's life by caring for him at home, Lillian also saved his estate a great deal of money by avoiding years of expensive nursing home care. RA-4,5,6.

Howard's estate at the time of his death was worth approximately \$1,485,000.00. RA-2. His estate includes a 1/3 interest in some farm

property. His three children already own a 2/3 share of those farms worth \$970,000.00 which is not included in Howard's estate. RA-38, 40.

Lillian and Howard built their life in the same home for 34 years. Although the home was actually owned by Howard, he often promised her she could live there for the rest of her life. RA-21, A-54-55. Howard was deeply grateful for Lillian's devoted care for over 30 years, and he felt Lillian should be well taken care of financially when he died. He changed some of his accounts to go to Lillian after his death, but his son James Kinney (also the personal representative) threatened Lillian so she would remove her name from several of Howard's accounts. RA-21, A-46-49.

Howard died with an estate worth almost one and half million dollars. Lillian's share under the antenuptial agreement is only the proceeds from the \$10,000 life insurance policy. Howard's children have even asked the Court to evict Lillian from the marital home, although the Court has allowed her to stay there during the Court proceedings.

#### SUMMARY OF THE ARGUMENT

The relevant law in Minnesota is found in the Supreme Court's decision in *McKee-Johnson v. Johnson*, 444 N.W.2d 259, 265 (Minn.1989).

It requires antenuptial agreements to be procedurally fair and substantively fair, both at inception and at the time of enforcement. This seminal case makes clear that there is one body of law in Minnesota regarding these agreements, no matter whether they were signed before or after the common law was codified into statute. The only difference is that the statute changes the burden of proof by placing it on the spouse challenging the agreement. *Id* at 263.

The agreement before this court was procured unfairly and is also substantively unfair. Procedurally, Lillian was never informed that she had the right to have the agreement reviewed by independent counsel, nor was she given any time to seek counsel on her wedding day. There was no reason for Howard to keep the agreement a surprise until the wedding day other than to keep Lillian from having an opportunity to calmly and carefully review it and seek out the advice of a lawyer to understand its legal terminology. This violated the extensive trust that Lillian had placed in Howard, and is sufficient grounds to invalidate the agreement, as the district court did.

But the agreement itself was unfair from the start. Payment of \$10,000 at death was clearly unreasonable in this case for several reasons. First, Lillian was likely to outlive Howard by many years because of the

disparity in their ages. Second, there was a great disparity in their assets. Third, the agreement did not even give Lillian the right to live in the marital home following Howard's death. Other appellate cases in Minnesota have concluded that such a small provision in an antenuptial agreement is unfair, especially where the spouse giving up the widow's rights is likely to far outlive the other spouse, as in this case. See *Slingerland, supra*, at 275.

Finally, it would be patently unfair to enforce this agreement today after Lillian devoted her life to Howard during 34 years of marriage, including the last years of Howard's life when Lillian cared for Howard at home when he had dementia and was incontinent and could not dress himself. After many years of their marriage, Howard himself recognized this gross unfairness and tried to rectify it, but his son threatened Lillian so she would return the money.

## ARGUMENT

### STANDARD OF REVIEW

#### *Issue #1: Procedural Fairness:*

“A motion for summary judgment shall be granted when the pleadings, depositions, answers to interrogatories, and admissions on file, together

with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law. On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.” *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted).

In this case, there is no genuine issue of material fact regarding the fact that Lillian Kinney did not have the opportunity to consult with independent counsel before she signed the agreement. Since this is a procedural requirement for the agreement to be valid under *McKee-Johnson, supra*, and *Serbus, supra*, the district court correctly concluded that Lillian Kinney was entitled to a judgment as a matter of law and that the agreement is invalid.

When the district court grants summary judgment based on the application of law to undisputed facts, the result is a legal conclusion, reviewed de novo by the appellate court. *Lefto v. Hoggsbreath Enters., Inc.*, 581 N.W.2d 855, 856 (Minn. 1998) (citing *Wallin v. Letourneau*, 534 N.W.2d 712, 715 (Minn. 1995)).

*Issues #2 and 3: Substantive Fairness at the Time of Execution and at the time of Enforcement:*

The district court did not address these issues since it invalidated the agreement for being procedurally unfair. These issues present a mixed question of law and fact. “When reviewing mixed questions of law and fact, this court corrects erroneous applications of the law, but accords the district court discretion in its findings of fact and ultimate conclusions.”

*Rehn v. Fischley*, 557 N.W.2d 328, 333 (Minn. 1997).

## ISSUES

**Issue #1: When she signed the antenuptial agreement, Lillian Kinney did not act of her own free will; she was in reality acting pursuant to the will of Howard Kinney.**

The Minnesota Supreme Court held in *McKee-Johnson v. Johnson*, 444 N.W.2d 259 (Minn. 1989), that for an antenuptial agreement to be valid under our common law, each party to the agreement must have unrestrained access to independent counsel. *Id.* at 263, 265. The court in *McKee-Johnson* determined that the 1979 statute codifying this requirement simply shifted the burden of proof, but did not add new procedural requirements:

The statute acknowledged the continuing validity and enforceability of such agreements provided that at or prior to the inception of the agreement each party had fully and fairly disclosed earnings and property owned by him or her and that each party had, prior to signing, been afforded an opportunity to consult with legal counsel - in other words, that each party had been afforded procedural fairness. As indicated below, those same factors of procedural fairness had always existed in the common law of Minnesota respecting premarital agreements. *Id* at 263.

In *Mckee-Johnson*, the Court reviewed the relevant case law and concluded that “[a]s the cases demonstrate, premarital agreements, if fairly arrived at, following full disclosure of financial condition, and with opportunity to consult independently with counsel, have been favored in the common law of Minnesota...”. *Id* at 265.

This holding was essential to the Court’s decision, and not dicta, as the appellant has argued. The Court held that it was required to analyze the case under our common law because it interpreted Minn. Stat. §519.11 to allow antenuptial agreements dealing with marital property as long as the agreement would be valid under our common law. “Therefore, ...we must look to our common law for guidance.” *Id* at 265.

The Court then applied the requirement that each party to the agreement have the opportunity to consult with independent counsel. It found that the wife, Mary, had been afforded the opportunity to receive independent advice on multiple occasions, but that she had rejected those

offers. *Id.* at 266. First, the antenuptial agreement itself advised her in writing of her right to seek independent counsel. Second, her fiancé told her he preferred it if she would obtain independent counsel, and he offered to pay the cost. Third, her fiancé also suggested that she consult with her lawyer-brother. Fourth, the lawyer that drafted the agreement advised the parties as to its effect. Mary acknowledged in the record that there was little more her fiancé could have done to protect her right to be advised by independent counsel. Therefore, it is clear that the Court in *McKee-Johnson* applied this procedural requirement to the facts of the case before it and determined that the requirement had been met.

In stark contrast to the facts in *McKee-Johnson*, Lillian Kinney was never told of or given the chance to seek independent advice about the agreement. This is conclusively demonstrated by the facts of this case: (1) the antenuptial agreement itself did not state that Lillian Kinney had the right to independent legal counsel; (2) only Howard Kinney was represented by counsel; (3) the first time Lillian knew about or saw the agreement was in the office of Howard's attorney on her wedding day with Howard Kinney telling her that if she did not sign the agreement there would be no marriage. These facts are undisputed. The district court was correct to conclude that

the requirement that Lillian have the opportunity to consult with independent counsel was not met.

*McKee-Johnson* was not the first time the Supreme Court held that an antenuptial agreement is not valid under the common law unless each party has an opportunity to consult with independent counsel. The Supreme Court held in *Estate of Serbus v. Serbus*, 324 N.W.2d 381 (Minn. 1982) that the opportunity for review by independent counsel is a procedural requirement for a valid antenuptial agreement under the common law and explained its reasoning:

At common law, the burden of proving...knowledge of right to independent legal counsel rests with the proponent of the antenuptial contract, John Serbus in this case. *Gartner v. Gartner*, 246 Minn. 319, 323, 74 N.W. 2d 809, 813 (1956); *Slingerland v. Slingerland*, 115 Minn. 270, 132 N.W. 326. The reason for such a rule is that persons entering into such a contract are in a fiduciary relationship. The party giving up an interest is placing trust in the other party and expecting him or her not to abuse that trust. Since it would be easy for the person retaining the greater interest to abuse the trust placed in him, we require that person to prove he has provided the other with full and fair information before entering into the antenuptial contract. *In re Estate of Malchow*, 143 Minn. At 58, 172 N.W. at 916. *Id.* at 385.

The *Serbus* Court's fear of overreaching is reasonable in light of cases like the present case. Lillian Kinney was clearly coerced, rushed and confused when she was presented with and signed the antenuptial agreement several hours before her wedding. A-31 at pp. 51-53. The facts cry out

unfair advantage. Howard Kinney took advantage of the trust Lillian Kinney placed in him, and of her “altered state” that day, by surprising her on their wedding day with a trip to his lawyer to “sign some papers”. RA-12. Keeping the antenuptial agreement and the meeting with his attorney a secret until the wedding day was the very essence of abuse of trust which concerned the Court in *Serbus*. It was a breach of trust, and clearly constitutes coercion.

Previous Supreme Court decisions also held that each party must have access to independent counsel. As the Court of Appeals concluded in its decision in this case, “ a review of the common law shows that most cases generally include a reference to either receiving advice from a separate attorney or that the individual was at least advised of the rights that were being given up absent the agreement,” citing *Gartner v. Gartner*, 74 N.W.2d 809 (Minn. 1956), *Stanger, supra*, and *Slingerland v. Slingerland*, 132 N.W. 326 (Minn. 1911).

In *Stanger v. Stanger*, 189 N.W.2d 402 (Minn. 1922), the Supreme Court held that if there was a confidential relation between the parties, there was a duty to disclose both the amount of assets and the legal rights being given up in the agreement. The Court concluded that the antenuptial agreement was not valid because nothing was said to the plaintiff about her

legal rights to her husband's property in the event of marriage, and she had no counsel. The Court even stated it a second time: "She was no match for her husband in making such an agreement, and as said before she had no counsel while he had." It is clear from the *Stanger* case that under our common law, this Court has long held that if the parties have a confidential relationship, then there is a duty of disclosure, including the opportunity to consult with independent counsel.

In *Gartner v. Gartner*, 74 N.W.2d 809 (Minn. 1956), the Supreme Court upheld an antenuptial agreement because it concluded that the "plaintiff was fully informed as to what her rights would be as a widow and as to the nature and effect of the antenuptial agreement with respect to those rights."

In *Slingerland v. Slingerland*, 132 N.W. 326 (Minn. 1911), the Supreme Court held that it was the husband's duty to show that his wife knew the nature and extent of her rights as his wife and widow that she was giving up. Even though she knew she was giving up her rights in his estate, she did not know what those rights were. In *Welsh v. Welsh*, 184 N.W. 38 (Minn. 1921), the Supreme Court held that it was the husband's duty to show that his wife knew the nature and extent of her rights as his wife and widow that she was giving up.

Therefore, the appellant's argument that the independent counsel requirement did not exist at common law is flatly and directly contradicted by at least three Minnesota Supreme Court cases, among others. See *Mckee-Johnson*, *Serbus*, and *Stanger*, *supra*. There is no compelling reason to overturn this line of Supreme Court cases and every reason to continue with the requirement of unrestrained access to independent counsel in order to prevent abuse of trust by parties in a confidential relationship who sign an antenuptial agreement. The requirement of unrestrained access to independent counsel is deeply rooted in Supreme Court cases dealing with antenuptial agreements dating back over 80 years, and the experience of the Court over these years has shown the wisdom of this requirement. Nor has the legislature criticized the Court's insistence on this requirement, and, in fact, the legislature adopted this requirement as sound policy in our statute.

The Court of Appeals decisions have followed the Supreme Court's insistence that each party either know the rights they are giving up or have unrestrained access to independent counsel. In *Hill v. Hill*, 356 N.W.2d 49 (Minn.App.1984), the Court held that to establish a valid antenuptial agreement under the common law, the proponent must prove both full disclosure of assets and the contestant's knowledge of the right to independent counsel.

In *Rudbeck v. Rudbeck*, 365 N.W.2d 330 (Minn.App.1985), the Court of Appeals held that in addition to full disclosure of assets, the proponent must prove knowledge of the right to independent counsel. Like the present case, the Court in *Rudbeck* concluded that the husband did not prove that his wife knew of the right to independent legal counsel for four reasons: 1) the antenuptial agreement itself did not state that the wife had the right to independent legal counsel; 2) only the husband was represented by counsel; 3) the first time the wife saw the agreement was in the office of the husband's attorney when she was first asked to sign the document; and 4) the wife signed the agreement only 5 days before their marriage after it was made clear that if there was no signature there would be no marriage. The Court stated that these facts were sufficient evidence to conclude that the wife "had no meaningful opportunity to consult an attorney prior to signing the agreement." *Id.* at 333.

It is clear from this analysis that Lillian Kinney also did not have the opportunity to consult with independent counsel. The facts in this case are remarkably similar to the facts in *Rudbeck, supra*. If the Court of Appeals concluded that having just 5 days before the wedding to review the agreement does not afford a meaningful opportunity to consult with an attorney, then clearly having only a few hours before the wedding to review

the agreement did not afford Lillian Kinney a meaningful opportunity to consult with an attorney.

In the present case, the district court correctly found that Lillian Kinney did not have an opportunity on her wedding day to review the antenuptial agreement with independent counsel. The district court concluded that according to the Minnesota Supreme Court in *Serbus, supra*, requiring an opportunity for independent counsel, the agreement is invalid. The court found that there was no notification, knowledge, or understanding that Lillian Kinney had the right to consult with independent counsel. A-13.

Independent Counsel could have explained to Lillian Kinney the legal rights she was giving up in this agreement. For example, counsel could have explained the homestead exemption and the right for the widow to live in the marital home for the rest of her life. Had Lillian Kinney understood that she was giving up this right, it is highly unlikely she would have signed the contract. This is evidenced by the fact that Howard Kinney told her and other's repeatedly that Lillian could live in the home for the rest of her life, and that neither Howard nor Lillian apparently understood this part of the agreement.

Had Lillian had counsel, the counsel could have helped Lillian resist the strong coercion she was subjected to on the day of her wedding and kept her

from signing the contract in haste before she understood it. Independent counsel could have also helped with the confusion Lillian experienced in signing the agreement.

The evidence shows that there is no genuine issue of fact as to whether Lillian Kinney “knew the nature and extent of her rights as his wife and widow.” Lillian stated in her deposition corrections that she did not understand the legal rights that she was giving up, including waiver of her right of election, descent of homestead, widow’s support and allowances, dower and other rights upon dissolution of marriage or her husband’s death. RA-20. She stated in her interrogatory answer that Howard had never mentioned an antenuptial agreement before their wedding day. RA-12,13. She stated in her interrogatory answer that no one advised her during the meeting at the lawyer’s office on her wedding day that she had the right to independent counsel. RA-12,13. Since we can assume that no one at that meeting other than Lillian is still living or available to testify, Lillian’s testimony is uncontroverted.

A pivotal fact is that the agreement itself does not advise Lillian of her right to independent counsel. A-6,7. The *Stanger* decision from the Minnesota Supreme Court was almost 50 years old when these parties were married, and Howard’s attorney therefore clearly knew the two requirements

for a valid antenuptial agreement when there is a confidential relationship between the parties. Leaving out the right to independent counsel in the agreement was therefore a glaring omission. This fact offers further uncontroverted proof that Lillian was not advised of her right to independent counsel.

Finally, Appellant argues that the law does not require that the prospective spouse know she had the right to review by independent counsel. The Minnesota Supreme Court rejected this argument in *Serbus, supra*, when it required the proponent of an antenuptial agreement to prove knowledge of the right to independent legal counsel. *Id* at 385. Logic dictates that the Supreme Court's repeated insistence on the right to independent counsel to prevent overreaching would be a meaningless protection if the spouse being protected does not know she has that right. As the Court of Appeals concluded in this case, "[w]ithout knowledge, the opportunity does not exist." A-08.

It is also clear that Lillian Kinney signed the agreement on her wedding day because of pressure from Howard Kinney, and not of her own free will.

Appellant incorrectly relies on the lack of facts showing direct threats to Lillian Kinney. The Minnesota Supreme Court in *Slingerland, supra*, has made it clear that duress can take other forms. "But there may be undue influence or duress without urgings, concealment, misrepresentations, or

actual threats. *Slingerland*, supra, at 273-274. See also *Minnesota Practice Series TM, Family Law, Chapter 20, "Antenuptial Agreements"*:

Coercion and duress deal with circumstances at the time the contract was negotiated and executed. Coercion could be a statement that if the agreement is not signed there will be no marriage. [Citing Rudbeck]. Duress might involve....a spouse who is confronted with the contract shortly before the wedding and is confronted with a choice of signing or having the wedding called off. Coercion and duress are similar in that both involve emotional distress of one party because of stress and pressure applied by the other.

Lillian Kinney was clearly coerced into signing the Agreement by surprising her on her wedding day, by not giving her time to review the agreement or have it reviewed by an independent attorney, and by Howard telling her the agreement needed to be signed in order for them to get married later that day. Had Lillian been afforded the opportunity to review the agreement with independent counsel, this coercion could have been avoided.

Thus, it is clear that Lillian Kinney signed the agreement as a result of coercion on her wedding day without an opportunity to consult with counsel, and that she did not understand the legal rights she was giving up, including the right to stay in the marital homestead.

**Issue #2: The antenuptial agreement in this case was substantively unfair at the time of execution because it did not make a fair and reasonable provision for Lillian Kinney.**

The law in Minnesota has long been that antenuptial agreements are invalid if they are substantively unfair. See *McKee-Johnson, supra*, at 267.

As the Supreme Court stated:

...this court has always scrutinized challenged premarital agreements purporting to allot property or limit maintenance for procedural and substantive fairness at the inception. This scrutiny has been prompted by a recognition of the existence of potentiality for overreaching by one party over the other due to the relationship existing between them at the time of execution. *Id.*

The agreement in this case did not make a fair and reasonable provision for Lillian Kinney. The agreement only provides her with \$10,000. This provision was clearly unfair in return for Lillian relinquishing up to half of Howard's estate, especially since the agreement also requires that Lillian move out of the marital homestead if Howard dies.<sup>1</sup> Furthermore, because Lillian was so much younger than Howard, she would likely outlive him by many years, thus making the consideration even more inadequate. See *Slingerland, supra*, where the Court concludes that "the sum of \$5000

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<sup>1</sup> For a marriage of 15 years or more, the survivor's elective share is 50% of the augmented estate. See Minn. Stat. section §524.2-202(a). Lillian and Howard were married for over 34 years, so she would receive 50%.

was ‘grossly disproportionate, unreasonable and unfair as a provision for a wife likely to outlive him many years.’” *Id* at 275.

\$10,000 was also clearly inadequate to support Lillian Kinney’s waiver of the many legal rights she would receive by virtue of her marriage. This included a waiver of her right of election, descent of homestead, widow’s support and allowances, dower and other rights upon dissolution of marriage or her husband’s death. A-16. A provision of \$10,000 was especially unfair in light of the acknowledged size of Howard Kinney’s estate on the day of his marriage (see A-7, Antenuptial Agreement, stating estate was “...in excess of \$200,000.00”). As this Court concluded in *Slingerland*, \$5000 was “grossly disproportionate, unreasonable, and unfair” when husband’s estate was valued at \$225,000 when the agreement was signed); See also *Stanger* (provision of a life estate plus \$1000 not equitable when husband’s estate was worth \$21,000); *Hill*, (\$20,000 unfair where husband disclosed he had \$300,000 to \$400,000<sup>2</sup> when the agreement was signed); *Rudbeck v. Rudbeck*, 365 N.W. 2d 330, 332 (concluding that provision was “clearly inadequate because Carol would receive only a small portion of what she would otherwise be entitled”).

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<sup>2</sup> The Court later determined the estate was actually \$750,000, but was understated through a good faith error.

While it is true that the District Court found there was sufficient consideration for the agreement, that in no way constitutes a finding that the agreement was substantively fair at the time it was executed. The Court did not make any finding about the amount of money provided in the agreement to Lillian. The Court could easily have meant that the marriage was enough consideration for the agreement. See Younger, *Perspectives on Antenuptial Agreements*, 40 Rutgers L.Rev. 1059 (1988), at 1063, “The marriage itself satisfies the common law requirement of consideration”, and cases cited therein.

The small provision for Lillian in the antenuptial agreement was clearly inadequate, disproportional and unfair in return for Lillian Kinney signing away all of her legal rights in her husband’s estate, including a life estate in their home, and in light of Howard Kinney’s extensive estate worth in excess of \$200,000.

**3. Lillian Kinney, devoted wife and caretaker of Howard Kinney for 34 years, including his final years with dementia, should receive a fair and reasonable portion of his one and a half million dollar estate, and she should be allowed to remain in the marital home.**

The Supreme Court has long reviewed the substantive fairness of antenuptial agreements as of the time of enforcement, as well as at the time

of execution. The Supreme Court restated the rule in *McKee-Johnson, supra*, as requiring careful scrutiny “if the premises upon which they were originally based have so drastically changed that enforcement would not comport with the reasonable expectation of the parties at the inception to such an extent that to validate them at the time of enforcement would be unconscionable.” *Id* at 267. The court listed the birth of a child during the marriage as one factor that can lead to changed circumstances and trigger a further substantive review.

Other courts include a lengthy marriage as another factor. See *Younger, supra*, at 1086, and cases cited therein. This factor is very important in this case, since Lillian and Howard were married for 34 years, which is longer than the marriages in the eleven Minnesota appellate cases dealing with this issue during the past century (e.g. *McKee-Johnson, supra* (8-year marriage); *Rudbeck, supra*, (8-year marriage); *Hill, supra*, (9-year marriage); *Serbus, supra*, 16-year marriage); and *Slingerland, supra*, 20-year marriage). For other possible factors, see Younger, Perspectives on Antenuptial Agreements, 40 Rutgers L.Rev. 1059 (1988) cited by the court in *McKee-Johnson, supra*, (“The birth of a child or changes in a spouse’s financial status, employability, or health after the execution of the agreement

may make its enforcement seem unfair though it was fairly procured and substantively fair when it was executed.). *Id* at 1091.

In the present case, Howard's health changed drastically in the final five years of the marriage when he was stricken with dementia. The value of his assets also dramatically changed during the marriage, from \$200,000 at the start of the marriage to \$1,485,000 at the time of his death. RA-2. These changes make enforcement of the 1969 antenuptial agreement unfair at this time.

The Minnesota Supreme Court has long reviewed the substantive fairness of antenuptial agreements at the time of enforcement. In *Slingerland, supra*, the Court passionately took note of the unfairness of the agreement in light of events that occurred during the marriage:

She has been his wife for 20 years, and four children of the marriage are living. The power to cast her and them from him, without a share of his great wealth, is abhorrent to every sense of justice, and equity should not be powerless to grant relief. *Id* at 274.

The Court of Appeals also reviewed the substantive fairness of antenuptial agreements at the time of enforcement in *Hill v. Hill*, 356 N.W.2d 49 (Minn. Ct. App. 1984), and held that changes in the wife's health made enforcement of the agreement at the time of the divorce unfair.

It would be unconscionable to uphold the antenuptial agreement in this case considering the care and devotion that Lillian gave Howard during 34 years of marriage. Lillian worked full-time out of the home for many years during the marriage, while Howard retired shortly after the marriage. Nevertheless, Lillian cleaned and cooked with little help from Howard. He would not even bring his dishes into the kitchen after he ate the meals she prepared for him. She continued this throughout their marriage. RA-4.

In 1999, Howard was diagnosed with Dementia. Lillian cared for him with no outside help, including little or no help from Howard's children. For almost 5 years, Lillian alone kept Howard out of the nursing home by helping him dress and cleaning him up after his many episodes of incontinence.

Howard was grateful for Lillian's devotion and care. He often promised her that she could live in the marital home for the rest of her life, and that she would be a rich woman after he died. A-51, 54. To keep his promise, he did transfer some of his assets into her name. However, Howard's son coerced Lillian into returning much of those assets back into Howard's name alone. A-46-49. These facts make it unconscionable to enforce the 1969 antenuptial agreement giving Lillian such a small portion of Howard Kinney's estate.

## CONCLUSION

The district court was correct when it concluded as a matter of law that the antenuptial agreement in this case was unfairly procured due to lack of opportunity for review by independent counsel. This court should uphold that decision. In addition, the agreement was substantively unfair at inception because it failed to make reasonable provision for Lillian, and it is grossly unfair to enforce it now after a long marriage of devoted care, including during a long illness for many years. The decision of the trial court should therefore be affirmed.

Dated: November 20, 2006

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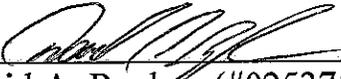
No. A05-1794  
State of Minnesota  
In Supreme Court

<p>In re the Estate of Howard C. Kinney, decedent.</p> <p>James H. Kinney, Appellant,</p> <p>v.</p> <p>Lillan M. Kinney, Respondent</p>	<p><b>CERTIFICATE OF BRIEF LENGTH</b></p>
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I hereby certify that this brief conforms to the requirements of Minn. R. Civ. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. By automatic word count, the length of this brief is 6584 words. This brief was prepared using Microsoft Word 2004.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).