

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 REPLY BRIEF

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

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Introduction	1
Additional Statement of Facts	2
Argument.....	6
I. This Court Has Never Voided an Antenuptial Agreement at Common Law Solely for Failure to Consult with Independent Counsel.	6
A. Retroactive application of the statute/ <i>Serbus</i> would impair Howard’s contract with his children.	6
B. The Kinney Antenuptial Agreement met all common-law requirements.....	7
C. The trial court failed to consider access to independent counsel as only a factor in the analysis.....	10
D. Although proof of knowledge of one’s rights supports enforcement of an antenuptial agreement, it does not establish an independent counsel requirement.	11
II. Issues of Substantive Fairness Were Not Addressed by the District Court and Provide No Basis to Affirm.....	13
A. “Substantive fairness” analysis does not apply to the Kinney Antenuptial Agreement.....	14
B. Whether the Agreement meets “substantive fairness” requirements is not properly before this Court.	16
Conclusion.....	17

TABLE OF AUTHORITIES

STATE CASES

<i>Christenson v. Minneapolis Municipal Employees</i> , 331 N.W.2d 740 (Minn. 1983)	6
<i>Despatch Oven Co. v. Rauenhorst</i> , 229 Minn. 436, 40 N.W.2d 73 (1949).....	6
<i>In re Estate of Serbus</i> , 324 N.W.2d 381 (Minn. 1982)	9
<i>Funchess v. Cecil Newman Corp.</i> , 632 N.W.2d 666 (Minn. 2001)	16
<i>Gartner v. Gartner</i> , 246 Minn. 319, 74 N.W.2d 809 (1956).....	7, 8, 11, 14
<i>Hill v. Hill</i> , 356 N.W.2d 49 (Minn. Ct. App. 1984).....	9, 10
<i>Hruska v. Chandler Associates, Inc.</i> , 372 N.W.2d 709 (Minn. 1985)	12
<i>McKee-Johnson v. Johnson</i> , 444 N.W.2d at 67.....	8, 17
<i>Murphy v. Country House, Inc.</i> , 240 N.W.2d 507 (Minn. 1976)	12
<i>Pollock-Halvarson v. McGuire</i> , 576 N.W.2d 451 (Minn. Ct. App. 1998).....	15
<i>Rudbeck v. Rudbeck</i> , 365 N.W.2d 330 (Minn. Ct. App. 1985).....	9, 10
<i>Slingerland v. Slingerland</i> , 132 N.W. 326 (Minn. 1911)	8, 10, 11
<i>Stanger v. Stanger</i> , 189 N.W. 402 (Minn. 1922)	7, 8

Thiele v. Stich,
425 N.W.2d 580 (Minn. 1988) 16

Welsh v. Welsh,
184 N.W. 38 (Minn. 1921) 11

FEDERAL STATUTES

U.S. Const. art. 1 § 10.....6

STATE STATUTES

Minn. Const. art. 1, § 116

Minn. R. Civ. P. 132.01 19

INTRODUCTION

In its opening brief, Appellant, Estate of Howard C. Kinney (“the Estate”), demonstrated that the antenuptial agreement between Howard C. Kinney and Respondent, Lillian Kinney (“the Kinney Antenuptial Agreement”) was valid under the common law at the time it was executed. Respondent Lillian Kinney (“Lillian”) argues for an interpretation of the common law that would include an independent counsel requirement, but fails to support her argument with applicable precedent.

Under the rule of law established by the common law cases, the existence of separate counsel is not even considered a relevant factor, unless the court first determines that the agreement is not supported by adequate consideration or that pre-execution disclosure of assets was lacking. The district court in this matter found that consideration and disclosure were sufficient. Nevertheless, it erroneously held that the Kinney Antenuptial Agreement was void solely on the basis of lack of independent counsel. The effect of this decision was to disrupt the parties’ expectations and unconstitutionally impair Howard’s contract with his children. This Court should reverse.

Lillian’s alternative arguments regarding the substantive fairness of the Kinney Antenuptial Agreement also fail. First, there was no

“substantive fairness” requirement at common law where disclosure and consideration were adequate and thus, there is no need to consider the issue here. Moreover, the evidence establishes that the Agreement was not procured through fraud or duress, which are the “substantive fairness” considerations identified in the common law cases. Although Respondent urges the Court to apply the post-statutory formulation of substantive fairness, the issue is not properly before this Court because the district court did not address it. Indeed, Lillian’s version of the facts (many of which are supported only by manufactured testimony given on a deposition errata sheet) only highlights how inappropriate it would be for this Court to assume the role of fact-finder to determine whether the Agreement was substantively fair under the statute.

This Court should reverse.

ADDITIONAL STATEMENT OF FACTS

The Estate offers these additional facts to correct incomplete and inaccurate statements in Respondent’s recitation of facts.

1. *Lillian was a mature and experienced woman at the time of her marriage.*

In her fact statement, Lillian presents herself as a woman overpowered and outsmarted by her husband-to-be, but the record demonstrates otherwise. (Resp. Brief at 4.) Although Lillian cleaned houses while she was in high school and *started* her career at Prudential

in a secretarial position, she later became a Prudential manager and was “totally self-sufficient” at the time of her marriage, supporting both herself and her mother. (Appellant’s Appendix (“A.”) 31-34.) Lillian testified that she came from a middle-class upbringing, and that her financial circumstances were not significantly changed while she dated Howard: they frequented the same clubs and restaurants she would have otherwise visited. (A. 30-31.) In addition, Lillian was 45 years old at the time of the marriage. (A. 34.) Lillian was not an uneducated, poor, naïve girl who could be duped by an “older man.”

2. *Lillian read and understood the Agreement when she signed it.*

Despite the fact that the parties executed the Agreement on the day of their marriage, Lillian read and understood it. Lillian describes herself as being in an “altered state” and “shocked and confused” when she signed the Agreement, but these statements are unsupported by the record. (Lillian cites to her statement that she was “very excited about getting married.” (Respondent’s Appendix (“R.A.”) 12, Answer to Interrogatory 10.)) Howard never threatened to call off the wedding nor made any threat to force her to sign the Agreement. (A. 40, 58.) She did not ask to delay signing the Agreement, and she already knew that the reason she was asked to sign it was to preserve assets for Howard’s children. (A. 41, 58.) Howard and Lillian had discussed the fact that the

farm Howard inherited from his first wife was to pass to his first wife's children upon his death. (A. 38.) She was likely also aware that passing these assets to the children was part of Howard's contractual obligation to them in exchange for a lifetime of income from their share of the farms. (A. 18-19.) Lillian thought it reasonable that he might want even more than the farm land to pass to his children upon his death. (A. 58.)

Although Lillian now claims that she did not carefully read the Agreement, in other testimony, and in the Agreement itself, she admits that she understood it when she signed it. (A. 58; 16.) She offers no explanation for her decision to wait until Howard died to challenge it. (A. 50.)

3. *Howard disclosed the amount of his assets to Lillian when they married.*

Lillian's recitation of the facts also inaccurately reports that she did not inquire into Howard's finances and had no idea of the extent of his assets. (Resp. Brief at 6.) In fact, Lillian was in charge of the payroll for agents at Prudential and was even in charge of issuing Howard's paycheck. (A. 36-37.) She had visited one of his farms and his home in Minnesota. (A. 31, 36.) She does not recall whether Howard had told her about the other farm in Indiana. (R.A. 12). Whether or not she knew precisely the number of bank accounts Howard possessed, she knew,

and acknowledged in the Kinney Antenuptial Agreement, that Howard's assets exceeded \$200,000. (A. 16).

She also acknowledged that she understood that under the terms of the Agreement she would be entitled to a \$10,000 insurance policy, and Howard's children would be entitled to the remainder of his estate. (A. 58.) Although Lillian complains about this policy, she fails to disclose that it was worth \$70,000 when Howard died, and that he also provided for her in other ways. (A. 59.) Howard provided her with an annuity that was worth more than \$120,000 when he died. (R.A. 23 (All State (Glenbrook) Annuity.) Howard also paid the bulk of the couple's expenses while he was alive, permitting Lillian to stash away her earnings from Prudential. (A. 61.)

Although Lillian claims that Howard wanted her to have more than she agreed to in the Antenuptial Agreement, the evidence does not support her claim. Lillian understood that Howard wanted their finances to remain separate. (A. 57.) Her name simply began to appear on Howard's accounts in the mid-1990s, *after* Howard had been diagnosed with dementia. (A. 20.) When Howard's children discovered this, they asked her to take her name off of Howard's separate bank accounts. (A. 20.) When asked why she complied, Lillian testified that she knew that those accounts were Howard's property. (A. 50, 20.)

There is also no support in the record for the claim that Lillian significantly increased the value of the marital estate during marriage. The increase in property value occurred in non-marital assets, such as the homestead (\$180,000) and farms (\$600,000). (R.A. 2.) Her own assets grew substantially as well and she has retained the full value of those assets in the amount of approximately \$400,000. (A. 61.)

ARGUMENT

I. This Court Has Never Voided an Antenuptial Agreement at Common Law Solely for Failure to Consult with Independent Counsel.

A. Retroactive application of the statute/*Serbus* would impair Howard's contract with his children.

Respondent's arguments rest entirely on her interpretation of the applicable common law; she apparently concedes that this Court cannot retroactively apply the 1979 statute to the Kinney Antenuptial Agreement. To do so would improperly intrude upon the parties' freedom of contract, contravening their expectations (*Despatch Oven Co. v. Rauenhorst*, 229 Minn. 436, 443, 40 N.W.2d 73, 78 (1949)), and would unconstitutionally impair Howard's contract with his children, in which he promised them assets in exchange for a lifetime income stream. See 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). Thus, the parties agree that the Court should apply the common

law as it existed in 1969. Under that law, the Kinney Antenuptial Agreement is valid.

B. The Kinney Antenuptial Agreement met all common-law requirements.

Notwithstanding Lillian's arguments to the contrary, the Kinney Antenuptial Agreement met the requirements of the common law *as it existed* in 1969. As noted in Appellant's opening Brief, these requirements were: (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). If the consideration was absent or inadequate, only then was the proponent of the agreement required to show the absence of fraud or duress. *Id.* The trial court in this case held that the disclosure and consideration requirements were met. Accordingly, whether the parties had independent counsel is irrelevant.

Respondent urges the Court to adopt a different interpretation of the common law, relying heavily on *Stanger v. Stanger*, 189 N.W. 402, 402 (Minn. 1922), but *Stanger* does not establish a requirement of independent counsel. Although the *Stanger* court mentions, as one of many factors, that the wife had no separate counsel, it primarily struck down the antenuptial agreement because the husband failed to make a disclosure of assets. The Court stated:

If there was a confidential relation there was a duty of disclosure. It does not appear that any particular disclosure was made. Indeed, very little appears as to what his property then was except by inference from the fact that he was a retired farmer, and was living on property which he owned in St. Cloud. The evidence shows that the present value of the estate is about \$21,000.

Stanger, 189 N.W. at 402-03. This Court only looked to the issues of fairness and the existence of duress *after* it had determined that the disclosure of assets was inadequate. Only then did the Court examine other factors such as the wife's age, education, business experience, and access to legal advice, to support the trial court's decision to nullify the agreement. *See also Slingerland v. Slingerland*, 132 N.W. 326 (Minn. 1911).

Thus, assuming that Howard's lawyer knew the law regarding the validity of antenuptial agreements, as set forth in *Gartner* and *Stanger* (Resp. Brief 22-23), he knew only two requirements: that the parties must disclose their assets and that they must provide adequate consideration. *See Gartner v. Gartner*, 246 Minn. 319, 323-24, 74 N.W.2d 809, 813 (1956); *see also Stanger*, 189 N.W. at 403. These were the precise requirements that Howard's lawyer expressly met in the Kinney Antenuptial Agreement. (A. 16-17.)

Similarly, this Court's holding in *McKee-Johnson v. Johnson*, a case decided twenty years *after* the Kinney Antenuptial Agreement was signed,

does not adopt a common-law independent counsel requirement. 444 N.W.2d 259 (Minn. 1989). In applying the 1979 statute to the 1980 agreement before it, the Court discusses common-law requirements, but the only common-law case it cites is *In re Estate of Serbus*, 324 N.W.2d 381 (Minn. 1982), a 1982 decision, in which the Court, in *dictum*, referred to a common-law independent counsel requirement. That *dictum* was inaccurate. (See Appellant's Opening Brief at 15-16.) The *McKee-Johnson* court did not independently analyze the common-law requirements in the course of upholding the agreement under the later-enacted statute.

Likewise, Respondent's reliance on other post-statute Court of Appeals cases such as *Hill v. Hill*, 356 N.W.2d 49 (Minn. Ct. App. 1984), and *Rudbeck v. Rudbeck*, 365 N.W.2d 330 (Minn. Ct. App. 1985), is entirely misplaced. (Resp. Brief at 18-19). Both *Hill* and *Rudbeck* relied on the same piece of *dictum* from *Serbus* in holding that there was an independent counsel requirement at common law. See *Rudbeck*, 365 N.W.2d 330, 332 (Minn. Ct. App. 1985); *Hill v. Hill*, 356 N.W.2d 49, 53 (Minn. Ct. App. 1984) (both citing *Serbus*, 324 N.W.2d 381, 385 (Minn. 1982)). Both courts only examined the issue of fairness, including access to counsel, after first finding that the consideration offered was

“clearly inadequate.” *Hill*, 356 N.W.2d at 53; *Rudbeck*, 365 N.W.2d at 332.

Here, the trial court found that Howard’s disclosure of assets was adequate, and the record contains undisputed proof supporting that finding. (A. 11, 16-17). In no case—not *Stanger*, *Serbus*, *McKee*, or any other case—has the Court stricken an antenuptial agreement under the common law for lack of an opportunity to consult with independent counsel, standing alone, let alone where adequate disclosure of assets and adequate consideration were present.

C. The trial court failed to consider access to independent counsel as only a factor in the analysis.

Lillian’s argument also fails to address the fact that no common-law cases refer to the existence of independent counsel except as one of many factors when consideration or disclosure is found to be absent. As noted in the Estate’s opening brief, where the opportunity to consult with independent counsel is relevant—in cases where consideration is found to be inadequate—it is only a factor to consider, not a dispositive requirement. *Slingerland v. Slingerland*, 115 Minn. 270, 272-73, 132 N.W. 326, 327 (1911). Thus, the trial court’s granting of summary judgment to Respondent, based solely on the absence of independent counsel, was reversible error not only because the Kinney Antenuptial Agreement met consideration and disclosure requirements. If the court

were warranted in conducting a more searching inquiry, it was required to consider *all* relevant factors—not simply access to counsel. It failed to do so. Accordingly, reversal is required on this alternative basis.

D. Although proof of knowledge of one’s rights supports enforcement of an antenuptial agreement, it does not establish an independent counsel requirement.

Respondent’s assertion that a valid agreement does not exist absent proof that the party understood the rights she was forfeiting misreads decisions of this Court and conflates two separate legal concepts. Again, in the cases Respondent cites, the Court mentions that the party understood her rights *as a factor* in upholding the agreement. (Resp. Brief at 17-18). *See Gartner v. Gartner*, 74 N.W.2d 809 (Minn. 1956); *Slingerland v. Slingerland*, 132 N.W. 326 (Minn. 1911); *Welsh v. Welsh*, 184 N.W. 38 (Minn. 1921) (all discussing whether party contesting antenuptial agreement understood rights given up). In none of these cases did the Court expressly or impliedly hold that the agreement at issue was invalid absent the existence of independent counsel. At common law, there simply was no “consultation with independent counsel” requirement.

Moreover, if Lillian’s knowledge of her rights were a relevant factor in this case, then that factor weighs heavily in favor of *upholding* the Kinney Antenuptial Agreement. It is undisputed in this case that Lillian

was aware of the legal rights she gave up; the Kinney Antenuptial Agreement states that she was aware and willingly and freely gave up her rights:

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, . . .

6. Lillian M. Seiler . . . is entering into this agreement freely and with a full understanding of its provisions.

(A.16-17) (emphasis added). Lillian cannot now, particularly in support of a summary judgment motion, contradict with parol evidence this evidence that she knowingly forfeited her rights. *Hruska v. Chandler Assocs., Inc.*, 372 N.W.2d 709, 713 (Minn. 1985).¹

Indeed, if a written affirmation were to be held by this Court to be insufficient to establish a party's knowledge, then an estate, which will always be deprived of the testimony of the decedent, will never be able to establish the existence of any of the requirements required by law

¹ Even more egregious is the fact that Lillian attempts to provide this contradictory testimony through her deposition errata sheet, treating her deposition as though it were a take-home examination. (Resp. Brief at 22; R.A. 18-24). When a deponent makes changes to his or her deposition testimony, the reliability and veracity of the altered testimony is an issue to be determined by the trier of fact. *Murphy v. Country House, Inc.*, 240 N.W.2d 507, 511 (Minn. 1976). Accordingly, to the extent Lillian relies on reconstructed versions of the facts, her credibility must be assessed by the jury, rendering summary judgment inappropriate and further supporting reversal of the district court.

because the spouse can simply contradict the written terms, as Lillian is attempting to do here.

Furthermore, the district court expressly held that Lillian understood what she was giving up:

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.) Accordingly, even under Respondent's reading of *Gartner*, *Slingerland* and *Welsh*, the Kinney Antenuptial Agreement was enforceable.

In any event, the question before this Court is not whether Lillian knew of her rights, but whether the Agreement is invalid simply because she did not have independent counsel. As discussed above, this question must be answered in the negative because there was no independent counsel requirement at common law.

II. Issues of Substantive Fairness Were Not Addressed by the District Court and Provide No Basis to Affirm.

Lillian asks this Court to affirm on two grounds not reached by the district court in its consideration of the cross-motions for summary judgment: the substantive fairness of the Kinney Antenuptial Agreement

at the time it was made and at the time it was to be enforced. (Resp. Brief at 25-30.) This argument is unavailing for two reasons. First, under the common law, the court need not conduct a substantive fairness review, particularly where, as here, consideration and disclosure are deemed sufficient. Second, if a substantive fairness analysis were required, it must first be conducted by the trial court.

A. “Substantive fairness” analysis does not apply to the Kinney Antenuptial Agreement.

Under the common law, the court need not conduct a substantive fairness review; rather the court need determine only whether consideration and disclosure of assets for an antenuptial agreement were adequate. *Gartner v. Gartner*, 246 Minn. 319, 323-24, 74 N.W.2d 809, 813 (1956). If these requirements are not satisfied, only then must the court determine whether the agreement was the product of fraud or duress. *Id.* Here, the court found that consideration and disclosure were adequate. Under these circumstances there was no need for the trial court, and no need for this Court, to reach common law “fairness” issues before holding that the Agreement is enforceable.

In any event, there was sufficient evidence in the record for a jury to find that the contract was not procured by fraud or duress.² 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). There is no evidence that Howard made any misrepresentation to Lillian, and the district court found that the Agreement was not unconscionable in holding the consideration to be adequate. (A. 11). Importantly, Lillian made no complaint about the Agreement for 35 years, only raising issues after Howard died.

The evidence fully supports the trial court's finding that consideration was adequate. There is no requirement that a division of assets under an antenuptial agreement be equal or equivalent to what a party would have taken under a will. The whole purpose of an antenuptial agreement is to alter this division of assets. See *Pollock-Halvarson v. McGuire*, 576 N.W.2d 451, 455 (Minn. Ct. App. 1998). Here, Howard gave Lillian a life insurance policy and also waived his right to make any claim against Lillian's estate. (A. 16 at ¶ 3.) Lillian had no assets when she married Howard and worked only ten more

² The standards for "substantive fairness" as applied to the time of contracting are similar to common-law requirements. "Substantive fairness guards against misrepresentation, overreaching and unconscionability." *Pollock-Halvarson*, 576 N.W.2d at 455.

years. Yet, during their marriage, while the couple lived primarily on the income from the farms, Lillian was able to amass nearly \$400,000 in assets. (A. 61). In addition to the insurance policy, Howard's waiver of a claim to her estate provided ample consideration.³ This evidence establishes that the Agreement was not procured by fraud or duress.

B. Whether the Agreement meets “substantive fairness” requirements is not properly before this Court.

Even if the Court were inclined to conduct a “substantive fairness” analysis, the issue would not be properly before this Court because the district court did not address it. (Resp. Brief at 2-3.) “A reviewing court generally may consider only those issues that the record shows were presented to *and considered by* the trial court.” *Funchess v. Cecil Newman Corp.*, 632 N.W.2d 666, 673 (Minn. 2001) (citing *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (emphasis supplied)). If the Court believes that a substantive fairness analysis must be performed, it should be performed by the district court on remand.

³ Similarly, at the time of Howard's death, the distribution of assets was fair. Howard's “estate” cannot be considered to “own” the 1/3 interest in the farms because he had contractually obligated himself to leave that interest to his children. The cash in Howard's accounts was generated by that farm and by income from the children's farm assets, pursuant to the contract. By the time of Howard's death, Lillian's \$10,000 life insurance had grown to \$70,000 and Lillian also benefited from an annuity that had a value on Howard's death of \$120,000. These amounts were certainly fair given Lillian's own resources, the existence of Howard's other heirs and the obligations of the farm contract.

Indeed, as this Court has recognized, the substantive fairness analysis is amorphous and “require[s] appropriate inquiry into facts bearing upon the reasonable expectations of each signatory as to the scope and ultimate effect of the contract in the event the marriage should terminate by dissolution.” *McKee-Johnson*, 444 N.W.2d at 67. It is, therefore, a fact-based inquiry best left to the district court.

In any event, the trial court found that disclosure and consideration were accurate, which are tantamount to finding substantive fairness, at least at the inception. Accordingly, this Court should reverse and declare that the Kinney Antenuptial Agreement is valid and enforceable.

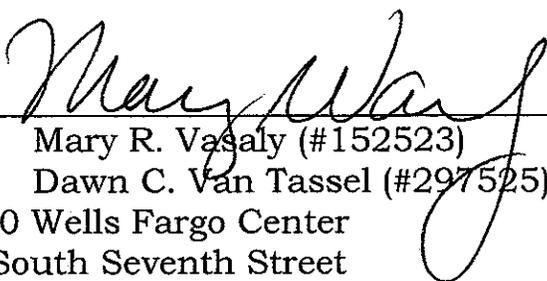
CONCLUSION

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: December 4, 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

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

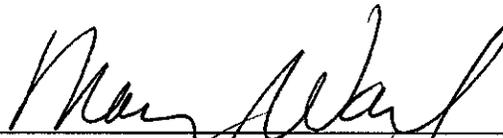
CERTIFICATE OF BRIEF LENGTH

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 3,790 words. This brief was prepared using Microsoft Word 2003.

Dated: December 4, 2006

MASLON EDELMAN BORMAN & BRAND, LLP

By



Mary R. Wasaly (#152523)

Dawn C. Van Tassel (#297525)

3300 Wells Fargo Center

90 South Seventh Street

Minneapolis, MN 55402-4140

(612) 672-8200

ATTORNEYS FOR APPELLANT