

NO. A05-1794

State of Minnesota
In Supreme Court

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

James H. Kinney,
as Personal Representative of the
Estate of Howard C. Kinney,

Appellant,

vs.

Lillian M. Kinney,

Respondent.

APPELLANT'S BRIEF AND APPENDIX

MASLON EDELMAN BORMAN
& BRAND, LLP
Mary R. Vasaly (#152523)
Dawn C. Van Tassel (#297525)
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402
(612) 672-8200

Attorneys for Appellant

David Adler-Rephan (#253753)
200 Village Center Drive, Suite 800
North Oaks, MN 55127
(651) 255-9500

Attorney for Respondent

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STATEMENT OF THE ISSUES

INTRODUCTION

In this case, the Court must decide whether an antenuptial agreement, executed by Howard Kinney in 1969 to fulfill a contract obligation to preserve certain assets for his children, is enforceable under Minnesota common law. Howard Kinney's second wife challenged the agreement after his death in 2004. The trial court found as a matter of law that there was adequate disclosure of the husband's assets before the execution of the agreement and adequate consideration for the agreement. It struck down the agreement solely on the grounds that the husband's Estate did not prove that the wife had been advised to seek independent counsel. The Court of Appeals affirmed.

ISSUES

1. An antenuptial agreement governed by the common law is enforceable if (1) its execution was preceded by a fair and full disclosure of assets; and (2) either the consideration for it was adequate or it was not procured by fraud or duress. The trial court found that full disclosure of assets was made and the consideration given was adequate.

Did the Court of Appeals err in striking down the antenuptial agreement on the grounds that Respondent did not have an opportunity to consult with independent counsel before signing the agreement?

The Court of Appeals held that, regardless of the existence of disclosure and consideration, the antenuptial agreement was invalid absent proof that Respondent had had an opportunity to consult with independent counsel before signing the agreement.

Most apposite authority:

In re Estate of Serbus, 324 N.W.2d 381 (Minn. 1982)
Slingerland v. Slingerland, 115 Minn. 270, 132 N.W. 326 (1911)
Gartner v. Gartner, 246 Minn. 319, 74 N.W.2d 809 (1956)

2. To the extent that the opportunity to consult independent counsel is relevant under the common law, it is to be considered one fact in determining whether an antenuptial agreement was the product of fraud or duress. Did the Court of Appeals err in entering summary judgment holding that, regardless of any other evidence, the antenuptial agreement was unenforceable as a matter of law, in the absence of proof that Respondent had an opportunity to consult with independent counsel?

The Court of Appeals affirmed the trial court's holding that the agreement was invalid because the record lacked evidence that Howard Kinney advised Respondent to seek independent counsel.

Most apposite authority:

Minnesota Statutes § 519.11
In re Estate of Serbus, 324 N.W.2d 381 (Minn. 1982)

STATEMENT OF THE CASE

Appellant, Estate of Howard C. Kinney (“the Estate”), seeks reversal of a decision filed by the Court of Appeals on July 3, 2006. (Appellant’s Appendix (“A-”) 2-9.) In its decision, the court held that an antenuptial agreement between decedent Howard C. Kinney and Respondent, Lillian Kinney was invalid.

The Kinney probate proceedings were originally commenced after Howard C. Kinney died on July 3, 2004. Thirty-five years before, on August 29, 1969, Howard and Lillian had executed an antenuptial agreement in which Lillian waived her right to inherit from Howard at his death. Notwithstanding the existence of this agreement, on October 27, 2004, Lillian filed claims against the Estate, seeking *inter alia*, an augmented share of the estate, family maintenance, homestead rights and a selection of personal property. (A-11.) Howard’s personal representative, James Kinney, filed objections to these claims. The parties then filed cross-motions for summary judgment.

The district court granted summary judgment to Lillian. (A-11-13.) In its July 15, 2005, order, the court held as a matter of law that “Lillian Kinney had sufficient knowledge of the extent of decedent’s assets prior to signing the antenuptial contract” and “[t]here was sufficient consideration for the antenuptial contract.” (A-11 at ¶¶ 7-8.)

Nevertheless, the court held that the antenuptial agreement was invalid because there was no evidence that Lillian was “informed of the right to consult with independent counsel.” (A-13.)

The Estate timely appealed. On July 3, 2006, the Court of Appeals held that the common law governed the antenuptial contract, but affirmed the trial court’s entry of summary judgment on the grounds that the Estate had failed to prove that Lillian had had an opportunity to consult with independent counsel before she signed the agreement. (A-6, 10).

STATEMENT OF FACTS

A. Howard’s First Marriage and Acquisition of the Farms.

Howard married Mary Marthelia Hasselblad in 1937. (A-18.) The Kinneys had three children, James, Robert and Marthelia Ann. (A-18.) Mary Hasselblad Kinney, Howard’s first wife, died intestate in 1967, leaving Howard an estate worth approximately \$175,000.00, which included a one-third interest in farmland in Illinois and Indiana that had belonged to her family. (A-19.) Her children inherited the remaining two-thirds interest in the land. (*Id.*)

B. Howard’s Contract with His Children.

In March of 1969, Howard met with each of his three children and expressed his desire to retire from his job. He explained to them that in

retirement he would need the entire income generated by the family farms, not just the one-third share he had inherited from his first wife. He asked his children to give him a life estate in their two-thirds interest in the farms, in exchange for which Howard would ensure that his children inherited his one-third interest in the farms on his death. His children agreed and completely fulfilled their promise, allowing Howard to take all of the income generated by the farms until his death. (A-19.)

C. Howard and Lillian Discuss and Execute the Antenuptial Agreement.

Howard moved to Minnesota, where he met Respondent Lillian Kinney (nee Lillian Seiler) at Prudential Life Insurance Company, where both worked as managers. (A-30.) At the time, Lillian was 45 years old and had been living entirely independently for many years. (A-30-35.)

Before their marriage, Howard and Lillian had discussed on several occasions the fact that the farms Howard inherited from his first wife were to pass to his children upon his death. (A-42.) Lillian understood that Howard had asked an attorney to draft an antenuptial agreement to effect this intent. (*Id.*) Lillian and Howard had also visited the farms together, and Lillian saw first-hand the land involved. (A- 32-36.)

On the morning of August 29, 1969, Howard and Lillian went to an attorney's office to execute the antenuptial agreement. (A-35.) Lillian admits that Howard did not threaten or coerce her into signing the

agreement, nor did he threaten to call off the marriage if she refused to sign. (A-40.) However, she claims to have felt some time pressure because she and her mother needed to get to the beauty parlor and to run errands before the ceremony. (A-41.)

In the agreement itself, Lillian acknowledged that she knew the extent of Howard's property and that she fully understood its provisions.

The antenuptial agreement provides:

WHEREAS, Howard C. Kinney has disclosed to Lillian M. Seiler the nature and extent of his various real and personal property interests and of his sources of income, . . .

IT IS THEREFORE AGREED:

1. Lillian M. Seiler hereby waives and releases all rights including, but not limited to, dower, statutory allowances in lieu of dower, distributive share, right of election against a will, descent of homestead, widow's support or other widow's allowances, or otherwise, which she may acquire by reason of her marriage to Howard C. Kinney in any property owned by him at the time, or by his estate upon his death. . . .

6. Lillian M. Seiler acknowledges that the present approximate net worth of Howard C. Kinney has been fully disclosed to her, and that she understands that such net worth is in excess of Two Hundred Thousand (\$200,000.00) Dollars, that she has given due consideration to this fact and has conferred with her family as to same, and that she is entering into this agreement freely and with a full understanding of its provisions.

(A-16-17) (the "Kinney Antenuptial Agreement").

The Kinney Antenuptial Agreement also stated that Howard would provide \$10,000.00 in life insurance to be paid to Lillian upon his death

and would waive any rights as surviving spouse should Lillian predecease him. (*Id.*) Although Lillian was not represented by separate counsel with respect to the drafting or signing of the agreement, she did not ask for more time to review the agreement, and she felt able to sign it. (A-41.)

Howard and Lillian were married on August 29, 1969. (A-35.) Afterwards, Howard fulfilled all of his obligations under the Agreement. He purchased the requisite life insurance and even purchased additional coverage for Lillian's benefit, totaling approximately \$70,000. (A-59.) By fulfilling the requirements of the Agreement, he also fulfilled his contractual obligation to his children to preserve their mothers' property for them.

Throughout the marriage, Howard took care of all the couple's housing, transportation, food and basic living expenses. A significant portion of Howard's income was generated by the farms owned primarily by Howard's children. Thus, both Lillian and Howard benefited from Howard's contract with his children. Relieved of the need to pay her own expenses, Lillian was able to amass significant savings with the money she earned as a manager for Prudential. (A-19-20.)

D. Howard and Lillian Revisit Their Estate Planning.

During the mid-1990s, Howard and Lillian discussed again the Antenuptial Agreement while discussing financial and estate issues. (A-46.) During this time, Howard and Lillian set up a jointly owned annuity so that Lillian would receive additional funds. (A-48.) That annuity is worth approximately \$120,000. (A-59.)

During this process, Lillian had occasion to review the Agreement again. She considered whether to obtain legal advice related to the estate planning and the Antenuptial Agreement, but decided she needed to consult a lawyer only about issues relating to the couple's current finances. (A-49.) Neither Howard nor Lillian discussed amending or revoking the Antenuptial Agreement. (A-50.)

E. Howard Dies, and Lillian Challenges the Agreement.

Howard died on July 3, 2004. (A-4.) In derogation of the Antenuptial Agreement, Howard's will, and his contract with his children, Lillian filed a claim for an augmented share of the Estate. Both the Estate and Respondent moved for summary judgment on the issue of the validity of the Antenuptial Agreement.¹ (A-11.) The trial court held for Lillian on the grounds that the record did not establish that she had had

¹ Although the trial court's order states that the parties stipulated to the facts, the record contains no such stipulation and each side submitted separate evidence regarding the relevant facts.

an opportunity to consult independent counsel, although the court found that there had been a fair and full disclosure of assets and adequate consideration. The Court of Appeals affirmed.

SUMMARY OF ARGUMENT

The Court of Appeals applied an incorrect legal standard when it held that the Kinney Antenuptial Agreement was unenforceable under the common law. There were only two common law requirements at the time the agreement was executed: (1) a pre-execution fair and full disclosure of assets; and (2) adequate consideration. *Gartner v. Gartner*, 246 Minn. 319, 323-24, 74 N.W.2d 809, 813 (1956). Only if consideration was absent or inadequate, was the proponent of the agreement required to bear the burden of showing the absence of fraud or duress. *Id.* The Kinney Antenuptial Agreement was valid because it met these common law requirements, the trial court finding specifically the adequacy of both the asset disclosure and the consideration given. (A-11 at ¶¶ 7-8.)

Despite these findings, the court mistakenly imposed an “opportunity to consult with independent counsel” requirement to invalidate the Kinney Antenuptial Agreement. The court relied upon dictum in a 1982 decision of this Court that did not reflect applicable common law requirements. Although the legislature imposed a right to

counsel requirement by statute in 1979, the statute expressly does not retroactively apply to an agreement drafted ten years earlier. Moreover, imposing legal requirements that neither the parties nor the drafting attorney could have anticipated would not only be fundamentally unfair, but in the circumstances of this case, would unconstitutionally impair Howard's contract with his children.

The Court of Appeals made a further error of law when it held that the lack of opportunity to consult with counsel was dispositive of the validity of the antenuptial agreement and entered summary judgment without considering any other evidence in the record. Under the common law, where consideration is lacking and the court must consider whether the agreement was the product of fraud or duress, the opportunity to consult with a lawyer is only one factor in the determination. Here, the Court of Appeals erred first, as noted above, by failing to uphold the agreement based on the existence of disclosure and consideration, and second, by failing to consider all of the evidence regarding the question of fraud or duress, holding that the agreement was invalid as a matter of law based solely on the lack of evidence that Howard informed Lillian of her right to seek independent legal advice. The Court of Appeals' decision should be reversed.

ARGUMENT

I. Standard of Review.

On appeal from summary judgment, this Court determines whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). The Court must view the evidence in the light most favorable to the party against whom judgment was granted. See *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). Where, as here, the district court has granted summary judgment based on the application of the law to undisputed facts, the result is a legal conclusion reviewed *de novo*. *Lefto v. Hoggsbreath Enters., Inc.*, 581 N.W.2d 855, 856 (Minn. 1998).

II. The Trial Court's Findings Were Sufficient to Establish that the Antenuptial Agreement Was Valid Under the Common Law Existing at the Time It Was Executed.

A. The Kinney Antenuptial Agreement met the common law disclosure and consideration requirements; whether Lillian had an "opportunity to consult with independent counsel" was legally irrelevant.

The trial court erred when it invalidated the Kinney Antenuptial Agreement based on an "independent counsel" requirement because no such requirement existed under the common law at the time the agreement was executed. At the time the parties executed the Antenuptial Agreement, Minnesota courts encouraged the use of such

agreements to settle inheritance rights in advance of marriage, particularly when children from a former marriage existed. This Court, as early as 1919, stated: “[i]n the absence of fraud or imposition upon one of the parties by the other, they ought to be sustained.” *In re Malchow’s Estate*, 143 Minn. 53, 57 172 N.W. 915 (1919) (recognizing that parties frequently agree before a second marriage that their property should go to their children by the first marriage); *In re Appleby’s Estate*, 111 N.W. 305, 309 (Minn. 1907) (noting that the reason to uphold antenuptial agreements includes welfare of children from the first marriage). *See also Gartner v. Gartner*, 246 Minn. 319, 323, 74 N.W.2d 809, 812–13 (1956) (“Antenuptial contracts in anticipation of marriage, fixing the rights which the survivor shall have in the property of the other after his or her death, are not against public policy but are regarded with favor as conducive to the welfare of the parties making them, and these contracts will be sustained whenever equitably and fairly made.”)

To be enforced under the common law, as “equitably and fairly made,” the agreement was required to meet the following requirements:

- (1) its execution must have been preceded by a fair and full disclosure and explanation of every material particular within the knowledge of the one who seeks to uphold it against the other;
- (2) the consideration for it must not be, under all the circumstances, so inadequate as to be unconscionable. If the consideration is absent or inadequate, a presumption of fraud

arises requiring the proponent of the agreement to bear the burden of showing that the contract was not procured using fraud or duress.

Gartner, 246 Minn. at 323-24, 74 N.W.2d at 813. In *Gartner*, a case very similar to this case on the facts, this Court held that the wife, who was not represented by independent counsel, had received adequate consideration “[i]n view of the economic circumstances of the plaintiff and the defendant when the agreement was made, and in view of the claims that defendant’s children justly had upon their father’s property.” *Id.* at 326, 814.

Thus, at common law, Minnesota courts focused on disclosure and consideration, and, in the absence of consideration, looked to a variety of factors to determine fairness and the existence of duress. *See also In re Malchow’s Estate*, 143 Minn. 53, 172 N.W. 915 (1919).

Indeed, of the ten cases² decided by this Court under the common law, only two even *mention* the absence of consultation with counsel—the Court considering it as one of several factors. *See Stanger v. Stanger*, 189 N.W. 402, 402-03 (Minn. 1922) (striking down the antenuptial

² The cases are *Desnoyer v. Jordan*, 7 N.W. 140 (Minn. 1880); *Hosford v. Hosford*, 42 N.W. 1018 (Minn. 1889); *In re Appleby’s Estate*, 111 N.W. 305 (Minn. 1907); *Slingerland v. Slingerland*, 132 N.W. 326 (Minn. 1911); *In re Estate of Malchow*, 172 N.W. 915 (Minn. 1919); *Welsh v. Welsh*, 184 N.W. 38 (Minn. 1921); *Stanger v. Stanger*, 189 N.W. 402 (Minn. 1922); *Gartner v. Gartner*, 74 N.W.2d 809 (Minn. 1956); *In re Jeurissen’s Estate*, 161 N.W.2d 324 (Minn. 1968); *Englund v. Englund*, 175 N.W.2d 461 (Minn. 1970).

agreement for the husband's failure fully to disclose his assets); *Slingerland v. Slingerland*, 115 Minn. 270, 272-73, 132 N.W. 326, 327 (1911) (invalidating the agreement for multiple reasons, including lack of disclosure and lack of consideration).

Although the Minnesota legislature adopted a statute in 1979 that contained for the first time an "opportunity to consult with independent counsel" requirement, that statute expressly does not apply retroactively to antenuptial agreements executed before the statute was enacted. Minnesota Statutes section 519.11 provides that it applies only to agreements "executed on or after August 1, 1979." MINN. STAT. § 519.11, Subd. 5. See also *Christensen v. Christensen*, 393 N.W.2d 207, 209 (Minn. Ct. App. 1986); MINN. STAT. § 645.21 (statutes presumed to act prospectively unless legislature evidences a contrary intent); *Ubel v. State*, 547 N.W.2d 366, 369 (Minn. 1996). Accordingly, the new statutory requirement did not apply to the Kinney Antenuptial Agreement, which was executed ten years before it was passed.

The Kinney Antenuptial Agreement met all common law requirements, the trial court finding specifically the existence of disclosure and consideration. The trial court and Court of Appeals, however, mistakenly adopted an additional "opportunity to consult with independent counsel" requirement, relying on dictum in this Court's

1982 decision in *In re Estate of Serbus*, 324 N.W.2d 381, 385 (Minn. 1982). *Serbus* was decided three years after the legislature enacted MINN. STAT. § 519.11. Although the statute did not apply to the agreement in *Serbus*, the Court blended the common law and statutory standards. Citing *Slingerland*, the Court articulated the rule as follows: “Under both *Slingerland* and MINN. STAT. § 519.11, subd. 1, each party to an antenuptial contract must also have an opportunity to consult with an attorney.” *Serbus*, 324 N.W.2d at 386.³

But *Slingerland* had imposed no such requirement. There, the Court found lack of disclosure *and* inadequate consideration, the plaintiff having not been informed of the extent of the defendant’s vast holdings when she agreed to be limited in recovery to \$5,000 in the event of a divorce. 115 Minn. at 272-73, 132 N.W. at 327. As a result, the Court considered a number of other factors in ruling on the validity of the antenuptial agreement at issue. These included the great disparity in age, wealth and education between the parties and the fact that the parties had conceived a child out of wedlock, causing extreme social

³ The *Serbus* “rule” was dictum because this Court ultimately *upheld* the antenuptial agreement at issue even though the parties had not been represented by independent counsel. That the wife who challenged the agreement had been the one to choose the parties’ joint counsel in the first instance does not alter the fact that the *Serbus*’ court did not apply the “opportunity to consult independent counsel” rule in that case.

pressure for plaintiff to marry (in 1890). Although the plaintiff's lack of access to a "person of business judgment and experience" was one factor the *Slingerland* Court weighed, the Court did not hold that this factor alone rendered the agreement unenforceable. 115 Minn. at 272, 132 N.W. at 327.

In the later *Gartner* opinion, where the Court found the consideration to be adequate, it did not even mention the existence of independent counsel as a factor. *Gartner*, 246 Minn. at 323-24, 74 N.W.2d at 813. Thus, under the common law, although the opportunity to consult with independent counsel might have been a factor appropriate to consider in cases where consideration was inadequate, no Minnesota court before *Serbus* had ever held that an the opportunity to consult with counsel was a requirement, let alone an indispensable stand-alone requirement.⁴

The *Serbus* court's reference in dictum to *Slingerland* as generally establishing an independent counsel requirement was simply incorrect. This conclusion is strengthened by this Court's decision in later cases

⁴ The Court of Appeals' opinion here also relies upon references in some early cases to independent counsel or to advising the spouse of her rights, but those circumstances are only identified as "factors" in those decisions. See *Stanger v. Stanger*, 189 N.W. 402-03 (Minn. 1922); *Slingerland*, 115 Minn. at 274, 132 N.W. at 328; *Gartner*, 246 Minn. at 325, 74 N.W.2d at 814 (wife did not have independent counsel, but court found she was advised of her rights).

where it has made clear that the lack of independent counsel alone does not make an antenuptial agreement presumptively invalid, even under the more stringent requirements of the statute. *See McKee-Johnson v. Johnson*, 444 N.W.2d 259, 266 (Minn. 1989) (“[W]e have never held, nor are we prepared to do so now, that an attorney should *never* represent both parties seeking an antenuptial agreement.”) (emphasis supplied).

Before 1979, there simply was no requirement that a party have the opportunity to consult independent counsel. If *Serbus* were to be applied literally, it would result in retroactive application of the statutory requirement of independent counsel to pre-existing antenuptial agreements, a result that contradicts the legislative mandate that the statute apply only prospectively.

This Court should reverse the court’s holding that the Kinney Antenuptial Agreement is invalid for lack of an opportunity to consult with independent counsel, and, based on the trial court’s findings of adequate disclosure and consideration, declare that the Antenuptial Agreement is valid and enforceable.

B. Retroactive application of the statute/*Serbus* to the Kinney Antenuptial Agreement would impair Howard’s contract with his children.

This Court should not retroactively apply the 1979 statute to the Kinney Antenuptial Agreement for two additional reasons: (i) retroactive

application would contravene the intentions and expectations of the parties, who could not have anticipated that the law would change; and (ii) retroactive application would unconstitutionally impair Howard's contract with his children.

First, it is important that the parties' expectations be preserved, including the expectation that the law at the time of drafting will apply to their contracts. *Despatch Oven Co. v. Rauenhorst*, 229 Minn. 436, 443, 40 N.W.2d 73, 78 (1949). Indeed, the stability of society depends on stability in the rule of law. Citizens must be able to discern and to rely upon the law that applies to a contract when it is drafted. See *Christensen v. Minneapolis Mun. Employees Retirement Bd.*, 331 N.W.2d 740, 751 (Minn. 1983). When it comes time for the contract to be enforced, enforcing that law fosters confidence in the judicial system and encourages parties to enter into contracts to govern their future affairs.

When the Kinney Antenuptial Agreement was executed in 1969, the drafting lawyer could not have predicted that *Serbus* would change the law, more than ten years later. If he became aware of the new legislation in 1979, he would have known that it expressly applied only prospectively. Certainly the parties, who were not lawyers, would have had no occasion to monitor court decisions for changes in the law so that they could redraft their agreement. Retrospective application of the law

infringes on the parties' freedom to contract and on their ability to rely on the contracts they have made. It would be contrary to public policy, and fundamentally unfair, to apply a requirement that developed only *after* the enactment of MINN. STAT. § 519.11, and long after the antenuptial agreement in this case was executed, to invalidate the Kinney Antenuptial Agreement.

Second, in the unique circumstances of this case, retroactive application of the law results in impairment of Howard Kinney's contract with his children. Under both the federal and state constitutions, it is unlawful for the state to pass laws impairing the obligation of contracts. U.S. CONST. art. 1 § 10; MINN. CONST. art. 1, § 11; *see also Christenson v. Minneapolis Municipal Employees*, 331 N.W.2d 740, 750-751 (Minn. 1983). A state law unconstitutionally impairs a contract if (i) it operates as a substantial impairment of the contractual obligation; (ii) the state cannot demonstrate a significant and legitimate public purpose behind the legislation; and (iii) in light of the public purpose, the adjustment of the rights and responsibilities of the contracting parties is not based upon reasonable conditions or is not of a character appropriate to the public purpose justifying the legislation's adoption. *Id.*

Here, the application of the statute retroactively to the Kinney Antenuptial Agreement constitutes an unconstitutional impairment of

Howard's contract with his children. The statute's public purpose is to encourage parties to be independently represented. But the application of the statute retroactively to the Kinney Antenuptial Agreement does not further that purpose, as the parties were not, and could not have been, aware of the statute, and its requirements, at the time they entered into the contract. Accordingly, its retroactive application serves only to interfere with the parties' settled contract expectations. *Cf. Desnoyer v. Jordan*, 7 N.W. 140 (Minn. 1880) (applying statute retroactively to antenuptial agreement would unconstitutionally impair contract). Accordingly, retroactive application of the statute violates the federal and state contract clauses.

III. Even if the Opportunity to Consult Counsel Were Relevant, the Entry of Summary Judgment Was Improper Because Other Evidence Established that the Agreement was not the Product of Fraud or Duress.

The district court also erred for a second reason: Lillian was not entitled to summary judgment based solely on the Estate's failure to offer evidence that she had an opportunity to seek independent counsel. Where the opportunity to consult with independent counsel is relevant—in cases where consideration is found to be inadequate—the opportunity to consult counsel is only a factor to consider, not a dispositive requirement. *Slingerland v. Slingerland*, 115 Minn. 270, 272-73, 132 N.W. 326, 327 (1911). In such cases, this Court has never held, as did

the Court of Appeals below, that the absence of an opportunity to consult counsel, standing alone, rendered an antenuptial agreement void. In deciding summary judgment in this case, then, the court should have considered all of the circumstances to determine whether to enforce the agreement.

If the court had considered all of the evidence, it could not have properly rendered summary judgment for Lillian, as there was ample evidence in the record for a jury to base a determination that the contract was not procured by fraud or duress. The district court itself found:

The evidence tends to show that Lillian Kinney discussed the general terms of the antenuptial contract with the decedent prior to the wedding, that Lillian Kinney read the entire contract prior to signing it, that Lillian Kinney understood the purpose of the contract was to preserve decedent's assets for his children, and that Lillian Kinney understood she would receive none of decedent's assets at his death other than what was stated in the contract.

(A-13.)

Furthermore, the evidence establishes that Lillian had time to consider the contract in advance of her wedding day. Lillian knew about the terms of the Agreement, and Howard's plans to preserve his assets for his children, even if she did not actually review and sign the contract until the day of the wedding. (A-42-44). She had sufficient opportunity to seek counsel if she had wished it.

Moreover, after Howard and Lillian were married, she had thirty-five years to seek an amendment or rescission of the Agreement. During these intervening decades she could have obtained counsel, challenged the Antenuptial Agreement, or sought amendment of the Agreement.⁵ Instead, she waited to challenge the Agreement until the two eyewitnesses who could contest her version of events—Howard and his attorney—were deceased. Her decision to wait for her husband to die before challenging the Agreement undercuts her claim.

This evidence is particularly compelling in the probate context, where one spouse will always be unavailable to contest or to clarify the assertions of the other spouse. *Cf. Hafner v. Hafner*, 295 N.W.2d 567, 572 (Minn. 1980) (special concurrence of Kelly, J.) (highlighting the unfairness of treating a prenuptial agreement during a divorce in the same manner as a challenge during a probate proceeding.) To say that the Agreement is invalid because Howard is no longer alive to offer contradictory testimony is to proclaim the majority of antenuptial agreements invalid in the event of one spouse's demise.

⁵ There is no legal reason Lillian and Howard could not have altered the antenuptial agreement after the fact if they deemed it unfair, or if Lillian wished to obtain counsel to review it and to advise her of her options. *See Berg v. Berg*, 201 Minn. 179, 275 N.W. 836, 841 (1937) (antenuptial contract can be changed with voluntary consent of the parties).

Here there were ample facts and circumstances in the record that supported a finding that the Kinney Antenuptial Agreement was not the product of fraud or duress. The trial court failed to consider any of this evidence. (A-11-13.). This error requires reversal.

CONCLUSION

In the circumstances of this case, where the trial court found adequate disclosure and consideration for the Kinney Antenuptial Agreement, the holding that the Agreement was invalid was in error.

For all of the foregoing reasons, Appellant, the Estate of Howard C. Kinney, respectfully requests that the Court reverse the decision below and direct the entry of judgment for the Estate.

Dated: October 19, 2006

MASLON EDELMAN BORMAN & BRAND, LLP

By *Dawn Van Tassel*

Mary R. Vasaly (#152523)

Dawn C. Van Tassel (#297525)

3300 Wells Fargo Center

90 South Seventh Street

Minneapolis, MN 55402-4140

(612) 672-8200

ATTORNEYS FOR APPELLANT

No. A05-1794
State of Minnesota
In Supreme Court

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

James H. Kinney, Appellant,

v.

Lillian M. Kinney, Respondent

CERTIFICATE OF BRIEF LENGTH

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 5,047 words. This brief was prepared using Microsoft Word 2003.

Dated: October 19, 2006

MASLON EDELMAN BORMAN & BRAND, LLP

By 

Mary R. Vasaly (#152523)

Dawn C. Van Tassel (#297525)

3300 Wells Fargo Center

90 South Seventh Street

Minneapolis, MN 55402-4140

(612) 672-8200

ATTORNEYS FOR APPELLANT

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).