MARITAL PROPERTY AGREEMENTS: "AND YOU KNOW IT DON'T COME EASY"

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2009 STATE BAR OF TEXAS ANNUAL MEETING
FAMILY LAW SECTION
June 25, 2009

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The Supreme Court of the United States
The United States Courts of Appeals for the Fifth and Eighth Circuits
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Texas Super Lawyer 2003, 2004 & 2006 Family Law (Texas Monthly and Law & Politics magazine)

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Member, Professionals for Collaborative Family Law

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Co-Chair, Family Law on the Front Lines (University of Texas 2003, 2004, 2005, 2006 and 2007)

Associate Chair, Family Law on the Front Lines (University of Texas 2002)

Member, Planning Committee, Texas Academy of Family Law Specialists Trial Institute (2009)

Member, Planning Committee, Advanced Family Law Drafting Course (2008)

Member, Planning Committee, Advanced Family Law Course (2003 & 2007)

Member, Planning Committee, Family Law on the Front Lines (University of Texas 2001-2007)

Member, Planning Committee, The Ultimate Trial Notebook - Family Law (2000)

Member, Planning Committee, Fifth, Sixth, Ninth, Tenth, Eleventh and Thirteenth Annual Advanced Civil Appellate Practice Courses (1991-92, 1995-97, 1999)

Member, Editorial Board, APPELLATE ADVOCATE, State Bar Appellate Practice & Advocacy Section 1994-97

Member, Council, State Bar Appellate Practice & Advocacy Section 1995-1998

Member, Task Force on Staff Diversity, Texas Commission on Judicial Efficiency 1995-96

Chair, Civil Appellate Law Section, Austin Bar Association November 1991-1993, 1995-1997

Member, Austin Bar Association Board of Directors November 1991-1993, 1995-1997, 2006-2007

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Member, Travis County Family Law Advocates; President (2002-2003), Secretary/Treasurer (2001-2002)

Public Service Award, The Women's Advocacy Project (2003)

Member, Family Law Section Board of Directors, Austin Bar Association (2003-2007); Treasurer (2004-2005); President Elect (2005-2006); President (2006-2007)

Member, Planning Committee, Primer for Handling Civil Appeals, Travis County Bar Association, Austin 1995, 1996

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EDUCATION

Baylor University School of Law J.D., *cum laude* 1980

University of Texas B.A. 1974

SELECTED LAW RELATED PUBLICATIONS & PRESENTATIONS

"Marital Property Agreements: And You Know It Don't Come Easy," 2009 State Bar of Texas Annual Meeting, Dallas, Texas, June 2009.

"Different Ways to Trace Separate Property", New Frontiers in Marital Property Law, Napa, California, October 2008.

"The Marital Residence: There's No Place Like Home,"31st Marriage Dissolution Seminar, Galveston, Texas, April 2008.

"Dealing with Unusual Trusts", New Frontiers in Marital Property Law, Memphis, Tennessee, October 2007.

"Post Judgment Issues: Sometimes Its Heaven, Sometimes Its Hell, and Sometimes You Don't Even Know," 33rd Annual Advanced Family Law Course, San Antonio, Texas, August 2007.

"Issues in ADR,"30th Marriage Dissolution Seminar, El Paso, Texas, May 2007.

"Marital Property Agreements: Still Crazy After All These Years," 32nd Annual Advanced Family Law Course, San Antonio, Texas, August 2006.

"Temporary Orders: Yes, It's Really a Trial - How to Get Prepared," 32nd Annual Advanced Family Law Course, San Antonio, Texas, August 2006.

"Should the Abuse of Discretion Standard in Child Custody Cases Be Re-Examined?," APPELLATE ADVOCATE, State Bar Appellate Practice & Advocacy Section Vol. XVIII, No. 5 (Summer 2006)

"Witness Preparation," Family Law on the Front Lines, Galveston, Texas, June 2006.

"The 10 Biggest Mistakes Physicians Make in a Divorce", THE BIGGEST LEGAL MISTAKES THAT PHYSICIANS MAKE AND HOW TO AVOID THEM (SEAK, Inc. 2005).

"Family Law Case Update," 20th Annual Texas Association of Domestic Relations Offices Conference, Austin 2004.

"Family Law in Probate Court," Travis County Family Law Section, Austin 2004.

"Appeals and Mandamus - How to Repair Your Case and Prevent the Need for Repairs (or What to Do When Your Case is in the Ditch)", 29th Annual Advanced Family Law Course, San Antonio, Texas, August 2003.

"Early Stage Companies," Family Advocate, Vol. 25, No. 3, American Bar Association Winter 2003.

Obtaining and Retaining the Benefit of the Bargain- Premarital and Martial Agreements," New Frontiers in Marital Property Law, San Antonio, Texas October 2002.

"Business Interests: Characterization as Separate or Community Interests,"Expert Witness Manual, Volume I, Chapter 2-9, State Bar of Texas August 2002.

"Contesting and Defending Premarital Agreements", 28th Annual Advanced Family Law Course, Dallas, Texas, August 2002.

"Termination and Adoption: It Ain't Over Till It's Over", 28th Annual Advanced Family Law Course, Dallas, Texas, August 2002.

"High Tech Evidence: How to Find It, Retrieve It and Get It In", 28th Annual Advanced Family Law Course, Dallas, Texas, August 2002.

"Early-Stage Company Valuation"American Institute of Certified Public Accountants/American Academy of Matrimonial Lawyers National Conference, Las Vegas, Nevada, May 2002.

"Summary Judgments and Declaratory Judgments in Divorce", Marriage Dissolution Seminar, Austin, Texas, May 2002.

"Termination and Adoption: It Ain't Over Till It's Over", Marriage Dissolution Seminar, Austin, Texas, May 2002.

"Child Support Collection: A Practical Guide to the Opportunities and Pitfalls in Enforcing and Defending Child Support Obligations," Family Law on the Front Lines, Galveston, Texas, April 2002.

"Valuation of Law Practice in Divorce," American Academy of Matrimonial Lawyers, Sanibel, Florida March 2002.

"Valuation, Characterization and Division of Unusual Assets", New Frontiers in Marital Property Law, Santa Fe, New Mexico, October 2001.

"Professional Partings: Valuing Medical/Legal Professional Practices", 27th Annual Advanced Family Law Course, San Antonio, Texas, August 2001.

"Valuing and Dividing the Community Business, Marriage Dissolution Seminar, Corpus Christi, Texas, May 2001.

"Interaction of Probate Court and Family Law," Family Law on the Front Lines, Galveston, Texas, April 2001.

"Bottom Line Appellate Issues," Ultimate Trial Notebook: Family Law, New Orleans, Louisiana, December 2000.

"Pretrial and Trial Strategies for the Complex Property Case", Santa Fe, New Mexico, October 2000.

"Representing the High Tech Entrepreneur: IPO's, Venture Capitalists and Beyond", 26th Annual Advanced Family Law Course, San Antonio, Texas, August 2000.

"Family Law Court v. Probate Court: What Every Family Lawyer Should Know", 26th Annual Advanced Family Law Course, San Antonio, Texas, August 2000.

"Bill of Review", 23rd Annual Marriage Dissolution Institute, Ft.Worth, Texas, May 2000

"Appellate Tips: Judges Panel", 23rd Annual Marriage Dissolution Institute, Ft.Worth, Texas, May 2000

"Fiduciary Duties of Spouses and Non-Physical Torts", International Academy of Matrimonial Lawyers, Palm Beach, Florida, March 2000.

Internal Procedures in the Texas Supreme Court Revisited: The Impact of the Petition for Review and Other Changes, 31 TEX. TECH L. REV. 63 (2000)

"Strategic Use of Law Beyond the Family Code", New Frontiers in Marital Property Law, San Diego, California, October 1999.

"Trends in Preservation of Error (At Trial, Charge, and Post Verdict)", 13th Annual Advanced Civil Appellate Practice Course, State Bar of Texas, Austin, Texas, October 1999.

"The Appellate Process-the Good, the Bad, and the Ugly", 25th Annual Advanced Family Law Course, Dallas, Texas, August 1999.

"Litigating Marital Agreements: "You can't always get what you want....",22nd Annual Marriage Dissolution Institute, San Antonio, Texas, May 1999.

"Fiduciary Duties of Spouses, Effective Use of the Remedy of the Constructive Trust, Recoveries for Violations of These Duties, and Issues Presented When Spouses are under Conflicting Fiduciary Duties," New Frontiers in Marital Property Law, Sante Fe, New Mexico October 1998

"Appeal of the Coverage Suit," Third Annual Insurance Law Institute (University of Texas School of Law, October 1998) (panelist/speaker and co-author);

"The New Appellate Rules -- At Last!" Eleventh Annual Advanced Civil Appellate Practice Course, Dallas September 1997 (speaker and author);

GUIDE TO THE NEW RULES OF APPELLATE PROCEDURE (State Bar of Texas 1997) (contributing author);

Motion Practice in the Texas Supreme Court, 59 TEX. B. J. 846 (October 1996)

"Factual and Legal Sufficiency in the Texas Supreme Court," Tenth Annual Advanced Civil Appellate Practice Course, Austin 1996 (co-author)

"Inside the Texas Supreme Court," Ninth Annual Advanced Civil Appellate Practice Course, San Antonio 1995 (moderator and author)

Internal Procedures in the Texas Supreme Court, 26 TEX. TECH L. REV. 935 (1995)

"Internal Procedures and Motion Practice in the Supreme Court," Seventh Annual Advanced Civil Appellate Practice Course, Austin 1993 (speaker and author)

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of Preeminent Lawyers

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Member, Planning Committee, Family Law on the Front Lines (University of Texas 2005, 2006, 2007)

Member, Planning Committee, Marriage Dissolution Institute (State Bar of Texas 2006, 2007, 2008)

Member, Planning Committee, Advanced Family Law Seminar (State Bar of Texas 2006)

Texas Academy of Family Law Specialists Board of Directors (Class of 2007)

Member, Texas Academy of Family Law Specialists

Member, Travis County Family Law Advocates

Public Service Award, The Women's Advocacy Project (2003)

Travis County Women Lawyers

Member, Family Law Section Board of Directors, Austin Bar Association (2001-present); Treasurer (2003-2004); President Elect (2004-2005); President (2005-2006)

Member, Austin Bar Association Board of Directors (2005-2006)

Texas Bar Foundation

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Checklist Committee of the State Bar Family Law Section

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Member, District 9A Grievance Committee (1998-2002)

Member, Robert W. Calvert Inn, American Inns of Court (1995-1997)

Instructor, Family Law Section, University of Texas Legal Assistant Program (1997-1998)

EDUCATION

Whittier College School of Law J.D. 1992

Texas A&M University B.S. 1982

SELECTED LAW RELATED PUBLICATIONS & PRESENTATIONS

"Conservatorship: What's the Fight About?," 31st Annual Marriage Dissolution Institute, Galveston, Texas, April 2008.

"Homestead: What you Need to Know in the 21st Century," 31st Annual Marriage Dissolution Institute, Galveston, Texas, April 2008.

Predicates, Making and Meeting Objections, Trial of a Family Law Jury Case, Kerrville, Texas, December 2007.

"Standing," 33rd Annual Advanced Family Law Course, San Antonio, Texas, August 2007.

"Post Judgment Issues: Sometimes Its Heaven, Sometimes Its Hell, and Sometimes You Don't Even Know," 33rd Annual Advanced Family Law Course, San Antonio, Texas, August 2007.

"Proving Economic Contribution and Reimbursement Claims," 30th Annual Marriage Dissolution Institute, El Paso, Texas, May 2007.

"Tips for Keeping the Presentation of Your Case Straightforward," Family Law on the Front Lines, Galveston, June 2006.

"Practical Tips for Proving Tracing, Economic Contribution and Reimbursement," Austin Bar Association Bench Bar Conference, April 2006.

"Factors and Issues Judges Use in a SAPCR Case," 29th Marriage Dissolution Institute, Austin, April 2006.

"Property Issues and Closing the Case,"Annual Divorce Basics Seminar, Austin, December 2005.

"Business Evaluation in Small Estates," Family Law on the Front Lines, Galveston, Texas, June 2005.

"Judges' Panel," Family Law on the Front Lines, Galveston, Texas, June 2005 (moderator).

"Across the Divide: Trial Techniques for Family Lawyers," Austin Bar Association Bench Bar Conference 2005

"The 10 Biggest Mistakes Physicians Make in a Divorce", THE BIGGEST LEGAL MISTAKES THAT PHYSICIANS MAKE AND HOW TO AVOID THEM (SEAK, Inc. 2005).

"Responding to a Grievance," Travis County Bar Association Family Law Section Luncheon, Austin, Texas, September 2003.

"Children Inside Wedlock/Outside Wedlock," 16th Annual Marriage Dissolution Institute Houston, Texas, May 2003.

"I've got a Divorce in My Guardianship Case!" Guardianship and Advanced Elder Law Course Dallas, Texas, March 2003.

"Family Limited Partnership Basics," State Bar Section Report: Family Law, Volume 2000-2, Spring 2000.

"Summary of the 1999 Amendments to the Texas Family Code," Legal Assistant U, San Antonio, Texas, September 1999.

"Playing By the Rules: Recent Changes in the Rules of Evidence and Discovery," 1998 Winning Techniques in Family Law Litigation.

"Discovery Objections: The Good, the Bad and the Frivolous," 24th Annual Advanced Family Law Course, Dallas, Texas, August 1998.

"Analysis of the Law and Key Issues and Procedures in the Divorce Process," 1998 Texas Family Law Practice for Paralegals.

"Avoiding a Grievance, or When that Fails, Practical Tips for Responding,"1998 Travis County Bar Association Family Law Seminar.

"Ethical Considerations When Leaving a Law Firm," 1993 Travis County Bar Association Moving Up or Moving Out Seminar.

"Ethics in Litigation: A Hitchhiker's Guide," 1993 University of Houston Law Foundation Advanced Civil Litigation Course.

Table of Contents

MARITAL PROPERTY AGREEMENTS: "AND YOU KNOW IT DON'T COME EASY"

I. INTRODUCTION

This article discusses the theoretical and practical concerns involved in negotiating premarital and marital agreements and in litigating disputed premarital and marital agreements. Accordingly, issues treated herein include prelitigation matters, such as drafting and negotiation tactics, and litigation matters, such as pleadings, discovery, and disposing of or enforcing the agreement, whether during pretrial summary judgment or at trial.

II. GENERAL OVERVIEW

A. Historical Development

Although Texas has retained the basic features of the community property system rooted in its Mexican and Spanish heritage, Texas marital property law has been changed numerous times as a result of constitutional amendments, legislative enactments, and judicial decisions. *Winger v. Pianka*, 831 S.W.2d 853, 854 (Tex. App.–Austin 1992, writ denied), *citing,* Thomas M. Featherston, Jr. & Julie A. Springer, *Marital Property Law in Texas: The Past, Present and Future*, 39 BAYLOR L.REV. 861, 862 (1987). Historically, neither married persons nor persons about to marry could not by "mere agreement" convert the character of income or community property into separate property. *Williams v. Williams*, 569 S.W.2d 867, 870 (Tex. 1978) (superceded on other grounds by constitutional amendment).

In 1948, however, art. XVI, §15 of the Texas Constitution was amended, making it possible for ***spouses*** to partition their existing community property. *See, Winger*, 831 S.W.2d at 854 (emphasis added). However, in *Williams*, 569 S.W.2d at 870, the Texas Supreme Court held that a ***premarital*** agreement that attempted to recharacterize income or property acquired during marriage as separate property was "void" under the 1948 amendment.

In 1980, the Texas Constitution again was amended, authorizing spouses, as well as ***persons about to marry***, to partition or exchange their interests in property then existing or to be acquired in the future. *See, Winger*, 831 S.W.2d at 854 (emphasis added).

In *Beck v. Beck*, 814 S.W.2d 745, 749 (Tex. 1991), *cert. denied*, 503 U.S. 907 (1992), the Texas Supreme Court reviewed the history of art. XVI, §15, stating that "...one purpose of the [1980] amendment was to uphold the intentions of spouses who entered into premarital agreements before 1980...and to supersede the effect of this court's decision in *Williams*...." Further, Justice Cornyn, writing for the court, noted that, when the Texas Legislature originally proposed the adoption of the Spanish model of community property laws, it failed to include a constitutional provision incorporating the Spanish rule that future spouses could contract to recharacterize their property as they desired. *Id.* at 749. Thus, in *Beck,* 814 S.W.2d at 749, the Texas Supreme Court concluded:

> We hold that the 1980 amendment to article XVI, section 15, of the Texas Constitution demonstrates an intention on the part of the legislature and the people of Texas to not only authorize future premarital agreements, but to impliedly validate [former] section 5.41 of the Texas Family Code and all premarital agreements entered into before 1980 pursuant to that statute. The legislature and the people of Texas have made the public policy determination that premarital agreements should be enforced.

Prior to September 1987, section 5.45 of the Texas Family Code provided that "[i]n any proceeding in which the validity of a provision of an agreement, partition, or exchange agreement made under this subchapter is in issue as against a spouse..., the burden of showing the validity of the provision is on the party who asserts it. The proponent of the agreement, partition, or exchange agreement...has the burden to prove by clear and convincing evidence that the party against whom enforcement of the agreement is sought gave informed consent and that the agreement was not procured by fraud, duress, or overreaching." Act of June 18, 1987, 70th Leg., R.S. ch. 679, 187 Tex. Gen. Laws 2530-2533. *See, Williams v. Williams*, 720 S.W.2d 246, 248 (Tex. App.—Houston [14th Dist.] 1986, no writ). TEX. FAM. CODE §5.45 (repealed).

Effective September 1, 1987, section 5.45 was replaced by section 5.55, which is identical to sections 4.006 and 4.105, except that it did not

include sections 4.006(c) and 4.105(c). Act of June 18, 1987, 70th Leg., R.S. ch. 679, 187 Tex. Gen. Laws 2530-2533. With that new legislation, significantly, the burden of enforcement of a marital property agreement shifted from the proponent to the opponent of an agreement. *Id. See, e.g., Pearce v. Pearce*, 824 S.W.2d 195, 197-198 (Tex. App.-El Paso 1991, writ denied).

In 1993, apparently in response to *Daniel v. Daniel*, 779 S.W.2d 110 (Tex. App.--Houston [1st Dist.] 1989, no writ), sections 4.006(c) and 4.105(c) was added to sections 4.006 and 4.105. The Bill Analysis of House Bill 1274 (which eventually became section 4.105(c)) stated that "[i]t is apparently unclear whether the statutory defenses and remedies to such agreements are the only remedies and defenses available." The purpose of House Bill 1274 was to clarify "existing law on the enforcement of certain premarital and marital agreements by explicitly stating that remedies for violations of and defenses to such agreements which are listed by statute are the exclusive remedies and defenses available." House Comm. On Judicial Affairs, Bill Analysis, Tex. H.B. 1274, 73rd Leg., R.S. (1993).

B. Constitutional and Statutory Authority

Both premarital and marital property (postmarital) agreements are authorized by the Texas Constitution and by the Texas Family Code. In pertinent part, TEX. CONST. Art. XVI, §15, provides:

> ...that persons about to marry and spouses, without the intention to defraud pre-existing creditors, may by written instrument from time to time partition between themselves all or part of their property, then existing or to be acquired, or exchange between themselves the community interest of one spouse or future spouse in any property for the community interest of the other spouse or future spouse in other community property then existing or to be acquired, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property and estate of such spouse or future spouse; spouses also may from time to time, by written instrument, agree between themselves that the income or property from all or part of the separate property then owned or which thereafter might be acquired by only one of them, shall be the separate property of that spouse....

The Texas Family Code also specifically provides for, and controls, both premarital and marital property agreements.

1. Premarital Agreements

Subchapter A of Chapter 4, Texas Family Code, entitled "Uniform Premarital Agreement Act," reflects the fact that Texas is one of the states that have enacted the Uniform Premarital Agreement Act.

Under the Texas Family Code, a "premarital agreement" is defined as "an agreement between prospective spouses made in contemplation of marriage and to be effective on marriage." TEX. FAM. CODE §4.001(1); *see also,* TEX. FAM. CODE §4.004 ("[a] premarital agreement becomes effective on marriage"); *Ahmed v. Ahmed*, 261 S.W.3d 190,194 (Tex. App.–Houston [14th Dist.] 2008, no pet.) (trial court erred by enforcing an Islamic marriage contract signed after a civil ceremony, but prior to a religious ceremony, as a premarital contract because the parties were already spouses and not prospective spouses). Although the issue has not been decided in Texas, and is not expressly addressed in any statute, the Official Comments to the Uniform Premarital Agreement Act indicate that a ceremonial marriage is required before a premarital agreement falls under the statute. *See,* Harry L. Tindall & Angela G. Pence, *Premarital and Marital Property Agreements* at 1-2, ADVANCED FAMILY LAW COURSE (San Antonio 2001). Additionally, if a marriage is determined to be void, an agreement that would otherwise have been a premarital agreement is enforceable only to the extent necessary to avoid an inequitable result. TEX. FAM. CODE §4.007.

For the purposes of a premarital agreement, "'Property,' means an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings." TEX. FAM. CODE §4.001(2). Texas law defines "property" very broadly to include every species of

valuable right and interest. *Winger v. Pianka*, 831 S.W.2d 853, 857 (Tex. App.-Austin 1992, writ denied).

As for formalities, the Texas Family Code requires only that the premarital agreement be in writing and signed by both parties; consideration is specifically not required, as provided by the statute. TEX. FAM. CODE §4.002.

Section 207.2A of the TEXAS PATTERN JURY CHARGES-FAMILY (2008) provides: "A premarital agreement is an agreement between prospective spouses made in contemplation of marriage and to be effective on marriage. A premarital agreement must be in writing and signed by both parties." *See* TEX. FAM. CODE §§4.001, 4.002.

Parties to a premarital agreement may contract with respect to a number of matters, including:

> (1) the rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;
>
> (2) the right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
>
> (3) the disposition of property on separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;
>
> (4) the modification or elimination of spousal support;
>
> (5) the making of a will, trust, or other arrangement to carry out the provisions of the agreement;
>
> (6) the ownership rights in and disposition of the death benefit from a life insurance policy;
>
> (7) the choice of law governing the construction of the agreement; and
>
> (8) any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.

TEX. FAM. CODE §4.003(a). However, and significantly, the Texas Family Code provides that the right of a child to support may not be "adversely affected" by a premarital agreement. TEX. FAM. CODE §4.003(b).

After marriage, a premarital agreement may be amended or revoked only by a written agreement signed by the parties. TEX. FAM. CODE §4.005. The amended agreement or the revocation is also enforceable without consideration. *Id.*

2. Property Agreements Ratifying Premarital Agreements

It is customary that spouses sign a "Property Agreement" which ratifies the Premarital Agreement, reaffirms that income arising from the separate property of the spouses remains separate property (if the parties have so agreed), and reaffirms the waiver of a spouse's interest in the other spouse's retirement benefits. It is particularly important to reaffirm the waiver of a spouse's interest in the other spouse's retirement benefits. Whether a party can effectively waive their rights in retirement plans subject to ERISA in a premarital agreement is an open question in Texas. In other words, does one have to be a "spouse" to waive his or her rights in retirement plans subject to ERISA. In addition, it is important to reaffirm that income arising from the separate property of the spouses remains separate property (if the parties have so agreed) because the law regarding the ability of persons about to marry to recharacterize income from separate property as separate property is somewhat unsettled in Texas.

a. Retirement Plans Subject to ERISA

(1) Argument That Only Spouses Can Waive Rights in Retirement Plans Subject to ERISA

Congress passed ERISA in 1974 to establish a comprehensive federal scheme for the protection of the participants and beneficiaries of employee benefit plans. *See* 29 U.S.C. § 1001; *see also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 1551 (1987). ERISA broadly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29

U.S.C. § 1144(a); see also *Manning v. Hayes*, 212 F.3d 866, 870 (5th Cir. 2000). A law "relates to" an employee benefit plan when the law has "a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 2896 (1983). The scope of the ERISA preemption provisions is "deliberately expansive," and they are consistently construed to accomplish the congressional purpose of insuring certain minimum standards in the administration of employee benefit plans. *See Pilot Life Ins. Co.*107 S.Ct. at 1522. There is no doubt that ERISA governs Husband's 401k plan.

Under ERISA, every plan must provide a joint and survivor annuity to the spouse on the "annuity starting date" or a "qualified preretirement survivor annuity" if the spouse dies before that date (29 U.S.C. § 1055[a] [1] and [2]). Although ERISA does not specifically address premarital agreements, it does set out quite plainly the requirements for an effective spousal waiver of benefits. *Hurwitz v. Sher,* 982 F.2d 778, 780 (2d Cir. 1992). The statute provides that a spouse may waive her right to benefits under a covered plan only if: (1) "the spouse of the participant consents in writing to such election," (2) such election "designates a beneficiary (or a form of benefits) which may not be changed without spousal consent..., and (3) the spouse's consent acknowledges the effect of such election and is witnessed by a plan administrator or notary public. (29 U.S.C. § 1055(c)(2)(A). Based upon the language of the statute, a spouse's interest in plan benefits may be waived only by the participant's "spouse." Thus, any provisions of premarital agreements are insufficient to waive the spouse's rights because, by definition, parties to a premarital agreement are not spouses at the time the agreement is signed. *John Deer Deferred Savings Plan v. Propst*, 2007 WL 4594681 at *3 (E.D. Wis. 2007); *Hagwood v. Newton*, 282 F.3d 285, 290 (5th Cir. 2002); *Hurwitz v. Sher,* 982 F.2d 778, 780 (2d Cir. 1992).

The conclusion that a premarital agreement cannot serve as a valid waiver of spousal rights as required by 29 U.S.C. § 1055(c) is further confirmed by the Internal Revenue Service's similar conclusion with respect to the identical requirements in the Internal Revenue Code provisions of ERISA. *John Deer Deferred Savings Plan*, 2007 WL 4594681 at *4; *Hagwood v. Newton*, 282 F.3d at 290; *Hurwitz v. Sher,* 982 F.2d at 782. With the adoption of ERISA, Congress enacted mirror image counterparts for the Internal Revenue Code to encourage employers, through tax benefits, to establish qualifying pension plans. The provisions of 29 U.S.C. § 1055(c) are repeated in 26 U.S.C. § 417(a) and the Secretary of the Treasury adopted regulations interpreting § 417(a). The Treasury Regulations specifically address premarital agreements:

> Q-28 Does consent contained in an antenuptial agreement or similar contract entered into prior to marriage satisfy the consent requirements of section 401(a)(11) and 417 [of the Internal Revenue Code]?
>
> A-28 No. An agreement entered into prior to marriage does not satisfy the applicable consent requirements....

Treasury Regulation § 1.401(a-20). Because the Internal Revenue Service is an agency "entrusted to administer" the tax counterpart of ERISA, its interpretation of 26 U.S.C. § 417(a) is entitled to deference. *John Deer Deferred Savings Plan*, 2007 WL 4594681 at *4; *Hagwood v. Newton*, 282 F.3d at 290; *Hurwitz v. Sher,* 982 F.2d at 782.

Numerous federal courts have concluded that a party may not waive ERISA rights in a premarital agreement. See *John Deer Deferred Savings Plan v. Propst*, 2007 WL 4594681 (E.D. Wis. 2007) (holding that "an antenuptial agreement is insufficient to waive a spouse's rights under ERISA"); *Hagwood v. Newton*, 282 F.3d 285 (5th Cir. 2002) (holding that the premarital agreement "does not fulfill the requirements of 29 U.S.C. § 1055(c) because it was executed by parties who were not married and because § 1055 requires that a spouse who actually has, by marriage, the statutory benefit conferred by § 1055(a) waive the right by executing a formal consent form."); *National Automobile Dealers & Assocs. Retirement Trust v. Arbeitman*, 89 F.3d 496 (8th Cir. 1996) (holding that an agreement "signed before the marriage failed to satisfy the waiver requirements of ERISA"); *Hurwitz v. Sher,* 982 F.2d 778 (2d Cir. 1992) (holding that "antenuptial agreements lacking ERISA waiver requirements do not constitute effective waivers under ERISA"); *Ford Motor Co. v. Ross*, 129 F.Supp.2d 1070 (E.D. Mich. 2001) (holding that "premarital agreement cannot be used to circumvent ERISA's spousal waiver requirements"); *Zinn v. Donaldson Co.*, 799 F.Supp.

69 (D. Minn. 1992) (holding the premarital agreement insufficient to waive spouse's rights under ERISA because it was executed prior to the marriage).

One of our sister states has considered this question. In *Richards v. Richards*, 640 N.Y.S.2d 709 (N.Y. Sup. 1995), *aff'd*, 649 N.Y.S. 2d 589 (N.Y. App. Div. 1996), the question was whether the wife was barred from an equitable distribution of the husband's pension and retirement plan as a result of her execution of a premarital agreement. Prior to marriage, husband and wife signed a premarital agreement that specifically waived their rights in the other person's pension. After the parties' married, the wife did not execute and consent to waive her rights to the retirement plans. The Appellate Court, relying upon the holding in *Hurwitz v. Sher,* 982 F.2d 778 (2d Cir. 1992) including the Treasury Regulations cited therein, held that under ERISA, (29 U.S.C. § 1055(c)(2)(A)(i)), and the Internal Revenue Code, (29 U.S.C. § 417(a)(2)(A)(i)), only a spouse can waive spousal rights to employee plan benefits, that a fiancee is not a spouse, and that such rights, therefore, cannot be effectively waived in a premarital agreement.

(2) Argument That Party Can Effectively Waive Their Rights in Retirement Plans Subject to ERISA in a Premarital Agreement

The central question in regard to federal preemption is whether "state law conflicts with the provisions of ERISA or operates to frustrate its objects." *Boggs v. Boggs,* 520 U.S. 833, 841, 117 S.Ct. 1754, 138 L.Ed.2d 45 (1997). ERISA's general pre-emption clause, 29 U.S.C. § 1144(a), provides that the Act "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan ...." "Initially, the Supreme Court interpreted ERISA's pre-emption statute as creating a 'deliberately expansive' pre-emption of state law." *Emard v. Hughes Aircraft Co.,* 153 F.3d 949, 953 (9th Cir. 1998) (citation omitted). "Recently, 'the Court has come to recognize that ERISA pre-emption must have limits when it enters areas traditionally left to state regulation.' " *Id.* (citations omitted). Domestic relations is an area of law usually governed by state law, and general legislation enacted by Congress rarely attempts to displace the authority of the state in this area. *Mansell v. Mansell,* 490 U.S. 581, 587, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989). *See Manning v. Hayes*, 212 F.3d 866, 872 (5th Cir. 2000) ("The law of family relations, which includes an individual's right to expressly apportion property upon divorce, has traditionally been a fairly sacrosanct enclave of state law."). "On the rare occasion when state family law has come into conflict with a federal statute, the United States Supreme Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be preempted." *Rahn v. Rahn,* 914 P.2d 463, 466 (Colo. Ct. App. 1995) (citing *Rose v. Rose,* 481 U.S. 619, 107 S.Ct. 2029, 95 L.Ed.2d 599 (1987)). Moreover, 29 U.S.C. § 1056(d)(3)(B)(i)(1) of ERISA expressly defers to state domestic relations law to define a spouse's property rights in the event of divorce.

ERISA was passed by Congress as a federal regulatory scheme to govern employee benefit plans by providing standards for the establishment, operation and administration of these plans so as to ensure their financial soundness for employees. 29 U.S.C. § 1001(a). ERISA prohibits the alienation or assignment of benefits because the statute was designed with the main purpose of protecting the interests of plan participants and their beneficiaries by minimizing the dissipation of pension funds. 29 U.S.C. § 1001(b); *see also Boggs,* 520 U.S. at 845, 117 S.Ct. 1754. The United States Supreme Court states that "ERISA does not confer beneficiary status on ... [former spouses] by reason of their marital ... status." *Boggs,* 520 U.S. at 847, 117 S.Ct. 1754. Instead, "ERISA confers beneficiary status on a nonparticipant spouse ... in only narrow circumstances delineated by its provisions." *Id.* at 846, 117 S.Ct. 1754. The protections afforded to spouses of plan participants are found in two ERISA provisions: (1) the qualified joint and qualified pre-retirement survivor annuity (survivor annuity); and (2) the qualified domestic relations order (QDRO) proviso, which is exempt from ERISA's anti-alienation provision, 29 U.S.C. § 1056(d)(3)(A), and general preemption clause, 29 U.S.C. § 1144(b)(7). *Boggs,* 520 U.S. at 846, 117 S.Ct. 1754. "The QDRO and the surviving spouse annuity provisions define the scope of a nonparticipant spouse's community property interest in pension plans consistent with ERISA." *Id.* at 850, 117 S.Ct. 1754. The ERISA surviving spouse annuity and related protections are inapplicable to a former wife in the context of a divorce. *See id.* at 843, 117 S.Ct. 1754 (commenting that "the statutory object of the qualified joint and survivor annuity provisions, along with the rest of [29 U.S.C.] § 1055, is to ensure a stream of income to *surviving* spouses") (emphasis added).

Furthermore, "[t]he terms 'qualified joint and survivor annuity' and the 'qualified preretirement survivor annuity' are terms defined by the statute which, without setting forth definitions, refer to a person who was the spouse of the participant at the time of the participant's death." *Rahn,* 914 P.2d at 465; 29 U.S.C. § 1055(d), (e). "ERISA provides explicit requirements for a spouse's waiver of rights to the 'qualified joint and survivor annuity' and the 'qualified preretirement survivor annuity' in a qualified plan." *Rahn,* 914 P.2d at 465. The surviving spouse annuity cannot be waived unless certain requirements are met: (1) that the spouse consents in writing; (2) that a beneficiary (or form of benefits) is designated which cannot be changed without spousal consent (unless the spouse expressly consents to permit future designations by the participant); and (3) the spouse's consent is witnessed by a plan representative or notary public, 29 U.S.C. § 1055(c)(2)(A)(1). "ERISA also requires the consent of a current spouse for the withdrawal of the present value of a 'qualified joint and survivor annuity' or a 'qualified preretirement survivor annuity.'" *Rahn,* 914 P.2d at 466; 29 U.S.C. § 1055(g). However, these mandatory consent requirements for the waiver of pension benefits do not apply to divorced spouses.

The plain language of the statute creates a dichotomy between current spouses who are potentially surviving spouses and former spouses. ERISA provides only one mechanism to vindicate the rights of a former spouse at the time of divorce, the QDRO procedure set forth in 29 U.S.C. § 1056(d)(3). Although ERISA is silent on the issue of the validity of a former spouse's waiver of a property interest in a participant's pension benefits by a prenuptial agreement, the statute clearly expresses that the division of marital property upon divorce is subject to state law by the court's entry of a QDRO:

> (B)For purposes of this paragraph-
> (i) the term "qualified domestic relations order" means a domestic relations order-
> (I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, ...
> (ii) the term "domestic relations order" means any judgment, decree, or order (including the approval of a property settlement agreement) which-
> (I) relates to the provision ... [of] marital property rights to a spouse [or] former spouse ... and
> (II) is made pursuant to a State domestic relations law (including community property law).

29 U.S.C. § 1056(d)(3)(B)(i), (ii).

In *Boggs,* the Court expressed that "the QDRO provisions address the rights of divorced and separated spouses, ... which are the traditional concern of domestic relations law." 520 U.S. at 849, 117 S.Ct. 1754. Here, Congress sought to protect divorcing wives by allowing, but not requiring, state law to circumvent ERISA's anti-alienation election by designating the former spouse as an alternate payee and providing her with an interest in the participant's pension benefits. *See Boggs,* 520 U.S. at 839, 117 S.Ct. 1754. ERISA does not insist that a state court recognize a former wife as an alternate payee to an interest in her spouse's pension, but only yields to the prerogative of state law to do so.

Several of our sister states have considered this question. In *Rahn v. Rahn,* 914 P.2d 463 (Colo. Ct. App. 1995), the Colorado Court of Appeals concluded that ERISA's consent requirements relate to the waiver of survivor benefits only, and the statute is "silent as to the waiver of other types of pension benefits." 914 P.2d at 465. In reaching its decision, the Court reasoned that the "[d]issolution of marriage proceedings, by definition, terminate the statute of the spouse prior to the death of the participant, thereby, also by definition, disqualifying that spouse from being, or ever becoming, a surviving spouse[;]" and "the [consent] restrictions of 29 U.S.C. § 1055(c)(2)(A) are designed to protect a surviving spouse, not a ... former spouse." *Id.* at 466-68.

In *Edmonds v. Edmonds,* 184 Misc.2d 928, 710 N.Y.S.2d 765 (2000), the parties entered into an antenuptial agreement two days prior to their marriage. The agreement provided that each party would have the exclusive right to dispose of any and all property of whatever nature which he or she "now owns or is possessed of, or may hereafter acquire, or receive, as his or her own absolute property in like manner as if he or she had remained unmarried." It also provided that any property acquired in their joint names after the marriage

would be divided equally between the parties in the event of a divorce. The parties waived their rights to an equitable distribution in the event of a divorce. At the time the agreement was executed, wife was employed by Bell Atlantic and had accrued a pension. Wife remained with Bell Atlantic, with her pension increasing in value during the marriage. She also participated in a retirement and savings plan through her employer. Wife eventually filed for divorce. Husband sought a determination that wife's pension and deferred compensation plan are marital assets subject to equitable distribution. The court concluded that husband waived his interest in wife's pension by a valid prenuptial agreement and that such pension was therefore not subject to equitable distribution. "Apart from the survivor benefit of REA [the Retirement Equity Act of 1984], ERISA does not mandate that other benefits be provided to a participant's spouse. In fact, ERISA expressly prohibits alienation of benefits by the plan participant, except by a Qualified Domestic Relations Order (QDRO) issued by a state court in a matrimonial action under the State's domestic relations law (29 USC § 1056[d]). ERISA creates no substantive rights in the case of divorce, but only accommodates, by the provisions governing QDRO's, rights created by state matrimonial law.

In *Stewart v. Stewart,* 141 N.C.App. 236, 541 S.E.2d 209 (2000), the parties signed a written premarital agreement on June 25, 1992. The parties separated in January 1998. In February 1998, plaintiff-wife brought an action seeking an equitable distribution. Defendant-husband pled that the terms of the agreement barred wife's claims. The parties did not dispute the existence or validity of the agreement. In July 1999, the trial court granted partial summary judgment in favor of husband on wife's claims for equitable distribution of certain property excluded by the terms of the agreement, specifically the parties' respective retirement accounts. Wife appealed. The North Carolina Appellate Court determined that the spousal benefit waiver requirements outlined in 29 U.S.C. § 1055(c)(2) are limited to survivor benefits and do not apply to a waiver of an interest in a spouse's pension plan as such interest arises under state law. 541 S.E.2d at 216. The court then concluded that the unambiguous language of the parties' agreement provided that the parties' retirement accounts were to remain their separate property and that the waiver was valid under North Carolina state law as well as ERISA. *Id.*

Accord Critchell v. Critchell, 746 A.2d 282, 286 (D.C. App. 2000) ("Nothing in the plain language of ERISA, nor case law, suggests that a former spouse is unable to waive her property interest in her husband's pension at the time of divorce. To the contrary, ERISA only details that a survivor's annuity may not be waived, but the statute is purposefully silent and does not demand the same safeguards for former spouses. Importantly, ERISA does not create or afford a former spouse any substantive rights, and a divorcing spouse's right to a property interest in pension benefits arises only by operation of state marital property law."); *Sabad v. Fessenden*, 825 S.2d 682, 697 (Pa. Super. Ct. 2003); *Savage-Keough v. Keough*, 861 A.2d 131, 137-38 (N.J. Super. Ct. App. Div. 2004).

(3) Conclusion: Be Cautious and Prudent

Since whether a party can effectively waive their rights in retirement plans subject to ERISA in a premarital agreement is an open question in Texas, you should exercise caution and prudence and insist that the spouses sign a "Property Agreement" which reaffirms the waiver of a spouse's interest in the other spouse's retirement benefits.

b. Character of Income from Separate Property

The law regarding the ability of persons about to marry to recharacterize income from separate property as separate property may be somewhat unsettled in Texas.

The Texas Constitution specifically authorizes persons about to marry to partition or exchange property. *See* TEX. CONST. art. XVI §15. The Texas Constitution provides that persons about to marry may:

> partition between themselves all or part of their property, then existing or to be acquired, or exchange between themselves the community interest of one spouse or future spouse in any property for the community interest of the other spouse or future spouse in other community property then existing or to be acquired.

TEX. CONST. art. XVI §15.

This provision has been interpreted by Texas courts to mean that persons about to marry may agree that a spouse's income is the separate property of that spouse. *Beck v. Beck*, 814 S.W.2d 745, 749 (Tex. 1991); *Dokmanovic v. Schwarz*, 880 S.W.2d 272, 275 (Tex. App.–Houston [14th Dist.] 1994, no writ); *Winger v. Pianka*, 831 S.W.2d 853, 858-859 (Tex. App.–Austin 1992, writ denied) (holding that both the Texas Constitution and the Texas Family Code permitted persons about to marry to partition or exchange between themselves salaries and earnings to be acquired by the parties during their future marriage); *Fanning v. Fanning*, 828 S.W.2d 135, 142 (Tex. App.–Waco 1992), rev'd on other grounds, 847 S.W.2d 225 (Tex. 1993).

In *Beck*, the parties signed a premarital agreement prior to the adoption of the 1980 Amendment. The agreement provided that "all the properties...held or standing in the name of only one of them shall be considered as a separate property of the one of them in whose name such property is held or stands..." *Beck*, 814 S.W.2d at 746. The underlying dispute was whether the husband owned an interest in the income generated from the wife's separate property. *Id*. The court of appeals held that the agreement was effective as an "exchange" of each spouse's community interest in future income from separate property. *Id*. The Supreme Court affirmed, stating that the 1980 Amendment validated all premarital agreements entered into pursuant to Texas Family Code section 5.41. *Id*. at 749.

In *Dokmanovic*, the parties signed a premarital agreement which provided "...All income of the separate property of each party shall be treated as the separate property of the party owning the separate property producing the income. All earnings for personal services of each party shall be treated as the separate property of the party earning the income..." *Dokmanovic*, 880 S.W.2d at 273. The husband challenged this agreement on the grounds that the Texas Constitution authorizes only spouses to agree that income from separate property will be separate property. *Id*. at 274. The court rejected this argument and held that the agreement was enforceable as an exchange of income pursuant to Article XVI, section 16. *Id*. at 275.

However, at least one court apparently found that the Texas Constitution specifically reserves to spouses the right to agree that income from separate property will be separate property of that spouse. *See Fanning v. Fanning*, 828 S.W.2d 135, 141 (Tex. App.–Waco, 1992), rev'd on other grounds, 847 S.W.2d 225 (Tex. 1993). The Texas Constitution provides:

> ***...Spouses*** also may from time to time, by written instrument, agree between themselves that the income or property from all or part of the separate property then owned or which thereafter might be acquired by only one of them, shall be the separate property of that spouse.

TEX. CONST. art. XVI §15 (emphasis added).

In *Fanning*, the parties signed a premarital agreement that included a provision that provided "the parties agree that as soon as legally possible all income from their respective estates shall be the separate property of the spouse form whose separate estate such income is derived." *Id*. at 139. The court held that this provision was invalid because the 1980 Amendment did not authorize persons intending to marry to make such an agreement. *Id*. at 140-141. Additionally, the court held that the plain meaning of the language used by the parties indicated this was not a partition or exchange of their property. *Id*. at 141.

Although the law regarding the ability of persons about to marry to recharacterize income from separate property as separate property appearts to be settled in Texas, a cautious practitioner should draft a property agreement recharacterizing income to be signed after the potential spouses marry if the potential spouses seek to recharacterize income from their separate property as separate property

3. Marital Property Agreements

Subchapter B of Chapter 4 of the Texas Family Code authorizes a "marital property agreement" between spouses. For the purposes of a marital property agreement under Subchapter B, "property" is defined in the same broad manner as it was in Subchapter A, for premarital agreements. TEX. FAM. CODE §4.101.

Under the Texas Family Code, marital property agreements between spouses accomplish one of two ends. Spouses may partition or exchange between themselves, at any time, any part of their community property, then existing or to be acquired, as the spouses may desire, and such property or

property interest transferred to a spouse by a partition or exchange agreement becomes that spouse's separate property. TEX. FAM. CODE §4.102. Spouses may also agree, at any time, that the income or property arising from the separate property that is then owned by one of them, or that may thereafter be acquired, shall be the separate property of the owner. TEX. FAM. CODE §4.103; *see also, Pearce v. Pearce*, 824 S.W.2d 195, 197-198 (Tex. App.--El Paso 1991, writ denied) (by entering into trust indenture shortly after their marriage, the parties created a "postnuptial agreement," in which the parties agreed that the separate property of the husband would remain his separate property, and that all increases and income from the husband's separate property would constitute part of his separate estate); *cf., Bradley v. Bradley*, 725 S.W.2d 503, 504 (Tex. App.--Corpus Christi 1987, no writ) (where the parties' premarital agreement provided that "...on or before the 15th day of April of each year during the existence of this marriage, [the parties] will fairly and reasonably partition (and/or exchange) in writing all of the community estate of the parties on hand that will have accumulated since January 1 of the preceding year...," the agreement did not itself effect a partition and exchange of the parties' respective community interests in each other's personal earnings, but rather merely evidenced an intent to do so in the future).

Again, as with a premarital agreement, a marital property agreement must be in writing and signed by both parties. TEX. FAM. CODE §4.104; *see also, Sims v. Sims*, 2006 WL 2190639, *4 (Tex. App.–Austin 2006, no pet.) (affidavit waiving rights to wife's pension plan signed only by husband is not a valid marital property agreement); *Miller v. Miller*, 700 S.W.2d 941, 951 (Tex. App.--Dallas 1985, writ ref'd n.r.e.) (partition agreement must be in writing); *Recio v. Recio*, 666 S.W.2d 645, 649 (Tex. App.--Corpus Christi 1984, no writ) (partition or exchange agreements must be in writing to be enforceable).

However, at least two Texas appellate courts have required that a written partition and exchange agreement include an express indication of the parties' intent to partition and exchange the subject property. *See*, *Pankhurst v. Weitinger & Tucker*, 850 S.W.2d 726, 730 (Tex. App.--Corpus Christi 1993, writ denied) (purported assignment of interest in federal cause of action by debtor husband to wife was not enforceable "partition or exchange agreement," where there was no indication in the written document that there was any joint agreement to partition or exchange any community property interest in the suit and the assignment lacked the wife's signature); *Collins v. Collins* 752 S.W.2d 636, 637 (Tex. App.--Fort Worth 1988, writ ref'd) (since the joint income tax returns signed by both spouses, in which the income of various assets were listed as separate and community, contained no language of an agreement to partition, at best such returns could only constitute a written memorandum of an oral or unstated agreement to partition, and, absent specific language indicating that the documents were intended by the parties to constitute an agreement to partition, as a matter of law did not constitute a partition agreement in writing and signed by the parties as required by former Texas Family Code §5.54 (repealed, recodified at current Texas Family Code §4.104)).

In 2003, the Legislature amended section 4.102 to provide that partitioned property automatically included future earnings and income from the partitioned property unless the spouses agreed in a record that the future earnings and income would be community property after the partition or exchange. TEX. FAM. CODE §4.102 (repealed). This change applied to a partition and exchange agreement made on or after September 1, 2003. In 2005, the Legislature amended section 4.102 to delete the automatic partition of future earnings and income from partitioned property and made it discretionary. This change applied to a partition and exchange agreement made on or after September 1, 2005, and a partition and exchange agreement made before September 1, 2005 is governed by the law in effect on the date the agreement was made and the former law is continued in effect for that purpose. As a result, partition and exchange agreements executed between September 1, 2003 and August 31, 2005 will automatically include future earnings and income from the partitioned property unless the spouses agree in a record that the future earnings and income would be community property after the partition or exchange.

4. Premarital vs. Postmarital Agreements

Most reported Texas cases discussing enforcement of marital property agreements deal with those entered during marriage, rather than before. *Marsh v. Marsh*, 949 S.W.2d 734, 745, n. 4 (Tex. App.–Houston [14th Dist.] 1997, no writ). The statutory defenses for premarital and postmarital agreements are, however, identical. It has been stated that, in post-marital agreements, a

fiduciary duty exists that is not present in premarital agreements between prospective spouses. *Id.; see also, Daniel v. Daniel*, 779 S.W.2d 110, 115 (Tex. App.--Houston [1st Dist.] 1989, no writ) (recognizing the confidential relationship between a husband and wife imposes the same duties of good faith and fair dealing on spouses as required of partners and other fiduciaries). However, adverse parties who have retained independent counsel may not owe fiduciary duties to one another. *See Miller v. Ludeman*, 150 S.W.3d 592, 597 (Tex. App.—Austin 2004, pet. denied); s*ee also Toles v. Toles*, 113 S.W.3d 899, 916 (Tex. App.—Dallas 2003, no pet.).

In *Sheshunoff v. Sheshunoff*, 172 S.W.3d 686, 700-701 (Tex. App.–-Austin 2005, pet. denied), the Austin Court of Appeals addressed the applicability of a fiduciary duty in a post-marital agreement:

> Our conclusion is not altered by Mr. Sheshunoff's assertions that Ms. Sheshunoff, as his spouse, owed him a fiduciary duty to be truthful during their negotiations. Assuming without deciding that such a duty would apply under the circumstances of this case, the Texas Legislature enacted section 4.105 with the understanding that married spouses owing fiduciary duties to one another would negotiate and execute marital property agreements. Notwithstanding these duties, the legislature manifested the strong policy preference that voluntarily made marital property agreements be enforced. We have concluded that Mr. Sheshunoff has not raised a fact issue regarding the sort of involuntary execution the legislature could have intended to bar enforcement of marital property agreements. That conclusion would control even in the face of the fiduciary duties Mr. Sheshunoff claims.

Id. at 700-701 (citations and footnote omitted).

In addition, under Texas law, breach of fiduciary duty is arguably a defensive issue which is subsumed into the issue of whether each spouse was provided a fair and reasonable disclosure of the property or financial obligations of the other spouse (*i.e.*, the unconscionability prong of section 4.105). *See*, *Blonstein v. Blonstein*, 831 S.W.2d 468, 471 (Tex. App.–Houston [14th Dist]), *writ denied per curiam*, 848 S.W.2d 82 (Tex. 1992). In other words, an alleged breach of fiduciary duty relates exclusively to the "unconscionability" prong of section 4.105. It may also be possible for spouses to waive (or discharge) any possible fiduciary duty with respect to entering into a marital property agreement.

Nonetheless, it should also be noted that a fiduciary duty may arise ***before*** marriage. *See, Andrews v. Andrews,* 677 S.W.2d 171, 174 (Tex. App.--Austin 1984, no writ) (fiduciary duty existed between a couple who had been seeing each other for approximately seven years, were living together and engaged to be married, and who had agreed to purchase a house jointly for use as their marital residence).

C. The Nature of the Beast

Is a marital agreement a contract? Certainly, language in the Texas Family Code would so imply. *See,* TEX. FAM. CODE §4.003 ("[t]he parties to a premarital agreement may ***contract***...") (emphasis added). Texas appellate courts treat marital agreements like contracts. *See,e.g., Marsh v. Marsh*, 949 S.W.2d 734, 743-44 (Tex. App.–Houston [14th Dist.] 1997, no writ) (wife's payment of gift taxes was not a "condition precedent" to husband's performance of his obligations under the parties' premarital agreement requiring him to fund trust). Legal commentators often also suggest that marital agreements constitute contracts. *See, e.g.,* Tindall and Pence at 18 ("[a] premarital or marital agreement is subject to the same general rules of construction and interpretation as any contract"). Finally, the "Official Comment to Uniform Premarital Agreement Act," Section 2, states "...a premarital agreement is a contract."

Yet, as stated above, Texas Family Code §4.002 and §4.104 specifically provide that consideration is ***not*** required for a premarital or marital agreement. A "contract," however, must be based upon a valid consideration. *Federal Sign v. Texas Southern University*, 951 S.W.2d 401, 408 (Tex. 1997); *see also, American Nat'l Ins. Co. v. Warnock*, 114 S.W.2d 1161, 1164 (Tex. 1938) (consideration is a fundamental element of every valid contract).

Can it be argued that a marital agreement is not a "contract"? Does it matter? It might. As discussed hereinbelow, courts frequently resort to a discussion of "commercial contract" issues when examining a premarital agreement. Is it appropriate to consider commercial or contract law in the context of a premarital agreement? Although Texas courts, and Texas lawyers, assume so, the issue is not definitively resolved, and some difficulties exist with the "accepted" approach.

III. ENFORCEABILITY

A. Statutory Provisions

1. Premarital Agreements

TEX. FAM. CODE §4.006 provides the statutory framework for the enforcement of premarital agreements. Section 4.006 provides:

> (a) A premarital agreement is not enforceable if the party against whom enforcement is requested proves that:
>
> (1) the party did not sign the agreement voluntarily; or
>
> (2) the agreement was unconscionable when it was signed and, before signing the agreement, that party:
>
> (A) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
>
> (B) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
>
> (C) did not have, or reasonably could not have had, adequate knowledge of the property or financial obligations of the other party.
>
> (b) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.
>
> (c) The remedies and defenses in this section are the exclusive remedies or defenses, including common law remedies or defenses.

2. Partition and Exchange Agreement

TEX. FAM. CODE §4.105, providing for the enforcement of a "partition and exchange agreement" is identical to §4.006 (*see, Marsh,* 949 S.W.2d at 745, n. 4.):

> (a) A partition or exchange agreement is not enforceable if the party against whom enforcement is requested proves that:
>
> (1) the party did not sign the agreement voluntarily; or
>
> (2) the agreement was unconscionable when it was signed and, before execution of the agreement, that party:
>
> (A) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
>
> (B) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
>
> (C) did not have, or reasonably could not have had, adequate knowledge of the property or financial obligations of the other party.
>
> (b) An issue of unconscionability of a partition or exchange agreement shall be decided by the court as a matter of law.
>
> (c) The remedies and defenses in this section are the exclusive remedies or defenses, including common law remedies or defenses.

Furthermore, although section 4.105 deals specifically with "partition and exchange" agreements, it does not expressly cover agreements between spouses concerning income or property derived from separate property. The Committee on Pattern Jury Charges of the State Bar of Texas, however, has stated that the same standard for enforceability (as provided in §4.105) should apply to both types of agreements. Comment, TEXAS PATTERN JURY CHARGES-FAMILY 207.4 (2008); *see also, Daniel v. Daniel*, 779 S.W.2d 110, 113-14 (Tex. App.-Houston [1st Dist.] 1989, no writ) (it seems evident that the legislature intended income arrangements between spouses, which were covered by former Texas Family Code §5.53 (entitled "Agreements Between Spouses Concerning Income from Property Derived") to be enforced in the same manner as "partition and exchange agreements" covered by former Texas Family Code §5.52).

B. Public Policy

As already stated, the legislature and people of Texas have made a public policy determination that premarital agreements should be enforced. *Beck v. Beck*, 814 S.W.2d 745, 749 (Tex. 1991), *cert. denied*, 503 U.S. 907 (1992)*; Marsh v. Marsh*, 949 S.W.2d 734, 739 (Tex. App.–Houston [14th Dist.] 1997, no writ). Therefore, premarital agreements are presumptively enforceable. *Marsh,* 949 S.W.2d at 739; *Grossman v. Grossman*, 799 S.W.2d 511, 513 (Tex. App.--Corpus Christi 1990, no writ).

Apparently, no reported case has specifically held that a marital property agreement, as opposed to a premarital agreement, is presumptively enforceable. In *Sadler v. Sadler*, 769 S.W.2d 886, 886-887 (Tex. 1989), the Texas Supreme held that, under former Texas Family Code §5.46, a marital property agreement was not presumptively enforceable, but noted that the Texas legislature had amended the Family Code to make it easier to enforce marital property agreements. Given the identical enforcement provisions in the current Texas Family Code for both premarital and marital property agreements, as noted above, there appears to be no cogent policy reason to exclude marital agreements from the presumption of enforceability.

C. Burden of Proof

According to the statutes, the party opposing enforcement bears the burden of proof to rebut the presumption of validity and establish that the marital agreement is not enforceable. *See, e.g., Marsh,* 949 S.W.2d at 739; *Grossman*, 799 S.W.2d at 513.

D. Applicable Law

The law to be applied to premarital agreements is the applicable law at the time of divorce. *Sadler*, 769 S.W.2d at 887. It should be noted, however, that the law at the time of divorce trumps the law at the time of execution of the agreement, ***except*** as to certain defenses to enforcement as discussed hereinbelow.

E. Limitations

A statute of limitations applicable to an action asserting a claim for relief under a premarital agreement is tolled during the marriage of the parties to the agreement. TEX. FAM. CODE §4.008. The "Official Comment to the Uniform Premarital Agreement Act," Section 8, explains that the applicable statute of limitations is tolled "[i]n order to avoid the potentially disruptive effect of compelling litigation between the spouses in order to escape the running of an applicable statute of limitations...."

It seems that §4.008 is intended to address the situation in which, during marriage, some act by a party or other occurrence gives rise to a cause of action under a premarital agreement, for example, a repudiation of a covenant that was to be performed within some time period after execution of the agreement. In such a situation, the aggrieved spouse is not faced with a limitations issue until a divorce is rendered. Thus, the parties could feasibly attempt to work out a problem for any number of years during the marriage, without the aggrieved spouse ever losing his or her right to sue under the agreement.

In *Fazakerly v. Fazakerly*, 996 S.W.2d 260 (Tex. App.–-Eastland 1999, pet. denied), George and Mary Fazakerly signed a premarital agreement prior to their marriage in 1973. Before his death in 1992, George executed a will naming his daughter from a prior marriage, Jill, as his executrix. After George's death, in May 1993, Jill and Mary signed a partial settlement agreement which disposed of some of the property in George's estate but specifically preserved Mary's right to assert the premarital agreement as a defense. In 1993, Jill filed suit

against Mary requesting a declaratory judgment that certain stock was community property and that the community estate was entitled to reimbursement for George's efforts in managing certain companies. In 1998, Jill filed her second amended petition adding a claim seeking a declaratory judgment that the premarital agreement was void. Mary filed a motion to strike Jill's second amended petition asserting, among other things, limitations and laches. The trial court granted the motion to strike. The Eastland Court of Appeals held that Jill's claim seeking a declaratory judgment that the premarital agreement was void was barred by limitations. *Id.* at 264-65. However, the appellate court stated that section 4.008 and its predecessor deal with the tolling of limitations and are not statutes of limitation. *Id.* at 264. The appellate court determined that the applicable statute of limitations provided for a four year period plus a one year period based upon George's death. *Id. See* TEX. CIV. PRAC. & REM. CODE §§ 16.004, 16.051, 16.062.

F. Laches and Estoppel

Texas Family Code §4.008 also specifically provides that equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party. *Id.* The "Official Comment to the Uniform Premarital Agreement Act," Section 8, provides that "a party is not completely free to sit on his or her rights because the section does preserve certain equitable defenses."

Under the express language of the statute, the "equitable defenses" limit "the time for enforcement...." In other words, such equitable defenses are not defenses to the premarital agreement itself, but rather, are defenses against contestability. *Cf.,* TEX. FAM. CODE §4.006; TEX. FAM. CODE §4.105. Thus, it would seem that, under §4.008, during a marriage a party is not free to sit on his or her rights under a premarital agreement when some act by a party or other occurrence already has given rise to a cause of action under such agreement.

In *Fazakerly*, the Eastland Court of Appeals held that Jill's claim seeking a declaratory judgment that the premarital agreement was void was barred by laches:

> The elements of laches are: (1) unreasonable delay by one having legal or equitable rights in asserting them and (2) a good faith change of position by another to his detriment because of the delay. *Rogers v. Ricane Enterprises, Inc*., 772 S.W.2d 76, 80 (Tex. 1989). The record reflects that Jill knew about the antenuptial agreement which she and Mary signed the settlement agreement in May 1993. Jill asserted her claims against the antenuptial agreement five years after signing the settlement agreement. At the time Jill filed her second amended petition, Mary had been confined with Alzheimer's disease. She was no longer competent or even able to testify; her position had changed during the delay. Jill's claims, regardless of any statute of limitations, were barred by laches. That equitable doctrine attempts to prevent injustice against one party that could result when another asserts his demands so long after they matured that evidence has been lost or impaired. [citations omitted] Laches provided another ground for the trial court to strike Jill's pleadings attacking the antenuptial agreement's validity.

996 S.W.2d at 265.

The following hypothetical may also illustrate the effect of §4.008. Under a premarital agreement, one spouse is required to make a series of payments to the other spouse at certain specified times after the marriage. The obligated spouse does not do so. The aggrieved spouse, however, does nothing to assert his or her rights. The obligated spouse, a number of years later, takes that money and expends it on the education of a child by a former marriage. The aggrieved spouse does nothing, until, some years later in the spouses' ensuing divorce, after the money has been expended on the child, his or her lawyer asserts a breach of contract claim. Although the "statute of limitations" does not bar the aggrieved spouse's claim, "laches" may.

Another unresolved issue surrounding §4.008 concerns the interplay between the two sentences of the section. Presumably, under the statute, at some point a tolled "statute of limitations"

situation becomes a "laches" problem. Neither the statute nor any reported case provides any guidance regarding at what specific point the "laches" principle arises, or as to the effect the marriage, with its concomitant fiduciary responsibilities, has on the "reasonableness" of any delay in acting on the part of one spouse.

Further complexity to the interplay of the two sentences of §4.008 derives from the general rule that "laches" is inappropriate when the controversy is one to which a statute of limitations applies. *See, e.g., Stevens v. State Farm Fire and Cas. Co*., 929 S.W.2d 665, 672 (Tex. App.--Texarkana 1996, writ denied). Only in exceptional circumstances may laches bar a claim in a period shorter than that established by an applicable statute of limitations. *Id.* Clearly, the plain language of §4.008 suggests that a statute of limitations applies to an cause of action regarding the enforceability of a premarital agreement. Read otherwise, the statute would appear very much as sound and fury, but signify nothing. Yet, assuming a statute of limitations, the preservation of the defense of "laches" then seems to conflict with existing Texas case law, in that "laches" should be an "inappropriate" claim in such a situation.

As with "laches," §4.008 preserves the defense of estoppel. Scenarios similar to those recited above for "laches" also can be imagined for "estoppel" and "quasi-estoppel." *See, e.g., Daniel v. Goesl*, 341 S.W.2d 892, 895 (Tex. 1960) (a party cannot accept that part of a contract beneficial to the party and deny the application of other provisions which may be detrimental or disadvantageous; one who accepts the benefit of a contract must also assume its burdens); *see also, e.g, Enochs v. Brown*, 872 S.W.2d 312, 317 (Tex. App.--Austin 1994, no writ) (the doctrine of quasi-estoppel applied to preclude a guardian ad litem for a child injured in a bicycle-vehicle collision from challenging the validity of a contingent fee contract with the attorney who represented the child in a personal injury action, when the child had accepted the benefits of the attorney's services; a party cannot assert, to another's disadvantage, a right inconsistent with a position he or she has previously taken).

The statute of limitations for breach of contract, or to enforce a contract, is four years. TEX. CIV. PRAC. & REM. CODE §§16.004, 16.051; *see also, Pettitt v. Pettitt*, 704 S.W.2d 921, 924 (Tex. App.--Houston [14th Dist.] 1986, writ ref'd n.r.e.) (ten-year statute of limitations governing actions for enforcement of a judgment, instead of four-year general statute of limitations governing written contract rights, applied to proceeding to enforce provision of settlement agreement incorporated in divorce decree dividing separate property).

It should be recalled that, under the Texas Family Code, once a final decree based upon a premarital agreement has been entered, the statute of limitations for enforcement of the decree is two years. TEX. FAM. CODE §9.003.

G. Defenses to Enforcement

Both Texas Family Code §4.006(c) and Texas Family Code §4.105(c) provide that "[t]he remedies and defenses in this section are the exclusive remedies or defenses, including common law remedies or defenses." *See, Marsh v. Marsh*, 949 S.W.2d 734, 738 (Tex. App.–Houston [14th Dist.] 1997, no writ) (wife conceded that the 1991 premarital agreement was subject to common law defenses). The 1993 amendment to the Texas Family Code that first provided the exclusivity of the remedies provided in the Code was intended to overrule those cases, such as *Fanning* and *Daniel*, suggesting that other defenses to marital agreements continued to exist. *See*, Sampson & Tindall, TEXAS FAMILY CODE ANNOTATED, p. 58 (August 2008).

However, the enabling act to the 1993 amendments to the Texas Family Code provided that "[t]his Act takes effect on September 1, 1993, and applies only to an agreement executed on or after that date. An agreement executed before that date is governed by the law in effect at the time the agreement was executed, and former law is continued in effect for that purpose." *See,* Comment, TEXAS PATTERN JURY CHARGES-FAMILY 207.2 (2008).

Accordingly, commentators have concluded that pre-1993 common law defenses regarding the enforcement of contracts may still be available to attack pre-September 1, 1993 agreements. *See,* Tindall, and Pence at 8. Such common law defenses are "substantive," rather than merely "procedural." *Cf., Fanning v. Fanning*, 828 S.W.2d 135, 145 (Tex. App.--Waco 1992), *aff'd in part, rev'd in part,* 847 S.W.2d 225 (Tex. 1993) (1987 amendment to the Texas Family Code governing the determination of the unconscionability of a partition or exchange

agreement applied retroactively, and thus the party resisting enforcement had the burden to prove that the partition agreement was unconscionable, where the amendment simply changed the "procedural scheme" for determining the enforceability issue).

1. Voluntariness

A premarital agreement is not enforceable if the party against whom enforcement is requested proves that he or she did not sign the agreement voluntarily. TEX. FAM. CODE §4.006(a)(1); TEX. FAM. CODE §4.105(a)(1). Whether a party voluntarily signed a marital agreement is a question of fact. *See, e.g.,* TEXAS PATTERN JURY CHARGES-FAMILY 207.2B (2008).

One Texas court of appeals has defined "voluntary" as doing something "by design or intentionally or purposely or by choice or of one's own accord or by the free exercise of the will." *Prigmore v. Hardware Mut. Ins. Co. of Minn.*, 225 S.W.2d 897, 899 (Tex.Civ.App.--Amarillo 1949, no writ). Thus, according to the Amarillo Court of Appeals, "[a] voluntary act proceeds from one's own free will or is done by choice or of one's own accord, unconstrained by external interference, force or influence." Id.

In Sampson & Tindall, TEXAS FAMILY CODE ANNOTATED, p. 58 (August 2008), the editors state that it is usually very difficult to establish that a premarital agreement was signed involuntarily. Moreover, one who signs a contract is presumed to know its contents. *Emerald Texas, Inc. v. Peel*, 920 S.W.2d 398, 402 (Tex. App.–Houston [1st Dist.] 1996, no writ). In the specific context of a marital agreement, the Houston Fourteenth Court of Appeals has stated "one is presumed to know the contents of a document he has signed and has an obligation to protect himself by reading a document before signing it." *Marsh v. Marsh*, 949 S.W.2d 734, 744 (Tex. App.–Houston [14th Dist.] 1997, no writ); s*ee and cf*, *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 90 (Tex. 1996) (a party's failure to read an arbitration agreement does not excuse such party from arbitration); *G-W-L, Inc. v. Robichaux*, 643 S.W.2d 392, 393 (Tex. 1982), overruled on other grounds by *Melody Home Mfg. Co. v. Barnes*, 741 S.W.2d 349 (Tex. 1987) (parties to a contract have an obligation to protect themselves by reading what they sign).

It seems clear that an agreement signed under "duress" is not signed voluntarily. In *Matelski v. Matelski*, 840 S.W.2d 124, 128 (Tex. App.--Fort Worth 1992, no writ), the Fort Worth Court of Appeals held that, at the time of trial, the husband had the burden of proving that his execution of the partition agreement was not voluntary ***due to duress***. (Emphasis added). The Fort Worth appellate court then recounted:

> There can be no duress unless there is a threat to do some act which the party threatening has no legal right to do. Such threat must be of such character as to destroy the free agency of the party to whom it is directed. It must overcome his will and cause him to do that which he would not otherwise do, and which he was not legally bound to do. The restraint caused by such threat must be imminent. It must be such that the person to whom it is directed has no present means of protection.

Id. After stating the law, the Fort Worth Court of Appeals devoted nearly two pages of its opinion to discussing the facts of the case, as such facts pertained to the idea of duress, all as part and parcel of the asserted defense that the partition agreement had not been signed voluntarily. *See, Id.,* at 129-130. *See Osorno v. Osorno*, 76 S.W.3d 509, 510-11 (Tex. App.--Houston [14th Dist.] 2002, no pet.) (premarital agreement was signed voluntarily even though the wife was forty, unmarried and pregnant and the agreement was signed the day before the parties married); *Nesmith v. Berger*, 64 S.W.3d 110, 115 (Tex. App.--Austin 2001, pet. denied).

The "voluntary" defense is not always as easy to defeat as some lawyers and judges may believe. This is not to say that the easy case does not exist. For example, during the give and take of negotiations surrounding a proposed marital agreement, changes are often made upon the request of one party, or perhaps even both parties. Under such factual circumstances, it seems a stretch for the party who requested, and received, from negotiations a modification to the proposed marital agreement to later argue that he or she did not sign the agreement voluntarily. Nonetheless, the argument is made, although sometimes unsuccessfully. *See, e.g., Margulies v. Margulies,* 491 So.2d 581, 583 (Fla.Dist.Ct.App.-1986) (a party who, during pre-execution negotiations, effects a modification of a proposed marital agreement,

should not be allowed to later take the position that he or she did not sign the agreement voluntarily); *see also, Marsh,* 949 S.W.2d at 740 (the husband had participated in preparing the premarital agreement, and indeed had dictated portions of it); *See Osorno*, 76 S.W.3d at 510-11 (premarital agreement was signed voluntarily even though the wife was forty, unmarried and pregnant and the agreement was signed the day before the parties married).

In *Sheshunoff v. Sheshunoff*, 172 S.W.3d 686 (Tex. App.–Austin 2005, pet. denied), the Austin Court of Appeals considered the meaning of "involuntary execution" and the extent to which it can be proven by evidence of common-law defenses such as fraud or duress. The trial court granted a partial summary judgment foreclosing the husband's involuntary-execution defense to a marital property agreement. On appeal, the husband argued that he raised a fact issue with regard to the common-law defenses of fraudulent inducement and duress, and that this evidence also raised a fact issue regarding involuntary execution.

In considering the extent to which "involuntary execution" can be proven by evidence of common-law defenses such as fraud or duress, the Court concluded:

> The ordinary meaning of "voluntary," the legislative history and application of the Uniform Act, and the manner in which Texas courts have construed the term compel us to agree with [the husband]-although the presence of such factors as fraud, duress, and undue influence may bear upon the inquiry, [the husband] does not have to prove each element of these common-law defenses to establish the ultimate issue of involuntary execution. We implied as much in *Nesmith [v. Berger*, 64 S.W.3d 110 (Tex. App. – Austin, 2001, pet. denied)] where we looked not to the elements of common-law defenses but directly to the controlling issue of whether the party resisting enforcement executed the agreement voluntarily. This approach is consistent with the text of section 4.105, which refers not to common-law concepts but solely to whether the party signed the agreement voluntarily.
>
> [The husband] contends that the legislature's addition of subsection (c) renders irrelevant the history and application of the involuntary execution defenses under the Uniform Act. We disagree. Subsection (c) was intended to clarify merely that, contrary to *Daniel [v. Daniel*, 779 S.W.2d 110 (Tex. App. – Houston [1st Dist.] 1989, no writ)], parties cannot assert common-law defenses *in addition* to the defenses enumerated in section 4.105. It does not prohibit us from considering as potential evidence of involuntary execution proof of conduct that [the husband] asserts constitutes fraud or duress.
>
> In sum, we conclude that section 4.105 sets out the exclusive remedies available to prevent enforcement of a postmarital agreement, and that, although common-law defenses may inform our analysis of "voluntariness," they will not necessarily control.

172 S.W.3d at 697-98 (footnote and citations omitted). Further, the Court held "that subsection (c) of section 4.105 independently bars [the husband's] attempt to assert common-law defenses and counterclaims distinct from the statutory involuntary execution and unconscionability defenses." *Id.* at 702.

The husband asserted two theories of involuntary execution: (1) he was forced into signing the marital property agreement; and (2) he was misled into signing the marital property agreement because he believed that the wife would not actually seek a divorce and enforce the marital property agreement.

Concerning his first theory, the husband argued that the wife had threatened that if he did not sign the marital property agreement, she would withdraw her loan guarantee she had advanced his company and have the bank immediately call the line of credit resulting in dire consequences for the

company. The Court noted that the husband's summary judgment evidence showed that the wife threatened to withdraw her loan guarantee and that doing so would have entitled the bank to cut off the line of credit. However, the husband did not offer any evidence regarding the likelihood that the bank in fact would have exercised its contractual right to cut off the line of credit at the wife's request or otherwise. *Id.* at 699-700. The Court concluded that "[a]bsent such proof, the jury could not reasonably infer-and could only speculate-that [the wife's] alleged threat to withdraw the loan guarantee presented the sort of imminent threat that Texas law has considered capable of overwhelming free will and rendering [the husband's] execution of the Marital Property Agreement involuntary." *Id.* at 700.

Concerning his second theory, the husband asserted that he was misled regarding the wife's subjective intent to avail herself of her rights under the marital property agreement. The Court concluded that it "would impermissibly deviate from the statutory language-and the legislature's manifest intent to facilitate enforcement of marital property agreements-by holding that a party who executes a marital property agreement with knowledge and understanding of its terms nonetheless did so 'involuntarily' because he or she believed the other party would not enforce the agreement." *Id.* at 700.

2. Unconscionability

a. Definition of Unconscionability

The Texas Family Code expressly provides that whether a premarital agreement was unconscionable at the time it was signed is a matter of law to be decided by the court. TEX. FAM. CODE §4.006(b). Neither the legislature nor Texas courts have defined "unconscionable" in the context of premarital property agreements. *Marsh v. Marsh*, 949 S.W.2d 734, 739 (Tex. App.–Houston [14th Dist.] 1997, no writ). Instead, Texas courts have addressed the issue of unconscionability on a case-by-case basis, looking to the entire atmosphere in which the agreement was made. *Pearce v. Pearce*, 824 S.W.2d 195, 199 (Tex. App.--El Paso 1991, writ denied).

The simplicity of the statutory language notwithstanding, the determination of "unconscionability" may be quite complex, and usually involves a detailed inquiry into the facts and circumstances surrounding a disputed marital agreement. Moreover, the statute is altogether unclear as to the nature of the proceedings by which the trial court is to determine unconscionability. For example, in *Blonstein,* 831 S.W.2d at 472, it was argued on appeal that the trial court should make the determination of unconscionability early in the proceedings. In response, the Fourteenth Court of Appeals stated:

> While this court finds that an early determination is the better practice, the statute does not require the trial court to make the determination prior to submitting the case to the jury. The section requires only that the trial judge make the finding as a matter of law.

Id. Since the trial court had stated in its judgment that the agreement challenged was not unconscionable, the Houston appellate court in *Blonstein* could find nothing wrong with the trial court's actions. *Id.*

Also according to the Houston Fourteenth Court of Appeals, in the absence of clear guidance as to the definition of "unconscionability" in premarital property cases, Texas courts have turned to commercial law for direction. *Marsh*, 949 S.W.2d at 739-740. *See Pletcher v. Goetz*, 9 S.W.3d 442, 445 (Tex. App.--Fort Worth 1999, pet. denied). In *Marsh*, the Fourteenth Court of Appeals relied upon an opinion from a commercial law case involving a real estate listing agreement, quoting such opinion as follows:

> In determining whether a contract is unconscionable or not, the courts must look to the entire atmosphere in which the agreement was made, the alternatives, if any, which were available to the parties at the time of the making of the contract; the non-bargaining ability of one party; whether the contract is illegal or against public policy; and, whether the contract is oppressive or unreasonable. At the same time, a party who knowingly enters a lawful but improvident contract is not entitled to protection by the courts. In the absence of any mistake, fraud, or oppression the courts, as such, are not interested in

> the wisdom or impolicy of contracts and agreements voluntarily entered into between parties compos mentis and sui juris.

Marsh, 949 S.W.2d at 740, *citing, Wade v. Austin*, 524 S.W.2d 79, 86 (Tex.Civ.App.–Texarkana 1975, no writ).

Wade has been cited in another premarital agreement case, *Fanning v. Fanning*, 828 S.W.2d 135, 145 (Tex. App.--Waco 1992), *aff'd in part, rev'd in part,* 847 S.W.2d 225 (Tex. 1993). In *Fanning,* the Waco Court of Appeals stated, "[a]s in *Wade*, we will focus upon the circumstances at the time the agreement was executed rather than the disproportionate effect of the agreement." The Waco appellate court looked to the circumstances surrounding the execution of the agreement, and considered evidence that the parties had been experiencing "severe marital problems," and that the husband, a custody lawyer who had won ten consecutive custody cases for fathers, had threatened to take the children if the wife did not sign the agreement. *Id.* at 145-146. Further, the Waco Court of Appeals stated that since the wife believed her husband's threats as to the children, she also believed that her only alternative was to sign the agreement. *Id.* at 146. Finally, given the husband's aggressive, manipulative, and retaliatory character, the Waco appellate court considered the wife's bargaining ability to be far less than that of her husband. *Id.* Consequently, the Waco Court of Appeals held that the trial court had not erred when it concluded that the parties' partition agreement was unconscionable when it was signed. *Id.*

b. *Marsh v. Marsh:* Family Law Perspective

In *Marsh*, 949 S.W.2d at 741-743, the husband argued that he established the following factors which made the parties' premarital agreement unconscionable: (1) the onerous circumstances of its execution, including, (a) the parties' disparate bargaining power, (b) the agreement's proximity in time to the marriage, and (c) the absence of counsel representing husband's interests; (2) the oppressive, one-sided nature of the agreement; and (3) the failure of the agreement to effect the parties' intent. The Houston First Court of Appeals disagreed, stating first, with respect to disparate bargaining power, that both parties were mature, educated, and had business experience. *Id.* at 741.

(1) Proximity of Execution to Wedding

According to the Houston appellate court, the fact that the premarital agreement was signed shortly before the wedding (one day) did not make the agreement unconscionable. *Id.* at 741, *citing, Williams v. Williams*, 720 S.W.2d 246, 248-249 (Tex. App.--Houston [14th Dist.] 1986, no writ) (holding that an agreement signed on the day of marriage was not procured through fraud, duress or overreaching because the wife had substantial business experience and the husband testified they had discussed the agreement's terms six months before the wedding); *see also, Huff v. Huff*, 554 S.W.2d 841, 843 (Tex.Civ.App.--Waco 1977, writ dism'd) (premarital agreement, signed two days before marriage, upheld); *Osorno v. Osorno*, 76 S.W.3d 509, 510-11 (Tex. App.–Houston [14th Dist.] 2002, no pet.) (premarital agreement was signed voluntarily even though the agreement was signed the day before the parties married).

(2) No Legal Representation

Likewise, the fact that the husband was not represented by independent counsel was not dispositive. *Marsh*, 949 S.W.2d at 741-743, *citing, Pearce v. Pearce*, 824 S.W.2d 195, 199 (Tex. App.--El Paso 1991, writ denied) (enforcing a postmarital agreement where, although the wife testified she was not represented by counsel and did not read or understand the agreement, she encouraged her daughter-in-law to sign a similar agreement against the advice of her daughter-in-law's attorney). Moreover, in *Marsh* the husband had consulted his long-time attorney shortly after the marriage and admitted at trial that the attorney pointed out several problems with the agreement. *Id.*

(3) Unfairness of Agreement

The Houston Court of Appeals also refused to accept the husband's assertion that the one-sided nature of the agreement strongly preponderated toward a finding of unconscionability. *Id.* Even though a premarital agreement may be disproportionate, the appellate court stated, unfairness is not material to the enforceability of the agreement. *Id., citing, Chiles v. Chiles*, 779 S.W.2d 127, 129 (Tex. App.--Houston [14th Dist.] 1989, writ denied),overruled on other grounds by *Twyman v. Twyman*,855 S.W.2d 619, 624 n. 15 (Tex.1993).. *See Fazakerly v. Fazakerly*, 996 S.W.2d 260, 265 (Tex. App.–-Eastland 1999, pet. denied) (The mere fact that a party made a hard bargain does not allow

her relief from a freely and voluntarily assumed contract – parties may contract almost without limitation regarding their property.). Thus, a factual finding that a premarital agreement is unfair does not satisfy the burden of proof required to establish unconscionability. *Id.; see also, Chiles,* 779 S.W.2d at 129.

The husband's complaints about unintended tax consequences of the agreement, admitted to exist by the wife, were disregarded by the Houston appellate court, particularly since the trial court had asked the parties to modify or reform the agreement to alleviate the deleterious tax consequences (to which the wife agreed), but the husband refused. *Marsh,* 949 S.W.2d at 742-743. Ultimately, therefore, according to the Houston Court of Appeals, in the absence of any evidence that the premarital agreement was obtained through an unfair advantage taken by the wife, the appellate court concluded that the husband had not sustained his burden to defeat the presumption of enforceability. *Id.* at 743.

(4) Failure to Read Agreement

The husband additionally complained that his failure to read the agreement constituted grounds to avoid the agreement. *Id.* at 742. The wife in *Pearce,* 824 S.W.2d at 199, proffered the same argument. Both in *Marsh,* and in *Pearce,* such argument failed. As stated by the appellate court in *Marsh,* "[a]bsent fraud, one is presumed to know the contents of a document he has signed and has an obligation to protect himself by reading a document before signing it." 949 S.W.2d at 742.

Marsh is consistent with Texas law on the issue of the effect of the failure to read an agreement before signing it. Generally, a party who has the opportunity to read an agreement, and then signs it, is presumed to know the contents of the agreement. *EZ Pawn Corp. v. Manias*, 934 S.W.2d 87, 90 (Tex. 1996) (party's failure to read an arbitration agreement is not excused from arbitration); *see also, Nautical Landings Marina v. First Nat'l Bank in Port Lavaca*, 791 S.W.2d 293, 298 (Tex. App.--Corpus Christi 1990, writ denied) (as a general rule, a party who signs a contract is presumed to know its contents); *Dedier v. Grossman*, 454 S.W.2d 231, 236 (Tex.Civ.App.--Dallas 1970, writ ref'd n.r.e.) (in the absence of fraud or mistake the law contemplates that women and men contract with their eyes open and with full knowledge of the legal effect of their action). Simply put, parties to a contract have an obligation to protect themselves by reading what they sign. *G-W-L, Inc. v. Robichaux*, 643 S.W.2d 392, 393 (Tex. 1982).

c. *El Paso Natural Gas:* Commercial Law Perspective

El Paso Natural Gas Co. v. Minco Oil & Gas Co., 964 S.W.2d 54 (Tex. App.--Amarillo 1997) rev'd on other grounds, 8 S.W.3d 309 (Tex. 1999), presents a comprehensive analysis of unconscionability in the commercial law context. In *El Paso,* the plaintiff property owners sued a natural gas company, alleging a breach of take-or-pay gas purchase agreements; the company defended based upon a release that it had previously obtained from the property owners, prior to allowing them to sell their gas to other buyers. In the release, the plaintiffs had waived any causes of action the plaintiffs might have had against the gas company. The district court held that the releases were unconscionable and entered judgment in favor of the plaintiffs, and the defendant appealed. On appeal, the Amarillo Court of Appeals held that, among other things, under the totality of the circumstances, the disputed releases and termination letters were not unconscionable. However, on other grounds, the appellate court affirmed the judgment against the defendant gas company in favor of one of the plaintiffs. The Texas Supreme Court reversed the Court of Appeal's judgment concluding that the Uniform Commercial Code does not impose a duty of good faith upon the formation or procurement of a final release of liability. 8 S.W.3d at 311. Consequently, the Court of Appeal's discussion of unconscionability remains viable.

(1) Standard of Review

The Amarillo appellate court began its discussion in *El Paso* by stating that "[w]e are told that the ultimate question as to whether an agreement is unconscionable is one of law," which, suggested that appellate review was to be *de novo. Id.* at 60. However, the Amarillo Court of Appeals continued:

> Yet, it cannot be forgotten that the decision of whether some agreement is or is not unconscionable is dependent upon the existence of facts which allegedly illustrate unconscionability. And, as to the

existence of those facts, our review is not de novo. In other words, we cannot review the record, divine our own inferences from the evidence contained therein, resolve conflicts in same, or decide what evidence to believe and what not to believe. The power to do those things, that is, to find facts, lies with the trial court. Once it has exercised that power, we must then defer to the findings made. And, as long as the findings enjoy sufficient evidentiary support, they cannot be disturbed, even though we may have construed the evidence differently. Nevertheless, this does not prevent us from assessing whether the findings made illustrate unconscionability for, again, that is a question of law. Nor does it prevent us from deciding whether the evidence of record, when viewed in a light most favorable to the court's findings and regardless of its potential inferences, illustrates unconscionability, for that too is a question of law.

Id. at 60-61. The Amarillo appellate court likened the "mental gymnastics" involved in a review of unconscionability to that present in a traditional abuse of discretion review, and noted that, by enabling the reviewing court to reassess *de novo* that part of the decision involving the law and its application, while at the same time recognizing the trial court's authority to weigh and interpret the evidence, the abuse of discretion review is helpful in determining mixed questions of law and fact. *Id.* at 61. Accordingly, the Amarillo Court of Appeals adopted the abuse of discretion standard as indicative of the framework in which the reviewing court must proceed in the determination of unconscionability. *Id*.

The Amarillo court's position regarding the appropriate standard of review should be contrasted to that of Houston Fourteenth Court of Appeal's position in *Marsh.* According to the Houston appellate court, since the issue of unconscionability is a question of law for the trial court, appellate review is in fact *de novo*, without deference to the lower court's conclusions. *Marsh v. Marsh*, 949 S.W.2d 734, 739 (Tex. App.–Houston [14th Dist.] 1997, no writ). Further, an appellate court has a duty to ***independently*** evaluate the trial court's findings on matters of law. *Id.* (emphasis added), *citing, Daniel v. Daniel*, 779 S.W.2d 110, 114 (Tex. App.--Houston [1st Dist.] 1989, no writ) (although the *Daniel* opinion does not directly address the issue).

(2) The Scope of Unconscionability

According to the Amarillo court, unconscionability, historically perceived as a way of protecting the downtrodden against the overpowering, serves the purpose of negating an advantage gained through oppression and unfair surprise. *El Paso Natural Gas Co.,* 964 S.W.2d at 61. To be unconscionable, stated the Amarillo appellate court, the contract must arise through "procedural" and "substantive" abuse. *Id., citing, Tri-Cont'l Leasing Corp. v. Law Office of Richard W. Burns*, 710 S.W.2d 604, 609 (Tex.App.– Houston [1st Dist.] 1985, writ ref'd n.r.e.); *Wade v. Austin*, 524 S.W.2d 79, 85 (Tex.Civ.App.– Texarkana 1975, no writ). In a footnote, the Amarillo court then added that existing authority indicated that both procedural and substantive abuse must be present. *El Paso Natural Gas Co.*, 964 S.W.2d at 61, n.5. The Amarillo Court of Appeals noted an interrelationship between the indicia used under both procedural and substantive abuse, and agreed that the assessment of unconscionability should be made based upon the totality of the circumstances, but nevertheless maintained that the two-pronged analysis was a way of categorizing the pertinent factors and, to that extent, was useful. *Id.*

(3) Procedural Abuse

Procedural abuse means that oppression and unfairness taint the negotiation process leading to the agreement's formation, and involves, for example, (1) the presence of deception, overreaching, and sharp business practices, (2) the absence of a viable alternative, and (3) the relative acumen, knowledge, education, and financial ability of the parties. *Id.* No one indicia is determinative, but rather, the totality of the circumstances must be assessed before it can be said that someone fell prey to procedural abuse. *Id.* Moreover, the situation must be assessed as of the time the agreement was executed, not via hindsight. *Id.*

In *El Paso,* the Amarillo appellate court examined the trial court's finding that the challenged release was unconscionable. Under the procedural abuse prong, the appellate court noted that the trial court said nothing of the plaintiff's business expertise, financial status, and overall knowledge of the oil and gas trade, and did not comment upon the viable alternatives, if any, which were available. *Id.* at 63. Similarly, the trial court did not consider whether the plaintiff was "compelled" to sign the release . *Id.* Consequently, according to the Amarillo Court of Appeals, to the extent that the trial court did not consider such factors, the court

failed to assess the totality of the circumstances, and therefore abused its discretion. *Id.*

Additionally, although the appellate court conceded that the defendant gas company may have had superior bargaining power, in the absence of any evidence that the plaintiff objected to the release prior to its execution, or sought later to renegotiate the release, the Fourteenth Court of Appeals could not say that the plaintiff fell prey to the defendant's bargaining power; rather, the evidence showed that the plaintiff did not attempt to test that power and simply acquiesced to the defendant's preferences. *Id.* at 64. Furthermore, the appellate court noted with interest that there had been much negotiation over the years concerning the proposed releases, and in the past, the plaintiff appeared not have to have been overly concerned with them. *Id., citing, Resources Investment Corp. v. Enron Corp*., 669 F.Supp. 1038, 1042 (D.Colo.1987) (holding that multiple releases contained in 32 contracts signed over an 18 year period would indicate a lack of unconscionability).

Thus, the appellate court found the trial court abused its discretion in finding the release unconscionable. *Id.* Further, as matters of law, the Houston court found that the indicia relied upon by the trial court were alone not enough to illustrate gross procedural abuse, and that, under the totality of the circumstances, the plaintiff did not succumb to any gross procedural abuse. *Id.* The appellate court also emphasized that there was no evidence that the plaintiff did not understand the effect of its actions in executing the releases (indeed, the plaintiff's president was a sophisticated businessman), and that there were other options available to the plaintiff aside from executing the releases. *Id.*

The Amarillo appellate court also reviewed the trial court's findings that termination letters signed by the plaintiff were unconscionable. The Amarillo Court of Appeals found that the trial court again failed to consider the relative bargaining strength of the parties at the time the items were signed, their relative business acumen, knowledge, education, and financial ability, or the presence or absence of viable business alternatives. *Id.* To the extent that all these factors were ignored, the court did not permissibly exercise its discretion. *Id.* The appellate court also noted that there was no evidence that the plaintiffs had ever even read the letters, attempted to negotiate the terms of the documents, relied upon anything mentioned there as inducement to sign them, or felt compelled in any way to sign them for any particular reason. *Id.*

(4) Substantive Abuse

Substantive abuse concerns the fairness, or oppressiveness, of the contract itself. *Id.* According to the Amarillo Court of Appeals, the issue of substantive abuse is difficult, not easily quantified, and requires a consideration of the totality of the circumstances (as of the time the situation unfolded). *Id.* The Amarillo court noted that it has been argued that to be unconscionable, the contract, with its promises, benefits and detriments, must border on being inimical to public policy before it can be said to be sufficiently unfair or oppressive; arguments have also been made that the contract be utterly lopsided, that is, there must be no reasonable or subjective parity between the values exchanged. *Id.* at 61-62.

The Amarillo appellate court next stated that, regardless of grounds proffered as illustrative of either substantive abuse, or procedural abuse, such grounds must be sufficiently shocking or gross to compel the courts to intercede. *Id.* Under the totality of the circumstances, the trial court's authority to intercede is triggered only when the negative aspects of the bargaining process and subsequent contract are "gross." *Id.*

Finally, according to the Amarillo Court of Appeals, it is imperative that the complaining party fall prey to the gross aspects of the deal, *i.e.,* the circumstances before him must be such as to compel him to execute the bargain. *Id., citing, Troy Mining Corp. v. Itmann Coal Co*., 346 S.E.2d 749, 754 (W.Va.1986) (rejecting the claim of unconscionability due to the lack of evidence indicating that the contract was "forced" upon the complainant); *Wade*, 524 S.W.2d at 86 (stating that one who "knowingly" enters an improvident contract cannot be heard to complain); *Earman Oil Co., Inc. v. Burroughs Corp*., 625 F.2d 1291, 1299 (5th Cir.1980) (indicating that one who knowingly and "willingly" enters an agreement is not a victim of gross conduct).

In *El Paso Natural Gas Co.,* the trial court found substantive abuse because, in order to sell its gas to other buyers, the plaintiff had to release its causes of action against the defendant. Although the Amarillo Court of Appeals conceded that releasing its causes of action might have been "a distasteful option," the appellate court held, as a matter of law

on four grounds, that the release was not an instance of substantive abuse, or an act approaching a violation of public policy: (1) there was nothing "inimical" in releasing claims; (2) in exchange for the release, the plaintiff gained the opportunity to sell its gas to third-parties without hindrance from the defendant; (3) the plaintiff undoubtedly considered the claims unimportant at the time since it did not even attempt to investigate their potential existence or extent; and (4) the plaintiff had the option to pursue those claims rather than release them. *El Paso Natural Gas Co.,* 964 S.W.2d at 65. Given the totality of the circumstances which went unmentioned by the trial court, the Amarillo Court of Appeals concluded that the trial court abused its discretion in finding that the plaintiff was the victim of substantive abuse. *Id.*

With regard to the termination letters, the trial court found substantive abuse because the letters were "one sided." *Id.* at 66. While the appellate court agreed that the plaintiff received little in value for releasing the defendants, according to the Amarillo Court of Appeals, there was nothing inherently wrong in release agreements and the incorporation of the waiver terminology was not such that it could have escaped attention or been misunderstood. *Id.* Given the general lack of procedural abuse, therefore, the Amarillo appellate court held as a matter of law that the absence of a *quid pro quo* was not enough to raise the transaction from the realm of a "bad deal" into that of "unconscionability." *Id.* at 66.

d. The Code v. the Case law

As previously discussed, Texas courts often turn to contract law in an effort to analyze a marital agreement for unconscionability. Commercial and contract decisions concerning unconscionability address the circumstances surrounding the transaction, and discuss whether or not the ***entire transaction*** was unconscionable, approaches adopted by many courts in examining a premarital agreement. *See, e.g., Marsh v. Marsh*, 949 S.W.2d 734, 749 (Tex. App.–Houston [14th Dist.] 1997, no writ)*; Wade v. Austin*, 524 S.W.2d 79, 86 (Tex.Civ.App.–Texarkana 1975, no writ).

However, the Texas Family Code §4.006(a)(2) specifically provides that the agreement itself, rather than the transaction, must be unconscionable ("…the agreement was unconscionable when it was signed...").

Commercial and contract law sometimes also takes into account the effect of the agreement at the time it is being enforced to determine whether such agreements yield an unconscionable result. *See, e.g., Latham v. Castillo*, 972 S.W.2d 66, 68 (Tex. 1998); *but cf., El Paso Natural Gas Co.,* 964 S.W.2d at 61 (situation assessed as of the time the agreement is signed, not later via hindsight); *Fanning v. Fanning*, 828 S.W.2d 135, 145 (Tex. App.--Waco 1992), *aff'd in part, rev'd in part,* 847 S.W.2d 225 (Tex. 1993) ("[a]s in *Wade*, we will focus upon the circumstances at the time the agreement was executed rather than the disproportionate effect of the agreement").

However, the Texas Family Code expressly requires that the agreement be unconscionable "at the time it was signed," before "unconscionability" (as opposed to "voluntary execution") can be considered a defense to enforcement of the agreement. Logically, then, under the Texas Family Code, any eventual financial effect of the agreement does not determine unconscionability.

e. The Effect of the "Uniform Premarital Agreement Act"

The "Official Comment to Uniform Premarital Agreement Act," Section 6, pertaining to enforcement procedures, states that "[i]n order to determine whether the agreement is unconscionable, the court may look to the economic circumstances of the parties ***resulting*** from the agreement...." (Emphasis added). Sampson & Tindall, TEXAS FAMILY CODE ANNOTATED, p. 41 (August 1998). However, the Official Commentary to the Uniform Premarital Act has been omitted in more recent editions of Sampson & Tindall "because sufficient case law has developed in Texas to render that commentary either redundant or perhaps even misleading." Sampson & Tindall, TEXAS FAMILY CODE ANNOTATED, p. 53 (August 2005). Thus, according to the Official Comment, financial circumstances that ***result*** from the agreement are relevant to a determination of unconscionability. Apparently, the language of the Texas statute conflicts with the Official Comment to Section 6 of the Uniform Premarital Agreement Act.

Recall that in *Fanning*, 828 S.W.2d at 145, the Waco Court of Appeals stated that it would focus on the circumstances at the time the agreement was executed rather than any resulting disproportionate effect of the agreement. An issue unresolved in Texas is whether the Official

Comment to the Uniform Premarital Act, or *Fanning,* controls the issue of the appropriate temporal context in which to analyze the unconscionability of a marital agreement (if a resulting financial effect is considered a probative evidentiary factor, then certainly the relevant time period is extended beyond that established by the plain language of Texas Family Code). In the opinion of this Author, since *Fanning* follows the express language of the Texas Family Code on this point, *Fanning* should be considered authoritative.

f. Overlap Between "Voluntary" and "Unconscionable"?

Under the provisions of the Texas Family Code, "voluntary" and "unconscionability" are alternative defenses to the enforcement of a marital agreement. As a practical and procedural matter, however, Texas courts have repeatedly overlapped these alternative defenses.

Of the factors listed in *Wade*, discussed hereinabove, the first three, *i.e.,* (1) the entire atmosphere in which the agreement was made, (2) the alternatives, if any, which were available to the parties at the time of the making of the contract, and (3) the non-bargaining ability of one party, arguably all are probative and evidentiary factors only as to whether or not the agreement was signed voluntarily. The remaining two, (1) whether the contract is illegal or against public policy, and (2) whether the contract is oppressive or unreasonable, address the substance of the contract itself, and, arguably, are the factors to which the court can look to determine whether or not the agreement was unconscionable at the time it was signed.

An argument can be made that, under the express provisions of the Texas Family Code, to determine whether a marital agreement is unconscionable, the trial court should look ***only*** to the terms of the marital agreement, as set forth in the document itself, and not to the totality of the circumstances surrounding the agreement. Arguably, all other factors surrounding the execution of a marital agreement, or how a marital agreement came to be, should be included in the factual determination of whether the document was signed "voluntarily."

For example, in *Matthews v. Matthews*, 725 S.W.2d 275, 279 (Tex. App.–Houston [1st Dist.] 1986, writ ref'd n.r.e.), the Houston appellate court upheld the trial court's finding that the husband, who was seeking to enforce a post-marital indenture, had made threats and engaged in conduct for the purpose of coercing his wife into signing the document, and that the wife's free will had been destroyed by such acts and threats. In affirming the trial court's finding of duress, the First Court of Appeals considered the fiduciary relationship between the husband and wife, the contents of the document, the circumstances surrounding the couple's relationship, and the nature of the demands made by the husband. *Id*. All of these evidentiary factors were evaluated to determine whether or not the wife had voluntarily signed the indenture. *Cf., Prigmore v. Hardware Mut. Ins. Co. of Minn.*, 225 S.W.2d 897, 899 (Tex.Civ.App.--Amarillo 1949, no writ) ("[a] voluntary act proceeds from one's own free will or is done by choice or of one's own accord, unconstrained by external interference, force or influence").

Further, in *Blonstein v. Blonstein*, 831 S.W.2d 468, 471 (Tex. App.–Houston [14th Dist.] 1992), *writ denied per curiam*, 848 S.W.2d 82 (Tex. 1992), the Fourteenth Court of Appeals held that the defensive issues of "duress, overreaching, and undue influence" were encompassed in the broad form question submitted to the jury as to whether the husband (who was resisting enforcement of the agreement) voluntarily executed the marital property agreement at issue. Similarly, the defensive issues of "fraud, estoppel, and breach of fiduciary duties" were included in the broad form questions as to whether the husband was "provided fair and reasonable disclosure of the property or financial obligations of [the wife]" or whether the husband "had or reasonably could have had an adequate knowledge of the property or financial obligations of [the wife]." *Id*.

On the other hand, the Houston Fourteenth Court of Appeals has also observed that "in reviewing the validity of a marital property agreement, [it has] previously considered factors such as 'the maturity of the individuals, their business backgrounds, their educational levels, their experiences in prior marriages, their respective ages, and their motivations to protect their respective children.'" *Marsh*, 949 S.W.2d at 740, *citing, Williams v. Williams*, 720 S.W.2d 246, 249 (Tex. App.–Houston [14th Dist.] 1986, no writ). However, the factors listed in *Williams* were reviewed in determining whether or not a premarital agreement was obtained by fraud, duress or overreaching, rather than whether the agreement, an instrument in and of itself, was unconscionable.

Williams did not address, or even mention, the issue of unconscionability (at the time, former Texas Family Code §5.45 provided that party seeking to enforce the agreement had to prove that the other party gave informed consent and that the agreement was not procured by fraud, duress, or overreaching). *See, Id.* at 248. Thus, in light of *Matthews* and *Blonstein* (which specifically addressed the point), it can be argued that the Houston appellate court in *Marsh* overlapped elements of "voluntary" with "unconscionable."

In *Pearce v. Pearce*, 824 S.W.2d 195 (Tex. App.–El Paso 1991, writ denied), the wife sued her deceased husband's son, as the executor of the deceased husband's estate, alleging that a post-nuptial "Trust Indenture" was unenforceable. The Trust Indenture provided that the corpus of the trust would be separate property of the father and the son (the son's wife also signed the indenture). The trial judge found that the post-nuptial "Trust Indenture" was not unconscionable as a matter of law. The case was then submitted to the jury, which found, among other things, that the wife voluntarily executed the Trust Indenture. *Id.* at 197. On appeal, the wife argued that the trial court should have held the Trust Indenture unconscionable because, at the time the agreement was signed, she did not have a lawyer, she did not read or understand the agreement, and there was no reasonable disclosure of its effect made to her. *Id.* at 199.

The El Paso Court of Appeals noted that "unconscionability" had never been precisely defined, but was determined "on a case-by-case basis, looking to the entire atmosphere in which the agreement was made." *Id.* Consequently, the Eighth Court of Appeals held that the trial court could have properly considered the fact that the wife "kept the books" for the husband, both before and after the marriage, and had also urged the son's wife to sign the same agreement, even though the wife knew that the son's wife had been advised by an attorney not to sign the agreement. *Id.* Accordingly, the El Paso appellate court could not say that the trial court erred in refusing to find the agreement was unconscionable. *Id.* However, the El Paso court failed to address the "substance" of the Trust Indenture in any manner.

In *Fanning,* as already discussed, the Waco Court of Appeals found that the parties' agreement was unconscionable, given that the wife believed she had no alternative but to sign, the husband had threatened her with the loss of one of their children, and the wife's bargaining ability was far less than the husband's. The appellate court stated that since the wife believed her husband's threats as to the children, she also believed that her only alternative was to sign the agreement. 828 S.W.2d at 145-146.

It can be argued that the appellate courts in *Marsh*, *Pearce*, and *Fanning* have confused, or at least blended, the "voluntary" signing of an agreement with an "unconscionable" agreement.

The circumstances or atmosphere in which the agreement is made consists of evidentiary facts for the court or the jury to utilize in deciding whether an agreement was executed "voluntarily" or whether "adequate disclosure was made" (if the document is determined to have been unconscionable). Those facts, however, should not be a part of the determination of unconscionability of the document.

For the trial court to consider "the atmosphere in which the agreement was made," is to confuse "voluntary signature of the agreement" and "issues involving disclosure of property and financial obligations" with "unconscionability," and to collapse the two separate defenses into only one defense. Thus, the trial court's inquiry *should* be limited only to the terms of the agreement to determine if it was unconscionable at the time it was signed; all other facts are probative as to whether it was signed voluntarily, and if the trial court determines the agreement was unconscionable, whether or not all of the three prongs concerning disclosure exist.

As a litigation matter, it may be possible to use the "voluntary" issue to take away the issue of "unconscionability" from the trial judge by making the two overlap, in essence, by collapsing the two defenses into one, and thereby creating "fact issues" to be considered by the trier of fact. Even under the analysis of unconscionability dictated by *El Paso Natural Gas Co.,* with its independent determinations of procedural abuse and substantive abuse, the issue of whether the complaining party was "compelled" to sign the agreement appears in both prongs of the unconscionability test. *See, El Paso Natural Gas Co. v. Minco Oil & Gas Co*., 964 S.W.2d 54, 63 (Tex. App.--Amarillo 1997) rev'd on other grounds, 8 S.W.3d 309 (Tex. 1999); *Id.* at 61-62; *Id.* at 61, n. 5 (noting "an interrelationship between the indicia used under both procedural and substantive abuse").

g. Reconciliation: The Family Code and Commercial Law

Assume that a trial court is presented with a premarital agreement, executed in 2001, and one of the parties desires to enforce such agreement. The other party claims that the agreement was unconscionable when signed, but raises no specific allegation that he or she did not sign the agreement voluntarily. Under such circumstances, it would appear that the trial court would presume the agreement had been signed voluntarily.

Next assume that the trial court, adhering to "established" Texas procedure, considers the effect of commercial law precedent on the issue of unconscionability. The trial court therefore applies the analysis contained in *El Paso Natural Gas Co.,* and examines issues of procedural abuse and substantive abuse. Under the procedural abuse prong, the trial court considers the presence of deception, overreaching, and sharp business practices, the absence of viable alternatives, and the relative acumen, knowledge, education, and financial ability of the parties.

Yet, such factual considerations give the complaining party a "second bite" at the "voluntary" apple. For example, under *Blonstein,* issues of duress, overreaching, and undue influence are subsumed in the "voluntary" analysis. 831 S.W.2d at 471. Ultimately, the procedural abuse prong of *El Paso Natural Gas Co.* simply reiterates the independent and alternative requirement, under the Texas Family Code, that the premarital agreement be voluntarily signed. Similarly, "substantive abuse," under *El Paso Natural Gas Co.,* should be considered the commercial law correlative of "unconscionability" under the Texas Family Code.

By acknowledging that a "procedural abuse" investigation leads to a conclusion regarding whether a premarital agreement was voluntarily signed, and that a "substantive abuse" investigation leads to a conclusion regarding whether the agreement is unconscionable, a trial court would therefore conform its determination of enforceability more strictly to the express provisions of the Texas Family Code, particularly with respect to the alternative natures of the "voluntary" and "unconscionable" defenses.

3. Fair and Reasonable Disclosure

Once the trial court determines that a premarital agreement is unconscionable, the party resisting enforcement must also prove that, before signing the agreement, that party was not provided a fair and reasonable disclosure of the property or financial obligations of the other party. Texas Family Code §4.006(a)(2)(A). In other words, disclosure forms the second prong of the test to rebut the presumption of enforceability, and a lack of disclosure is material only if the premarital agreement has been determined to be unconscionable. *Marsh v. Marsh*, 949 S.W.2d 734, 743 (Tex. App.–Houston [14th Dist.] 1997, no writ). Thus, the premarital agreement must be found to be unconscionable before the jury is allowed to decide any disclosure issue.

In *Fanning,* the trial court found that the wife had not been provided "fair and reasonable disclosure" of the property or financial obligations of the husband. 828 S.W.2d 135, 144 (Tex. App.--Waco 1992), *aff'd in part, rev'd in part,* 847 S.W.2d 225 (Tex. 1993). On appeal, the husband argued that such finding was supported by legally and factually insufficient evidence. *Id.* at 146. However, the Waco appellate court looked to the wife's testimony that she had not received the required disclosure, that her husband wanted to keep her "ignorant of everything," and that she did not know how much money was in their account, how much her husband made, or how much property he actually owned, as well as the testimony of the husband's own psychologist, who described the husband as "secretive," in holding that sufficient evidence supported the trial court's finding. *Id.*

In *Daniel,* the husband complained that his wife and her attorney failed to disclose the existence of over $1 million of community income, which had accumulated to her separate property in a grantor trust governed by the terms of the parties' postnuptial agreement. 779 S.W.2d 110, 115 (Tex. App.--Houston [1st Dist.] 1989, no writ). The husband contended that he was not given complete access to this information, and that the wife's failure to disclose the accumulation of her income amounted to constructive fraud. *Id.*

The First Court of Appeals held that the trial court did not err in refusing to submit issues to the jury as to "fair and reasonable disclosure," the husband's knowledge of the property and financial obligations of the wife, and whether the husband waived any right to disclosure, because there was no evidentiary basis for submission of such issues to

the jury. *Id.* at 117-118. In reaching its conclusion, the Houston appellate court noted first that the husband was a licensed attorney, a certified public accountant, and an experienced businessman. *Id.* at 117. The husband also admitted that he read and understood the terms of the postnuptial agreement, as well as the joint income tax returns he and his wife filed during the six years of their marriage. *Id.* Although the husband knew of the sizeable amount of income accruing to his wife's separate estate, for his own, albeit laudable motives, *i.e.* his concern for the mental comfort of his wife, he voluntarily chose not to make any inquiry into those matters, and he also instructed his attorney not to make any such inquiry for him. *Id.* Moreover, when the husband executed the written marital agreement, he confirmed in writing his choice not to make any inquiry into the value and extent of his wife's property. *Id.*

Thus, the First Court of Appeals stated that the evidence conclusively established, as a matter of law, that the husband was given a reasonable opportunity to ascertain the true facts, and that he knowingly chose not to follow that opportunity. *Id.* at 116. According to the appellate court, when one spouse knowingly elects not to inquire into matters that affect his or her interest, he or she may not later complain that he or she did not know the full circumstances of the transaction. *Id.* at 117.

As already noted, the broad form jury questions as to whether one party is "provided fair and reasonable disclosure of the property or financial obligations" of the other party, or whether one party "has or reasonably could have had an adequate knowledge of the property or financial obligations" of the other party, encompass the defensive issues of "fraud, estoppel, and breach of fiduciary duties." *See, Blonstein*, 831 S.W.2d at 471.

4. Waiver of Disclosure

In addition to proving unconscionability, and the lack of "fair and reasonable disclosure," the party resisting enforcement must also prove that, before signing the agreement, that he or she did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided. TEX. FAM. CODE §4.006(a)(2)(B).

Under the express language of the statute, disclosure must be waived in writing ***before*** the marital agreement is signed. Accordingly, the statute apparently requires two separate written instruments, signed by both spouses, *i.e.,* a waiver and an agreement. Many, if not most, premarital agreements in Texas simply include the waiver within the written agreement. It is unresolved--indeed, as yet unaddressed in any reported case--whether such a procedure fulfills the statutory requirements.

5. Knowledge of Assets and Obligations

Finally, after establishing unconscionability, and the absence of disclosure or waiver of disclosure, the party resisting enforcement must also prove that, before signing the agreement, she or he did not have, or reasonably could not have had, adequate knowledge of the property or financial obligations of the other party. TEX. FAM. CODE §4.006(a)(2)(C).

Daniel seems to impose a "due diligence" requirement on a spouse resisting enforcement of a marital agreement. The language of §4.006(a)(2)(C), to the effect that the party resisting enforcement reasonably could not have had adequate knowledge, supports the notion of a due diligence requirement under appropriate circumstances. *Cf., Cabot Corp. v. Brown*, 754 S.W.2d 104, 106 (Tex. 1987) (of the three broad categories of covenants implied in all oil and gas leases, included within the covenant to manage and administer the lease is the duty to "reasonably" market the oil and gas produced from the premises; under the duty to "reasonably market," the lessee is required to market the production with due diligence). The language of §4.006(a)(2)(C) may also impose the standard of a "reasonably prudent person in the same or similar circumstances." *Cf., Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 568 (Tex. 1981) (the standard applied to test the performance of a lessee in its "reasonable" marketing of gas is that of "a reasonably prudent operator under the same or similar circumstances").

IV. EVIDENTIARY CONSIDERATIONS

A. Evidence Checklist Under Commercial Law Approach

Although the "commercial law" approach taken in *El Paso Natural Gas Co.* dealt explicitly with the issue of "unconscionability," such an analysis, with its focus on both "procedural abuse" and "substantive abuse," readily conforms to the

Texas Family Code's statutory "voluntary" or "unconscionable" inquiry. The following general checklist highlights the important evidentiary concerns involved in the *El Paso Natural Gas Co.* approach.

1. Procedural Abuse

(a) presence of deception, overreaching, or sharp business practices

(b) absence of viable alternatives (*i.e.,* did the resisting party have any other options?)

(c) relative acumen, knowledge, education, and financial ability of the parties

(d) was the party resisting enforcement "compelled" to execute the agreement?

(e) did the party resisting enforcement seek to renegotiate the agreement?

(f) did the resisting party test the alleged superior bargaining power of the other party, or did it simply acquiesce in the other's preferences (if so, then the resisting party cannot be said to have "fallen prey" to the other party's superior bargaining power)

(g) extent of negotiations, or extent of attempts to negotiate

(h) resisting party's attitude over time: did it show concern over the agreement or its effects?

(i) did the resisting party understand the effect of its actions?

(j) are the circumstances surrounding execution "shocking?"

(k) did the resisting party ever read the agreement?

(l) did the resisting party rely on something in the agreement as inducement to sign?

2. Substantive Abuse

(a) fairness or oppressiveness of the contract; "bad deal" vs. "unconscionable"

(b) is the agreement "inimical" to public policy?

(c) is there any reasonable or subjective parity between the values exchanged, or is it "utterly lopsided"? [recall, though, that under the Texas Family Code, no consideration is required for a marital agreement]

(d) is the agreement shocking?

(e) was the resisting party "compelled" to execute the agreement (*i.e.,* did it fall prey to the gross aspect of the deal?)

(f) does the agreement provide any benefit to the resisting party?

(g) did the resisting party investigate facts associated with its best interest and involved in the subject matter of the agreement? (due diligence)

(h) did the resisting party have any other options?

B. Evidence Checklist From Family Law Cases

Any dispute between two otherwise rational people as to the details surrounding their martial agreement may well (and probably will) devolve into a "swearing match." *See, e.g., Blonstein v. Blonstein*, 831 S.W.2d 468, 473 (Tex. App.–Houston [14th Dist.] 1992), *writ denied per curiam*, 848 S.W.2d 82 (Tex. 1992)(a review of the entire record showed, at best, a swearing match). Consequently, the prudent practitioner, whether he or she seeks to enforce or resist the enforcement of a marital agreement, will pay acute attention to the

"totality of the circumstances" surrounding the agreement.

A review of Texas cases involving marital agreements reveals a number of evidentiary factors repeatedly raised by the courts. The following checklist is not intended to be exhaustive. Further, such a checklist is not designed to particularize evidence of "voluntariness," as opposed to evidence of "unconscionability," since, as argued herein, such issues tend to be overlapped as a practical matter, by both courts and litigants. Nonetheless, the checklist does highlight typical evidentiary concerns raised in marital agreement cases.

1. Personal Characteristics of the Parties

a. Capacity to Contract

See, Marsh v. Marsh, 949 S.W.2d 734, 740 (Tex. App.–Houston [14th Dist.] 1997, no writ) (no evidence that husband was senile); *Sadler v. Sadler*, 765 S.W.2d 806, 808 (Tex. App.–Houston [14th Dist.] 1988), *reversed,* 769 S.W.2d 886 (Tex. 1989) (both parties were competent adults with full capacity to enter agreements).

b. General Character

See, Fanning v. Fanning, 828 S.W.2d 135, 146 (Tex. App.--Waco 1992), *aff'd in part, rev'd in part,* 847 S.W.2d 225 (Tex. 1993) (the psychologist who testified on the husband's behalf characterized the husband as manipulative and secretive, and that, given his competitiveness, his manipulative tendencies, and his aggression, the husband "could get very angry and be retaliatory"); *Blonstein*, 831 S.W.2d at 473 (witnesses testified that the deceased husband could not be forced to sign anything).

c. Maturity of the Individuals

See, Marsh, 949 S.W.2d at 741 (both parties were mature).

d. Business Backgrounds

See, Id. at 740 (husband was active in trading stocks); *Id.* at 741(both parties had business experience); *Fanning*, 828 S.W.2d at 139 (both parties were practicing attorneys when the marital agreement was executed); *Williams v. Williams*, 720 S.W.2d 246, 248-249 (Tex. App.--Houston [14th Dist.] 1986, no writ) (wife's job exposed her to contracts which dealt with banking financial records, and both parties had experiences with the sale of properties); *Daniel v. Daniel*, 779 S.W.2d 110, 115 (Tex. App.--Houston [1st Dist.] 1989, no writ) (husband was a licensed attorney and a certified public accountant, and once was employed as vice-president and assistant to the president of an engineering firm before he started his own venture capital firm).

e. Educational Levels

See, Marsh, 949 S.W.2d at 741 (both parties educated).

f. Experiences in Prior Marriages

See, Id. (both parties had been married before, and the wife saw her assets diminished through the lengthy illness of her late former husband); *Daniel*, 779 S.W.2d at 115 (both parties had prior marriages, and children by those marriages).

g. Respective Ages

See, Marsh, 949 S.W.2d at 741 (the husband was 78, the wife 58).

h. Motivations to Protect Respective Children

See, Id. (the wife had grown children to consider, whereas the husband was childless); *Williams*, 720 S.W.2d at 249 (husband testified that he was motivated to protect his children by prior marriages).

i. Relationship Prior to Marriage

See, Marsh, 949 S.W.2d at 742 (the husband acknowledged that before the marriage, he and the wife did not live together and had no access to each other's financial information).

j. Relationship Prior to Execution

See, Fanning 828 S.W.2d at 145-146 (severe marital problems); *Matthews v. Matthews*, 725 S.W.2d 275, 279 (Tex. App.–Houston [1st Dist.] 1986, writ ref'd n.r.e.) (the record reflected that the couple was having severe marital problems); *Blonstein*, 831 S.W.2d at 473 (the jury heard how the couple had been happily married for approximately forty years at the time the agreement was signed); *Pearce v. Pearce*, 824 S.W.2d 199 (Tex. App.--El Paso 1991, writ denied) (the trial

court could have properly considered the fact that the wife "kept the books" for the husband, both before and after the marriage).

k. Experience With Prior Marital Agreement

See, Marsh, 949 S.W.2d at 741 (only the wife had previously executed a premarital agreement); *Sheshunoff v. Sheshunoff*, 172 S.W.3d 686, 688 (Tex. App.–Austin 2005, pet. denied) (husband and wife had executed a premarital agreement and a post-marital agreement).

l. Awareness of Personal Financial Condition

See, Marsh, 949 S.W.2d at 740 (a letter written by the husband directing a specific transfer from one of his accounts showed that the husband appeared to be well aware of what he owned).

2. Negotiations Prior to Execution

a. Providing Documents

See, Id. (the wife's attorney, who prepared the agreement, testified that the husband provided all the financial documents needed to draft the premarital agreement).

b. Participation in Drafting

See, Id. (husband dictated portions of the agreement, and offered to have his accountant prepare any tax return required because of the effect of the agreement); *Id.* at 742 (the husband corrected the wife's counsel as to the total amount money transferred to a trust pursuant to the agreement); *Daniel*, 779 S.W.2d at 116 (on the day the agreement was executed, at the written suggestion of the husband, the drafting attorney, who was a mutual friend of both parties, inserted specific additional language in the final draft).

c. Circumstances of Negotiation

See, Daniel, 779 S.W.2d at 115-116 (the lawyer, a personal friend of both parties, who prepared drafts of the proposed agreement, which culminated in the agreement executed by the parties, testified that the matter was a "vigorously negotiated transaction," negotiated at "arms-length"); *Id.* at 116 (the husband had the proposed agreement reviewed by a lawyer, who later testified that the agreement had been negotiated in a friendly and amicable manner, and that the husband had agreed to make the agreement to preserve marital harmony with his wife); *Matthews*, 725 S.W.2d at 277 (an attorney testified that he met with both parties regarding the partition agreement, and that the wife seemed calm and normal, that she never indicated to him that she believed the agreement to be fraudulent, and that, in his opinion, both parties were fully aware of what they were doing).

3. Circumstances Surrounding Execution

a. Prior Discussion Concerning Agreement

See, Williams, 720 S.W.2d at 248 (the wife denied that she and the husband ever discussed the agreement prior to the day of its execution, whereas the husband stated that the parties had discussed and consented to the agreement's terms about six months prior to the wedding).

b. Awareness of Agreement

See, Id. at 249 (the wife was also familiar with the contents of the agreement, was of the opinion that the items designated in the agreement as the respective separate property of the parties were, in fact, their respective separate property at the time the agreement was executed, and conceded that at the time she executed the agreement, she had no objection to the division of the property as set forth therein); *Marsh*, 949 S.W.2d at 740-741 (the lawyer who drafted the agreement testified that he believed the parties were provided a copy of the documents to review before they were executed and he was sure that the husband understood the documents); *Grossman v. Grossman,* 799 S.W.2d 511, 513 (Tex. App.–Corpus Christi1990, no writ) (in his affidavit in support of his request for summary judgment, the husband stated "[p]rior to signing the premarital agreement, it was explained to my wife and she indicated that she understood what she was signing"); *Sadler*, 765 S.W.2d at 808 (the appellate court held that the wife could not escape her agreement by a mere denial of understanding it; a conclusory averment of ignorance was insufficient to avoid the agreement).

c. Reading the Agreement

See, Marsh, 949 S.W.2d at 740 (the husband's assertion that he did not read the agreement failed to persuade the appellate court that the agreement was unconscionable).

d. Threats, Etc.

See, Id. (the husband admitted that there were no threats, fraud, overreaching, duress, or misrepresentations made to him to induce him to execute the agreement, and the wife testified that she never threatened or dominated the husband, and that the agreement was not procured through fraud or duress)*; Fanning,* 828 S.W.2d at 146 (the husband threatened that the wife would not see their children again); *Matthews*, 725 S.W.2d at 277 (the wife testified that during the time period before the signing, the husband threatened that if she did not sign the indenture she would never see her son again).

e. Legal Representation Prior to Execution

See, Marsh, 949 S.W.2d at 740-741 (the husband acknowledged that he was free to consult an attorney and accountant before the execution of the agreement; the lawyer who drafted the agreement testified that he met with both parties over several hours in discussing the proposed agreement, including three visits with the husband alone, at which time he "strongly" recommended that the husband obtain independent counsel); *Chiles v. Chiles*, 779 S.W.2d 127, 129 (Tex. App.–Houston [14th Dist.] 1989, writ denied), *overruled on other grounds by Twyman v. Twyman*,855 S.W.2d 619, 624 n. 15 (Tex.1993) (the wife was represented by counsel at all times during extensive negotiations and drafts of the agreement); *Sadler*, 765 S.W.2d at 808 (the attorney who drafted the agreement testified at length to the circumstances of execution, stating that the parties freely entered into the agreement, that the attorney had dismissed the husband from the room and repeatedly counseled the wife to engage her own attorney; nonetheless, the wife declined the invitation and duly signed the contract, refusing to take it home and think about it); *Sheshunoff*, 172 S.W.3d at 688 (husband and wife had the assistance of several attorneys, accountants and other professional advisors when negotiating the marital property agreement).

f. Actions During Execution

See, Blonstein, 831 S.W.2d at 473 (the notary who witnessed the agreement's execution testified that the parties approached her desk and asked her to notarize a document, appeared to know what they were doing, were talking about an upcoming cruise they were planning while she was notarizing the agreement, and that there was absolutely no indication that the husband was not acting voluntarily).

g. Proximity of Execution to Wedding

See, Marsh, 949 S.W.2d at 741 (the fact that the premarital agreement was signed shortly before the wedding (one day) did not make the agreement unconscionable); *Osorno v. Osorno*, 76 S.W.3d 509, 510-11 (Tex. App.–Houston [14th Dist.] 2002, no pet.) (premarital agreement was signed voluntarily even though the agreement was signed the day before the parties married).

h. Available Alternatives

See, Fanning, 828 S.W.2d at 146 (since the wife believed her husband's threats as to the children, she also believed that her only alternative was to sign the agreement).

i. Relative Bargaining Abilities

See, Id. (given the husband's aggressive, manipulative, and retaliatory character, the wife's bargaining power was much less than that of the husband).

4. Actions After Execution

a. Legal Advice After Execution

See, Marsh, 949 S.W.2d at 741 (after execution of the agreement, the husband consulted an attorney, and admitted at trial that the attorney had pointed out several problems with the agreement).

b. Statements After Execution

See, Id. (the wife testified that the husband told her the agreement was worthless).

c. Actions Pursuant to the Agreement

See, Id. (contrary to his attorney's advice, the husband requested transfers from his account to an account established pursuant to the agreement).

d. Re-execution of the Agreement

See, Chiles, 779 S.W.2d at 129 (the agreement was executed a second time, immediately

after the marriage, to further express the intent of the parties that there would be no community property).

e. Obstinate Behavior

See, Marsh, 949 S.W.2d at 742-743 (the husband's complaints about unintended tax consequences of the agreement, admitted to exist by the wife, were disregarded by the Houston appellate court, particularly since the trial court had asked the parties to modify or reform the agreement to alleviate the deleterious tax consequences, to which the wife agreed but the husband refused.

f. Inconsistent Behavior

See, Pearce, 824 S.W.2d at 199 (the trial court properly considered the fact that the wife had also urged the son's wife to sign the same agreement she later claimed was unenforceable).

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5. Language of Agreement Itself

See, Marsh, 949 S.W.2d at 740 (the premarital agreement stated that each party entered the agreement freely and knowingly); *Id.* at 741, n. 5 (the agreement provided: "It has been strongly recommended, by the counsel of [the wife], that [the husband] obtain counsel for representation in the negotiations of this 'agreement,' however, [the husband] has elected not to retain independent counsel," and [the husband] represents that he enters into this 'Agreement' with informed consent and that this 'Agreement' was not procured by fraud, duress or overreaching"); *cf., Dewey v. Dewey*, 745 S.W.2d 514, 517 (Tex. App.–Corpus Christi 1988, writ denied) (the husband's income was community property because the premarital agreement did not expressly mention salaries or state that there would be no accumulation of community estate); *Daniel,* 779 S.W.2d at 117 (when the husband executed the written marital agreement, he confirmed in writing his choice not to make any inquiry into the value and extent of his wife's property); *cf., Sadler,* 765 S.W.2d at 807 (agreement was a "model of simplicity," but three pages long and containing only eight paragraphs).

6. Disclosure and Knowledge

See, Fanning, 828 S.W.2d at 146 (the wife's testimony that she neither received disclosure nor waived such disclosure, that her husband wanted to keep her "ignorant of everything" for her own protection, that she did not have any knowledge of how much money was in their account, how much money her husband was making, or how much property he actually owned, as well as testimony from the husband's psychologist describing the husband as "secretive," supported the court's findings that the husband failed to disclose his property or financial obligations); *Blonstein*, 831 S.W.2d at 474 (deceased husband was informed about his wife's property and had been extremely active in tending to finances during the marriage, particularly since the parties filed a joint tax returns each year, all records were available to the deceased at all times, and the husband (1) had complete access to their bank records, (2) had picked up certain bank records only a month before the agreement was signed, (3) sat down each year with a bookkeeper or accountant, went through each schedule of the tax return, and discussed which part of the reportable income was from his assets and which was from his wife's, and (4) had visited certain properties classified as his wife's separate estate); *Daniel*, 779 S.W.2d at 116 (the record showed that the parties filed joint income tax returns, and the husband admitted that he had reviewed the tax returns and that he had not misunderstood their import).

7. Due Diligence

See, Daniel, 779 S.W.2d at 117 (the husband admitted that he never asked his lawyer to inquire into relevant issues surrounding the distribution of the income from a trust created in the parties' agreement, but rather explained that his purpose in making the agreement was to provide his wife "comfort" regarding her estate and her assets, that he had not been interested in the size of her estate, and that he had not asked any questions about the extent of her properties because of their mutual understanding that he would not inquire into her properties, and she would not inquire into his).

V. LITIGATING THE MARITAL AGREEMENT

A. Initial Interview

A number of issues must be addressed with the client in the initial interview. If the client has brought a copy of the agreement, the attorney must read the agreement. If the client has not brought the agreement with him or her, the attorney must get a copy and then read it. Before making any prognostications, the prudent lawyer will read the agreement carefully. Further, the prudent attorney will not take the client's word for anything: the

agreement will speak for itself. Any statements by the client to the effect that "I have a prenup and it covers everything" must be discounted until the agreement has been examined in detail.

When reading the agreement, the attorney should look for idiosyncracies. Since the agreement is but an agreement between two people, and, depending on the circumstances, people will agree to "just about anything," a premarital agreement might say "just about anything." In a big picture sense, idiosyncracies, such as future requirements for actions, conditions precedent, or unusual transactions, etc., all point toward difficulties in later enforcement. That could be good, or that could be bad, depending on whose ox is about to be gored.

The attorney must check for the signatures, made at the time the agreement was executed, of both the parties and their respective lawyers, if any. The agreement must be examined to see that it is complete: confirm that all attachments, if any, exist, and are referred to properly within the agreement (*i.e.,* his separate property is indeed his, and not hers), and are accurate. Premarital agreements often refer to exhibits that have never been attached, or are inaccurate.

The agreement must be examined for a choice of law clause. If Texas law does not apply to the agreement, then the attorney must know it.

Ultimately, it is probably wise for the practitioner to communicate to the client that Texas does have a public polity of enforcing premarital agreements, but that, at least until further examination, issues of enforcement are unclear. Always keep in mind that a jury might well decide the issue, and juries are, well, juries.

B. Pleadings

1. The Petitioner's Pleadings

a. Fair Notice

Generally, a petition in an action predicated upon a contract must contain a short statement of the cause of action sufficient to give fair notice of the claim involved, including an allegation of a contractual relationship between the parties, and the substance of the contract which supports the pleader's right to recover. *UMC, Inc. v. Coonrod Elec. Co., Inc.*, 667 S.W.2d 549, 553 (Tex. App.–Corpus Christi 1983, writ ref'd n.r.e.); *see also*, *Cadle Co. v. Castle*, 913 S.W.2d 627, 630-631 (Tex. App.–Dallas 1995, writ denied) (a petition must state a breach of contract claim sufficient to give fair notice; an allegation of a contractual relationship and the substance of the contract which supports the pleader's right to recover are sufficient to give fair notice of the claim involved).

In *Williams v. Williams*, 720 S.W.2d 246, 249 (Tex. App.--Houston [14th Dist.] 1986, no writ), the wife argued that the husband's pleadings and proof were insufficient to support any claim of separate property based upon the parties' premarital agreement. In his First Amended Cross-Petition, however, the husband had included the following allegations:

> On April 16, 1982 Cross Petitioner [the husband] and Cross Respondent [the wife] entered into the following written agreement. Attached to this pleading as Exhibit "A" is a true and correct copy of the agreement entitled "Agreement in Contemplation of Marriage". Cross Petitioner will abide by all provisions of the agreement entered into with Cross-Respondent and asks that this agreement be adopted with its provisions carried out in the final judgment of this cause.

Id. The Fourteenth Court of Appeals held that, by attaching the premarital exhibit to his amended pleading, and by including the foregoing allegations, the husband had put the wife on notice of his intent to use the agreement at trial, particularly since the purpose of the adequate notice requirement for a pleading is to give the opposing party information sufficient to enable her or him to prepare a defense. *Id.*

Further, if a contract contains conditions precedent, there must be some allegation by the plaintiff that the conditions have been met. *Grimm v. Grimm*, 864 S.W.2d 160, 161 (Tex. App.–Houston [14th Dist.] 1993, no writ) (enforcement of marital and property settlement agreement incorporated into divorce decree). Similarly, when a party to a contract seeks to enforce the agreement, that party must prove that it has performed all of its own obligations under the contract. *Bernal v. Garrison*, 818 S.W.2d 79, 86 (Tex. App.–Corpus Christi 1991, writ denied).

b. Attorney's Fees

A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for, among other things, a written contract. TEX. CIV. PRAC. & REM. CODE §38.001(8).

To recover attorney's fees pursuant to the Texas Civil Practices and Remedies Code, (1) the claimant must be represented by an attorney; (2) the claimant must present the claim to the opposing party or to a duly authorized agent of the opposing party; and (3) payment for the just amount owed must not have been tendered before the expiration of the 30th day after the claim is presented. TEX. CIV. PRAC. & REM. CODE §38.002; *see also, Great Am. Ins. v. North Austin MUD,* 908 S.W.2d 415, 427 n.10 (Tex. 1995).

In a suit on a contract, the plaintiff bears the burden of pleading and proving that he or she made presentment of the claim to the opposing party. *Ellis v. Waldrop*, 656 S.W.2d 902, 905 (Tex. 1983). Neither the filing of a suit nor the allegation of a demand in the pleadings, can, without more, constitute presentment of a claim. *Carr v. Austin Forty*, 744 S.W.2d 267, 271 (Tex. App.–Austin 1987, writ denied).

In discussing the element of "presentment," the Austin Court of Appeals has noted:

> We recognize that no particular form of presentment is required....Nothing in the Texas Civil Practice and Remedies Code defines the word "present" as used in §38.002 where the act is made a prerequisite to recovering attorney's fees....Apparently, the [Texas] [S]upreme [C]ourt has construed the word to mean simply a demand or request for payment....In all events, the elements of presentment in §38.002 must include at minimum a demand or request for payment, irrespective of what else it might include.

Jim Howe Homes, Inc. v. Rogers, 818 S.W.2d 901, 904, n. 3 (Tex. App.–Austin 1991, no writ).

In *Marsh,* the husband initially raised several points of error on appeal alleging that the trial court erred in awarding the wife attorney's fees pursuant to section 38.001; however, before submission, the husband withdrew those points of error, conceding that the wife had complied with the requirements set forth in section 38.002 of the Texas Civil Practice and Remedies Code. *Marsh v. Marsh*, 949 S.W.2d 734, 737, n. 1 (Tex. App.–Houston [14th Dist.] 1997, no writ).

2. The Respondent's Pleadings

A general denial, coupled with an allegation that an existing marital agreement is valid, will place the issue of enforceability before the trial court. *See, Grossman v. Grossman,* 799 S.W.2d 511, 512 (Tex. App.–Corpus Christi1990, no writ) (the husband responded to wife's petition for divorce with a general denial regarding the wife's request for a division of marital property, pleading that the division of the marital property was subject to a premarital agreement, as well as a counter-claim for divorce). Presumably, a general denial, coupled with an allegation that an existing martial agreement is not enforceable, properly pleads the enforceability issue.

a. Affirmative Defenses

Rule 94 of the Texas Rules of Civil Procedure requires that a party plead its affirmative defenses. In the context of a marital agreement, several affirmative defenses may exist. As already discussed, agreements executed prior to 1993 are probably subject to some "common law defenses"; as grounds for avoidance of the agreement, such common law defenses must be pled and proved. Further, as also already discussed, many of the common law defenses have been subsumed into the requirement that the agreement be voluntarily signed; as elements of "voluntariness," several common law defenses might well deserve to be mentioned in pleadings, or at least in discovery, in order to avoid unnecessary and vexatious arguments about waiver or the preservation of error.

Finally, it should be recalled that section 4.008 expressly provides that certain equitable defenses limiting the time for enforcing a premarital agreement, including laches and estoppel, are available to either party.

(1) Unconscionability

An allegation that a provision in a contract is void, unenforceable, or unconscionable is a matter

in the nature of an avoidance which must be pled. *Posey v. Southwestern Bell Yellow Pages, Inc*., 878 S.W.2d 275, 281 (Tex. App.–Corpus Christi 1994, no writ).

(2) Ambiguity

Ambiguity is an affirmative defense, and a person seeking to establish ambiguity in a written contract must specifically plead it at the trial court level. *Gulf & Basco Co. v. Buchanan*, 707 S.W.2d 655, 656 (Tex. App.–Houston [1st Dist.] 1986, writ ref'd n.r.e.). The pleading must set out the alleged ambiguous portion of the contract and the meaning or construction relied on by the party asserting ambiguity. *Id.*

(3) Ratification

As a plea in avoidance (in the absence of a trial by consent), ratification is waived unless affirmatively pled. *Solvex Sales Corp. v. Triton Mfg. Co*., 888 S.W.2d 845, 849 (Tex. App.–Tyler 1994, writ denied).

(4) Undue influence

Undue influence must be pled to show specifically what influence was exercised or how influence was used to procure the consummation of the transaction in question. *Estate of Menifee v. Barrett*, 795 S.W.2d 810, 812 (Tex. App.–Texarkana 1990, no writ). Thus, a trial court may strike a party's late pleadings that attempt to raise such an issue. *Id.*

(5) Coercion

Coercion is an affirmative defense which must be specially pleaded and proved to be available. *Laughlin v. Federal Deposit Ins. Corp*., 657 S.W.2d 477, 480 (Tex. App.–Tyler 1983, no writ).

(6) Payment

It is well established Texas law that a plea of payment is an affirmative defense to a contract action and that a party claiming a right to an offset has the obligation of pleading and proving his or her entitlement and of requesting a jury issue on that point. *Gunter Hotel of San Antonio Inc. v. Buck*, 775 S.W.2d 689, 694 (Tex. App.–San Antonio 1989, writ denied).

(7) Mutual Mistake

Mutual mistake is an affirmative defense; thus, evidence of any mutual mistake by parties concerning potential tax consequences of a premarital agreement was properly excluded where affirmative defense of mutual mistake was not pleaded. *Marsh,* 949 S.W.2d at 745.

(8) Limitations

That a suit is barred by the statute of limitations is an affirmative defense. *See, e.g.,Velsicol Chem. Corp. v. Winograd*, 956 S.W.2d 529, 530 (Tex. 1997); *see also, Matter of Marriage of Collins,* 870 S.W.2d 682, 685 (Tex. App.–Amarillo 1994, writ denied) (limitations defense to informal marriage allegation must be pled or it is waived). Under Texas Family Code section 4.008, limitations should not be an issue in most premarital agreement cases.

(9) Laches

Laches is an affirmative defense. *See, e.g., Miller v. Sandvick*, 921 S.W.2d 517, 523 (Tex. App.– Amarillo 1996, writ denied).

(10) Estoppel

Estoppel is an affirmative defense. *See, e.g., RE/MAX of Texas, Inc. v. Katar Corp.*, 961 S.W.2d 324, 327 (Tex. App.–Houston [1st Dist.] 1997, writ) *pet. denied*, 989 S.W.2d 363 (Tex. 1999).

b. Condition Precedent

Rule 54 of the Texas Rules of Civil Procedure provides as follows:

> In pleading the performance or occurrence of conditions precedent, it shall be sufficient to aver generally that all conditions precedent have been performed or have occurred. When such performances or occurrences have been so plead, the party so pleading same shall be required to prove only such of them as are specifically denied by the opposite party.

A condition precedent may be either a condition to the formation of a contract or to an obligation to

perform an existing agreement. *Marsh,* 949 S.W.2d at 743.

c. Verified Denials

Rule 93 of the Texas Rules of Civil Procedure requires that certain pleas be verified. For example, a party that denies the execution, by itself or by its authority, of a contract, upon which a pleading is founded, must do so by a sworn denial. *Methodist Hosp. of Dallas v. Corporate Communicators, Inc.*, 806 S.W.2d 879, 882 (Tex. App.–Dallas 1991, writ denied). In the absence of a verified plea of denial, the court receives the instrument into evidence as fully proved. *See e.g., Zodiac Corp. v. General Elec. Credit Corp.*, 566 S.W.2d 341, 346 (Tex.Civ.App.–Tyler 1978, no writ).

C. Discovery

The main thrust of discovery in a premarital property case is to ascertain facts that either limit the issues involved in the case, or that support, or negate, enforceability. The new discovery rules do not change the underlying need for certain information. Of course, the usual precautions should be taken in discovery efforts, as in any litigation. For example, experts and their opinions should be disclosed. *See, e.g., Marsh,* 949 S.W.2d at 742 (over objection, the husband's expert was allowed to testify that the premarital agreement was unconscionable *per se*; the wife's expert, naturally, testified to exactly the opposite).

The precise areas of investigation are naturally determined according to the evidence available to the practitioner. Earlier in this paper, evidentiary outlines are provided, taken from both commercial case law and from domestic case law; discovery can be tailored to ascertain the existence of such evidentiary factors, as well as any others idiosyncratic to the case.

D. Summary Judgment

As previously mentioned, in *Blonstein v. Blonstein*, 831 S.W.2d 468, 472 (Tex. App.–Houston [14th Dist.] 1992), *writ denied per curiam*, 848 S.W.2d 82 (Tex. 1992), the Houston Fourteenth Court of Appeals stated that it was the better practice for the trial court to determine early in the proceedings whether an agreement is unconscionable. Summary judgment is the optimal method by which to test an agreement for unconscionability early in the game. *See, e.g., Beck v. Beck*, 814 S.W.2d 745, 746 (Tex. 1991) (summary judgment, holding that premarital agreement was enforceable, affirmed by the Texas Supreme Court)

Rule 166a of the Texas Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith... if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion..." TEX. R. CIV. P. 166a(c). Texas courts have expressed a desire to eliminate patently unmeritorious claims through summary judgment procedures. *Ross v. Texas One P'ship*, 796 S.W.2d 206, 209 (Tex. App.– Dallas 1990), *writ denied per curiam*, 806 S.W.2d 222 (Tex. 1991).

A movant must show that there are no genuine issues of material fact, and that the movant is entitled to judgment as a matter of law. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). A movant in summary judgment motion may have differing burdens as to what must be proven, however, depending upon whether he is the claimant or defendant in the underlying case.

Because the statute governing enforcement of premarital agreements creates a rebuttable presumption that the agreement is enforceable, the party who seeks to set aside the premarital agreement bears the burden to prove that the agreement is unenforceable. TEX. FAM. CODE §4.006. The respective burdens in a summary judgment motion, filed by the party seeking enforcement of a premarital agreement, were set forth in *Grossman v. Grossman,* 799 S.W.2d 511, 513 (Tex. App.–Corpus Christi1990, no writ), as follows:

> In a summary judgment context, when the movant is seeking to enforce a premarital agreement to which he is a party, such a presumption operates without evidence other than that of the existence and terms of the agreement to establish that there is not a genuine issue of material fact regarding the enforceability of the agreement.

The summary judgment is not required to dispense with all issues before the court; a partial summary judgment may be granted when a summary

judgment on the entire case is not proper and a conventional trial is necessary as to some issues, but the court can limit those issues to be litigated at trial. Under Rule 166a(e) of the Texas Rules of Civil Procedure, the movant is entitled to a partial summary judgment in the form of an interlocutory order when he or she demonstrates entitlement to relief as to a part, but not on the whole case. *Texas United Ins. Co. v. Burt Ford Enter., Inc.,* 703 S.W.2d 828, 832 (Tex. App.–Tyler 1986, no writ).

A summary judgment may be granted on separate issues within a single cause of action. *Chase Manhattan Bank, N.A. v. Lindsay*, 787 S.W.2d 51, 53 (Tex. 1990). The trial court may grant summary judgment as to any one or more issues of defense to the enforceability of the agreement. For example, the trial court can grant a partial summary judgment that a marital agreement was not unconscionable at the time that it was signed, without determining that the marital agreement is altogether enforceable or unenforceable.

The "no evidence" summary judgment is an extremely attractive method, for the proponent of a premarital agreement, to dispose of the issues of validity and enforceability early in the case. Since the burden to defeat a premarital agreement rests on the party resisting its enforceability, carefully drafted discovery will flush out any pertinent claims which could defeat the contract.

In the words of one commentator:

> A "no-evidence" motion for summary judgment should prove a useful vehicle on the part of the party supporting the validity of the agreement to obtain a partial summary judgment on [the issue of unconscionability] alone. If it is found that there is no evidence supporting the contention of the challenging party [*i.e.,* the agreement is unconscionable], the agreement would be upheld as an interlocutory order. This procedure should simplify and shorten the trial by permitting the court and the parties to focus only on the community property remaining.

Joe Shannon, Jr., *Summary Judgment–The Fast Lane or the Exit Ramp,* R-14, 25th ANNUAL ADVANCED FAMILY LAW COURSE (State Bar of Texas 1999).

It is strongly suggested that requests for admissions, interrogatories, and depositions be initiated as soon as possible to posture the client for a motion for summary judgment. Even if all of the issues can not be resolved by way of a complete summary judgment, a partial summary judgment disposing of the issues of validity and enforceability of the contract will eliminate a great deal of time and money.

Although a summary judgment, or more likely, a partial summary judgment, is possible in any premarital agreement case, problems do exist. Most importantly, as this article has discussed at some length, even the concept of "unconscionability," its purported character as a question of law notwithstanding, is, under current case law, a rather fact-dependant issue. The cases reiterate that "unconscionability" must be determined on a case-by-case basis, considering the totality of the circumstances. *See, e.g., Marsh v. Marsh*, 949 S.W.2d 734, 740 (Tex. App.–Houston [14th Dist.] 1997, no writ).

E. Trial

1. Separate Trials

Comment 207.1 of TEXAS PATTERN JURY CHARGES-FAMILY (2008) states:

> The Committee suggests that, if a suit involves the question of the enforceability of a premarital agreement..., the court should consider a separate trial to determine the validity of the agreement. *See* TEX. R. CIV. P. 174(b). Otherwise, the sets of alternative instructions on marital property will be unnecessarily confusing. Additionally, if enforceability and property issues are tried together, the litigants will have to advance alternative theories and produce evidence supporting those theories. On the other hand, if the determination of the enforceability of the property agreements is made first, the

presentation of evidence and the jury's task are greatly simplified.

Apparently, no reported Texas case specifically addresses the issue of a separate trial to determine the validity of a premarital agreement. However, as a factual matter, at least one case does recite that a separate trial on enforceability had been conducted in the proceedings. *See, e.g., Edgington v. Maddison*, 870 S.W.2d 187, 188 (Tex. App.–Houston [14th Dist.] 1994, no writ) (a separate trial was held to determine the validity of a premarital agreement, which the parties had signed shortly before the marriage).

2. Jury Trial

a. Jury Issues

Either party has a right to jury trial on the issue of enforceability. According to the TEXAS PATTERN JURY CHARGES-FAMILY (2008), the jury should be instructed that an agreement is not enforceable if it was not signed voluntarily, or if the party against whom enforcement is requested proves that, before signing the agreement, that party was not provided a fair and reasonable disclosure of the property or financial obligations of the other party; and did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and did not have and reasonably could not have had adequate knowledge of the property or financial obligations of the other party. *See,* TEXAS PATTERN JURY CHARGES-FAMILY 207.2B & 207.2C (2008).

The jury should then be asked the broad form question: "Is the premarital agreement between *PARTY A* and *PARTY B* enforceable?" *See,* TEXAS PATTERN JURY CHARGES-FAMILY 207.2D (2008). The potential problems with the charge, of course, is that it omits the trial judge's findings on whether the agreement is "unconscionable," and the time element as to when the finding is made - i.e., before submission to the jury or after submission to the jury? If the agreement is not found to be "unconscionable" by the judge, there is no need to submit the instructions on disclosure. More significantly, however, the broad form question as to whether the agreement is "enforceable" rather than specific questions on the elements pertaining to enforcement may be misleading to the jury members, who are unfamiliar with these concepts.

b. Waiver of Jury Trial

In *Young v. Young*, 854 S.W.2d 698, 700 (Tex. App.–Dallas 1993, writ denied), the parties executed a postmarital agreement which identified their separate property, and partitioned their existing community property, as well as community property to be acquired in the future. The wife filed for a divorce in November 1987, and paid a jury fee in May 1988. *Id.* The validity of the agreement became the focus of the divorce proceedings because the net effect of its terms and conditions was that no community property could be accumulated during the marriage. *Id.*

According to an agreement between the parties, a master conducted evidentiary hearings on several issues, including whether the wife voluntarily executed the agreement. *Id.* The master found that the wife voluntarily executed the agreement, and the wife timely filed her special exceptions to the master's recommendation. *Id.*

Approximately one month later, the trial court conducted a hearing on the wife's exceptions to the master's recommendation, denied the wife's request for a trial de novo (specifically, for a trial de novo before a jury on the issue of whether she signed the agreement voluntarily), and adopted the master's recommendations. *Id.*

On appeal, after the trial court entered a final decree of divorce, the Dallas Court of Appeals first held that appointment of the master was made pursuant to Rule 171 of the Texas Rules of Civil Procedure. *Id.* at 701. The Court then noted that when issues are referred to and heard by a master under Rule 171, the master's report is conclusive on all issues except those to which specific objections have been made. *Id.* Issues of fact raised by objections, however, are to be tried de novo before the district trial court if a jury has not been requested, or before a jury if one has been timely requested and a jury fee has been paid. *Id.* Accordingly, the Dallas appellate court held that the wife's timely special exceptions to the master's finding were sufficient to enable her to obtain a trial de novo before a jury on the issue of voluntary execution. *Id.* at 702.

In contrast to *Young,* in *Sadler v. Sadler*, 765 S.W.2d 806, 807 (Tex. App.–Houston [14th Dist.] 1988), *rev'd on other grounds*, 769 S.W.2d 886 (Tex. 1989), at the close of evidence before the master, the parties' attorneys made an agreement to

put the case into the appellate process without a trial de novo, in the event of dissatisfaction with the master's rulings. To the husband's extreme dissatisfaction, the master refused to enforce the marital property contract. *Id.*

On appeal, the husband complained of the denial of a jury trial. *Id.* However, the Houston appellate court held that by entering into the agreement in open court, the husband gave up this right to trial de novo, even though his counsel did not use the words "waiver of jury trial," since no other interpretation of the parties' agreement would give meaning to their express stipulation. *Id., citing,* TEX. R. CIV. P. 11. To the Fourteenth Court of Appeals, it was simply not sufficient for the husband to contend on appeal that his subjective understanding of the agreement differed from its objective meaning. *Id.*

c. Jury Trials and the Human Factor

In the event that separate trials are conducted, one for enforceability and one for the remaining issues in dispute, the practitioner must consider the question of whether he or she wants the same jury, or different juries, to act as the trier of fact. A single jury naturally enhances judicial and financial economy. However, "human factors" may well argue for separate juries in the separate trials.

For example, the lawyer who represents a likeable client who is also a good witness will probably attempt to keep a single jury panel during all related proceedings. On the other hand, a client who is less than likeable, or less than credible, may well suffer prejudice from a jury that has already heard the facts and circumstances surrounding a contested marital agreement, and that is now considering the delicate issues of custody, child support, and property issues. Even if, in the second proceeding, such bad facts are successfully removed from the jury's consideration by a successful motion in limine, if the same jury hears the second trial, such pretrial tactics will have no practical effect.

Although this article certainly attempts to highlight many "technical" matters involved in litigating premarital agreements, the Author emphasizes the critical nature of the "human element" in all such cases. The prudent practitioner cannot ignore the personalities of the litigants, or the manner in which the litigants present themselves as witnesses. A contest between the "bully" and the "innocent," or between the "successful businessman" and the "trophy" wife (or the successful businesswoman and the "dumb jock" husband) will inevitably color the judgment of the trier of fact. A premarital agreement that is unbalanced between the "bully" and the "innocent" may incline a jury to "even the score." A premarital agreement that is unbalanced between two equally successfully spouses, in contrast, may evoke no such emotional response on the part of the jury.

If the attorney represents the client who has the benefit of the "law" on his or her side, coupled with knowledgeable jurist, it is probably more prudent to waive a jury and let the court decide. However, if the judge is unable to understand and follow the law, or has denied a summary judgment, which should have been granted, one may have nothing to lose by going to the jury. If the latter is the case, the practitioner needs to be sure that error is properly preserved because an adverse decision will undoubtedly have to be appealed.

VI. POST TRIAL MATTERS

A party asserting an affirmative defense (like release or waiver) in a trial before the court must request findings in support thereof in order to avoid waiver. *Augusta Dev. Co. v. Fish Oil Well Servicing Co.*, 761 S.W.2d 538, 542 (Tex. App.–Corpus Christi 1988, no writ); *Pinnacle Homes, Inc. v. R.C.L. Offshore Eng'g Co.*, 640 S.W.2d 629, 630 (Tex. App.–Houston [14th Dist.] 1982, writ ref'd n.r.e.). Furthermore, if the findings issued by the court do not encompass any element of the defense asserted, then the failure to request additional findings relevant thereto effects a waiver. *Id.* Don't make this mistake.

VII. ENFORCEMENT: SPECIAL ISSUES

A. Anticipatory Breach

Under Texas law, when one party repudiates a contract, the nonrepudiating party has the right to accept the repudiation and bring a cause of action for damages immediately, or to keep the contract alive and sue for damages as they accrue. *Thomas v. Thomas*, 902 S.W.2d 621, 624 (Tex. App.–Austin 1995, writ denied); *see also, Hardin Assocs., Inc. v. Brummett*, 613 S.W.2d 4, 6 (Tex. Civ. App.–Texarkana 1980, no writ) (noting that upon repudiation, nonrepudiating party has right to maintain action at once for entire breach and thus receive in damages ***the present value of future payments*** due under contract) (emphasis added).

The two distinct options available to the non-breaching party are inconsistent, substantive rights. *Thomas*, 902 S.W.2d at 624. Thus, when the nonrepudiating party decides to file a suit for unaccrued future damages immediately upon repudiation of the contract, that party resolves the right to recover such future contract payments "into a mere cause of action for damages," giving up the right to later sue on the contract. *Id.; quoting, Greenwall Theatrical Circuit Co. v. Markowitz*, 79 S.W. 1069, 1071 (Tex. 1904).

According to the Texas Supreme Court, "a contract cannot be thus treated, for one purpose, as subsisting, and, for another purpose, as at an end. Upon such a repudiation ... the other may make his choice between the two courses open to him, but can neither confuse them together nor take both." *Id.* at 1071-72. If the nonrepudiating party accepts the renunciation as terminating the agreement, that party may not later sue on the contract. *Thomas*, 902 S.W.2d at 625. In other words, the decision to pursue a claim for anticipatory breach involves an "election of rights," and such election may have far-reaching implications, often misunderstood or misperceived by the practitioner. *See, Id.* at 624.

Thomas, for example, illustrates a potential trap in anticipatory breach claims. In *Thomas,* the parties were divorced in 1989. *Id.* at 622. As part of the divorce settlement, the husband agreed to pay contractual alimony to the wife. *Id.* at 622-623. In December, 1991, the former wife sued the former husband, alleging breach of the alimony contract as well as anticipatory repudiation of the contract and seeking judgment for all payments due, both past and future, under the alimony contract. *Id.* at 623. The jury found that the husband both breached and repudiated the contract, awarded the wife $100,000 in damages for breach of contract, but found zero damages for repudiation. *Id.* After the trial court reduced the damages for breach of contract to $68,000 for the past due and unpaid alimony payments from August 1991 through November 1992, the judgment became final. *Id.*

In April 1993, the former wife demanded alimony payments due under the same alimony contract that was the subject of the prior litigation. *Id.* In response, the former husband filed a suit for declaratory relief to the effect that the rights and obligations of the parties under the alimony contract had been fully and finally adjudicated in the previous lawsuit. *Id.* The trial court ruled in the former husband's favor. *Id.*

On appeal, the Austin Court of Appeals upheld the trial court's ruling, stating that the former wife "elected" to terminate the contract when she chose, in the original suit, to sue for anticipatory repudiation, instead of waiting to enforce the contract and sue to collect the alimony installments as they became due and unpaid. *Id.* at 625. Thus, according to the Austin appellate court, the trial court in the second action correctly determined that all contractual obligations between the parties had been terminated and that the former husband had no obligation to make alimony payments after November 1992 (the month that the first case was tried). *Id.*

Another potential trap lurking in anticipatory breach claims involves proof of damages. As stated, under an anticipatory breach claim, the nonbreaching party may sue for the ***present value*** of the payments payable under the agreement. *See, e.g., Taylor Pub. Co. v. Sys. Mktg. Inc*, 686 S.W.2d 213, 217 (Tex. App.– Dallas 1984, writ ref'd n.r.e.). An anticipatory breach does not change the usual rule for measuring damages, *(i.e.,* damages for breach of contract are to compensate the innocent party for loss or damage actually sustained), but rather merely requires that an accurate estimate of the probability of future performance be substituted for the certainty of performance. *Kiewit Texas Min. Co. v. Inglish*, 865 S.W.2d 240, 245 (Tex. App.–Waco 1993, writ denied). The face value of a contract is ordinarily different than the value of its expected performance, with the uncertainty of future performance usually accounting for the difference. *Id.* Thus, plaintiffs are only entitled to recover the value to them of the "expected performance" of the contract, which is the loss they actually sustained from the anticipatory breach; they are not automatically entitled to recover the present value of the remaining face value of the contract. *Id.* Consequently, plaintiffs have the burden of establishing with reasonable certainty the value of the expected performance. *Id.*

Moreover, it must be emphasized that, once the right to sue for anticipatory breach is elected, the right to sue for installments due under the contract is likely lost. Therefore, if the party electing to sue for anticipatory breach fails, for whatever reason, to prove its damages, such party will not later be able to sue on the contract, even if, at that later date, damages have become more ascertainable.

Several years ago, Wendy Burgower represented the wife in a case which involved an

anticipatory breach of a premarital agreement. The premarital agreement gave the wife $100,000.00 and an additional $5,000.00 for each month of the marriage. The agreement also included a forfeiture clause if any pleadings were filed to set it aside or invalidate the contract. Because the wife could not leave the separate property home of the husband without funds, the wife received the $100,000.00 early in the case. After the wife made a written demand for the additional money due under the agreement, the husband responded that he may have claims against the wife that would exceed the payment. In a subsequent hearing, the husband stated that he did not owe the wife anything because she had allegedly stolen property from the house. The husband sued the wife for conversion; the wife then sued for anticipatory breach and requested that the agreement be set aside, or if the court (or jury) found that the breach was not material, the wife requested specific performance of the premarital agreement. The husband asserted that the wife was excluded from any payment under the agreement based upon the wife's pleading to set aside the agreement which pleading was contrary to the forfeiture clause. The wife took the position that the husband's acts (i.e., repudiation of the agreement) were prior to the wife's filing of her pleading of anticipatory breach and, in addition, that she was excused from performance. The jury found (1) that the husband repudiated the premarital agreement, (2) that the wife waived her remedy of rescission of the agreement, (3) that the wife's damages that resulted from the husband's repudiation (which was defined as the difference between the amount the husband promised to pay the wife and the amount he paid) were $355,000.00, (4) that the wife filed pleadings or took action to invalidate the agreement either in whole or in part, and (5) that the wife's conduct was excused by the husband's prior repudiation of the agreement.

This case is indicative of several additional potential traps when asserting an anticipatory breach claim. For example, a forfeiture clause, selection of the appropriate remedy such as breach versus rescission, waiver and excuse.

B. The Effect of Pregnancy on Enforcement

1. Texas

In Texas, the effect of the woman being pregnant at the time a marital agreement is negotiated and executed has recently been decided. In *Osorno v. Osorno*, 76 S.W.3d 509 (Tex. App.–Houston [14th Dist.] 2002, no pet.), after Gloria became pregnant, Henry agreed to marry her if she would sign a premarital agreement. Gloria signed a premarital agreement and they were married the next day. When Henry filed for divorce six years later, Gloria unsuccessfully contested the enforceability of the premarital agreement. On appeal, Gloria argued that she signed the premarital agreement involuntarily because she was forty, unmarried and pregnant. *Id.* at 510-11. The Fourteenth Court of Appeals stated the "for duress to be a contract defense, it must consist of a threat to do something the threatening party has no legal right to do." *Id.* at 511. The appellate court concluded that Henry had no legal duty to marry Gloria and that his threat to do something he had the legal right to do is insufficient to invalidate the premarital agreement. *Id.*

2. Other Jurisdictions

Courts of other states have also considered the "pregnancy" problem.

a. Agreement Invalidated

In *Munson v. Munson,* No. FA 950325174S, 1997 WL 585754, *4-*5 (Conn. Super. 1997), the Superior Court of Connecticut held that a premarital agreement was invalid because the wife signed the agreement under duress. The Superior Court specifically found that, since the wife was four months pregnant at the time the agreement was signed, and the husband insisted on her signing the agreement "some weeks before the marriage," duress was established. *Id.* It should be noted, however, that the wife also testified that she saw the agreement only once, that the husband made the agreement a condition of marriage, that the husband prepared the agreement, and that the wife had not received full disclosure of the parties' assets. *Id.* at *4. In finding duress, the Superior Court focused nevertheless on the wife's pregnancy and the immediacy of the marriage.

In *Persichilli v. Persichilli,* No. FA920293938S, 1993 WL 574304, *2-*3 (Conn.Super. 1993), the Superior Court of Connecticut determined that a premarital agreement was invalid because the wife had not voluntarily signed the agreement. Factors the Superior Court considered were that the wife had no previous experience with legal matters or with lawyers (immediately before signing the agreement, the wife had been advised not to sign the agreement), the

wife was under extreme emotional distress after the husband told her the marriage, scheduled for the next day, would be canceled unless she signed the agreement, and the wife was four months pregnant at the time. *Id.* at *2. Under the circumstances, stated the Connecticut Superior Court, "...the wife would have signed anything the husband wanted in order to have the marriage take place the next day." *Id.* at *3.

In *Rowland v. Rowland,* 599 N.E.2d 315, 319 (Ohio Ct. App. 1991), *motion to certify overruled,* 62 Ohio St.3d 1442, 579 N.E.2d 215 (Ohio 1991), an appeal of a judgment upholding a premarital agreement, the appellate court found "evidence of what might characterized as duress or coercive circumstances: appellant's age [18], lack of experience, morning sickness, and indeed the pregnancy itself," but since such circumstances were fact issues, the appellate court considered itself bound the trial court's finding that there had been no fraud, duress, or coercion. However, the appellate court nevertheless invalidated the agreement on the basis of overreaching, since the agreement had been prepared entirely by the husband's attorney, without any input from the wife, the husband's attorney was unaware that the wife was pregnant at the time the agreement was signed and had failed to advise the wife of the rights she was giving up and her right to independent counsel, and the wife signed only after being advised in the office of the husband's attorney, procedures which the appellate court considered to be a violation of the Ohio Canons of Ethics. *Id.* at 319-321.

In *Williams v. Williams,* 617 So.2d 1032, 1035 (Ala. 1992), the Alabama Supreme Court held that the evidence created a genuine issue of fact, precluding summary judgment against the wife, as to whether the father's conditioning of the marriage on the pregnant mother's signing the premarital agreement, joined with the mother's moral objection to abortion and the importance of legitimacy in a small town, engendered a coercive atmosphere in which the mother had no viable alternative to accepting the father's condition for marriage, *i.e.,* signing the agreement.

In West Virginia, the only statutory grounds for voiding a premarital agreement are that either of the parties is a minor at the time the agreement is signed or that the female party to the agreement is pregnant at the time the agreement is signed. *See, Gant v. Gant,* 329 S.E.2d 106, 112 (W.Va. 1985).

In *Bassler v. Bassler,* 593 A.2d 82 (Vt. 1991), the trial court refused to enforce a premarital agreement. On appeal, the husband argued that the agreement was valid, and that the trial court erred in admitting the testimony of the wife that the husband insisted that she sign the agreement before the marriage, and that the wife was induced to sign by the pending wedding and her advanced pregnancy. 593 A.2d. at 88. The husband argued that the wife's testimony sought to contradict or negate the terms of the agreement because it was inconsistent with the agreement's acknowledgment clause and was therefore barred as parol evidence. *Id.* The Supreme Court of Vermont, however, held that evidence of unconscionability did not offend the parol evidence rule because such evidence may be offered to disaffirm or avoid the binding force of the contract. *Id.* Thus, the trial court did not err by admitting the testimony of the wife, since her testimony did not vary or add to the terms of the agreement, but rather challenged the validity of the contract. *Id.*

b. Agreement Valid

In *Margulies v. Margulies,* 491 So.2d 581 (Fla. Dist. Ct. App. 1986, rev. denied), the wife alleged at trial that, after the parties' child had been born, she had been coerced into signing a premarital agreement. The trial court upheld the agreement. On appeal, the appellate court noted that whether the wife believed that the signing of the agreement was a mandatory condition precedent to marriage and whether the husband would have refused to marry the wife, were questions that were not openly discussed at or before the time the wife signed the agreement. *Id.* at 583. Even if the wife was motivated by a strong desire to legitimize the child, the appellate court found substantial evidence that she entered into the agreement with "her eyes wide open," after complete disclosure of the husband's financial condition and negotiations through counsel resulting in modifications to the agreement. *Id.* Thus, the trial court's conclusion that the agreement was not coerced, the result of undue influence, or otherwise unlawfully procured, was amply supported by the evidence. *Id.*

In *Hamilton v. Hamilton,* 591 A.2d 720 (Pa.Super.Ct. 1991), the wife, who was 18, pregnant, unemployed, and "probably frightened," was told by her husband that without a premarital agreement, there would be no wedding. 591 A.2d at 722. At the time of divorce, the trial court refused to enforce the waiver of spousal support contained in the

premarital agreement and the husband appealed. The appellate court held that the trial court erred by refusing to enforce the premarital agreement, because it was clear that there was neither force nor threat of force used to induce the wife to execute the agreement. *Id.* She had been represented by counsel, who advised her not to sign the agreement, but she signed anyway. The appellate court state that where a party has been free to consult counsel before signing an agreement, the courts have uniformly rejected duress as a defense to the agreement. *Id.*

In *Kilborn v. Kilborn,* 628 S.W.2d 884 (Ala.Civ.App. 1993), the trial court enforced a premarital agreement which had been signed by the 20 year old wife at time when she was three months pregnant. The husband had informed her that she would have to sign the agreement before he would marry her. She contacted an attorney, who advised her to sign the agreement, but qualifying her signature with the words, "due to duress and being pregnant." The husband promptly refused to go through with the wedding. Some months later, the husband again proposed marriage and the premarital agreement. The wife contacted another attorney who also advised her not to sign the agreement. Nonetheless, the wife signed the agreement, to which was attached a list of the husband's assets and expected inheritance. On appeal, the appellate court rejected the wife's arguments that she did not sign the agreement voluntarily, but rather under coercive circumstances, stating that there was sufficient evidence of voluntariness, with competent, independent advice and full disclosure. *Id.* at 885.

In *Marriage of Dawley,* 551 P.2d 323 (Cal. 1976), the Supreme Court of California held that an antenuptial agreement, signed after the parties entered into a contemplated short-term marriage of convenience, which altered community status of property acquired during marriage, could not be said to be "oppressive or unfair," and thus was not procured by undue influence, where, even though the wife was compelled to enter into the agreement by her unplanned pregnancy and by her fear that she would lose her job, the husband, who was threatened with a paternity suit and also the likely loss of his job, was in no position to take advantage of the wife's distress; further, the wife did not rely on the husband's advice but consulted her own attorney before executing the agreement. 131 Cal.Rprt. at 11-12.

In *Baumgartner v. Baumgartner,* No. L-88-032, 1989 WL 80947, *10 (Ohio Ct.App. 1989) (unreported), the trial court refused to enforce the parties' premarital agreement, stating, "....the only reason [the wife] signed the agreement was because she was pregnant, and that she wanted her baby to have the [the husband's] last name, and the [the husband] made it clear that if [the wife] did not sign the agreement, [the husband] would not marry her." The appellate court found that the trial court's statements were indeed supported by evidence, but that such statements were totally irrelevant to whether the premarital agreement was valid, because a party's statement that he will not marry, and thereby not give his child his name, unless the other party signs a premarital agreement, is not fraud, duress, coercion or overreaching. *Id.* The appellate court also noted that if all premarital agreements failed because one party refused to marry the other if the agreement wasn't signed, then virtually all premarital agreements would be unenforceable. *Id.* at *11.

C. Child Support

As already stated, Texas Family Code section 4.003(b) specifically provides that the right of a child to support may not be ***adversely*** affected by a premarital agreement. Clearly, parties to a premarital agreement may not agree to eliminate the obligation to pay child support. However, other issues related to child support, such as private education, college expenses, or choice of residence, might be included in a marital agreement, subject, of course, to court review. *See Ex parte Hall*, 854 S.W.2d 656, 658 (Tex. 1993) (orig. proceeding) (a person may also contract to support his spouse and children, and that obligation, to the extent it exceeds his legal duty, is a debt; further, the contract may be enforced by an order requiring payment of the support as agreed, but to the extent the obligation is a debt, it is enforceable only by ordinary processes of law).

What would be the effect of a premarital agreement that established child support in an amount greatly in excess of the Texas guidelines? *Hill v. Hill*, 819 S.W.2d 570 (Tex. App.–Dallas 1991, writ denied) may provide the answer.

In *Hill,* the former husband obtained a judgment declaring that the former wife would be in breach of the parties' marriage settlement agreement if she obtained an increase in the amount of court-ordered child support, and that the former

husband would be entitled to damages equal to the amount of the increase. However, on appeal, the Dallas Court of Appeals held that the declaratory judgment violated public policy in that it permitted the former husband to nullify, as a practical matter, a court's determination that an increase in amount of child support was in children's best interest. *Id.* at 571-572. According to the Dallas appellate court, "[w]hen the parties draft child-support agreements, they cannot agree to prohibit the intervention of the courts required by the Family Code as necessary to protect the children." *Id.*

D. Severability

In general, the doctrine of severability applies when the original consideration for a contract is legal, but incidental promises within the contract are found to be illegal. *Williams v. Williams*, 569 S.W.2d 867, 871 (Tex. 1978) (superceded on other grounds by constitutional amendment). Whether a void contractual provision can be severed depends on the language of the contract and the intent of the parties. *McFarland v. Haby*, 589 S.W.2d 521, 524 (Tex. Civ. App.–Austin 1979, writ ref'd n.r.e.). The issue is whether the parties would have entered into the agreement absent the illegal parts. *Id.*; *see also, Rogers v. Wolfson*, 763 S.W.2d 922, 925 (Tex. App.–Dallas 1989, writ denied).

In *Williams,* the Texas Supreme Court addressed a controversy in which, in reliance on a premarital agreement that had been executed by their late father, adult children who were the beneficiaries under the father's will, brought suit for declaratory judgment to obtain possession of certain property that their father's widow refused to vacate. The Texas Supreme Court held that the trial court correctly concluded that the agreement was void to the extent that it provided that income or other property acquired during marriage should be the separate property of the party who earned, or whose property produced, such income or acquisition, since such provisions were no more than a mere agreement between the parties to establish the character of the property prior to its acquisition during marriage in violation of both the Texas Constitution and the Texas Family Code (as they existed at the time). *Williams,* 569 S.W.2d at 870.

The widow contended that the entire agreement was vitiated by these void provisions, but the Texas Supreme Court disagreed. *Id.* at 807-871. Rather, the Texas Supreme Court stated that the agreement was controlled by the rule that where the consideration for an agreement is valid, an agreement containing more than one promise is not necessarily rendered invalid by the illegality of one of the promises; the invalid provisions may be severed and the valid portions of the agreement upheld, if the invalid provision does not constitute the main or essential purpose of the agreement. *Id.* at 871. According to the Texas Supreme Court, mutual promises to marry, subsequently performed, provide valid consideration for a premarital agreement. *Id.* The invalid provisions of the agreement in *Williams* were only a part of the many reciprocal promises in the agreement concerning the rights of the parties to the marriage, and did not constitute the main or essential purpose of the agreement. *Id.* Therefore, the trial court severed the invalid provisions from the premarital agreement and enforced the valid provisions of the premarital agreement. *Id.; see also, Fanning v. Fanning*, 828 S.W.2d 135, 142 (Tex. App.–Waco 1992), *aff'd in part, rev'd in part,* 847 S.W.2d 225 (Tex. 1993) (as in *Williams,* the invalid provision was severable from the valid portions of the agreement because the invalid provision did not constitute the agreement's main or essential purpose).

Section 2.302 of the Texas Business and Commerce Code provides:

> (a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
>
> (b) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.

In pertinent part, the "Uniform Commercial Code Comment" to section 2.302 provides:

> 2. Under this section the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability, or it may strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement, or it may simply limit unconscionable clauses so as to avoid unconscionable results.
>
> 3. The present section is addressed to the court, and the decision is to be made by it. The commercial evidence referred to in subsection (2) [section "b" in the Texas version] is for the court's consideration, not the jury's. Only the agreement which results from the court's action on these matters is to be submitted to the general triers of the facts.

As already discussed, the decision concerning whether a contract clause is unconscionable, so that its enforcement should be denied or limited, is a matter of law for the court's determination. As also already stated, in making that determination, the court must look to the "entire atmosphere" in which the agreement was made. *Wade,* 524 S.W.2d at 86. Thus, under section 2.302, in the commercial context, evidence is admissible to show the commercial setting at the time of the making of the contract. *See, Tri-Cont'l Leasing Corp. v. Law Office of Richard W. Burns*, 710 S.W.2d 604, 609 (Tex.App.– Houston [1st Dist.] 1985, writ ref'd n.r.e.).

Additionally, since *Williams* was apparently premised on the notion that mutual promises to marry provided sufficient consideration for premarital agreements, it is unclear whether the amendments to the Texas Family Code, specifically negating the need for any consideration to support a marital agreement, have any effect on the continuing vitality of *Williams.*

If commercial contract law is applicable in the context of enforcing marital agreements, under Comment 3 to section 2.302, it would appear possible to prevent a jury from hearing evidence concerning the "commercial setting" of the premarital agreement. Moreover, if provisions of an agreement are declared unenforceable due to unconscionability, Comment 3 also seems to suggest that the revised contract, from which the offending provisions have been deleted, is the contract presented to the jury. If indeed such a procedure prevails, then significant damaging evidence might be kept from a jury considering fact issues surrounding a marital agreement. No Texas case appears to address the issue.

E. Interaction With Homestead Rights

Article XVI, §52 of the Texas Constitution provides that the homestead shall not be partitioned among the heirs of the deceased during the lifetime of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead; such provision is sometimes referred to as the "probate homestead." *Williams,* 569 S.W.2d at 869. The homestead right of the survivor has been held to be one in the nature of a legal life estate or life estate created by operation of law. *Id.*

Such rights, provided by law for the protection of the family and to secure a home for the surviving spouse, may be waived, however, particularly where, in the absence of any suggestion of fraud, overreaching or lack of understanding, (1) the parties to a premarital agreement are mature individuals, (2) full disclosure is made of the nature and extent of the property interest involved, (3) both parties have substantial separate property which they desire to preserve for themselves, and (4) there are no interests of any minor children to protect. *Id.* at 869-870; *but see, Hunter v. Clark*, 687 S.W.2d 811, 817 (Tex. App.–San Antonio 1985, no writ) (premarital agreement was not a basis for establishing that the surviving spouse waived his right to elect to remain on homestead premises, which was the separate property of the deceased spouse, where the agreement contained no words such as "free from any claim" that might arise as the result of the marriage and, even if there were such words, there was no proof that the surviving spouse gave informed consent).

F. Surplusage

In general, in construing a contract, all language is presumed to have some meaning and is not regarded as surplusage. *See, e.g., R.H. Sanders Corp. v. Haves*, 541 S.W.2d 262 (Tex. Civ. App.– Dallas 1976, no writ). No provision may properly be interpreted so as to make it mere surplusage, unless it irreconcilably conflicts with other contract

terms. *See, e.g.*, *Williams v. J. & C. Royalty Co*., 254 S.W.2d 178, 179 (Tex. Civ. App.–San Antonio 1952, writ ref'd).

The general rule notwithstanding, there exists in contract law the idea of surplusage, *i.e.,* a provision in the contact that is, ultimately, unnecessary to the contract's essential purpose. *See, e.g., Universal Sav. Ass'n v. Killeen Sav. & Loan Ass'n*, 757 S.W.2d 72, 76 (Tex. App.–Houston [1st Dist.] 1988, no writ) (letter of credit is separate and apart from the underlying contract, and a reference in the letter of credit to the underlying contract will generally be regarded as mere surplusage, unless letter expressly provides that compliance with the underlying contract is a condition for honoring the draft; general references to underlying agreements are surplusage).

"Surplusage" may appear in a marital agreement. In *Dokmanovic v. Schwarz*, 880 S.W.2d 272, 273 (Tex. App.–Houston [14th Dist.] 1994, no writ), for example, the parties' premarital agreement provided, among other things:

> Separate property increases, income, or proceeds which the law of Texas classifies as separate property shall remain the separate property of the owner of the separate property producing the increase, income, or proceeds; and
>
> All income of the separate property of each party shall be treated as the separate property of the party owning the separate property producing the income. All earnings for personal services of each party shall be treated as the separate property of the party earning the income.

In upholding the validity of the agreement, the Houston Fourteenth Court of Appeals noted that, although the agreement also contained an additional sentence indicating an intent to partition income in the future, such provision provided merely "an alternative and unnecessary method for recharacterizing community property as separate property," because the agreement had previously accomplished the purpose of exchanging property interests without the need to execute additional agreements. *Id.* at 275. In other words, the provision regarding an intent to partition in the future was, in effect, surplusage.

Assume that a premarital agreement effects a partition and exchange. Assume also that the agreement states that the parties' will reaffirm the agreement five years after the date of its original execution. Assume finally that the parties' never reaffirm the agreement. What is the effect of the parties' failure to reaffirm?

Arguably, under *Dokmanovic*, there is no effect. The parties' original agreement effected a partition and exchange, without the need to execute additional agreements. The reaffirmation provision is surplusage, unnecessarily providing an alternative method to accomplish the intent of the parties.

G. Ratification

Ratification of a premarital agreement, alleged to be unenforceable, is a potential issue in any premarital agreement case. *See, e.g., Marsh v. Marsh*, 949 S.W.2d 734, 741, n. 7 (Tex. App.–Houston [14th Dist.] 1997, no writ) (the appellate court, because it held the agreement valid, did not reach the wife's claim that the husband, by making payments to a trust pursuant to the agreement, ratified the agreement); *see also Nesmith v. Berger*, 64 S.W.3d 110, 115 (Tex. App.–Austin 2001, pet. denied).

Ratification is the adoption or confirmation by a person with knowledge of all material facts of a prior act which did not then legally bind him and which he had the right to repudiate. *Spellman v. Am. Universal Inv. Co*., 687 S.W.2d 27, 29 (Tex. App.–Corpus Christi 1984, writ ref'd n.r.e.). Ratification occurs when one, induced by fraud to enter into a contract, continues to accept benefits under the contract after he becomes aware of the fraud or if he conducts himself in such a manner as to recognize the contract as binding. *See, e.g., Daniel v. Goesl*, 341 S.W.2d 892, 895 (Tex. 1960). Once a contract has been ratified by the defrauded party, the defrauded party waives any right of rescission or damages. *Old Republic Ins. Co., Inc. v. Fuller*, 919 S.W.2d 726, 728 (Tex. App.–Texarkana 1996, writ denied).

An express ratification is not necessary; any act based upon a recognition of the contract as subsisting or any conduct inconsistent with an intention of avoiding it has the effect of waiving the right of rescission. *Id.* In other words, ratification

may be inferred from conduct *Spellman*, 687 S.W.2d at 29.

One who asserts ratification must prove that the ratifying party acted upon full knowledge of all material facts. *See, e.g., K.B. v. N.B.*, 811 S.W.2d 634, 638 (Tex. App.–San Antonio 1991, writ denied) (the husband, who did not consent in writing to the artificial insemination procedure performed on his wife, ratified the parent-child relationship with the child born as the result of the procedure, where the husband knew about the artificial insemination process and participated in it willingly from the beginning, acknowledged the child, and publicly held him out as his son for several years). Ratification is an issue that is normally a question of fact, but it may become one of law if the facts and circumstances are admitted or clearly established. *Williams v. City of Midland*, 932 S.W.2d 679, 685 (Tex. App.–El Paso 1996, no writ).

In addition, mental intent or reservation does not affect determination of the question of ratification. *See, e.g., Oram v. Gen. Am. Oil Co. of Texas*, 513 S.W.2d 533, 534 (Tex. 1974); *see also, Spellman*, 687 S.W.2d at 30 (even if the appellants stated that they did not intend to ratify the lease by accepting rental payments, the acceptance of the payments was inconsistent with the intention to avoid the lease and recognized the lease as subsisting and binding; therefore, the appellants waived or abandoned any right of rescission or of attack upon the initial invalidity, if any, of the lease).

H. Effect of Remarriage

In *Marshall v. Marshall*, 735 S.W.2d 587, 592 (Tex. App.–Dallas 1987, writ ref'd n.r.e.), the parties were first married on April 26, 1982. On June 14, 1982, they executed a separate property agreement, which provided: "All income and/or property arising from the separate property now owned by [said spouse] or hereafter acquired by [said spouse], shall be the sole and separate property of [said spouse]." *Id.* The parties then divorced, and the October 15, 1982 judgment of divorce recited that the agreement was valid. *Id.*

Approximately five months later the parties remarried, only later to file for divorce again. *Id.* On appeal after the trial of the second divorce, the husband argued that the parties' 1982 agreement was still in effect at the time of the second divorce. *Id.* The Dallas Court of Appeals rejected the husband's argument, noting that the parties' agreement contained no express provision providing for the termination or continuation of the agreement. *Id.* When the duration of a contract is not expressly dictated by the agreement, stated the Dallas appellate court, Texas courts frequently presume that the parties intended that the agreement should continue for a reasonable time. *Id.* However, when it appears, from the intrinsic nature of the agreement, that an agreement is necessarily limited as to duration by the happening of any one of several contingencies, this ascertainable contingency determines the duration. *Id.*

The Dallas Court of Appeals then examined the agreement, which had been executed less than two months after the first marriage, and specifically focused on the following provisions:

> WHEREAS, JOSEPH WOODROW MARSHALL and ARLENE O'BRIEN MARSHALL were married on April 26, 1982, and are now husband and wife;
>
> WHEREAS, at the time of said marriage each owned separate property and each expects that each might hereafter acquire separate property; and
>
> WHEREAS, both desire the income and/or property arising from all of the respective separate property now owned or which hereinafter might be acquired by each shall be the respective separate property of each, it is therefore agreed between them as follows....

Id.

From such provisions, the Dallas appellate court concluded that the parties were contracting in relation to the existing [first] marriage only, and that it was unreasonable to assume that they anticipated a series of remarriages and divorces. *Id.* According to the Fifth Court of Appeals, the first divorce was the ascertainable contingency that determined the duration of the agreement; consequently, the agreement had no bearing on either the second marriage or the second divorce. *Id.*