IN THE EIGHTH JUDICIAL DISTRICT
DISTRICT COURT, MARION COUNTY, KANSAS

SHIRLEY L. WEIBERT, Plaintiff,	)	
v.	)	Case No. 10 CV 19
S. WARREN WEIBERT and SHERYL WHITE, Co-Executors of the ESTATE OF DAVE E. WEIBERT, Deceased, Defendants.	)	

Pursuant to K.S.A. Chapter 60

IN THE DISTRICT COURT OF MARION COUNTY, KANSAS

IN THE MATTER OF THE ESTATE OF	)	
DAVE E. WEIBERT, Deceased	)	Case No. 10-PR-8

Pursuant to K.S.A. Chapter 59

MEMORANDUM DECISION

The court heard the evidence on this matter during trial. For the reasons as set forth herein, the Plaintiff and movant's prayer for the Pre-Marital Agreement and Consent of Spouse to be declared invalid are denied.

FINDINGS OF FACT

1. This is a consolidated action of two cases relating to the Estate of Dave E. Weibert, deceased ("Dave"). Marion County Case No. 10 CV 19 (the "Civil Action") is a declaratory judgment action where Shirley Weibert ("Shirley") is asking the Court to set aside the premarital agreement between her and Dave (the "Premarital Agreement"). Marion County Case No. 10 PR 8 (the "Probate Action") is an action to probate Dave's Last Will and Testament ("Dave's Will"), wherein Shirley has challenged the validity of her consent to Dave's Will (the "Spousal Consent") and is seeking to elect against Dave's estate.

2. Dave was married to Doris Weibert ("Doris") for over 55 years.

3. Dave and Doris had five children, S. Warren Weibert, Sheryl White, Marilyn Pierce, David M. Weibert, and Kimberly Mohan.

4. Doris was a stay-at-home wife and mother who took care of the family, house, and helped Dave in the farming business.

5. Dave and Doris accumulated substantial wealth during their marriage.

6. Doris passed away on March 4, 1999.

7. After having been cared for by his wife Doris for over 55 years, Dave was lonely after her death and sought companionship by attending senior mixers in Salina, Kansas.

8. Dave told his son Warren that he was lonely and Warren advised Dave to take his time and not make any quick decisions.

9. Less than one month after Doris' death, Dave met Shirley at one of the senior mixers.

10. Shirley knew Dave was lonely and had recently lost his wife.

11. Shirley was 69 years of age and had been married and divorced on three prior occasions.

12. Shirley testified that in her second and third marriages, she treated her property as separate from the property of her spouse and that, upon their divorce, each party kept as their own what they brought into the marriage because "her property belonged to her."

13. At all times following her first divorce, Shirley was self-sufficient and made personal and financial decisions on her own, including purchasing and selling vehicles and real estate.

14. Shirley held numerous jobs, including one at the Ellsworth Correctional Facility where she made good money. Shirley left her job at Ellsworth Correctional Facility voluntarily.

15. At the time Shirley met Dave, she was working as a cook at a Senior Center in Russell, Kansas. This employment was to supplement her social security income.

16. Shirley controlled and managed her own finances, except her long-term investments which were managed and partially owned by her brother, Don Bender.

17. Shirley owned, free of any mortgage or note, her own car and her own home in Russell, Kansas.

18. Shirley purchased her home in Russell, Kansas without the aid or advice of her brother, Don Bender.

19. During their courtship, Dave and Shirley saw each other every Wednesday and almost every weekend. During this time, Dave and Shirley equally shared their expenses, including alternating between them as to who paid for meals when they ate out.

20. In approximately August, 1999, Dave told Warren that he was considering getting re-married. Warren advised Dave to consider a premarital agreement.

21. In August 1999, Dave asked Shirley to marry him. Dave was 77 years of age and Shirley was 69 years of age.

22. Shirley understood that if she married Dave, she would no longer have to work, could retain her social security benefits for herself.

23. Shirley accepted Dave's marriage proposal and prepared to move to Hillsboro, Kansas with Dave. Shirley quit her job at the Senior Center on or about September 4, 1999 and moved from Russell to Hillsboro, Kansas on or about September 10, 1999.

24. At the express request of Mr. Weibert, Shirley sold her Mercury Marquis to Mr. Weibert's brother, Ivan Weibert, for the approximate sum of $4,000. It is unclear if this sale occurred before or after the wedding.

25. Dave and Shirley did not have a confidential relationship prior to the execution of the Premarital Agreement and Consent to Will because they had only known each other a few short months and had not had the opportunity to develop the trust and confidence of a long-term romantic relationship or marriage.

26. Prior to execution of the premarital agreement, Dave asked Shirley to prepare a list of her assets. Shirley traveled from Hillsboro to Russell to gather information regarding her assets. Shirley also contacted Don Bender, her brother, to inquire as to the balance of the investment accounts he owned in joint tenancy with Shirley and managed on their behalf. Shirley then provided Dave a list of her assets.

27. On September 1, 1999, Dave contacted Daniel Baldwin ("Mr. Baldwin"), a local attorney, for the purpose of retaining his services to prepare the Premarital Agreement.

28. On September 7, 1999, Dave called Mr. Baldwin's office, but it is unknown whether he talked to Mr. Baldwin. Later that same day, however, both Dave and Shirley met with Mr. Baldwin concerning the Premarital Agreement.

29. Shirley told Dave and Mr. Baldwin that her attorney was Dennis Davidson ("Mr. Davidson"), an attorney from Russell, Kansas. Mr. Davidson had previously prepared a durable power of attorney and Last Will and Testament for Shirley. The Last Will and Testament

prepared by Mr. Davidson had replaced Shirley's previous Will that had been drafted by attorney Jerry Smetana in 1976.

30. Shirley has a history of hiring attorneys for her legal work, including Jerry Smetana, Michael Holland, and Dennis Davidson.

31. At some point, Shirley contacted Mr. Davidson and asked that he fax a copy of her Last Will and Testament to Mr. Baldwin.

32. Mr. Davidson called Mr. Baldwin's office on September 7, 1999, regarding Shirley. Mr. Baldwin returned Mr. Davidson's call on September 8, 1999. Despite their attempts otherwise, Mr. Baldwin and Mr. Davidson never spoke to one another.

33. On September 10, 1999, Mr. Davidson faxed a copy of Shirley's will to Mr. Baldwin's office. Shirley claims that she asked Mr. Davison to mail a copy of her will to her home in Hillsboro because Dave wanted to see it. Contrary, however, Mr. Davidson testified that he would not have faxed the will to Mr. Baldwin without the express permission of Shirley.

34. Also on September 10, 1999, Dave and Shirley met a second time with Mr. Baldwin concerning the Premarital Agreement.

35. On September 13, 1999, Dave and Shirley met with Mr. Baldwin a third time to discuss the Premarital Agreement.

36. On September 14, 1999, Dave and Shirley met with Mr. Baldwin for the fourth time concerning the Premarital Agreement. They met in Mr. Baldwin's office, where Mr. Baldwin reviewed the Premarital Agreement with Dave and Shirley and each was provided with a financial disclosure of the other's assets. The Premarital Agreement was discussed and Mr. Baldwin answered questions of the parties.

37. Shirley's recollection of the events leading up to the execution of the Premarital Agreement and the execution of the agreement are not consistent with the other evidence, including Mr. Baldwin's calendar and Ms. Mary Meisinger's ("Maggie") testimony. Maggie worked for Mr. Baldwin and was the notary on both the Premarital Agreement and later Consent to Will, signed by Shirley.

38. Shirley's recollection is inconsistent with where she was when she signed the Premarital Agreement, what was discussed, how many times she met with Mr. Baldwin and Dave. Shirley testified that she signed the Premarital Agreement on a non-existent bar in the foyer of the law office. She recalled being upset and crying in Mr. Baldwin's office and not

having an opportunity to read the document prior to execution of the document. Furthermore, Shirley recalls that no one spoke to her; she was just handed a pen and shown where to sign.

39. During this time period, Mr. Davidson was available to consult with Shirley about the Premarital Agreement, but she chose not to consult him.

40. While the financial disclosure of Dave did not contain the value of his assets, it showed that Dave owned seven life insurance policies, a bank account, a certificate of deposit, a retirement account, 35 Industrial Revenue Bonds, nine residential properties, three quarter sections of real property, and two newer vehicles.

41. Mr. Baldwin testified that it was his habit and custom to advise his client and his/her prospective spouse of the legal rights they were both relinquishing in executing a premarital agreement. He further testified that he had no reason to believe he deviated from that habit and custom in his representation of Dave.

42. Mr. Baldwin informed Shirley that he represented only Dave in relation to the Premarital Agreement. He advised Shirley numerous times that she should consult her attorney if she had any questions regarding the Premarital Agreement.

43. Over the course of the four meetings between Dave, Shirley, and Mr. Baldwin, the Premarital Agreement was revised at least once from the initial draft to the executed version.

44. Shirley did not have her non-prescription reading glasses with her at the time she executed the Premarital Agreement. However, she did not tell anyone present at the execution of the Premarital Agreement that she could not read the document and she did not ask anyone present to read the document to her.

45. Mr. Baldwin testified that if Shirley had cried during the signing of the Premarital Agreement, he would have stopped the process and told her to contact her attorney.

46. The Premarital Agreement was notarized by Maggie. Shirley acknowledged to Maggie that she executed the Premarital Agreement freely and voluntarily.

47. Maggie had been a legal assistant in Mr. Baldwin's law office for over 28 years at the time she notarized the Premarital Agreement.

48. Maggie clearly remembers Shirley coming in to Mr. Baldwin's office to execute the Premarital Agreement. Shirley showed Maggie a ring that she was wearing and acted very happy. Maggie remembers Shirley wearing dark clothing.

49. Maggie was present when Dave and Shirley executed the Premarital Agreement. Maggie inquired if either party was being forced to execute the Premarital Agreement and both responded no.

50. Maggie had prepared the typed financial disclosures of Dave and Shirley that are attached to the Premarital Agreement from handwritten documents provided by Dave and Shirley to Mr. Baldwin.

51. Maggie testified that in her tenure at Mr. Baldwin's law office, there has never been a Premarital Agreement or Consent to Will signed in the front reception area or hallway of the office.

52. Dave and Shirley executed the Premarital Agreement voluntarily and knowingly releasing any and all rights they may have obtained by virtue of marriage in each other's assets.

53. Shirley was provided a fair and reasonable disclosure of Dave's property and financial obligations prior to executing the Premarital Agreement and had adequate knowledge of Dave's property and obligations at the time she executed the Premarital Agreement.

54. Shirley's signature on the Premarital Agreement was not procured through fraud, undue influence, duress, and/or coercion.

55. In the Premarital Agreement, Shirley waived additional financial information. In paragraph 3, page2, (each) "party voluntarily and expressly waive3 any7 right to disclosure of property, financial position or obligations of the other beyond the disclosures herein mentioned."

56. After executing the Premarital Agreement, Dave and Shirley were each provided an unfolded executed original of the Premarital Agreement in a 9" x 12" envelope.

57. The two original Premarital Agreement documents were later folded and placed in two separate smaller envelopes and placed in Dave's safe deposit box. The outside of the envelopes bear the words "Shirleys (sic) Premarital agreement" and "Daves (sic) Premarital Agreement," respectively, and each state the date "Sept. 14, 1999." Both Warren and Sheryl recognized the handwriting to be Shirley's.

58. The Premarital Agreement provides that each party shall keep and retain sole ownership, control, and enjoyment of their Separate Property, as defined at paragraph 5 of the Premarital Agreement, during their lifetime and/or upon termination of the marriage by death or operation of law.

59. The Premarital Agreement also provides that upon the death of either party, the survivor spouse shall receive 1) all personal effects, jewelry, appliances, household goods, and

furnishings that have been acquired during the marriage; 2) all property titled in joint tenancy with right of survivorship; and 3) the proceeds of any life insurance policy of which either party is a beneficiary. The Premarital Agreement also provides that upon Dave's death, Shirley shall have the right to use and occupy the marital residence owned by Dave for a period of one year after Dave's death.

60. The Premarital Agreement is not unconscionable in its terms.

61. Suspicious circumstances did not surround the execution of the Premarital Agreement.

62. Dave and Shirley were married on September 16, 1999.

63. On October 1, 1999, Dave contacted Mr. Baldwin concerning updating his Last Will and Testament to correspond with the Premarital Agreement. Dave provided Mr. Baldwin with a copy of his previous will containing handwritten changes that Dave wanted to make.

64. Mr. Baldwin prepared a draft will and mailed it to Dave for review on October 7, 1999.

65. On October 14, 1999 Dave and Shirley met with Mr. Baldwin in his office to review and execute Dave's will and Shirley's consent to the will.

66. Shirley did not have her non-prescription reading glasses with her at the time she executed the consent to Dave's will. She did not tell anyone present at the signing that she could not read the document and she did not ask anyone present to read the document to her.

67. Shirley recalls that no one spoke to her; she was just handed a pen and shown where to sign the consent.

68. Mr. Baldwin testified that if Shirley had cried during the signing of Dave's Will or her execution of the consent thereto, he would have stopped the process and told her to contact her attorney.

69. Mr. Baldwin testified that it was his habit and custom to inform persons consenting to a Will of the rights under Kansas law they are giving up. He further testified that he had no reason to believe he deviated from that habit and custom in the execution of Dave's Will and Shirley's consent thereto.

70. Maggie testified that she was present when Mr. Baldwin reviewed the terms of the Will with Dave and Shirley.

71. Mr. Baldwin advised Shirley that she should consult her attorney if she had any questions regarding her execution of the consent to Dave's will. Maggie testified that she was

present when Mr. Baldwin advised Shirley to contact her attorney to review the consent if she had any questions or concerns.

72. Maggie inquired if either party was being forced to execute the Will and/or the Consent to Will and both parties responded no.

73. Shirley had a fair and reasonable disclosure of Dave's property and obligations by virtue of the financial disclosure provided to her in conjunction with the Premarital Agreement a few weeks prior.

74. Dave's will references the Premarital Agreement and provides for Shirley consistent therewith. It provides that she shall receive "all personal effects, jewelry, appliances, household goods and furnishings that were acquired by us during our marriage as well as the primary automobile we own at my death and also any joint bank checking account" and "the right to use and occupy our marital residence that we occupied at the time of my death for a period of one (1) year . . ."

75. Shirley's execution of the consent to Dave's will was not procured through constructive fraud, undue influence, duress, and/or coercion.

76. Shirley voluntarily, understandably, and intelligently executed the consent to Dave's will.

77. Suspicious circumstances did not surround the execution of the consent to Dave's will.

78. Shirley testified that she was suffering from depression and was on the medication Zoloft at the time of the execution of the Premarital Agreement and the Consent to Dave's will. There was no testimony at trial that substantiated her contention that her condition or the medication in anyway affected the voluntariness of her execution of the documents.

79. In the consent to spouse on page 3 of the will Shirley acknowledged that she had read the last will of Dave; that she know the contents; and that she freely consented to the will and the manner of disposition of Dave's estate. On page 4 she acknowledged that the was granted a reasonable disclosure of the property and financial obligations of Dave and waived any further disclosure beyond the disclosure provided.

80. The Premarital Agreement directs that Dave and Shirley shall maintain a joint bank account, to which each party shall contribute, to be used for the joint living expenses of the parties.

81. On October 15, 1999, Dave and Shirley opened a joint checking account at Hillsboro State Bank, held in joint tenancy with rights of survivorship. Dave deposited $220 per month into the account and Shirley deposited $240 per month into the account. Dave arranged for his personal bank account to be used as a "sweep account" in case the joint checking account was ever overdrawn or needed additional funds deposited.

82. The joint bank account was used to pay some of the joint living expenses of the parties. Dave paid for several of the joint expenses out of his personal account, including, but not limited to the cable/internet/telephone bill and Shirley's medical insurance premium.

83. Shirley maintained her own personal checking account at Commerce Bank in the name of Shirley Sprick. Dave maintained his own personal checking account at Hillsboro State Bank. Dave and Shirley did not account to each other for the monies in their respective bank accounts or investments.

84. Shirley and Dave each paid all expenses, including taxes associated with their respective assets. They did not co-mingle income produced from their assets beyond their contributions to the joint checking account at Hillsboro State Bank as was contemplated by the Premarital Agreement.

85. Dave's financial account statements were mailed to the marital residence and Shirley had access to those statements. Shirley reviewed those statements on a regular basis and filed the statements for Dave according to their personal filing system.

86. In 2006 Shirley contacted her attorney, Mr. Davidson, and directed him to draft a living will and a durable power of attorney for health care decisions nominating her daughter to serve as her agent for health care decisions and Dave as an alternate in the event her daughter was unable to serve. The documents were executed on August 24, 2006 at Mr. Davidson's office in Russell, Kansas. Dave was not present. Shirley instructed Mr. Davidson not to mail copies of the documents to her home or to send a bill for his services to her home because she did not want Dave to know she had consulted an attorney.

87. In January 2007, Shirley again contacted Mr. Davidson for legal services. Shirley mailed a draft copy of the Premarital Agreement to Mr. Davidson along with a post-it-note, written by her, inquiring as to the effect of the Premarital Agreement on property accumulated by the parties after the marriage; specifically as it relates to Dave's rental properties. Again, Shirley advised Mr. Davidson that she did not want Dave to know that she had consulted with him.

88. Mr. Davidson testified that during his telephone conversation with Shirley regarding the Premarital Agreement in 2007, Shirley did not indicate that she was unfamiliar with the premarital agreement nor did she allege that she involuntarily executed the Premarital Agreement. Shirley did not seek advice on invalidating the Premarital Agreement.

89. Mr. Davidson was under the impression from Shirley that although the copy of the Premarital Agreement he received for review was not executed, there existed an identical executed copy somewhere.

90. In December 2008, Shirley discussed Dave's will and the Premarital Agreement with Rita Weibert, Dave's daughter-in-law. During that discussion, Shirley told Rita about the Premarital Agreement, but made no allegation that it was involuntarily executed. Furthermore, Shirley confided in Rita that she was concerned Warren Weibert would not allow Shirley to remain in the marital residence after Dave's death. At that time Shirley asked Rita to talk to Dave about changing his will.

91. Rita's husband, David Martin Weibert, was in the room during Shirley and Rita's conversation, but he testified that he was not engaged in their conversation or paying attention to what they were discussing.

92. Rita did not discuss Dave's will or Premarital Agreement with Dave because she felt it was not her business. She did not even tell her husband, David Martin Weibert, about the Premarital Agreement until shortly before Dave's death.

93. Dave became seriously ill and was hospitalized in early 2010. Dave spent approximately six weeks in a nursing home prior to his death on March 16, 2010.

94. During Dave's last illness, Shirley began depositing tenant rent checks and other funds belonging to Dave into the joint bank account that she would own at Dave's death. Contrary to Shirley's testimony that she was only left with $69 in the joint checking account following Dave's death, there was actually $474.54 in the account on the date of Dave's death. Two days after Dave's death, Shirley deposited into the joint checking account three checks payable solely to Dave from his investment accounts in the total amount of $4,882.50.

95. Following Dave's death, Shirley and Defendant Sheryl White retrieved a copy of the Premarital Agreement and Dave's Will from Dave's safe deposit box. When Defendants sat down with Shirley to review the documents, Shirley did not act surprised by the contents of the documents and she did not indicate that she was forced to execute the same. In fact, in regard to a provision of Dave's Will that provides that each of his grandchildren shall receive the sum of

$2,000.00, she remarked that Dave included that provision because he liked a similar provision in her Will.

96. When Mr. Weibert died, his probate estate was worth $1,039,919.40 (amended inventory 2010 PR 8 Marion County District Court). His augmented estate was estimated at $3.5 Million by his executors.

CONCLUSIONS OF LAW

1. A premarital agreement is unenforceable if: 1) it was not voluntarily executed; or 2) that it was unconscionable at the time that it was executed and before execution of the agreement, such party was not provided a fair and reasonable disclosure of the assets of the other party, such party did not voluntarily and expressly waive right to disclosure of assets, and such party did not have, or reasonably could not have had, adequate knowledge of the assets of the other party. K.S.A. § 23-807.

2. A party challenging the validity of a premarital agreement bears the burden of proving his/her claim by clear and convincing evidence. See *In re Estate of Broadie*, 208 Kan. 621, 627, 193 P.2d 289, 295 (1972); In re *Estate of Brown*, 189 Kan. 193, 197, 368 P.3d 27, 33 (1962); and *In re Estate of Schippel*, 169 Kan. 151, 218 P.2d 192 (1950).

3. A premarital agreement will only be set aside on the grounds that it was involuntarily executed, upon a showing of fraud or undue influence. See *Davis v. Miller*, 269 Kan. 732, 741, 7 P.3d 1223, 1230 (2000). Fraud and undue influence must be shown by clear and convincing evidence. See *In re Estate of Farr*, 274 Kan. 51, 62-63, 49 P.3d 415,426 (2002); and *In Re Estate of Hessenflow*, 21 Kan.App.2d 761, 774, 909 P.3d 662, 671 (1995).

4. Clear and convincing evidence is that which is sufficient to establish that the truth of the facts asserted are "highly probable." *In the Interest of B.D.-Y.*, 286 Kan. 686, 696, 187 P.3d 594 (2008).

5. The character of clear and convincing evidence is a matter of quality. By clear and convincing evidence, it is meant that the witnesses shall be found to be credible, that the facts to which they testify are distinctly remembered and narrated exactly and in due order, and that their statements are true. *Fox v. Wilson*, 211 Kan. 563, 578, 507 P.2d 252 (1973).

6. To determine if the Premarital Agreement was executed voluntarily, the court must focus on the facts and circumstances surrounding the Premarital Agreement, including "the situation of the parties as compared to each other, such as their respective ages, educational

backgrounds, business experience, property, family ties and connections" *Davis*, 269 Kan. at 741. Additionally, the court should look at "the circumstances leading up to the execution of the Premarital Agreement and the marriage, including the timing of the presentation and execution of the agreement, who drafted the agreement, provisions for the dependent spouse, statements made by the party wanting the agreement, if there was independent legal counsel, and who was present at the time of execution."

7. Failure to disclose assets is not dispositive of the issue of the voluntariness of a premarital agreement. *Davis,* 269 Kan. at 741. A party to a premarital agreement does not need to provide an exact dollar amount for his/her property. *Davis*, 269 Kan. 743-45. Where a party is generally aware of the nature of the other party's property and was aware of the clear terms of the agreement, the premarital agreement will be held to have been voluntarily executed. See *In re Marriage of Adams*, 240 Kan. 315, 323, 729 P.3d 1151 (1986).

8. A consent to will/waiver of spousal right is unenforceable if: 1) it was not voluntarily executed; or 2) that it was unconscionable at the time that it was executed and before execution of the agreement, such party was not provided a fair and reasonable disclosure of the assets of the other party, such party did not voluntarily and expressly waive right to disclosure of assets, and such party did not have, or reasonably could not have had, adequate knowledge of the assets of the other party. See K.S.A. § 59-6a213.

9. A party challenging the validity of a consent and/or waiver of spousal rights bears the burden of proving his/her claim by clear and convincing evidence. When a consent to a will of a spouse is properly given, "ignorance or undue influence should clearly appear before such instrument is declared invalid." *In re Estate of Patzner*, 173 Kan. 133, 141 (1952) (emphasis added). It should appear by more than the mere testimony of an interested party.

10. Whether the Spousal Consent was voluntarily executed should be judged on whether it was freely and understandingly given at the time of execution. See e.g. *Younger v. Estate of Younger*, 198 Kan. 547, 551, 426 P.2d 67, 71 (1967); and *In re Estate of Ellis*, 168 Kan. 11, 29, 210 P.2d 417, 429 (1958).

11. If a review of the circumstances shows that "the consenting spouse was fully aware of the estate of the other, and of the disposition made in the will, knew for some period of time that the particular disposition was to be made, made no effort to inform herself, made no protest to documents of testamentary disposal and her consent thereto being prepared and

without any effort to ascertain her rights, executed the consent, it must be held either that she acted intelligently or that she was willing to act unintelligently." *Ellis*, 168 Kan. at 29.

12. Unconscionability is only an issue if there is a non-disclosure of assets. See *Davis*, 269 Kan. at 742. The standard of unconscionability is used to protect against one-sidedness, oppression, and unfair surprise. *Davis*, 269 Kan. at 742. In order to determine whether the agreement is unconscionable, the court may look to the economic circumstances of the parties resulting from the agreement, and any other relevant evidence such as the conditions under which the agreement was made, including the knowledge of the other party. If the court finds the agreement not unconscionable, its terms respecting property division and maintenance may not be altered by the court at the hearing. An agreement is not unconscionable unless there is some sort of deceptive practice associated with the agreement and the agreement is so unfair it shocks the conscience of the court. See *Aves v. Shah*, 258 Kan. 506, 520, 906 P.2d 642 (1995).

13. The crux of the inquiry concerning whether a premarital agreement was voluntarily executed focuses on "free choice." *Davis*, 269 Kan. at 741.

14. Lack of independent counsel does not indicate that a premarital agreement was involuntarily executed. See *In re Estate of Lutz*, 563 N.W.2d 90, 98 (N.D. 1997) (showing that no state requires independent counsel as a prerequisite for a premarital agreement being enforceable); See also *Matlock v. Matlock*, 223 Kan. 679, 576 P.2d 629 (1978); *In re Estate of Broadie*, 208 Kan. 621, 493 P.3d 289 (1972); *In re Estate of West*, 194 Kan. 736, 402 P.2d 117 (1965); *In re Estate of Gillen*, 191 Kan. 254, 380 P.2d 357 (1963); and *McCollum v. Mathews*, No. 62,441, 771 P.2d 561 (Kan.Ct.App. March 17, 1989)

15. Allegations relating to the affect of depression and/or medication on the voluntariness of the Premarital Agreement and consent to will must be presented through expert testimony. See *In re Estate of Cobb*, 91 P.3d 1254 (2004) (unpublished).

16. It is presumed that persons executing a premarital agreement and/or consent to will have read the document and know of its contents. See *Burns v. Spiker*, 109 Kan. 22, 27, 202 P. 370, 372 (1921).

17. To support a claim of fraud, clear and convincing evidence must be presented that a false statement of existing and material fact was made, that the maker knew to be false at the time it was made, or made it recklessly, with the intent of inducing another into executing a document and that such person reasonably relied on such false statement and incurred damages as a result. See *Nelson v. Nelson*, 288 Kan. 570, 583, 205 P.3d 715, 726 (2009). A statement of

future intent generally cannot be the basis of a fraud claim. *Edwards v. Phillips Petroleum Co.*, 187 Kan. 656, 659, 360 P.3d 23, 26 (1961).

18. To support a claim of undue influence, clear and convincing evidence must be presented evidencing coercion, compulsion, or constraint to such a degree that a person's "free will" to execute a document was destroyed. See *In re Estate of Farr*, 274 Kan. 51, 70, 49 P.3d 415, 430 (2002). The desire, motive, or opportunity to exercise undue influence does not demonstrate that undue influence occurred. See id. Legitimate influence is not improper and influence "obtained by kindness and affection will not be regarded as undue."

19. A presumption of undue influence will arise if a confidential relationship existed between the parties and there were suspicious circumstances involved in the execution of the document in question. See *In re Estate of Farr*, 274 Kan. 51, 70, 49 P.3d 415, 430 (2002).

20. A "confidential relationship exists whenever trust and confidence is reposed by the testator in the integrity and fidelity of another." See *In re Estate of Brown*, 230 Kan. 726, 732, 640 P.2d 1250, 1254 (1982). The mere relationship between a parent and a child and between spouses does not raise a presumption of a confidential and fiduciary relationship. See also *In re Estate of Draper*, 288 Kan. 510, 519, 205 P.3d 698 (2009). A confidential relationship is not presumed, and is a fact issue to be determined on a case by case basis. *Nelson v. Nelson*, 38 Kan.App.2d 64, 78, 162 P.3d 43, aff'd 288 Kan. 570 (2009). The burden of proving such a relationship existed rests upon the party asserting its existence.

21. The question of whether "suspicious circumstances" exist is also a question of fact determined on a case by case basis, and Kansas courts have declined to define the term. *Farr*, 274 Kan. at 72.

22. "… if any person successfully opposes the probate of any will or codicil, such person shall be allowed out of the estate his or her necessary expenses and disbursements in such proceedings, together with such compensation for such person's services and those of his or her attorneys as shall be just and proper." K.S.A. § 59-1504 (emphasis added).

23. Absent statutory authority, attorney fees should not be awarded in an action. See *In re Estate of Gardiner*, 29 Kan.App.2d 158, 161, 23 P.3d 902, 904 (2001).

DISCUSSION:

Dave Weibert and his first wife Doris were married for 55 years and had five children. Plaintiff, Shirley married Dave shortly after Doris died. He was 8 years older than her at the time of their marriage. Dave, during his life with Doris had accumulated a sizeable estate and, no doubt, wanted to make sure that the bulk of the estate went to his children from Doris. Thus, he decided to protect that wealth with a pre-marital agreement. Such agreements are common place this day and age whenever two persons meet late in life and are married to the spouse who did not mother or father their children. The law allows the agreement and strives to uphold it so long as there is compliance with the statute, that it is voluntary (no fraud or undue influence), and the agreement is not unconscionable. Here, the record does not convince the court that Shirley was coerced through undue influence to sign the document. Neither was the document unconscionable.

Unconscionability does not come into play, according to statute, unless a party not provided a fair and reasonable disclosure of the assets of the other party, such party did not voluntarily and expressly waive right to disclosure of assets, and such party did not have, or reasonably could not have had, adequate knowledge of the assets of the other party. K.S.A. § 23-807. Here, while Shirley may have been unaware of the value of the property, she was aware of the large amount of property that Dave had including 3 quarter sections of land. Thus she was generally aware that he was well-to-do and chose to enter into the agreement of her own free will.

Given the reason for premarital agreements and consents to wills that are made by older folks in second and sometimes third or fourth marriages, the court cannot say that the terms of the agreement or the consent shock its conscience. Granted, the will did not leave Shirley much, still it was none-the-less what was contemplated by the parties.

Other State courts have interpreted the Uniform Premarital act many times and have discussed the reasons for the agreements and have commented on the fact that the agreement is meant (usually) for a specific purpose, to protect the wealth of the wealthier partner. That type of reasoning should be adopted by the Kansas Courts also. *In re the Marriage of Susann Margreth Bonds and Barry Lamar Bonds. Susann Margreth Bbonds, Appellant, v. Barry Lamar Bonds, Supreme Court of California*, 24 Cal. 4th 1; 5 P.3d 815; 99 Cal. Rptr. 2d 252; 2000 Cal.

LEXIS 6117; also Estate of James Martin, Jr.. *Supreme Judicial Court of Maine* 2008 ME 7; 938 A.2d 812; 2008 Me. LEXIS 9.

It is easy indeed for the survivor to come into court after the death of the spouse and advance a theory that she had no knowledge of the contents of two documents she signed and that she was the victim of undue influence. This is particularly true when the children of the deceased knew very little about the person before they were married and the husband is obviously unavailable to appear and defend himself. That is why the burden is high as it should be on the party trying to set aside the agreement and consent. In this case however, the court's ruling herein would have been the same if the burden was by a preponderance of the evidence.

Wherefore, it is by the Court, Considered, Ordered and Decreed that Plaintiff's Petition for declaratory relief is denied and the prayer to invalidate the Pre-Marital Agreement and Consent to Will is likewise denied. Motion by plaintiff for attorney fees is likewise denied.

Costs are assessed to the Plaintiff, movant.

This decision shall serve as a final order and no further Journal Entry is required.

IT IS BY THE COURT SO ORDERED.

Dated:_____

_____
HONORABLE STEVEN HORNBAKER
District Judge

CERTIFICATE OF SERVICE

I, Lynn Hartung, hereby certify that a copy of the above and foregoing Memorandum Decision was delivered by First Class ail, postage prepaid, on the _____ day of July, 2011, 2011, addressed to: M

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_____
Lynn Hartung
Deputy Clerk