IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 29569

IN RE ESTATE OF PAUL A. EICHSTADT

Appeal from the Circuit Court
Third Judicial Circuit, Beadle County, South Dakota
The Honorable Jon R. Erickson, Retired Circuit Judge

BRIEF OF APPELLANT

NOTICE OF APPEAL FILED April 6, 2021

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JURISDICTIONAL STATEMENT

The Estate of Paul Eichstadt appeals the March 1, 2021 Order declaring that the premarital agreement signed by Kathryn Eichstadt was invalid. The Estate filed a Petition for Interlocutory Appeal on March 5, 2021. The Petition was granted on April 1, 2021. The Estate filed a Notice of Appeal on April 6, 2021. The Court Reporter's Endorsement was filed on August 3, 2021.

STATEMENT OF THE ISSUES

1. **Whether consideration is required for premarital agreements**

The trial court held that the premarital agreement was invalid due to lack of consideration.

2. **Whether Kathryn Eichstadt's consent to the premarital agreement was involuntary**

The trial court held that Kathryn did not voluntarily consent to the premarital agreement.

3. **Whether the premarital agreement is valid under SDCL § 29A-2-213(b)**

The trial court held that the premarital agreement was invalid.

4. **Whether the drafting attorney had a duty to provide legal advice to Kathryn**

The trial court held that Paul's attorney had a duty to provide legal advice to Kathryn concerning the premarital agreement.

5. **Whether the trial court placed the burden of proof on the Estate**

The trial court required the Estate to present its case before Kathryn, who had the burden of proof.

6. **Whether the trial court erred by disregarding the testimony of Elena Ball**

The trial court did not consider the testimony of Kathryn's daughter, Elena Ball.

STATEMENT OF THE CASE

Kathryn Eichstadt filed a Petition for Elective Share. The Estate of Paul Eichstadt opposed the petition, as Kathryn and Paul had signed a premarital agreement that disclaimed inheritance rights. A trial on the validity of the premarital agreement was held on February 3, 2021. The trial court held that the premarital agreement was invalid. This appeal follows.

STATEMENT OF FACTS

Paul Eichstadt was born on July 15, 1928. In 1952, he married Vanieda Schirmer; over the course of a forty-nine year marriage, they had two children and three grandchildren. Paul and Vanieda had a farming and ranching operation near Wolsey, South Dakota.

In August of 1987, Kathryn Bergeson's husband, Bert, took a job assisting Paul on the farm. (Tr. 34:2-10). The Bergeson's and their daughters moved onto a property owned by the Eichstadt's. (Tr. 35:10-12). Bert Bergeson left a year later; Kathryn remained at the Eichstadt property and began working for Paul, assisting with the farm operation. (Tr. 35:19-36:6). Kathryn also performed basic bookkeeping services for Paul's farm for a number of years. (Tr. 37:1-10).

Kathryn testified that she and Paul began an affair in 1989. (Tr. 37:11-21). Kathryn left the Eichstadt property in May of 2001, when she moved to Huron and started a new job. (Tr. 38:4-39:3). Vanieda died in July of 2001. (Tr. 38:7-8). Kathryn and Paul continued their relationship after Vanieda's death. (Tr. 38:9-18). While Paul and Kathryn began discussing marriage in 2001, Kathryn did not agree to marry him until 2002. (Tr. 40:1-17). In May of 2003, Kathryn chose to leave her home in Huron and

move into Paul's house near Wolsey. (Tr. 40:18-24). However, she chose to keep her job in Huron. (Tr. 40:25-41:2).

Paul and Vaneida had a longstanding estate plan. Since 2001, Circle E, LLC owned the land used in the farming operation. (R. 451-52 - Deposition of Dale G. Coyle, 17:1-18:8). Paul's revocable living trust owned 49% of the LLC. Vanieda's irrevocable trust owned the other 49% of the LLC since July 2001, when Vanieda passed away. (R. 451-52, 58 - Coyle Dep. 17:16-18:18, 42:20-24). Paul did not own the 49% of the LLC held by Vanieda's trust. (R. 451-52 – Coyle Dep. 17:1-18:8). Rather, Paul had an income interest in Vanieda's trust. (R. 452 – Coyle Dep. 18:18-22; R. 183). Paul's two children each held 1% interests in the LLC. (R. 452).

At some point in 2003, Paul asked his attorney, Carl Haberstick, to draft a premarital agreement. Paul's CPA, Dale Coyle, reviewed the information in Paul's financial disclosures to the pre-nuptial agreement. Id., Ex. 6, Ex. A thereto., Coyle had prepared Paul's tax returns since at least 2001. (R. 449, 453 – Coyle Dep. 6:24-7:3, 25:15-21). Coyle also prepared and filed the Form 706 estate tax return in 2003 for Vanieda's estate. (R. 452-453 – Coyle Dep. 20:2-19, 25:2-9; R. 433).

Coyle testified to the methodology he used, in 2002, to appraise the value of Vanieda's 49% interest in the LLC when he prepared her estate Form 706. (R. 452-53 – Coyle Dep. 20:16-21:23, 22:1-24:19; R. 433). Coyle used a similar discount methodology to arrive at a $400,000 value of Paul's 49% LLC interest in 2003. (R. 453-54, 458-60 – Coyle Dep. 25:24-27:20, 45:1-23, 49:22-50:4; R. 182-83). For purposes of valuing Paul's LLC interest, Haberstick provided Coyle a 2003 value of the land in the

LLC of $1,100,000, which Coyle then discounted to reflect the fact that the land was owned by the LLC rather than Paul himself. (R. 458 – Coyle Dep. 45:3-45:23).

Haberstick mailed copies of the agreement to Kathryn and Paul. (Tr. 22:5-8). On July 17, 2003, Kathryn and Paul went to Haberstick's office. When they arrived, Haberstick gave Kathryn a letter that read as follows:

> In talking with Paul today, he informs me that you do not wish to have an attorney review the Prenuptial Agreement before you sign it. Although I recommend you consult an attorney prior to signing, you may sign it without consultation. You must understand that I have drafted this Agreement at the request of Paul. He is my client and I cannot represent you in this matter. As such, I cannot give you any advice concerning the Agreement. (R. 182).

According to Haberstick, the purpose of the letter was to "make it clear that [he represented] Paul, not her" and that he could not "give her any advice or really answer any questions about the consequences of her signing it or not signing it." (Tr. 14:23-14:4).

Kathryn acknowledged her receipt of the letter by signing it. (R. 182, Tr. 15:9-10, 42:19-20). She understood that Haberstick was not her lawyer, and that he was recommending she get her own lawyer before signing the premarital agreement. (Tr. 42:23-43:6). Paul offered to pay for a lawyer to represent Kathryn and look over the premarital agreement for her. (Tr. 43:7-11). However, Kathryn refused his offer because she "did not believe she needed [an attorney]." (Tr. 15:43:15-16).

Paragraph 7 of the premarital agreement contained a waiver of "any claim or demand of inheritance, dower, curtesy, elective share, family allowance, or any other claim given to a surviving spouse by law, irrespective of the marriage or any laws to the contrary." (R. 179). The agreement also included asset disclosure statements for both

Paul and Kathryn. Kathryn was unable to identify a single item of property owned by Paul in 2003 that was not included in the asset disclosure. (Tr. 53:20-54:9).

Paul did not threaten Kathryn, either physically or verbally, and she could point to no statements he made about what would happen if she did not sign. (Tr. 58:7-19). Kathryn claimed that Paul was pacing around the room in an agitated fashion, and that she was crying. However, Haberstick did not have any memory of this and, in his twenty-five years' acquaintance with Paul, had never seen him behave in such a fashion. (Tr. 16:7-11). Haberstick further testified that, if people seemed angry or upset at an appointment to sign documents, it was his practice to tell them to come back another day and sign when they were not upset. (Tr. 18:11-19, 19:14-17).

Kathryn admitted she had the opportunity to review the premarital agreement, and that no one stopped her from reading it in full or put a limit on the time she had to review the document. (Tr. 57:1-10). While she claimed she did not understand the agreement, she stated that she understood it meant she and Paul would keep their own property. (Tr. 77:22-25). Kathryn admits that, with this knowledge, she signed the agreement. (Tr. 77:22-78:4).

Kathryn and Paul were married on July 24, 2003 in a private ceremony at her daughter's home in Woonsocket. Kathryn claimed she had no idea the wedding was going to happen until that morning. (Tr. 55:3-5). However, her daughter, Elena Ball, testified that Kathryn had discussed it with her and made plans in advance, including flowers and refreshments. (Tr. 29:25-30:2, 30:18-31:1, 10-11). The wedding was officiated by Elena's father-in-law. (Tr. 29:29-23).

Kathryn deserted Paul in June of 2016. (Tr. 59:4-6). Paul died approximately three months later, after changing his will to remove his previous bequests to Kathryn. Kathryn petitioned the Court for an elective share pursuant to SDCL ch. 29A-2. The Estate opposed this petition based on the July 17, 2003 premarital agreement.

A bench trial was held on February 3, 2021. The court did not ask Kathryn to present her case for why the premarital agreement was invalid. Instead, the court ordered the Estate to present its case first, thereby forcing the Estate to anticipate which of Kathryn's many, shifting arguments she would choose to pursue at trial and preemptively contradict them. The trial court granted the petition, finding that the Agreement was unconscionable, and that Kathryn's signature was not voluntary.

STANDARD OF REVIEW

While factual findings are reviewed under the clearly erroneous standard, the trial court's decisions on questions of law are fully reviewable by the Supreme Court with no deference to the trial court. *Gluscic v. Avera St. Luke's,* 2002 S.D. 93, ¶ 15, 649 N.W.2d 916, 919.

ARGUMENT

In order to invalidate the Agreement, the trial court relied on a number of factors that are not merely unsupported but directly contradicted by South Dakota law: lack of consideration, ignorance, subjective feelings, and the failure of Paul's attorney to provide legal advice to Kathryn. The court also disregarded the unconscionability standards set out by SDCL §§ 25-2-21 and 29A-2-213 in favor of a nebulous rule based on a dislike of what the law allows. These are not issues of fact or credibility, though the trial court's refusal to consider the impeaching testimony of Kathryn's daughter or even acknowledge

this testimony in its opinion was clear error. The errors that led to the invalidation of the Agreement were errors of law, which, if sustained, threaten the viability of every premarital agreement in the state of South Dakota. When the correct legal standards are applied to the facts of this case, it is clear the Agreement bars Kathryn's claims.

1. Consideration is not required for premarital agreements

The trial court's first reason for invalidating the Agreement was that Kathryn received no consideration. However, SDCL § 25-2-17 explicitly states that premarital agreements are "enforceable without consideration." When § SDCL 25-2-18 includes disposition of property upon death among the rights that may be the subject of a premarital agreement, it does not single out inheritance as a special class exempt from SDCL § 25-2-17. Nor does *In re Estate of Smid's* reference to consideration lead to a different result. *See In re Estate of Smid*, 2008 S.D. 82, ¶ 22, 756 N.W.2d 1, 9. *Smid* concerned a *post*nuptial agreement; SDCL § 25-2-17 applies only to premarital agreements, like the one at issue in this case. The trial court unquestionably erred in invalidating the Agreement for lack of consideration.

2. Kathryn failed to prove her signature was involuntary

The trial court held that Kathryn's signature was involuntary because she did not understand the Agreement and was coerced into signing. However, when the law is correctly applied to the facts of this case, the only possible result is the validation of the Agreement. Ignorance, particularly deliberate ignorance, is not a defense to a contract. Further, Kathryn failed to present any evidence that meets the standards for coercion.

A. Kathryn cannot void the Agreement by claiming ignorance

"[O]ne who accepts a contract is conclusively presumed to know its contents and to assent to them, in the absence of fraud, misrepresentation or other wrongful act by another contracting party." *Smid* at ¶ 17, 756 N.W.2d at 7. Kathryn offered no evidence of fraud, misrepresentation, or any wrongful acts by Paul or his counsel. She conceded that no one stopped her from reading the Agreement or put a limit on the amount of time she had to review it. Her sole argument was that she did not understand what she was signing.

The trial court's position appears to be that Kathryn's lack of education meant she could not be held to the same standard as other contracting parties. However, South Dakota law does not determine a person's ability to make a contract based on his or her education or even literacy. Instead, SDCL § 20-11A-1 states that people have the capacity to contract unless they are "entirely without understanding…" This Court has explained the standard as follows:

> Here, obviously, the term 'understanding' is used to denote not the act of understanding, but the capacity or faculty for doing so; and the expression 'without understanding' is to be understood as referring to persons without such capacity…it is to be understood as restricted to the subject matter to which the section relates – which is that of contracts, executed and executory – and hence as applying to all persons who are entirely without the capacity of understanding or comprehending such transactions.

Fischer v. Gorman, 274 N.W. 866, 869 (S.D. 1937). Understanding "suggests the concept of a mind with the faculty of applying its powers of reason to the elements it comprehends, to the end that a judgment or conclusion may be formed." *Id.* In other words, the question was not, as the trial court suggested, whether Kathryn understood every word of the contract, but if she had the capacity to comprehend that she was

entering into an agreement. When the correct standard is applied, it is clear that Kathryn was able to enter into the Agreement.

Kathryn presented no evidence that she lacked the mental capacity to contract. She testified she was not under the influence of any drug and did not have any mental impairment when she signed the Agreement. (Tr. 60:13-25). Nothing in the record suggests, let alone proves, that Kathryn was unable to understand what it meant to enter into an agreement. The court's insinuations about her intellectual capacity are misguided. While Kathryn did not complete high school, the Court ignored testimony that she received her GED in 2001 and did the bookkeeping for Paul's farming operation. (Tr. 59:21-60:5). Kathryn had the capacity to contract and must therefore be held to the same standard as every other competent person: she is "conclusively presumed to know [the Agreement's] contents and to assent to them…." *Smid* at ¶ 17, 756 N.W.2d at 7. *See, e.g.*, *Hafner v. Hafner*, 295 N.W.2d 567, 571-72 (Minn. 1980) (noting that although wife had quit school in ninth grade and had a 'minimal' education, she had the ability to read the document).

Finally, and most tellingly, Kathryn's testimony demonstrates that she did, in fact, understand what she was signing. She conceded that the Agreement contained language concerning wills, death, and divorce, and that she knew what those words meant; her counterargument was only that she had not noticed them when she first read the Agreement. (Tr. 77:6-21). Most importantly, she understood the Agreement meant that she and Paul would keep their own property. (Tr. 77:22-25). This is the essence of the premarital agreement. Kathryn is presumed by law to know what she signed. Her testimony proves the presumption was correct.

B. Kathryn's consent was not invalidated by her lack of counsel

Nor does Kathryn's lack of representation render her signature involuntary. As discussed in Section 4 below, the law does not require the parties to a premarital agreement to have counsel. Kathryn was aware the drafting attorney did not represent her and signed a document acknowledging this fact. She also admitted that Paul offered to pay for an attorney to review the Agreement on her behalf. However, she decided to forego this opportunity and sign instead. Kathryn's argument is essentially that Paul did not mean what he said, and she feared some nebulous consequences if she took him up on his offer, without being able to identify a single word or action to validate her alleged fear.

Not only is this argument legally specious, it is factually untrue. Kathryn testified that the reason she chose not to take Paul up on his offer to get her an attorney was not that she believed it was a lie, but because she "had that trust and faith in him that he was supposed to be an honorable man and honored his word." (Tr. 43:9-14). She conceded that she believed he would honor his offer to pay for a lawyer. (Tr. 43:23-44:1). Kathryn cannot invalidate her signature based on a fear she did not even feel.

C. Subjective feelings cannot make a waiver involuntary

Kathryn offered no evidence that she was forced to sign the Agreement against her will, and the court made no such finding. Instead, its holding on voluntariness was based on Kathryn's testimony about her subjective, unprovoked fear. This Court's longstanding precedent establishes that, whether the case is considered under the rubric of duress or undue influence (a distinction neither Kathryn nor the trial court recognized), subjective feelings are not enough to void consent.

"The contractual defense of duress requires that there has been such constraint upon the complainant that the complainant was forced to act against his own free will." *Waara v Kane,* 269 N.W.2d 385, 397 (S.D. 1978). "Until a threat has been established which will support a legal conclusion that duress or menace has been employed, there is no occasion for the use of any test or any standard to measure its effect on an individual mind." *Denbow v. Tesch,* 278 N.W. 16, 20 (S.D. 1938).

It is not enough for the act to be wrongful in the moral sense. *Dunes Hospitality, LLC v. Country Kitchen, Intern., Inc.,* 2001 S.D. 36 ¶ 27, 623 N.W.2d 484, 491. Instead, South Dakota law has defined duress as:

> (1) Actual or threatened unlawful confinement of the person of the party, or of husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband, or wife; or
> (2) Actual or threatened confinement of any such person or persons lawful in form but fraudulently obtained or fraudulently made unjustly harassing or oppressive; or
> (3) Actual or threatened unlawful violent injury to the person or property of any such person or persons; or
> (4) Actual or threatened injury to the character of any such person or persons; or
> (5) Actual unlawful detention of the property of any such person.

SDCL § 53-4-3.

Kathryn offered evidence of none of these things. She testified that Paul did not threaten her, physically or otherwise, and did not even insinuate violence at any point in their relationship. (Tr. 58:7-19). Kathryn's daughter testified that, over the many years she had known Paul, his relationship with her mother had been a good, loving one, and that he had never been abusive. (Tr. 32:20-33:2). Kathryn herself testified that, at the time she signed the agreement, she considered Paul to be an honorable man. (Tr. 43:19-22).

As Kathryn's attorney conceded in closing, coercion is not the correct word to describe her allegations about Paul's conduct. (Tr. 80:9-10). The only overt act Kathryn could cite – Paul allegedly pacing around the room – was not corroborated by the drafting attorney. (Tr. 16:7-11). While Kathryn's attorney insinuated the behavior could have happened when Haberstick was out of the room, this is not consistent with Kathryn's testimony. She stated that it occurred while she and Haberstick were sitting on opposite sides of a desk. (Tr. 70:15-19). Even if this discrepancy is ignored, the 'threat' alleged by Kathryn is that Paul paced around the room for a few minutes and offered to pay for an attorney. No reasonable person would respond to this with a state of panic that would make her act against her own free will.

Kathryn also offered no proof of undue influence, and the court made no findings to that effect. "Influence, to be undue, must be of such character as to destroy the free agency of the consenting party and substitute the will of another person for her own." *Schaefer v. Sioux Spine and Sport, Prof. LLC*, 2018 S.D. 5, ¶ 11, 906 N.W.2d 427, 431-32 (quotations omitted). Undue influence consists:

> (1) In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence; or authority for the purpose of obtaining an unfair advantage over him; or
> (2) In taking an unfair advantage of another's weakness of mind; or
> (3) In taking a grossly oppressive and unfair advantage of another's necessities or distress.

SDCL § 53-4-7.

Kathryn had the burden of proving each of the following elements by the greater weight of the evidence:

> (1) Her susceptibility to undue influence;
> (2) Opportunity to exert such influence and effect the wrongful purpose;
> (3) A disposition to do so for an improper purpose; and

(4) A result clearly showing the effects of undue influence.

Smid at ¶ 33, 756 N.W.2d at 12. Kathryn did not prove any, let alone all, of these elements.

There was no evidence whatsoever that Kathryn was susceptible to undue influence. She was not suffering any kind of physical or mental incapacity in 2003. (Tr. 60:13-25). Further, her testimony showed that she was a strong-willed person who did not allow uncertainty or discomfort to prevent her from doing as she saw fit. The reason her first husband began working for Paul in the late 1980s was that Kathryn had quit her own job in order to force him to find employment. (Tr. 34: 14-35:7). She left Paul's property and employment in 2001 to secure a new job and residence in Huron, despite having relied on him for employment and housing for more than a decade. (Tr. 38:4-39:3). She continued to work in Huron after making the decision to move in with Paul in 2003. (Tr. 40:25-41:2). Finally, Kathryn was both willing and able to leave Paul and the marital home shortly before his death in 2016. (Tr. 59:1-15). By her own testimony, Kathryn was not a person who was susceptible to undue influence.

Nor did Kathryn prove that Paul had either the opportunity or disposition to put undue influence upon her. While Kathryn might claim that Paul had ample opportunity, as she was living with him at the time, opportunity is most meaningful in cases where the person upon whom the influence was exerted is unable to speak for herself. Kathryn, a living person of sound mind, must show some indication the opportunity was actually used. As has been previously discussed, Kathryn has not identified anything Paul did to coerce her into signing.

The evidence at trial also failed to establish Paul as a person with a disposition to use his influence for an improper purpose. Again, Kathryn's daughter testified that Paul was "very caring," a good friend to both her and her mother, and "like a father" to her. (Tr. 32:17-33:6). Kathryn herself described Paul as a "big Christian" with whom she had a "good" relationship. (Tr. 62:21-23, 70:2). Kathryn failed to meet her burden of proof.

Finally, as in *Smid,* the Agreement does not clearly show the effects of undue influence, as there is no wrongful purpose in wanting one's children to receive ownership of property accumulated during a prior marriage to the children's mother. *Smid,* at ¶ 35, 756 N.W.2d at 12-13. Long before his marriage to Kathryn, Paul and his late wife had created revocable trusts to ensure the farm property would benefit their children. (Tr. 9:12-10:21). That he would seek to exclude Kathryn from sharing in the farm after his death is no less natural than his decision to revoke bequests to Kathryn after she left him in 2016.

Kathryn was not forced to act against her own free will; if she truly found the premarital agreement repugnant, she could have refused to marry Paul. Instead, she chose to sign, knowing the Agreement meant that Paul's property was his own, to do with as he pleased. As the Iowa Supreme Court has held, if an individual does not want to sign a premarital agreement, he or she has the reasonable option of refusing to marry. *In re Marriage of Shanks,* 758 N.W.2d 506, 512 (Iowa 2008). If this is not the case in South Dakota, then no premarital agreement can survive scrutiny. All it would take was for the spouse seeking invalidation to prove the indisputable: that the other spouse wanted a premarital agreement. Premarital agreements are permitted by statute and "favored" by the courts. *Schutterle v. Schutterle,* 260 N.W.2d 341, 347 (S.D. 1977), *superseded on*

other grounds as stated in State v. Catch the Bear, 352 N.W.2d 640 (S.D. 1984). It is not coercion for a spouse to ask for what the law allows.

3. The Agreement cannot be invalidated under SDCL § 29A-2-213(b)

A premarital agreement waiving spousal inheritance rights is not enforceable if the surviving spouse proves that:

> the waiver was unconscionable when executed and, before execution of the waiver, the surviving spouse: (i) was not provided a fair and reasonable disclosure of the property or financial obligations of the decedent; (ii) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the decedent beyond the disclosure provided; and (iii) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the decedent.

SDCL § 29A-2-213(b). *See also* SDCL § 25-2-21 (setting out same standard for all premarital agreements). The surviving spouse bears the burden of proof on the issue of enforceability. SDCL § 29A-2-213. The "issue of unconscionability of a waiver is for decision by the court as a matter of law." SDCL § 29A-2-213(c).

Rather than discuss the standard set out by SDCL §§ 25-2-21 and 29A-2-213, the trial court simply concluded that "Paul's conduct was unconscionable." This was error for two reasons. First, premarital agreements that waive inheritance rights are not per se unconscionable. Second, the court did not – and could not – find that the property disclosure was unfair or unreasonable.

A. It is not unconscionable to disinherit a surviving spouse

The premarital agreement was not unconscionable merely because it allowed Paul to disinherit Kathryn. Both the case law and the South Dakota Code make it clear that premarital agreements, including those concerning inheritance rights, are not merely permissible but favored. "Antenuptial arrangements are favored in law since they allow

the parties to protect the inheritance rights of their respective children by prior marriages and thus prevent subsequent strife over the disposition of their respective estates." *Schutterle*, 260 N.W.2d at 347. "[C]ourts have recognized that it is natural and proper for a parent to desire to provide for the children of his or her first marriage." *Id.* at 348.

One of the factors this Court has recognized as affecting the unconscionability analysis is whether the property at issue predated the marriage, and whether the surviving spouse contributed financially during the marriage. *See Smid* at ¶ 25, 756 N.W.2d at 9-10. As his 2003 disclosure makes clear, Paul's primary assets at the time of the marriage were related to the family farm and held in a manner that showed a longstanding intent to benefit his children. (R. 180). Paul and his late wife had set up revocable trusts; Paul had a beneficial interest in Vanieda's trust, and his primary assets - including grain, farm machinery, and cattle - had been placed in his own revocable trust. (R. 180, 454, Tr. 10:2-23). The most valuable asset was a 49% interest in a family farm LLC, the rest of which was owned by his children and his late wife's trust. (R. 451-52, Tr. 10:6-21). In short, not only did the assets predate the marriage to Kathryn, the trusts showed Paul and Vaneida's long-term intent to keep the farm in the family.

This Court addressed an analogous situation in *Smid*. In that case, the husband and wife executed a postnuptial agreement in which the wife waived her statutory rights in the marital home. *Smid*, at ¶ 8, 756 N.W.2d at 5. The husband had owned the home before he had even met the wife, and it had been paid for with his first wife's inheritance. *Id.* at ¶ 25, 756 N.W.2d at 9. While the second wife continued to work during the marriage, there was no evidence she had contributed financially to the house during the marriage. *Id.* This Court held that the agreement was not unconscionable. *Id.*

Like the husband in *Smid*, Paul Eichstadt had obtained his property long before his marriage to Kathryn, while he was married to the mother of his children. Kathryn did not contribute to the accumulation of these assets, and she offered no evidence that she contributed financially to the farm operation, let alone the assets of the trusts or the LLC during the marriage. Further, the manner in which the farm assets were held showed a long-term plan that had been executed by Paul and Vanieda to benefit their children. It was not unconscionable for Paul to take measures to keep this plan in place, and the family farm in the family.

B. Paul made a fair and reasonable disclosure of his property

Even if a premarital agreement is unconscionable, it is still valid when there is a fair and reasonable disclosure of property, a waiver of that disclosure, or adequate knowledge of the property. SDCL §§ 25-2-21, 29A-2-213. The trial court made no findings on the reasonableness of Paul's property disclosure. This is unsurprising, as the record demonstrates that Paul's disclosure was fair and reasonable, and, in any event, Kathryn had extensive knowledge of the property. Because Kathryn was well aware of Paul's property, both through personal knowledge and disclosure, the Agreement cannot be invalidated under SDCL § 29A-2-213(b), regardless of whether it was unconscionable.

"It is not necessary…for a spouse to provide a detailed and exact valuation of his or her net worth in a premarital agreement. It is sufficient for a spouse to provide, within the best of his or her abilities, a list of assets and liabilities with approximate valuations. The listing must be sufficiently precise to give the other spouse a reasonable approximation of the other spouse's net worth." *Smetana v. Smetana*, 2007 S.D. 5, ¶ 12, 726 N.W.2d 887, 893 (quotations omitted). Paul provided a disclosure that listed all of

the property he owned. *Compare Smetana* at ¶ 13 (spouse did not supply any list of assets or liabilities). It is undisputed that Kathryn received this disclosure and had the opportunity to review it before signing the Agreement. Nor was there any evidence whatsoever that Paul's disclosure was inaccurate, incomplete or deceptive; Kathryn was unable to identify to a single item or asset that had been excluded. (Tr. 53:20-54:9).

C. Kathryn Had Adequate Knowledge of Paul's Assets

Moreover, Kathryn's knowledge of Paul's assets was more than adequate to meet the standards of SDCL §29A-2-213(b)(iii). Kathryn was intimately familiar with the both the farm operation and Paul's finances.

Kathryn lived at the Eichstadt property (south farm) from 1987 to May 2001 Aerial photos of Paul's "south" farm, admitted at trial, showed the cattle, feed and equipment of Paul's farming operations, as well as the residence where Kathryn lived. (R. Tr. 44:41 – 45:11, R. 444-45). Kathryn moved in with Paul at the 9th Street farm in 2003, before they married. (Tr. 45:17-46:15, R. 446). Kathryn was also very familiar with the farmland and pastures, as she traveled to different parts of the farm in the course of her work for Paul. (Tr. 46:10-23). She testified that, if Paul would tell her to go to a certain field or pasture, she would have known what he meant. (Tr. 46:24-47:2).

Kathryn also had knowledge of the farm finances. She was responsible for preparing general ledgers for the farming operation for many years; the record includes the 2001–2004 general ledgers for the farming operations, in Kathryn's handwriting, and she admitted to preparing ledgers for years prior to that. (Tr., 47:14-48:7). These ledgers showed farm income, expense and payroll taxes. (R. 200-389). In addition to the ledgers, Kathryn prepared Rolodex cards for Paul's bull sales business. (Tr. 49:12-22, R.

390-428). The sales shown in the Rolodex cards dated back to 1990 and included bank deposit information as to payments received. (Tr. 49:23-25, R. 390-428). Kathryn reviewed bank statements and prepared detailed handwritten notes of Paul's income and expenses – including sales of cattle and grain, CRP payments, expenditures, and payment of debt – for multiple years, including 2003. (Tr. 50:5-51-25). R. 428-442).

In sum, Kathryn was intimately familiar with Paul's property. The combination of disclosure and actual knowledge means that Paul's decision to disinherit Kathryn after she left him was protected by statute, regardless of what Kathryn would have been entitled to in the absence of the premarital agreement.

4. <u>The drafting attorney had no duty to provide legal advice to Kathryn</u>

The other troubling aspect of the trial court's decision was its assertion that Paul's attorney should have explained the Agreement to Kathryn, even after she had acknowledged he did not represent her and refused to get her own lawyer. This duty is nowhere in the case law or the Code – and for good reason, as it would place attorneys in an ethically impossible position.

Rule 1.7 of the Rules of Professional Conduct prohibits attorneys from representing clients whose interests are directly adverse. "Like divorce actions, the nature of prenuptial agreements is such that the parties' interests are fundamentally antagonistic to one another. Indeed, the purpose of a prenuptial agreement is to preserve the property of one spouse, thereby preventing the other from obtaining that to which he or she might otherwise be legally entitled." *Ware v. Ware*, 687 S.E.2d 382, 389 (W.V. 2009). Consequently, "one attorney may not represent, nor purport to counsel, both parties to a prenuptial agreement." *Id.*

If the trial court's decision were a correct statement of the law, attorneys would have to choose between providing legal advice to both parties in violation of Rule 1.7 and violating Rule 1.3 by sending their actual client away with an unenforceable premarital agreement. This is an untenable rule that has no foundation in either statute or precedent. Neither Kathryn nor the trial court was able to identify a statute or controlling case that required one spouse's attorney to advise the other.

In fact, the law does not even mandate that both parties get legal advice. Nothing in Chapters 25-2 or 29A-2 requires the signatories to a premarital agreement to consult a lawyer. If the Legislature had intended to create such a requirement, it would have said so. *Compare* Cal. Prob. Code § 143 ("[A] waiver is enforceable under this section unless…the surviving spouse was not represented by independent legal counsel at the time of the signing of the waiver.").

Even if South Dakota law required both parties to a premarital agreement to be represented by counsel, the 'right' would be subject to waiver. If a criminal defendant can waive the constitutional right to counsel, *see, e.g., State v. Wolf,* 2014 S.D. 89, ¶ 6, 857 N.W.2d 594, 595, then a right set out nowhere in the Code or the case law can also be knowingly waived. Kathryn was aware that Haberstick did not represent her, and knew he had suggested she get her own counsel. She declined to do so, even after Paul had offered to pay for a lawyer on her behalf. In signing the Agreement under these circumstances, Kathryn waived any right to representation she might have had.

5. <u>The court incorrectly placed the burden of proof on the Estate</u>

Although the trial court's opinion states that Kathryn had the burden of proof, the manner in which it conducted the trial shows that this was little more than lip service.

Again, SDCL § 29A-2-213 clearly states that the surviving spouse has the burden of proving that his or her waiver of inheritance rights is not enforceable. The trial court, however, required the Estate to present its case first. (Tr. 4:2-5). This decision harmed the Estate's ability to refute Kathryn's case and demonstrated the judge's disregard for the burden of proof.

Under South Dakota law, the party having the burden of proof is the first to offer evidence at trial. SDCL § 15-14-1(4). While the statute is from a section of the code that discusses jury trials rather than bench trials, the logic is the same: the decision turns on the ability of the party with the burden of proof's ability to meet that burden. If the case is not made, then it is over; the opposing party does not need to disprove what has never been proven.

The trial court's decision left the Estate trying to refute every argument the petitioner had made in the past, with the court demanding justification for lines of questioning that were only relevant because of what Kathryn had previously asserted or might assert. *See, e.g.*, Tr. 40:1-7, 41:13-25, 55:21-56:4. This prejudiced the Estate's ability to present its case and disproves the trial court's assertion that it was, in fact, placing the burden of proof on Kathryn.

6. <u>The trial court's factual findings were clearly erroneous</u>

Although this Court is to give "due regard to the trial court's opportunity to observe the witnesses and examine the evidence," *see Donat v. Johnson,* 2015 S.D. 16, ¶ 13, 862 N.W.2d 122, 127, the trial court's decision to ignore the testimony of Elena Ball was clear error.

The trial court's decision was premised in significant part on its conclusion that everything Kathryn said was credible. However, her version of events was not consistent with that of the other witnesses at trial. While it might be asserted, rightly or wrongly, that a drafting attorney has motive to testify in a way that supports the validity of the agreement, Kathryn's daughter was the definition of an impartial witness. Unlike Kathryn, she had nothing to gain from her testimony. The trial court made no ruling on the credibility of Elena Ball. Instead, the court completely ignored her testimony, despite the fact that it directly contradicted Kathryn's.

Elena testified that Paul, Kathryn and Elena had discussed, as far back as 1990, there would be a pre-nuptial agreement if Paul were to remarry. Tr., 31:15-32:13. This was just one year after, according to Kathryn, she and Paul began an affair in 1989. The fact there would be a pre-nuptial agreement was long known and was never a surprise to Kathryn.

The story Kathryn wished to tell – and the story the trial court appears to have believed – is that Paul was a domineering individual who made Kathryn's decisions for her when it came to their marriage.

Elena's unbiased testimony showed that Kathryn was lying. Kathryn testified that Paul simply decided one day that they should get married because it was too windy to put up hay. (Tr. 55:6-8). Elena, however, testified that her mother had actively participated in advance planning for the wedding and was exclusively responsible for making arrangements for refreshments. (Tr. 29:14-30:2, 18-31:1). Rather than consider this testimony, the trial court simply pretended that it did not exist. Kathryn's story about the

relationship – one that Paul himself could no longer contradict – was central to the decision; it was clear error to ignore unbiased proof that this story was false.

CONCLUSION

The trial court's decision turns premarital agreements into a catch-22 for both the spouse seeking the agreement and the attorney who drafted it. If a spouse can void a marital agreement on the grounds that he or she did not understand it, after turning down both the opportunity to review and an offer of independent counsel, then no premarital agreement can survive scrutiny under South Dakota law. The trial court's decision must be reversed.

Dated at Sioux Falls, South Dakota, this __2nd___ day of September, 2021.

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellant complies with the type volume limitations set forth in SDCL § 15-26A-66. Based on the information provided by Microsoft Word 365, this Brief contains 5,820 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 365.

Dated at Sioux Falls, South Dakota, this __2nd___ day of September, 2021.

DAVENPORT, EVANS, HURWITZ & SMITH, L.L.P.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing "Brief of Appellant" was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to 500 East Capitol Avenue, Pierre, South Dakota, 57501-5070, on September 2, 2021.

The undersigned further certifies that an electronic copy of "Brief of Appellant" was emailed to the attorneys set forth below, on September 2, 2021:

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RE: 02PRO 16-32 In Re Estate of Paul A. Eichstadt

Coounsel:

The Estate of Paul A. Eichstadt asks the Court to hold valid and enforce a prenuptial agreement that the late Mr. Eichstadt had with his second wife, Kathryn.

1. In August of 1987, Bert Bergeson took a job on the Paul Eichstadt farm helping Paul with his farm operation.
2. Kathryn, Bert's wife, and their daughters moved on to the Eichstadt farm.
3. A year later, Bert left Kathryn and their daughters. Kathryn remained on the Eichstadt farm and began working for Paul assisting with the farm operation and providing basic bookkeeping services.
4. In 1989, Kathryn and Paul began an affair.
5. In May 2001, Kathryn moved to Huron and began working there.
6. In July 2001, Paul's wife, Vanieda, died.

7. After a period of mourning, Paul and Kathryn started their relationship again, and in the fall of 2001 began discussing marriage and in 2002 Kathryn agreed to marry Paul.
8. In May 2003, Kathryn moved into Paul's home near Wolsey and continued to work in Huron. She also continued to do bookwork for Paul's farming operation.
9. Prior to July 17, 2003, unbeknown to Kathryn, Paul hired attorney Carl Haberstick to draft a prenuptial agreement.
10. Attorney Haberstick testified that he mailed copies of the prenuptial agreement to both Paul and Katherine along with a letter advising Kathryn to consult with an attorney and review the agreement.
11. Kathryn testified that she never received the letter or the agreement.
12. On July 17, 2002, Paul asked Kathryn to take a ride with him. They drove to Huron and it was at this time she learned they were stopping at attorney Haberstick's office. Attorney Haberstick presented Kathryn with a letter which stated:

    In talking with Paul today, he informed me that you. do not wish to have an attorney review the Prenuptial Agreement before you sign it. Although I recommend you consult with an attorney prior to signing, you may sign it without consultation. You must understand that I have drafted this Agreement at the request of Paul. He is my client and I cannot represent you in this matter. As such, I cannot give you my advice concerning the Agreement.

13. On July 17, 2003, Kathryn was given time to review the Agreement before signing it. Attorney Haberstick did not explain any of the provisions to her. No time limits were placed on her and Paul told her he would pay for an attorney if she wanted to consult with one.
14. Attorney Haberstick left Paul and Kathryn in the office and Kathryn stated that Paul was pacing the room. She testified that she was afraid that if she took more time to review the Agreement with a lawyer or that if she refused to sign it, Paul would leave her.
15. The entire meeing took around 15 minutes.
16. She scanned the Agreement and then signed it telling Paul she trusted him and believed she did not need an attorney.
17. Paul and Kathryn were married a week later. Kathryn stated that she did not know they were to marry that day until they drove up to her daughter's home in Wolsey. Paul had gotten the wedding license and had made all arrangements without consulting Kathryn.
18. Paul and Kathryn separated in June 2016. Paul executed a new Will on July 19, 2016 revoking previous bequests to Kathryn.
19. Paul died less than two months later.
20. Kathryn has a eighth grade education and testified there were parts of the legal language in the Agreement she did not understand.

21. Kathryn testified that Paul was controlling and the dominant person in their marriage.

Argument:

Kathryn claims she did not voluntarily waive her surviving spouse statutory rights. Because she only has an eighth grade education she did not understand many of the legal terms contained in the Agreement, particularly in paragraph 8 concerning what would happen in event of dissolution of the marriage.

Further, she argues that she was afraid that if she delayed the signing in order to consult with an attorney or refused to sign Paul would leave her.

The Estate argues that a spouse's subjective feelings of distress at the time of signing does not render a waiver involuntary. Rather, she must show she was forced to act against her free will. If she was not physically forced to sign the waiver and did not have a mental condition that unduly interfered with her ability to understand the events around signing the waiver, then it is valid.

Analysis:

SDCL 29A-2-213 provides that a surviving spouse may waive any and all rights of the surviving spouse but:

> (b) A surviving spouse's waiver is not enforceable if the surviving spouse proves that:
>
> (1) the waiver was not executed voluntarily;...

"[O]ne who accepts a contract is conclusively presumed to know its contents and to assent to them, in the absence of fraud, misrepresentation or other wrongful act by another contracting party." *Estate of Smid*, 2008 SD 82, ¶17 (Other cites omitted).

Kathryn has the burden of proving her waiver was not voluntary. Ibid, ¶17.

A premarital agreement, like a postnuptial agreement governs the confidential relationship between husband and wife and is subject to close scrutiny. Ibid. ¶22 quoting *Estate of Gab*, 364 NW2d, 924, 925-926 (SD 1985). A prenuptial agreement, like the Gab postnuptial agreement will be upheld so long as it was entered into "freely and for good consideration." *Smid*, ¶22.

Decision:

Kathryn's case greatly differs from the Smid case.

1. Unlike the Smid case Kathryn received no consideration.
2. Unlike the Smid case Kathryn and Paul did not discuss having such an Agreement drafted, rather it was a unilateral decision on Paul's part. She did not even know they were going to the lawyer's office until they parked in front of the office.
3. Unlike the Smid case, Kathryn did not participate in consulting Paul's attorney and compiling the property list.
4. In the Smid case the wife was given a copy of the Agreement and had a chance to review it for five days prior to signing.
5. Kathryn has an eighth grade education, testified she did not understand some legal terms in the Agreement and even during the trial had to ask counsel to rephrase questions because she did not understand certain words that were being used
6. Paul's attorney did not go through the Agreement with Kathryn explaining the pertinent provisions after she said she trusted Paul and did not need to consult with an attorney. Had that been done the Estate would have a much stronger case.
7. In this case, it's the finding of the Court, that Paul was a controlling person. Not only did he unilaterally make the decision concerning the Agreement, but unilaterally planned the wedding. As Kathryn testified, he made all the decisions.
8. Kathryn knew her husband and I believe her when she says she was fearful of how he might react if she delayed, tried to negotiate changes or refused to sign his Agreement.

Based on the totality of these circumstances, I find that Paul's conduct was unconscionable. I further find that Kathryn's signing of the Agreement was not voluntary. The Agreement is set aside.

Mr. Burns is to draft Findings, Conclusions and an order conforming to this opinion.

BY THE COURT:

JON R. ERICKSON
CIRCUIT COURT JUDGE

STATE OF SOUTH DAKOTA	**)**	**IN CIRCUIT COURT**
	:ss	
COUNTY OF BEADLE	**)**	**THIRD JUDICIAL CIRCUIT**
In Re:		**02PRO16000032**
Estate of		
PAUL A. EICHSTADT		**ORDER**

A hearing was held on the 3rd day of February, 2021 regarding the premarital agreement executed between Paul Eichstadt and Kathryn Eichstadt. The Estate of Paul A. Eichstadt was represented by Elizabeth Hertz and Kathryn Eichstadt was represented by Jeff Burns. Upon hearing testimony and reviewing exhibits, the Court issued a Memorandum Opinion on February 5, 2021 which is incorporated herein by this reference, and it is hereby

ORDERED ADJUDGED AND DECREED that the prenuptial agreement between Paul Eichstadt and Kathryn Eichstadt was not signed voluntarily, is not a binding agreement, and shall be set aside.

BY THE COURT:

Signed: 2/26/2021 3:39:44 PM

Jon R. Erickson

Honorable Jon R. Erickson
Judge of the Circuit Court

Attest:
Dykstra, Amber
Clerk/Deputy

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 29569

IN RE ESTATE OF PAUL A. EICHSTADT

APPEAL
FROM THIRD JUDICIAL CIRCUIT
BEADLE COUNTY, SOUTH DAKOTA

THE HONORABLE JON R. ERICKSON
Retired Circuit Judge

APPELLEE'S BRIEF

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

IN RE ESTATE OF **APPEAL NO. 29569**

PAUL A. EICHSTADT **BRIEF**

PRELIMINARY STATEMENT

Throughout this brief the estate of Paul A. Eichstadt will be referred to as Appellant and Kathryn Eichstadt will be referred to as the Appellee. References to documents in the settled records will be designated as SR followed by the appropriate page number. References to the trial transcripts shall be designated as TT followed by the appropriate page number and references to the trial exhibits will be designated as TR EX followed by the appropriate number. References to the Appendix will be designated as APX followed by the appropriate page number. References to the Appellant's Brief will be designated as APP. BR followed by the appropriate page number.

JURISDICTIONAL STATEMENT

Appellee accepts Appellant's Jurisdictional Statement.

STATEMENT OF LEGAL ISSUES

Appellee rejects Appellant's shotgun approach to its Statement of Issues as most are without merit and contrary to the facts herein. The essential issue before the Court is whether Kathryn Eichstadt's consent to the pre-marital agreement was involuntary and whether the pre-marital

agreement is valid under SDCL 29A-2-213 and SDCL 25-2-21. Appellant's remaining issues are simply red herrings and I will only address them briefly in my arguments.

STATEMENT OF CASE

Appellee accepts Appellant's Statement of the Case

STATEMENT OF FACTS

Paul Eichstadt was born on July 15, 1928. In 1952, he married Vanieda Schirmer; over the course of a forty-nine year marriage, they had two children and three grandchildren. Paul and Vanieda had a farming and ranching operation near Wolsey, South Dakota.

In August of 1987, Kathryn Bergeson's husband, Bert, took a job assisting Paul on the farm. (TT 34:2-10). The Bergeson's and their daughters moved onto a property owned by the Eichstadts. (TT 35:10-12). Bert Bergeson left a year later; Kathryn remained at the Eichstadt property and began working for Paul, assisting with the farm operation. (TT 35:19-36:6). Kathryn also performed basic bookkeeping services for Paul's farm for a number of years. (TT 37:1-10).

Kathryn testified that she and Paul began an affair in 1989. (TT 37:11-21). Kathryn left the Eichstadt property in May of 2001, when she moved to Huron and started a new job. (TT 38:4-39:3). Vanieda died in July of 2001. (TT 38:7-8). Kathryn and Paul continued their relationship after Vanieda's death. (TT 38:9-18). While Paul and Kathryn began discussing marriage in 2001, Kathryn did not agree to marry him until

2002. (TT 40:1-17). In May of 2003, Kathryn chose to leave her home in Huron and move into Paul's house near Wolsey. (TT 40:18-24). However, she chose to keep her job in Huron. (TT 40:25-41:2).

At some point in 2003, Paul asked his attorney, Carl Haberstick, to draft a premarital agreement. Paul's CPA, Dale Coyle, reviewed the information in Paul's financial disclosures to the pre-nuptial agreement. (TR EX 2 EX 3.)

Haberstick mailed copies of the agreement to Kathryn and Paul at the same address. Kathryn testified she never received the letter. (TT 67:10-16). On July 17, 2003, Paul asked Kathryn to go for a drive and ended up stopping in front of Haberstick's office. Kathryn advised she would wait in the car and Paul advised he wanted her to come up. (TT 65:16-25 through 66:1-4). When they arrived in the office, Haberstick gave Kathryn a letter that read as follows:

> In talking with Paul today, he informs me that you do not wish to have an attorney review the Prenuptial Agreement before you sign it. Although I recommend you consult an attorney prior to signing, you may sign it without consultation. You must understand that I have drafted this Agreement at the request of Paul. He is my client and I cannot represent you in this matter. As such, I cannot give you any advice concerning the Agreement. (TR EX 4).

The conference at Haberstick's office took approximately 15 minutes. Kathryn testified that Paul was agitated and that she skimmed the document, advised Paul that she trusted him and signed the same while crying. (TT 68:18-19) (TT 73:15-25).

Kathryn and Paul were married on July 24, 2003 in a private

ceremony at her daughter's home in Woonsocket. Kathryn testified she did not know the exact date of the wedding until that morning when Paul proclaimed it was too windy to hay.

Shortly before Paul died, he changed his will to remove his previous bequests to Kathryn.

A bench trial was held on February 3, 2021. The trial court granted the Appellant's Petition finding that the agreement was unconscionable and that Kathryn had not voluntarily signed the agreement.

ARGUMENTS

1) Consideration. Appellee disagrees with Appellant's characterization that consideration was a reason that the court ruled the way it did. The court simply made Finding of Fact #21 stating that Kathryn received no consideration. This is an accurate statement and is not refuted by either side. The trial court found that Paul's actions were unconscionable and that Kathryn's execution of the agreement was involuntary based on the totality of the circumstances herein. The trial court did not state that its ruling was solely based on consideration. It is speculation as to what part, if any, that played in the court's ruling, but voluntariness and unconscionability are not necessarily black and white issues. The decision is derived from the total overall scenario. SDCL 25-2-17 indicates consideration is not required for premarital agreements, but it does not govern whether consideration can be factored into a voluntariness determination. It is a relevant fact. Similarly, if someone had received

consideration for signing a premarital agreement that would definitely weigh towards whether an agreement was unconscionable or was involuntary. It is not an improper finding and the court did not invalidate the agreement for lack of consideration.

2) Whether the Agreement was involuntary. The second issue raised was whether Kathryn executed the agreement voluntarily. Kathryn does not argue that she was physically forced to sign the agreement, but rather the circumstances surrounding the execution of the agreement led to her involuntarily signing the agreement. The trial court concurred with that conclusion. The Appellant states the trial court held "Kathryn's signature was involuntary because she did not understand the agreement and was coerced into signing." (APP BR pg. 7.) I reviewed the Findings of Fact and the court's Memorandum Opinion and I find no statement validating this premise. The court did find that the document was not voluntarily signed, but there's nothing to indicate the ruling was based solely on Kathryn's understanding of the agreement or that she was coerced into signing. In fact, I'm not sure the word coerced is ever utilized in either document. The Appellant again oversteps the facts in the ruling trying to cast the same in a more negative light than is appropriate. The Appellant argues, as they did at trial, as noted in the court's Memorandum Opinion, that Kathryn had to be physically forced to sign the agreement for it to be invalidated. It appears that Appellant believes that if a person signed the document, there cannot be an issue of voluntariness. This is

evident by their statement that "when the law is correctly applied to the facts of this case, the only possible result is the validation of the Agreement." (APP BR pg 7.) All premarital agreements are required to be signed. SDCL 25-2-17. There would not be any valid method to overturn a premarital agreement if the sole issue was simply whether it was signed. SDCL 25-2-21 provides for review of voluntariness and unconscionability.

In this matter, the facts speak for themselves. We have a millionaire farmer and woman with an 8th grade education who was in her 60s and had amassed $30,000 in assets of which $20,000 was a jointly owned car purchased by Paul Eichstadt.

The parties had discussed getting married, but never discussed getting a pre-marital agreement. On July 17, 2003, Paul says let's take a ride and they end up at Carl Haberstick's office. Prior to that day, Paul had prepared for the meeting by engaging a CPA and an attorney to help navigate the process for him. (TT pg 9, 10-11.) He also intentionally kept Kathryn unaware of the meeting by not providing documents from Haberstick, even though instructed to do so, and even telling Haberstick prior to the meeting that Kathryn had advised that she did not want to have an attorney. (TR EX 4.)

Kathryn learned of Paul's plan of a premarital agreement from Haberstick that day and she was asked to sign a letter that said "In talking to Paul today, he informs me that you do not wish to have an attorney review the Prenuptial Agreement before you sign it." (TR EX 4.) She also

was asked to aid in providing her bank balance for her property disclosure that Haberstick prepared.

During this 10 to 15 minute meeting, Kathryn had to process the betrayal or subterfuge by Paul, cover for a lie by Paul to his attorney, assess and maneuver through Paul's angst, evidenced by his pacing and tone, give her financial standing, determine what a premarital agreement was and what its ramifications are and then how it would affect her currently as well as possibly decades down the road and finally decide what the consequences would be if she didn't sign the agreement. To no ones surprise, she chose the option that kept the person in the power role of their relationship happy, which in turn kept a roof over her head. Kathryn did not read the agreement, nor did she seek an attorney. She simply said "I trust you" while crying and signed. (TT pg 73, 17-19.)

Premarital agreements are a daunting subject under the best of circumstances, let alone what Kathryn had to endure in this scenario. The parties were married a week later without notice to Kathryn on Paul's say so.

The agreement was not voluntary. Kathryn's signature may not have been physically forced, but it is impossible to be a voluntary participant in an agreement that you didn't know about, want or have any input into. Couple that with a limited education, vast disparity in bargaining power and likely an undeserved sense of loyalty, protection and

trust in her significant other and there is no doubt that Kathryn did not voluntarily agree to the premarital agreement.

The agreement was also invalid as the terms are unconscionable as it failed to provide for Kathryn in any significant manner. The agreement had a disclosure for Paul which Kathryn wasn't told to review, nor did she. The disclosure appears to have minimized Paul's financial standing. The premarital Agreement stated a net worth of $1,061,000.00 as of July 2003. (TR EX 1.) Less than a year earlier, a balance statement showed a net worth of $2,223,025.00, more than twice the assets that were disclosed in the premarital agreement. (TR. EX 3.) Perfection is not required on the disclosure, but there is a lifetime of work between one and two million dollars. This disclosure was inadequate.

Paul actively pursued a course of conduct intending to undermine Kathryn's ability to process the situation. He failed to give her the documents to review ahead of time, failed to advise her at all of what his plan were with regard to a premarital agreement, and thus left her wholly without the opportunity to review the agreement or seek any type of advice ahead of time. He also lied to Carl Haberstick about Kathryn declining an attorney, which caused Carl to unwittingly proceed under the wrong assumption and thus craft a meeting toward the goal of proceeding without an attorney to review for Kathryn.

There was undue influence. Paul was the dominant partner in the relationship and made all material decisions for the couple. He had the

house and the means and she had little else. Paul used deception and lies to get her to the meeting and illustrated his intended outcome through his demeanor and actions leading up to her signature. Kathryn was a small word person with an 8th grade education who worked entry level jobs all of her life. Paul provided her a better life and he abused that situation to get a one sided agreement solely in his favor.

3) Unconscionability. The court determined that the agreement was invalidated under SDCL 29A-2-213(b). The court at no time indicated that the waiver of inheritance rights is per se unconscionable. The court made a conclusion of law that the agreement was unconscionable. Appellant likes to argue that Kathryn, because she paid some bills and deposited some checks, that she was fully aware of Paul's financial dealings. There is no evidence in the record that suggests she knew the value of Paul's holdings, land, cattle or crop or that she that she was aware of the amount owed on the same. It took a CPA and an attorney several tries to attempt to zero in on a property disclosure. (TR EX 2.) Kathryn was supposed to know that off the top of her head?

4) Legal Representation. It is agreed that Mr. Haberstick could not represent both parties in this action. It is certainly not agreed that there was not a better way to handle this situation. The court speculated that if something different was done with regard to Kathryn's representation or how the matter was handled at the execution, that there could have been a different result. The court's speculation on that fact is

also likely contributed to by the lies that Paul told to his attorney about Kathryn being aware of the situation and that she was not interested in being represented by an attorney.

5) Appellee had the burden of proof at trial, as stated in the court's opinion. The court did indicate it felt the estate should go first. The estate did not object to the same. This issue was waived by the Appellant and should be disregarded. *State v. Hauge* 2019 SD 45 ¶ 31. This was a trial to the court with a relatively straight forward fact pattern and not a trial to a jury.

6) The Appellant is fixated on the testimony of Elaina Ball who frankly has little to no relevance to the case. The court has full authority to find credibility, and in this case found that it rested squarely on Kathryn Eichstadt. By doing so, it does not mean he disregarded testimony inappropriately, but rather, as in all cases, he determined one to be accurate and one not. The court was in the best position to evaluate witnesses and did so. None of the court's finding on testimony were clearly erroneous.

Along the same lines, Appellant utilizes Mr. Haberstick's statements frequently in their brief to establish facts about the meeting in his office to sign the prenuptial agreement. They fail to reference that he said numerous times at trial, he has no independent recollection of the day in question. (TT 17:20-25; 18:1-25; 19:22-24.)

CONCLUSION

The trial court was in the best position to judge the facts in this case and he unequivocally found that the agreement was not voluntarily executed. Based on the above, the Appellee requests the trial court's decision be affirmed.

Dated this 25th day of October, 2021.

Jeff Burns
of Churchill, Manolis, Freeman,
Kludt & Burns LLP
P.O. Box 176
Huron, South Dakota 57350-0176
(605) 352-8624

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

IN RE ESTATE OF **APPEAL NO. 29569**

PAUL A. EICHSTADT **CERTIFICATE OF COMPLIANCE**

---

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Book Antiqua typeface in 12 point type. Appellant's Brief contains 2507 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 25th day of October, 2021.

Jeff Burns
of Churchill, Manolis, Freeman,
Kludt & Burns LLP
P.O. Box 176
Huron, South Dakota 57350
(605) 352-8624

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

IN RE ESTATE OF **APPEAL NO. 29569**

PAUL A. EICHSTADT **CERTIFICATE OF SERVICE**

I hereby certify that on the 25th day of October, 2021, I mailed the original and two copies, as well as emailed in Word format, Appellee's Brief the South Dakota Supreme Court Clerk and e-mailed Elizabeth S. Hertz, of Davenport, Evans, Hurwitz & Smith L.L.P. to:

Shirley Jameson-Fergel scclerkbriefs@ujs.state.sd.us
South Dakota Supreme Court Clerk
500 East Capitol Avenue
Pierre, South Dakota 57501-5070

The undersigned attorney hereby also certifies that a true and correct copy of Appellee's Brief was served on October 25th, 2021, by electronic filing, at the e-mail address listed below, upon the following:

ELIZABETH S. HERTZ ehertz@hehs.com
Davenport, Evans, Hurwitz & Smith L.L.P.
206 West 14th Street, P.O. Box 1030
Sioux Falls, South Dakota 57101-1030
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APPENDIX TABLE OF CONTENTS

SNOW, HUETHER & COYLE

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POST OFFICE BOX 807
HURON, SOUTH DAKOTA 57350

TELEPHONE [redacted]
FAX [redacted]

JACK C. SNOW, CPA
ARNOLD A.HUETHER, CPA
DALE G. COYLE, CPA
JASON F. RUEISH, CPA

MEMBERS AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS
PRIVATE COMPANIES PRACTICE SECTION

FAX TRANSMITTAL FORM

TO: CARL H.

FROM: DALE C.

FAX NO: 352- 0756

DATE: 7-15-03

1 PAGES TO FOLLOW

COMMENTS: Re Your Disclosure on Annl Eichstadt

Paul A. Eichstadt

Through discussions with Paul and review of the trust document, I would suggest realignment of the disclosure items you faxed to me as follows:

		Titled in name of	Paul's Estimate of Value
2002 Honda Accord		J/T	20,000
Farm Checking		Paul	76,000
Personal Checking		Paul	25,000
Paul Eichstadt Revocable Living Trust:			
Grain		RLT	230,000
200 hd 2002 calves		RLT	160,000
Machinery and equipment		RLT	125,000
Circle E LLC 48%		RLT	400,000
Less final pymt to Case due 5-10-03		RLT	(20,250)
TOTAL			1,015,750
Income Interest in Vanieda Eichstadt Trust:			
Machinery and equipment	125,000		
Farm Checking	100,000 – Paul		
Circle E LLC 48%	400,000		
EST CURR VALUE OF VANIEDA TRUST	625,000		
CURRENT VALUE OF INCOME INTEREST	?? 25,000 Approx		

PAUL EICHSTADT

Name of spouse?
Kathryn E. Burgess

Joint Tenancy?
Land is only thing in LLC

File 706 - when Death?

ASSETS

Paul A. Eichstadt,
as Trustee, Trustee
and sole income beneficiary
of the Paul A. Eichstadt
98% Revocable Trust dated
June 23, 2001

Paul A. Eichstadt,
income beneficiary for
life from the Daniela
A. Eichstadt Revocable
Trust dated June 23, 2001

Vehicles		@ 20,000
Cattle	200 Mixed yearlings	@ 160,000
Machinery + Equipment		@ 225,000
Grain on hand	30,000 bushel 7 bean x's 25,000 bushel of corn	@
TOTAL ASSETS		

LIABILITIES (Principal Balances):

Case IH [redacted]	@ 29,000
TOTAL LIABILITIES	
NET WORTH	

#13-4505

Circle E, LLC $1,036,500.00

ASSETS

Paul Eichstadt as Trustee,
Trustee and sole beneficiary of the
Paul A. Eichstadt

(A) Revocable Trust dated $550,000

June 23, 2001

(B) discretionary beneficiary for life
from the Daniela A. Eichstadt
Revocable Trust dated June 23, 2001

Marital Trust | Family Trust

net income to Paul

upon death of Paul - termination - then to Family Trust

payment in full at age 35 to each child

5

EXHIBIT "A"

PAUL A. EICHSTADT DISCLOSURE

ASSETS:	
Circle E LLC (48%)	$ 400,000
Grain on Hand (30,000 bu. of soybeans @ $6.00 and 25,000 bu. of corn @ $2.00	$ 230,000.00
200 Head of Cattle (mixed yearlings)	160,000.00
Machinery & Equipment	~~250,000.00~~ 125,000
2002 Honda Accord	20,000.00
~~Checking Account (Farm) @ American Bank & Trust, Wolsey, SD~~	~~$~~76,000.00
Checking Account (Personal) @ American Bank & Trust, Wolsey, SD	25,000.00
Paul A. Eichstadt, as Trustor, Trustee & Sole Income Beneficiary of the Paul A. Eichstadt Revocable Trust dated 6-23-01	~~1,110,000.00~~
Paul A. Eichstadt, Income Beneficiary for Life from the Vanieda R. Eichstadt Revocable Trust dated 6-23-01	
Machinery and Equipment 125,000	
TOTAL ASSETS Farm Checking Acct. at American Bank & Trust of Wolsey, S.D. 100,000	$
Circle E LLC (48%) 400,000	
625,000	
LIABILITIES:	
~~Case IH Power~~ CURRENT VALUE OF ENCUMBERED ENTITLEMENT	$25,000 ~~20,000.00~~
TOTAL LIABILITIES	$ ~~20,000.00~~
NET WORTH	$

Dated: July __, 2003

Paul A. Eichstadt

Post-it Fax Note 7671	Date 7/09/03	# of pages ▶ 1
To Dale Coyle	From Carl Haberstick	
Co./Dept.	Co.	
Phone #	Phone # 2-0702	
Fax # 2-8393	Fax # 2-0756	

EXHIBIT "A"

PAUL A. EICHSTADT DISCLOSURE

ASSETS:

Paul A. Eichstadt, as Trustor, Trustee & Sole Income Beneficiary of the Paul A. Eichstadt Revocable Trust dated 6-23-01	
Grain on Hand (30,000 bu. of soybeans @ $6.00 and 25,000 bu. of corn @ $2.00	$ 230,000.00
200 Head of Cattle (mixed yearlings)	160,000.00
Machinery & Equipment	125,000.00
Circle E L.L.C. (48%)	400,000.00
2002 Honda Accord	20,000.00
Checking Account (Farm) @ American Bank & Trust, Wolsey, SD	76,000.00
Checking Account (Personal) @ American Bank & Trust, Wolsey, SD	25,000.00
Paul A. Eichstadt, Income Beneficiary for Life from the Vanieda R. Eichstadt Revocable Trust dated 6-23-01	
Machinery & Equipment	125,000.00
Checking Account (Farm) @ American Bank & Trust, Wolsey, SD	100,000.00
Circle E L.L.C. (48%)	400,000.00
TOTAL ASSETS	$1,661,000.00
~~***LIABILITIES:***~~	0.00
Current Value of Income Interest	~~$ 20,000.00~~ 0.00
TOTAL LIABILITIES	$ ~~20,000.00~~
NET WORTH	$1,641,000.00

Dated: July __, 2003

Paul A. Eichstadt

Balance Sheet

Paul A Eichstadt

Date of Statement:AUG 28,2002

Acct #

Current Farm Assets		Mkt. Val.	Current Farm Liabilities		$ Owed
Cash & Equivalents	Sch. 1	20,000	Accounts Payable	Sch. 18	
Marketable Bonds & Securities	Sch. 2		Operating Loans - AB/T	Sch. 21	4,500
Accounts & Notes Receivable	Sch. 3	6,550	Operating Loans - Other		
Market Livestock & Poultry	Sch. 4	248,475	CCC Loans		
Livestock Products	Sch. 5		Cur. Port. Term Debt - AB/T		
Crop - Inventory & Receivables	Sch. 6	301,950	Cur. Port. Term Debt - Other		21,000
Growing Crops	Sch. 7	74,500	Accrued Interest		121
Prepaid Expenses & Supplies	Sch. 8		Inc. & FICA Taxes Payable	Sch. 19	
Other Current Assets	Sch. 9				
CURRENT FARM ASSETS		**$651,475**	**CURRENT FARM LIABILITIES**		**$25,621**
Intermediate Farm Assets			Intermediate Farm Liabilities		
Machinery & Equipment	Sch.23	285,000	Term Debt - AB/T	Sch. 21	
Vehicles	Sch.23	21,500	Term Debt - Other		
Breeding Stock	Sch.10	201,600			
Notes Receivable > 12 mo.	Sch.11				
Not Readily Mkt. Bonds. & Sec.	Sch.12	7,000			
Other Interm. Farm Assets	Sch.13				
INTERMEDIATE FARM ASSETS		**$515,100**	**INTERM. FARM LIABILITIES**		
Long Term Farm Assets			Long Term Farm Liabilities		
Real Estate & Land	Sch.14	1,048,950	Term Debt - AB/T	Sch. 21	
Buildings & Improvements	Sch.15	7,500	Term Debt - Other		
Other Long Term Assets	Sch.16				
LONG TERM FARM ASSETS		**$1,056,450**	**LONG TERM FARM LIABILITIES**		
TOTAL FARM ASSETS		**$2,223,025**	**TOTAL FARM LIABILITIES**		**$25,621**
			TOTAL FARM EQUITY		**$2,197,404**
Non-Farm Assets	Sch.17		Non-Farm Liabilities	Sch. 22	
			TOTAL LIABILITIES		**$25,621**
			TOTAL EQUITY		**$2,197,404**
TOTAL ASSETS		**$2,223,025**	**TOTAL LIABILITIES & EQUITY**		**$2,223,025**

Paul A Eichstadt Tax I.D.#- 503-42-4288 20888 387th Ave Wolsey, SD 57384-6528 Ph. 605883-4505 Sole Proprietorship

The Undersigned certifies that this Balance Sheet Statement and all supporting schedules submitted for the purposes of applying for credit, whether as an applicant or a grantor, is complete, true and correct to the best of my (our) knowledge and represents the Undersigned's financial condition at the time indicated. The Undersigned agrees to give American Bank & Trust prompt written notification of any subsequent substantial change in such financial condition. The Undersigned authorizes American Bank & Trust to obtain the Undersigned's employment history, personal, consumer and/or business credit reports as well as the Undersigned's Internal Revenue Tax records.

Signature: _____ Signature: _____ Date: 8/28/02

AUG 28,2002 2:33PM AMERICAN BANK & TRUST HURON, SD ASB - 127828539830 V. 4.1

Balance Sheet Schedules

Paul A Eichstadt — Date of Statement: AUG 28,2002 — Acct #

Sch. 1 - Cash & Equivalents

	Mkt. Val.
Bank DDA	20,000
Total	$20,000

Sch. 3 - Accounts Receivable

	Mkt. Val.
Government Payments - CRP	2,550
Government Payments - USDA	4,000
Total	$6,550

Sch. 4 - Market Livestock & Poultry

	# Hd.	Wt.	$/Unit		Mkt. Val.
Cattle - Brdg. - Cull Cows	20		325.000	$/HD	6,500
Cattle - Brdg. - Bulls	10		850.000	$/HD	8,500
Cattle - Beef - 2001 Yearlings	210	1,000.	0.710	$/LB	149,100
Cattle - Beef - 2002 Calves	225		375.000	$/HD	84,375
Total	465				$248,475

Sch. 6 - Crop - Inventory & Receivables

		# Units	$/Unit		Mkt. Val.
Soybeans - 2001 Crop	Bu.	31,000.00	6.350	$/Unit	196,850
Corn - Baled Crop	Ton	260.00	35.000	$/Unit	9,100
Corn - 2001 Crop	Bu.	50,000.00	2.300	$/Unit	115,000
Hay - Mixed	Ton	200.00	60.000	$/Unit	12,000
				Total	$301,950

Sch. 7 - Growing Crops

	Acres	Cost/A	Mkt. Val.
Soybeans - 2002 Soybeans	220.00	100.000	22,000
Corn - 2002 Silage	300.00	175.000	52,500
Total			$74,500

Balance Sheet Schedules

Paul A Eichstadt — Date of Statement: AUG 28,2002 — Acct #

Sch. 10 - Breeding Stock

Raised

	#/Hd	$/Hd	Mkt. Val.
Cattle - Brdg. - Cows	240	750	180,000
Cattle - Brdg. - Bulls Herd	12	1,800	21,600
		Total	$201,600

Sch. 12 - Not Readily Marketable Bonds

	# Shares	Mkt. Val.
Life Ins Cash Value		7,000
	Total	$7,000

Sch. 14 - Real Estate & Land

	Yr. Prch	Total A.	Crop A.	$/Acre		Mkt. Val.
See List		1360.0		777	Total A.	1,048,950
					Total	$1,048,950

Sch. 15 - Buildings & Improvements

	Yr. Prch.	Mkt. Val.
Grain Bin 11,000 Bu		7,500
	Total	$7,500

Sch. 21 - Debt Schedule

			Int. Rate	Accrued Interest	Cur. Port. Prin. Due	Non-Cur. Prin. Bal.	Total Prin. Bal.	P & I Pmt	Pmt Date	Mat. Date
AMERICAN BANK & TR	RLOC		6.50%		4,500		4,500	4,500	7/31/03	
Case IH Credit	Int	Purchase Case IH MX	2.00%	121	21,000		21,000	21,420	5/15/03	
			Total	$121	$25,500		$25,500	$25,920		

Balance Sheet Schedules

Paul A Eichstedt

Date of Statement: AUG 28,2002

Acct #

Sch. 23 - Machinery, Equipment, & Vehicles

Qty	Item & Brand	Size & Type	Condition	Year	Serial #	Mkt. Val.
	See List					285,000
	See List					21,500
					Total	$306,500

Signature

Date

Fosheim, Haberstick & Hutchinson

ATTORNEYS AT LAW

DOUGLAS G. FOSHEIM
CARL F. HABERSTICK
REED HUTCHINSON - OF COUNSEL

CENTRE PLAZA, SUITE 5
269 DAKOTA AVE. S.
HURON, SOUTH DAKOTA 57350
TELEPHONE (605) 352-0702
FAX (605) 352-0756
EMAIL fhh.jhh@midconetwork.com

July 17, 2003

Ms. Kathryn E. Bergeson
747 5th Street S.E.
Huron, SD 57350

Re: Prenuptial Agreement

Dear Kathryn:

In talking with Paul today, he informs me that you do not wish to have an attorney review the Prenuptial Agreement before you sign it. Although I recommend you consult an attorney prior to signing, you may sign it without consultation.

You must understand that I have drafted this Agreement at the request of Paul. He is my client and I cannot represent you in this matter. As such, I cannot give you any advice concerning the Agreement.

Sincerely,

Carl F. Haberstick

CFH:slk

7-17-03 - Hand delivered to Kathryn E. Bergeson before signature on Prenuptial Agreement.

Kathryn E. Bergeson

Haberstick
Stephanie L. Floen
Ex. No. 4
Date: 27 Apr 2018

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 29569

IN RE ESTATE OF PAUL A. EICHSTADT

Appeal from the Circuit Court
Third Judicial Circuit, Beadle County, South Dakota
The Honorable Jon R. Erickson, Retired Circuit Judge

REPLY BRIEF OF APPELLANT

NOTICE OF APPEAL FILED April 6, 2021

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

1. The trial court's reliance on consideration was legal error that cannot be ignored

Kathryn asserts that the trial court's reference to consideration should be ignored because the opinion did not state that the "ruling was solely based on consideration" and it is "speculation as to what part, if any, that played in the court's ruling." (Br. at 4). In short, her argument is that consideration is merely one factor among many. However, the ruling need not have been "solely based on consideration" to be erroneous. The Code explicitly states that consideration is not required for premarital agreements. SDCL § 25-2-17. One factor among many is still a factor. If consideration is not required, then allowing it to play any part whatsoever in determining the validity of the premarital agreement was an error of law.

Appellee's argument is essentially a claim of harmless error. However, ignoring the plain language of a plainly applicable statute is not harmless. "Error is prejudicial if it most likely has had some effect on the verdict and harmed the substantial rights of the moving party." *Vorhees Cattle Co. v. Dak Feeding Co.,* 2015 S.D. 68 ¶ 17, 868 N.W.2d 399, 408 (quotations omitted). Consequently, the "harmless error inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence." *Mendenhall v. Swanson,* 2017 S.D. 2 ¶ 13, 889 N.W.2d 416, 421 (quotations omitted).

This is not a case where the Court is required to puzzle out what may or may not have influenced a jury. The record is clear: the trial court explicitly cited to the lack of consideration as a fact it found relevant to its decision, listing consideration as one of the reasons the case "greatly differs" from *In re Estate of Smid,* 2008 S.D. 82, 756 N.W.2d 1.

In fact, the trial court's opinion holds that a "prenuptial agreement, like [a] postnuptial agreement will be upheld so long as it was entered into freely and *for good consideration*." (Appx. 3) (emphasis added). The trial court did not merely give substantial weight to something the Legislature has clearly and unequivocally stated should not be a part of the analysis of premarital agreements. It created an explicit rule that negates SDCL § 25-2-17.

2. The Agreement is enforceable

Both Kathryn and the trial court fail to acknowledge the straightforward rule set out by SDCL §§ 25-2-21(a) and 29A-2-213: a premarital agreement is enforceable unless it is either (1) executed involuntarily, or (2) unconscionable, *and* executed without reasonable disclosure or personal knowledge of the spouse's property. The law sets out similarly straightforward standards for voluntariness, unconscionability, and disclosure. Rather than address the statutes and cases cited by the Estate, however, Kathryn returns to the vague assertion that her personal discomfort should override the law.

A. Kathryn did not prove her signature was involuntary

The Estate's argument is not, as Kathryn claims, that the Agreement is automatically valid because Kathryn signed it. The significance of the signature is that it demonstrates Kathryn's acceptance. It is not the Estate's job to prove that Kathryn's signature and acceptance were voluntary; Kathryn had the burden of proving that her apparent consent was invalid. SDCL § 53-4-1 sets out the specific circumstances under which a party who has apparently consented to a written agreement can void that consent: duress, fraud, undue influence, or mistake. Kathryn does not even attempt to identify which of these theories she is attempting to prove.

As the Estate has previously established, Kathryn's feelings do not meet the clear tests for undue influence or duress. Her argument about emotional upset does not pass muster, particularly in light of this Court's decision in *Smid*. In that case, the decedent's widow argued that, although she was not physically forced to sign a waiver of inheritance rights, her assent to the waiver was not voluntary because "she did not know what her surviving spouse rights were, that she was under stress and extremely upset because her husband was dying and she did not give the transaction much thought." *Id.* at ¶ 15, 756 N.W.2d at 7. However, this Court upheld the waiver, noting that the widow was still able to understand the events surrounding her and was not suffering from any weakness of mind. *Id.* at ¶¶ 23, 34.

Kathryn, like the widow in *Smid,* conceded that she was not suffering any kind of physical or mental incapacity. (Tr. 60:13-25). She also admitted that she understood the essentials of the Agreement – namely, that she and Paul would keep their own property. (Tr. 77:22-25). Because none of Paul's alleged acts rise to the level of duress under SDCL § 53-4-3 or conduct that would force an ordinary person to act against her own free will, Kathryn has failed to prove her consent was voidable.

While Kathryn's brief never identifies which of SDCL § 53-4-1's theories she relies upon, the claims about Paul's actions in the days leading up to the signing of the Agreement might be said to allege fraud. Even if Kathryn's inconsistent testimony is to be believed, not discussing the premarital agreement with her does not constitute fraud under SDCL §§53-4-5 or 53-4-6. Paul's alleged concealment of the fact that he was working on a premarital agreement with his attorney and accountant, and even the alleged failure to show Kathryn the copies of the agreement that Haberstick mailed to her, *see* Tr.

13:9-17, cannot be fraud due to the simple fact that Kathryn did, in fact, receive copies of the Agreement and Paul's asset disclosure before she signed. All the information she needed to make her decision was in front of her. She understood that the Agreement meant she and Paul would each keep their own property. (Tr. 77:22-25). She chose to sign anyway. There can be no fraud when all the relevant facts are in the open.

Ultimately, Kathryn's position appears to be that, while there was not technically fraud, duress, undue influence, or lack of capacity to contract, the circumstances as a whole somehow render her consent involuntary. This argument has no legal support whatsoever. A general implication of moral wrongness is not enough to invalidate a signed agreement. *Dunes Hospitality, LLC v. Country Kitchen, Inc.,* 2001 S.D. 36 ¶ 27, 623 N.W.2d 484, 491. If the totality of the circumstances does not establish duress, undue influence, or fraud, then Kathryn has failed to meet her burden of proof, and the Agreement must be enforced.

The Minnesota Supreme Court addressed allegations similar to Kathryn's in *Hafner v. Hafner,* 295 N.W.2d 567 (Minn. 1980). In that case, the wife was a former employee of the husband, whose net worth was approximately $750,000 in 1972 dollars. *Id.* at 568, 570. Approximately two weeks before the marriage, the husband told the wife that he wanted an antenuptial agreement; the matter was not mentioned again until a week later, when the husband informed her that they were going to his lawyer's office to sign the document. *Id.* at 569. The wife, who had a ninth-grade education and no significant property, was not represented by counsel, and was not told of her rights in the absence of a prenuptial agreement. *Id.* at 569-71. Nevertheless, the court upheld the agreement: "[A]lthough appellant was not told of her rights in the absence of an

antenuptial contract, she was aware of, and freely and voluntarily acceded to, respondent's desire to leave his property to his children. Further…the record discloses that appellant was a reasonably intelligent and experienced individual, even though she has a limited formal education. Thus…we hereby uphold…the validity of the antenuptial contract." *Id.* at 571-72.

Kathryn was a reasonably intelligent individual who, unlike the wife in *Hafner*, had and rejected the opportunity to get her own lawyer. Further, despite the trial court's erroneous insistence in its findings of fact that Kathryn had an eighth-grade education, she had obtained a GED, which is a high school equivalency degree, in 2001. (Tr. 60:2-5). Her will was not overborne, and her decision not to review the Agreement in detail was her own. Most importantly, she understood that the Agreement meant she would keep her property and Paul would keep his. (Tr. 77:22-25). Kathryn must be held to the terms of the agreement she voluntarily signed.

B. <u>The Agreement is valid under SDCL §§ 29A-2-213 and 25-2-21.</u>

Kathryn's unconscionability argument is essentially that finding an agreement waiving inheritance rights to be unconscionable is not the same as finding that the waiver of inheritance rights is unconscionable. However, the waiver is the only thing in the agreement that can be unconscionable. As has been previously argued, it was not unconscionable for Paul to preserve his estate plan and keep the family farm in the family.

Even if the Agreement had been unconscionable, Kathryn would still have the burden of proving she was not provided a fair and reasonable disclosure of Paul's property or financial obligations, or did not have, or reasonably could not have had, an

adequate knowledge of Paul's property or financial obligations. *See* SDCL §§ 29A-2-213(b), 25-2-21. Kathryn failed on both points.

The argument that the disclosure was inaccurate is both untimely and disingenuous. Notably, Kathryn did not argue to the trial court that Paul's asset disclosure was inaccurate, and the trial court made no finding to that effect. An issue not raised before the trial court will not be reviewed at the appellate level. *Ronan v. Sanford Health*, 2012 S.D. 6 ¶ 14, 809 N.W.2d 834, 837 (quotations omitted). In any event, the noted absence of this argument from both Kathryn's case at trial and the court's opinion is hardly surprising; the testimony of Haberstick and Coyle thoroughly eviscerates any claim that Paul's disclosure did not reflect his actual net worth.

The 2002 balance sheet that gives the $2.2 million dollar figure was not for Paul Eichstadt, but for the farming operation. The additional million dollars was the value of the land. It is undisputed and indisputable that the land was the property of Circle E, LLC, not Paul Eichstadt. (Tr. 10:22-25, R. 451 – Coyle Dep. 17:1-19). Paul did not own any land; instead, his revocable trust held a minority interest in the LLC that owned the land. (Tr. 10:9-23). Notably, Kathryn offered no evidence that a single acre of the farmland was in Paul's name. The $400,000 figure in Paul's asset disclosure (Exhibit A to the Agreement) represented the 2003 value of Paul's minority interest in the LLC as computed by his longtime accountant, Dale Coyle. (R. 454 – Coyle Dep. 26:22-27:20).

It is also undisputed that Paul's interest in his late wife's trust, which held approximately 48% of the LLC, was a beneficial interest that did not give him the right to control the LLC shares. The testimony established that Paul held only an income interest in Vanieda's trust. (Tr. 9:16-23, R. 454 - Coyle Dep. 28:18-22). Vanieda's trust became

irrevocable upon her death, and Paul could not make changes to it. (Tr. 9:24-10:1, R. 458 – Coyle Dep. 42:22-43:4). His sole right was to the income from Vanieda's trust during his lifetime; he could not have cracked open the trust and coopted its interest in Circle E to make himself a majority owner and realize the full value of the land. (Tr. 12:12-20, R. 458 – Coyle Dep. 42:18-43:9). Kathryn, who had the burden of proof, offered no evidence to contradict these facts

As Coyle's testimony made clear, the value of a minority interest in an LLC that owns land is very different from the value of the land itself. When Coyle determined the value of the LLC interest for Paul's disclosure, he used the same process he used to value Vanieda's interest in the LLC for the Form 706 he filed for her estate. (R. 453-Coyle Dep. 25:14-26:24). Coyle applied several discounts to the full value of the land. First, he took the total value times the percentage of the LLC that Paul owned. (R. 453 – Coyle Dep. 22:1-12). He then applied a minority discount and a lack of marketability discount because a minority owner would have no way to force the sale of the land and realize its full value. (R. 453 – Coyle Dep. 22:13-24:2).

This was not a falsely reduced number; when Coyle prepared the Form 706 for Paul's wife's estate in 2002, the value he assigned to Vanieda's interest in the LLC was $369,117 – approximately $30,000 less than the value assigned to Paul's interest in the 2003 disclosure. (R. 437, 475). In fact, Coyle testified that, had he prepared Paul's disclosure at the same time as Vanieda's Form 706, he would have come up with the same figure. (R .453-54 - Coyle Dep.25:14-26:24). Notably, the IRS did not take issue with Coyle's valuation of Vanieda's identical interest. (R. 453 – Coyle Dep. 24:15-17). The number used on Paul's asset disclosure reflected the fact that he owned a minority

interest in an LLC that owned the land rather than the land itself. Kathryn offered no evidence whatsoever that the method by which Coyle calculated the value of both Paul's and Vanieda's interests was incorrect. The trial court rightfully declined to hold that Paul's disclosure was inadequate.

Kathryn claims there was "no evidence in the record that suggests she knew the value of Paul's holdings, land, cattle or crop or that she was aware of the amount owed on the same." (Br. at 9). First, Kathryn knew or should have known all this information because it was contained in the property disclosure. Deliberate ignorance is not a defense.

Moreover, Kathryn's testimony and the exhibits demonstrate her extensive knowledge of Paul's farming operation and property. Kathryn had lived on Paul's farm for more than a decade and assisted him with the farm books and taxes. (R. 200, R. 390, R. 428). She was familiar with the farming operation and the land it included. (Tr. 36:7-9). As part of her duties, she reviewed the farm bank statements and recorded information showing deposits from Paul's cattle business. (Tr. 37:6-8, 49:21-50:4). She prepared annual statements for Paul showing his farm income and expenditures, including payment on debt. (Tr. 50:12-51:19).

Kathryn's handwritten financial records demonstrate that she had a sophisticated understanding of Paul's finances and ongoing farming operations over many years before they married. This Court has held that general knowledge that a prospective spouse owned land, livestock, and farm equipment is sufficient. *See Schutterle v. Schutterle,* 260 N.W.2d 341, 348 (S.D. 1977). Kathryn's knowledge was far more extensive. Even if she had not been provided with an accurate disclosure, the Agreement would still stand.

Finally, it is not relevant that Paul had more property than Kathryn. Nowhere in the Code or the case law does it state that rules are different for larger estates. Kathryn knew, through both disclosure and personal knowledge, the extent of Paul's property. She signed the Agreement, knowing that it meant Paul would keep that property and she would keep hers. (Tr. 77:22-25). The Agreement was valid under SDCL §§ 25-2-21(a) and 29A-2-213.

3. <u>The trial court's double representation rule affected the outcome</u>

While Kathryn concedes that Mr. Haberstick did not and could not represent her, she once again falls back on a harmless error argument to justify the trial court's decision. However, the court's statements concerning double representation were not mere speculation. The exact statement from the opinion is as follows: "Paul's attorney did not go through the Agreement with Kathryn explaining the pertinent provisions after she said she trusted Paul and did not need to consult with an attorney. *Had that been done the Estate would have a much stronger case*." (emphasis added). This is not speculation. This is a decision that explicitly requires attorneys to violate Rule 1.7 in order to make "a much stronger case" for a premarital agreement. The court admits to giving substantial weight to Haberstick's decision to decline to advise Kathryn as required by the Rules of Professional Conduct. Clearly, this was not harmless error.

Kathryn also fails to address the waiver issue. Again, she acknowledged in writing that Haberstick would not advise her and had recommended she get her own attorney. Despite all of this, she chose to sign the Agreement. The court erred in concluding that the Agreement was invalid because Kathryn did not receive something she had expressly disclaimed.

4. The trial court erroneously shifted the burden of proof to the Estate

Kathryn's argument that the Estate did not object to the trial court's decision to ignore typical trial proceedings is beside the point. The true significance of the court's peculiar approach to the trial is in what it says about the burden of proof. While the trial court referenced the well-established fact that Kathryn had the burden of proving the Agreement was unenforceable, its decision to require the Estate to present evidence first at trial further suggests that it shifted the burden of proof from Kathryn to the Estate.

5. The trial court's decision was clear error

In addressing the trial court's decision to ignore the testimony of Elena Ball, Kathryn asserts that her daughter's testimony "has little to no relevance in this case." However, this testimony was highly relevant because it contradicted Kathryn's story about her relationship with Paul, her claim that he had never raised the issue of premarital agreements before the day she signed, and her insistence that the wedding was a total surprise to her. The court made specific factual findings on all these points. If these matters had no relevance to the decision, then the court would not have recited them in its opinion.

Again, the trial court did not at any point conclude that Ms. Ball's testimony was not credible, or that she was, for whatever inexplicable reason, lying about Kathryn's involvement in planning the ceremony that was held in her backyard. It simply pretended this testimony did not exist. While the "credibility of witnesses and the weight afforded to their testimony is within the discretion of the trial court," *Donat v. Johnson*, 2015 S.D. 16 ¶ 14, 862 N.W.2d 122, 128, it is an abuse of that discretion and clear error to ignore a witness with no motivation to lie who directly contradicted the person on whose credibility the court's entire decision hinged.

CONCLUSION

Kathryn's argument on appeal is essentially that the multitude of legal and factual errors in the trial court's decision are harmless. But error is not harmless when it had substantial influence on the result. *Mendenhall* at ¶ 13, 889 N.W.2d at 421. The trial court's errors, viewed individually, are substantial because each one directly contradicts the South Dakota Code and long-established precedent. Taken together, they evince a complete disregard for the law and critical facts. The trial court's decision must be reversed.

Dated at Sioux Falls, South Dakota, this 24th day of November, 2021.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellant complies with the type volume limitations set forth in SDCL § 15-26A-66. Based on the information provided by Microsoft Word 365, this Brief contains 3,132 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 365.

Dated at Sioux Falls, South Dakota, this 24th day of November, 2021.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing "Reply Brief of Appellant" was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to 500 East Capitol Avenue, Pierre, South Dakota, 57501-5070, on November 24, 2021.

The undersigned further certifies that an electronic copy of "Reply Brief of Appellant" was emailed to the attorneys set forth below, on November 24, 2021:

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