

MARITAL PROPERTY AGREEMENTS

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University of Texas at Tyler, Alumni Association Distinguished Alumni Award (2016)
Listed in D Magazine – “Best Lawyers in Dallas” Family Law – 2018
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Listed in Texas Monthly – “Top 100 Dallas/FW Super Lawyers” (2003-2006; 2008-2009; 2011-2017)
Listed in Texas Monthly – “Texas Super Lawyer” in the area of Family Law (2003 - 2017).
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Premarital and Marital Property Agreements

I. Introduction

This paper will address three types of agreements that can govern property rights during and on dissolution of a marriage – premarital agreements, postmarital agreements or partition agreements, and conversion agreements.

Premarital agreements allow persons about to marry to confirm and modify the characterization of property. Premarital agreements can also be used to award alimony, address earnings or income during marriage, designate or waive homestead interests and provide for the choice of law to be applied in any future dispute.

Postmarital agreements or partition agreements allow spouses to convert their interest in existing or future community property into separate property. Partition agreements may also provide that future earnings and income arising from the transferred property shall be the separate property of the owning spouses. In a conversion agreement, spouses may agree that all or part of the separate property owned by either or both of them is converted to community property.

II. Premarital Agreements

A. Generally

1. Uniform Premarital Agreement Act

Texas adopted the Uniform Premarital Agreement Act (the “Uniform Act”) as set forth in Subchapter A of Chapter 4 of the Texas Family Code. In addition to Texas, the Act has been adopted by 26 other jurisdictions.

2. Purpose

Premarital agreements allow persons about to marry to confirm and modify the characterization of property. Premarital agreements can also be used to award alimony, allocate the management of property during the marriage, designate or waive homestead interests, and provide for the choice of law to be applied in any future dispute. *Tex. Fam. Code 4.003; Williams v. Williams*, 569 S.W.2d 867 (Tex. 1978)(homestead rights may be waived in a premarital agreement).

3. Premarital Agreement – Definition

Under the Texas Family Code, a premarital agreement is an agreement between prospective spouses made in contemplation of marriage and to be effective on marriage. *Tex. Fam. Code 4.001*.

4. Property – Definition

Property which may be subject to a premarital agreement is broadly defined to include any “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)*. This broad definition of property encompasses a variety of assets, including retirement benefits, stock options, leasehold interests, and unsecured debt. Texas law defines “property” very broadly to include every type of valuable right and interest. *Winger v. Pianka*, 831 S.W.2d 853, 854 (Tex. App.-Austin 1992, writ denied).

B. Texas Constitution

In addition to the Texas Family Code, Article XVI, section 15 of the Texas Constitution also governs premarital and marital agreements. The Constitution provides:

. . . provided 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; . . . *Tex. Const. Art. XVI, 15*.

C. Formalities

A premarital agreement must be in writing and signed by both parties, and the agreement is enforceable without consideration. *Tex. Fam. Code 4.002*.

D. Content of Premarital Agreement

Generally, a premarital agreement can cover any matter as long as it does not violate public policy or a statute imposing criminal penalties, adversely affect a child’s right to support or defraud a creditor. *See Tex. Fam. Code 4.003(a)(8), (b), 4.106(a)*. The following matters may be addressed in a premarital agreement:

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. C. Ann. 4.003(a)*; see *Williams v. Williams*, 569 S.W.2d 867 (Tex. 1978)(homestead rights may be waived in a premarital agreement); *Dokmanovic v. Schwarz*, 880 S.W.2d 272 (Tex. App.–Houston [14th Dist.] 1994, no writ)(premarital agreement which provided income from all separate property to remain separate property precluded creation of any community property during marriage); *Winger v. Pianka*, 831 S.W.2d 831 S.W.2d 853 (Tex. App.–Austin 1992, writ denied)(prenuptial agreement may partition future earnings of persons about to marry); *Scott v. Scott*, 805 S.W.2d 835 (Tex. App.–Waco 1991, writ denied)(premarital agreement may provide for “excess” income to be separate property).

E. Children Issues in Premarital Agreement

1. Child Support May Not Be Adversely Affected

The right of a child to support may not be adversely affected by a premarital agreement. *Tex. Fam. Code 4.003(b)*. Therefore, any provision in a premarital agreement that eliminates or reduces a party’s child support obligation in the event of divorce would be unenforceable. Agreements for private education, college expenses, or cars for children might be enforceable as a contract between the parties as long as it was found not to be a “violation of public policy” if it infringes on a parent’s rights or against a child’s best interests.

The phrase “adversely affect” does not mean parties cannot contract for child support in a premarital agreement; it just means that any provision affecting child support must be in the child’s best interest or it can be disregarded. See *Radtke v. Radtke*, 521 S.W.2d 749 (Tex. App.–Houston [14th Dist.] 1975, no writ); *Preston v. Dyer*, 2012 WL 5960193 (Tex. App.–Beaumont 2012, pet. denied)(spousal support, child support and attorney’s fees subject to arbitration under terms of premarital agreement); see also *Tex. Fam. Code 154.124(b)*(court must order child support in conformity with agreement if court finds agreement is in child’s best interest).

2. Waivers of Child Support, Custody or Visitation rights

The law of other Uniform Act states seems to make clear that public policy prevents the court from enforcing waivers of child support, custody, or visitation rights. See, e.g., *Edwardson v. Edwardson*, 798 S.W.2d 941 (Ky. 1990); *Huck v. Huck*, 734 P.2d 417 (Utah 1986); *In re Marriage of Fox*, 795 P.2d 1170 (Wash. App. 1990). Other provisions restricting a parent’s right to

raise their children have been found to be unenforceable. *See Zummo v. Zummo*, 574 A. 2d 1130, 1148 (Pa. Super. Ct. 1990) (premarital promise to raise child in certain religion not enforceable); *In re Weiss*, 22 F.L.R. 1161-62 (Calif. Ct. App. 1996) (mother's premarital written agreement to raise her children in Jewish faith is not legally enforceable).

F. Not in Violation of Public Policy

The Family Code permits the parties to contract in a premarital agreement with respect to any matter listed and any other matter not in violation of public policy or any statute imposing a criminal penalty. *Tex. Fam. Code 4.003(a)(8)*. All provisions of a premarital agreement are subject to a public policy review standard.

G. Common Provisions in Premarital Agreements

1. Confirmation of Texas Law

It is common for premarital agreements to confirm Texas law, such as a confirmation that certain assets brought into the marriage by a spouse remain the owner's separate property. The agreement may also confirm that anything acquired during the marriage by gift or inheritance will be separate property.

2. Income from Separate Property

Parties may agree that income from separate property is the owner's separate property. *Tex. Const. Art. XVI, 15*; *Dokmanovic v. Schwarz*, 880 S.W.2d 272 (Tex. App.–Houston [14th Dist.] 1994, no writ).

3. Wages, Salaries, and Personal Earnings

Persons about to marry may partition or exchange between themselves salaries and earnings to be acquired by them during their future marriage. *Winger v. Pianka*, 831 S.W.2d 853 (Tex. App.–Austin 1992, writ denied). However, the agreement must specifically provide for such a division. *See Fanning v. Fanning*, 828 S.W.2d 135 (Tex. App.–Waco 1992) *aff'd in part, and remanded in part on other grounds*, 847 S.W.2d 225 (Tex. 1993); *Dewey v. Dewey*, 745 S.W.2d 514 (Tex. App.–Corpus Christi 1988, writ denied)(since appellant's income was not expressly listed in the premarital agreement and it was acquired during marriage, it was community property); *Bradley v. Bradley*, 725 S.W.2d 503 (Tex. App.–Corpus Christi 1987, no writ)(statement in premarital agreement that the parties would take all steps necessary to maintain separate property character of property and earnings merely expressed an intent and was not sufficient to act as a partition absent a more specific written agreement).

4. Salaries from Separate Property Business Require Specificity

Although a premarital agreement may state that income from separate property is separate property, salaries from a separate property business should be specifically addressed in order to be considered separate property. *Dewey v. Dewey*, 745 S.W.2d 514 (Tex. App.–Corpus Christi 1988, writ denied). The

premarital agreement in *Dewey* provided that income from separate property would be separate, but did not expressly mention salaries received from husband's separate property medical practice. In finding the salary to be community property, the court held:

“The premarital agreement, however, did not mention appellant's salary received from the corporation during marriage; nor did it state that there would be no accumulation of a community estate. It merely asserted that the listed property and all profits, dividends, interest and proceeds resulting from that property should remain appellant's separate property. Since appellant's income was not expressly listed in the premarital agreement and it was apparently acquired during marriage, it was clearly community property.”

5. Division of Property on Divorce

Parties to a premarital agreement often agree as to the division of their marital estate in the event of divorce. *Fanning v. Fanning*, 828 S.W.2d 15 (Tex. App.–Waco 1992), *aff'd in part and rev'd in part*, 847 S.W.2d 225 (Tex 1993); *Scott v. Scott* 805 S.W.2d 835 (Tex. App.–Waco 1991, writ denied).

6. Disposition of Property on Death

Parties to a premarital agreement may agree as to the disposition of their property on the death of one of them. *In re Estate of Loftis*, 40 S.W.3d 160 (Tex. App.–Amarillo 2015, no pet.)(premarital agreement provision that wife was to receive house and car upon husband's death binding on his estate).

7. Choice of Law

The Family Code allows parties to a premarital agreement to contract with respect to the choice of law governing the construction of the agreement. *Tex. Fam. Code 4.003(a)(7)*.

8. Waiver of Retirement Benefits

A waiver of a party's interest in the qualified retirement benefits of a spouse or future spouse is governed by both state and federal law.

The federal ERISA statute expressly provides that it supersedes state laws regulating qualified employee benefit plans. *29 U.S.C. § 1144(a)*. Thus, state law is preempted generally in that area of regulation.

A premarital agreement cannot waive a prospective spouse's survivor benefits in an ERISA retirement plan. *See National Auto. Dealers & Assocs. Ret. Trust v. Arbeitman*, 89 F.3d 496 (8th Cir. 1996). Under ERISA, survivor benefits can be waived only by a spouse. *29 U.S.C. 1055(c)(2)(A)*. Even though a premarital agreement cannot waive survivor benefits, a party can include a provision in a premarital agreement that requires a prospective spouse to execute a waiver of survivor benefits under *29 U.S.C. 1055(c)(2)(A)* after the parties are married.

Strict construction of the federal statute seems to invalidate waivers of survivor benefits only. Specifically, ERISA provides that a spouse's waiver of rights to "qualified joint and survivor annuity" and the "qualified preretirement survivor annuity" is not valid unless 1) it is in writing; 2) it either names the alternative beneficiary or states that the employee spouse may designate an alternative beneficiary without further consent of the nonemployee spouse; and 3) the waiver "acknowledges the effect" of the waiver and is notarized or witnessed by a plan representative. 29 U.S.C. § 1055(c)(2)(A). Several courts have held that unlike survivor benefits, ERISA does not place restrictions on a prospective spouse's ability to waive an interest in other ERISA retirement benefits in a premarital agreement. *Savage-Keough v. Keough*, 861 A.2d 131 (N.J. Super.Ct. App. Div. 2004); *Critchell v. Critchell*, 746 A.2d 282 (D.C. 2000); *Deo v. Morello*, 906 A.2d 1145 (N.J. Super.Ct. 2006)

H. Effect of Marriage

A premarital agreement becomes effective on marriage. *Tex. Fam. Code 4.004*; see *Marshall v. Marshall*, 735 S.W.2d 587 (Tex. App.–Dallas 1987, writ ref'd n.r.e.). 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.

I. Amendment or Revocation

After marriage, a premarital agreement may be amended or revoked only by a written agreement signed by the parties. The amended agreement or the revocation is enforceable without consideration. *Tex. Fam. Code 4.005*. If parties divorce and remarry each other, the marital property agreement relative to their first marriage will not be effective as to their second marriage. *Marshall v. Marshall*, 735 S.W.2d 587 (Tex. Civ. App. – Dallas 1987, writ ref'd n.r.e.).

J. Void Marriage

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*; see *Davis v. Davis*, 521 S.W.2d 60 (Tex. 1975)(good faith putative spouse entitled to same property rights as legal spouse). An inequitable result can arise when the parties have married and lived together for a substantial period of time and one or both have relied on the existence of the premarital agreement. UPAA Section 7 (1983)(comment under Texas Family Code Section 4.007).

K. Statute of 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. However, equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party. *Tex. Fam. Code 4.008*. The Official Comment to the Uniform Premarital Agreement Act, Section 8, states that the applicable statute of limitations is tolled "in 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 ...”

III. Marital Property Agreements

A. Partition or Exchange of Community Property

The Texas Family Code authorizes a “marital property agreement” between spouses. At any time, the spouses may partition or exchange between themselves any part of their community property, then existing or to be acquired, as the spouses may desire. Courts generally refer to these agreements simply as “partition agreements.” Property or a property interest transferred to a spouse by a partition or exchange agreement becomes that spouse’s separate property. *Tex. Fam. Code 4.102; Robertson v. Robertson*, 2015 WL 7820814 (Tex. App.—Corpus Christi 2015, no pet. h.) (mem. op.) (partition agreement could not partition personal injury settlement because those were separate property, not community assets).

The purpose of a partition agreement is to allow spouses to convert their interest in community property into separate property. *Tex. Fam. Code 4.102; Tex. Const. Art. 16, Section 15*. A partition agreement can also be drafted so that all existing and future community property will be separate property. *Tex. Fam. Code 4.102*.

The partition or exchange of property may also provide that future earnings and income arising from the transferred property shall be the separate property of the owning spouses. *Tex. Fam. Code 4.102*. If this specific designation is not made, future earnings and income generated by the partitioned property will remain community property. *See Dewey v. Dewey*, 745 S.W.2d 514 (Tex. App.—Corpus Christi 1988, writ denied)(since husband’s earnings were not expressly listed in the premarital agreement and it was apparently acquired during marriage, it was community property).

B. Agreement Between Spouses Concerning Income or Property From Separate Property

Spouses may further agree that income or property arising from the separate property that is owned by them at the time of the agreement, or thereafter acquired, shall be the separate property of the owner. *Tex. Fam. Code 4.103; see 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).

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.

C. Formalities

Like premarital agreements, agreements between spouses must be in writing and signed by the parties. *Tex. Fam. Code 4.104*. The agreement must also either contain a reference to partition or show an intent to convert community property to separate property. *Tex. Fam. Code 4.102*; *Ahmed v. Ahmed*, 261 S.W.3d 190 (Tex. App.–Houston [14th Dist.] 2008, no pet.); *Byrnes v. Byrnes*, 19 S.W.3d 556 (Tex. App.–Fort Worth 2000, no pet.); *In re Eaton*, 2014 WL 4771608 (Tex. App.–Fort Worth 2014, orig. proceeding)(“Separation Agreement” held to be valid marital property agreement – partition does not have to be mentioned in agreement).

The intent of the parties to effectuate an actual partition and exchange of property should be included. *See Pankhurst v. Weiting & 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). A mere listing of assets designated as the separate property of one spouse, although a writing signed by the parties, does not constitute a partition and exchange agreement. *See Collins v. Collins*, 752 S.W.2d 636 (Tex. App. --Fort Worth 1988, writ ref’d)(listing of property as separate property in a joint tax return was not sufficient to be a partition agreement); *See also In re Eaton*, 2014 WL 4771608 (Tex. App.–Fort Worth 2014, orig.

proceeding)(“Separation Agreement” held to be valid marital property agreement – partition does not have to be mentioned in agreement).

A partition or exchange agreement does not require judicial approval. *Patino v. Patino*, 687 S.W.2d 799 (Tex. App.–San Antonio 1985, no writ).

IV. Enforcement of Property Agreements

A. Presumption in Favor of Enforceability

1. Statutory Authority – A premarital agreement or 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 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. *Tex. Fam. Code 4.006(a); 4.105(a); emphasis added.*
2. Exclusive Remedies – The remedies and defenses in the enforcement statutes for premarital agreements and partition or exchange agreements are exclusive remedies or defenses, including common law remedies or defenses. *Tex. Fam. Code 4.006(c); 4.105(c).*
3. Presumption – There is a rebuttable presumption that a premarital agreement and marital property agreement is enforceable. *Sheshunoff v. Sheshunoff*, 172 S.W.3d 686, 700-701 (Tex. App. – Austin 2005, pet. denied); *Grossman v. Grossman*, 799 S.W.2d 511 (Tex. App.–Corpus Christi 1990, no writ); *Sadler v. Sadler*, 769 S.W.2d 886 (Tex. 1989).
4. Burden of Proof – The burden of proof is on the party attacking the agreement in a proceeding to determine the validity of a premarital agreement or marital property agreement. *Tex. Fam. Code 4.006, 4.105; Pletcher v. Goetz*, 9 S.W.3d 442 (Tex. App.–Fort Worth 1999, pet. denied)(op. on reh’g).

5. Applicable Law – The law to be applied to premarital agreement is the applicable law at the time of divorce. *Sadler v. Sadler*, 769 S.W.2d 886 (Tex. 1989).
6. Evidence of Fault – It has been held that evidence of fault is not applicable if the premarital agreement addresses the specific property division. *Bufkin v. Bufkin*, 259 S.W.3d 343 (Tex. App.–Dallas 2008, rev. denied)(evidence of fault properly excluded where parties had agreed to a specific division of the community estate in premarital agreement).
7. Extrinsic Evidence – Extrinsic evidence can be used to prove a premarital agreement. *Jurek v. Couch-Jurek*, 296 S.W.3d 864 (Tex. App.–El Paso 2009, no pet.)(where original or copy of signed premarital agreement could not be found, wife was allowed to use extrinsic evidence to establish contents of the agreement, including a copy of her sister’s agreement which mirrored hers – further, throughout the marriage, the behavior of both parties was consistent with there being the existence of a premarital agreement).

B. Voluntariness

1. Voluntariness is a Question of Fact

A premarital agreement or partition 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 dependent upon all the circumstances and the mental effect on the party claiming involuntary execution. *Martin v. Martin*, 287 S.W.3d 260 (Tex. App.–Dallas 2009, pet. denied).

2. Definition of Voluntary

While Sections 4.006 and 4.105 of the Texas Family Code do not define “voluntarily,” courts have “generally construed it to mean an action that is taken intentionally or by the free exercise of one’s will.” *Martin v. Martin*, 287 S.W.3d 260 (Tex. App.–Dallas 2009, pet. denied); *Sheshunoff v. Sheshunoff*, 172 S.W.3d 686 (Tex. App. – Austin 2005, pet. denied). Voluntary has been defined as being “done by design or intentionally or purposely or by choice or of one’s own accord or by the exercise of will. A voluntary act proceeds from one’s own free will or is done by choice on or of one’s own accord, unconstrained by external interference, force, or influence.” *Prigmore v. Hardware Mutual Ins. Co.*, 225 S.W.2d 897 (Tex. Civ. App.—Amarillo 1949, no writ); see *Matthews v. Matthews*, 725 S.W.2d 275 (Tex. App.–Houston [1st Dist.] 1987, writ ref’d n.r.e.)(duress); *Moore v. Moore*, 383 S.W.3d (Tex. App.–Dallas 2012, pet. denied)(premarital agreement set aside as not signed voluntarily upon evidence of fraud and duress in the signing by wife); *But 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).

3. Evidence of Involuntariness

In determining whether any evidence of involuntariness existed, courts have considered (1) whether a party has had the advice of counsel, (2) misrepresentations made in procuring the agreement, (3) the amount of information provided, and (4) whether information has been withheld. *Moore v. Moore*, 383 S.W.3d 190 (Tex. App.–Dallas 2012, no pet. h.)(premarital agreement was not enforceable, even though the agreement contained recitations that the wife’s attorney had reviewed the agreement, when trial court found that husband represented to the wife that her attorney had approved the final agreement; direct threats or coercion are not required in order to show an agreement was signed involuntarily).

4. Agreements Signed Under Duress, Undue Influence or Fraud

Duress, fraud, undue influence, and lack of capacity, along with the parties’ relative bargaining power and knowledge regarding the meaning and effect of the agreement, are common law concepts that could have a bearing upon the ultimate determination of voluntariness. *Sheshunoff v. Sheshunoff*, 172 S.W.3d 686 (Tex. App. – Austin 2005, pet. denied).

An agreement signed under duress is not signed voluntarily. *Izzo v. Izzo*, 2010 WL 1930179 (Tex. App.–Austin 2010, pet. denied)(post-marital agreement not enforceable as evidence supported that wife did not sign the agreement 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. The Fort Worth appellate court stated:

“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.”

“In deciding whether there has been undue influence, the court should consider three factors: (1) the existence and exertion of an influence; (2) whether the influence operated to subvert or overpower the person’s mind when executing the document; and (3) whether the person would have executed the document but for the influence.” *Wils v. Robinson*, 934 S.W.2d 774 (Tex. App.–Houston

[14th Dist.] 1996), *writ granted, judgment vacated w.r.m.*, 938 S.W.2d 717 (Tex. 1997).

5. Sheshunoff v. Sheshunoff

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.

6. Participations in the Negotiations

It seems that a party who participated in the negotiations of the agreement should not later be able to assert that the agreement was not entered into voluntarily. *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 v. Marsh*, 949 S.W.2d 734 (Tex. App.--Houston [14th Dist.] 1997, no writ)(the husband had participated in preparing the premarital agreement, and indeed had dictated portions of it).

7. Fiduciary Duty Between Spouses

A court can also consider the fiduciary duty spouses owe to each other when analyzing whether a postmarital agreement was involuntarily executed. *Izzo v. Izzo*, 2010 WL 1930179 (Tex. App.—Austin 2010, pet. denied)(mem op.). This factor is unique to postmarital agreements because it does not exist before marriage. See *Sheshunoff v. Sheshunoff*, 172 S.W.3d 686 (Tex. App.—Austin 2005, pet. denied); *In re Marriage of Smith*, 115 S.W.3d 126 (Tex. App.—Texarkana 2003, pet. denied).

A fiduciary duty may arise before marriage as well. *Andrews v. Andrews*, 677 S.W.2d 171 (Tex. App.—Austin 1984, no writ)(fiduciary duty existed between 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. Unconscionability

1. Question of Law

The issue of whether a premarital agreement or partition agreement is unconscionable is a question of law to be decided by the court. *Tex. Fam. Code 4.006(b); 4.105(b); Pletcher v. Goetz*, 9 S.W.3d 442 (Tex. App.—Fort Worth 1999, pet. denied).

2. Entire Atmosphere Should Be Reviewed

The court should evaluate unconscionability in the context of general contract law:

“In determining whether a contract is unconscionable or not, the court 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 making 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.” *Wade v. Austin*, 524 S.W.2d 79 (Tex. Civ. App.—Texarkana 1975, no writ); *Pletcher v. Goetz*, 9 S.W.3d 442 (Tex. App.—Fort Worth 1999, pet. denied).

Several cases have interpreted the issue of unconscionability in the context of marital property agreements. In *Pearce v. Pearce*, 824 S.W.2d 195, 199 (Tex. App.—El Paso 1991, writ denied), the appellate court stated that the issue must be evaluated on a “case-by-case basis, looking to the entire atmosphere in which the agreement was made” and found an agreement to be conscionable even when the wife did not have an attorney, did not read or understand the agreement, and had no understanding of the effect of the agreement’s terms upon her.

In *Marsh v. Marsh*, 949 S.W.2d 734 (Tex. App.--Houston [14th Dist.] 1997, no writ), the Houston Court of Appeals held that the premarital agreement was not unconscionable as a matter of law despite the husband's arguments that the parties had disparate bargaining power, the agreement was signed shortly before the wedding, he was not represented by counsel, and the agreement was allegedly one-sided. The court stated:

“In reviewing the validity of a marital property agreement, this court has considered such factors 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.”

In *Fazakerly v. Fazakerly*, 996 S.W.2d 260 (Tex. App.—Eastland 1999, pet. denied), the agreement was found to be valid and enforceable. The *Fazakerly* court held that “the mere fact that a party made a hard bargain does not allow him relief from a freely and voluntarily assumed contract.”

In *Chiles v. Chiles*, 779 S.W.2d 127 (Tex. App.-- Houston [14th Dist.] 1989, writ denied), the court upheld the premarital agreement, noting:

“There was no evidence of involuntary execution by Patti, that the agreement was unconscionable or that she had inadequate knowledge of Jerry's assets. A jury finding that the agreement was not fair to Patti does not satisfy her burden of proof, nor is it material to the enforceability of the agreement. The record shows that Patti was represented by counsel at all times during extensive negotiations and drafts of the agreement. Also, 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.”

The *Chiles* court held that parties should be free to execute agreements as they see fit and whether they are ‘fair’ is not material to their validity. Although the wife also claimed that her signature on the agreement was procured through fraud, duress or overreaching, the court did not address these defenses.

3. 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).

4. No Legal Representation

The fact that a party is not represented by independent counsel is not dispositive. *Marsh v. Marsh*, 949 S.W.2d 734 (Tex. App.--Houston [14th Dist.] 1997, no writ), *citing*, *Pearce*, 824 S.W.2d at 199 (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.

5. Failure to Read Agreement

Failing to read an agreement will not make the agreement unenforceable on that fact alone. *Marsh v. Marsh*, 949 S.W.2d 734 (Tex. App.--Houston [14th Dist.] 1997, no writ); *Pearce v. Pearce*, 824 S.W.2d 195, 199 (Tex. App.--El Paso 1991, writ denied)(absent 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).

D. Disclosure of Property or Financial Obligations

Once a court finds that a premarital or marital property agreement is unconscionable as a matter of law, the complaining party must further show that there has been an inadequate disclosure of the property or financial obligations of the other party. *Tex. Fam. Code 4.006(a)(2)(A); 4.105(a)(2)(A)*. Furthermore, it must be shown that the complaining party did not have, or reasonably could not have had, adequate knowledge of the other party's property or financial obligations, and that there had been no waiver of the required disclosure. *Tex. Fam. Code 4.006(a)(2)(B)-(C); 4.105(a)(2)(B)-(C); see Fanning v. Fanning*, 828 S.W.2d 135 (Tex. App.--Waco 1992) *aff'd in part, and remanded in part on other grounds*, 847 S.W.2d 225 (Tex. 1993); *Blonstein v. Blonstein*, 848 S.W.2d 82 (Tex. 1982).

Non-disclosure of property or financial obligations is relevant only if the court finds that the agreement is unconscionable.

In *Fanning v. Fanning*, 828 S.W.2d 135 (Tex. App.--Waco 1992) *aff'd in part, and remanded in part on other grounds*, 847 S.W.2d 225 (Tex. 1993), the trial court found that the wife had not been provided "fair and reasonable disclosure" of the property or financial obligations of the husband. The 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.

E. 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. Best practices should be to require two separate written instruments signed by both spouses – a waiver and the agreement. Many premarital agreements in Texas simply include the waiver within the written agreement, and there is no case law which addresses this issue.

F. Knowledge of Assets and Obligations

After establishing unconscionability, and the absence of disclosure or waiver of disclosure, the party resisting enforcement must also prove that, before signing the agreement, he or she 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)*.

G. Fiduciary Duty

The statutory defenses for premarital and postmarital agreements are identical, however, it has been stated that, in postmarital agreements, a fiduciary duty exists that is not present in premarital agreements between prospective spouses. *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). A court can consider the fiduciary duty spouses owe to each other when analyzing whether a postmarital agreement was involuntarily executed. *Izzo v. Izzo*, 2010 WL 1930179 (Tex. App.—Austin 2010, pet. denied)(mem op.).

However, adverse parties who have retained independent counsel may not owe fiduciary duties to one another. *See Miller v. Ludeman*, No. 03-03-00630-CV, 2004 WL 1269321 (Tex. App.—Austin 2004, pet. denied); *see 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, 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).

H. Common Law Defenses for Agreements Prior to September 1, 1993

Texas Family Code sections 4.006(c) and 4.105(c) limit the attack of premarital and partition agreements to the statutory defenses of voluntariness and unconscionability. However, the statutes apply only to agreements “executed on or after” September 1, 1993. The common law defenses regarding the enforcement of contracts may still be available to attack agreements executed prior to September 1, 1993. *Marsh v. Marsh*, 949 S.W.2d 734 (Tex. App.–Houston [14th Dist.] 1997, no writ).

The three most popular common law defenses are fraud, duress, and undue influence. *Daniel v. Daniel*, 779 S.W.2d 110 (Tex. App.–Houston [1st Dist.] 1989, no writ); *Matelski v. Matelski*, 840 S.W.2d 124 (Tex. App.–Fort Worth 1992, no writ) (“no duress unless there is a threat to do some act which the party threatening has no legal right to do . . . of such character as to destroy the free agency of the party . . . overcome his will and cause him to do that which he would not otherwise do”).

1. Fraud

A contract may be avoided on the ground of fraudulent inducement, however, the fraudulent representation must have been the material factor in enduring the making of the contract and without which the contract would not have been made. *Bernal v. Garrison*, 818 S.W.2d 79 (Tex. App.–Corpus Christi 1991, writ denied).

2. Mutual Mistake of Fact

When the parties have contracted under a misconception or ignorance of a material fact, the agreement will be avoided. *Williams v. Glash*, 789 S.W.2d 261 (Tex. 1990). The parol evidence rule does not bar proof of the mistake. Unilateral mistake by one party, and knowledge of that mistake by the other

party is equivalent to mutual mistake. *Marcuz v. Marcuz*, 857 S.W.2d 623 (Tex. App.–Houston [1st Dist.] 1993, no writ).

3. Undue Influence

For there to be “undue influence” in the execution of a contract, there must be dominion and control exercised over the mind of the person who is signing such contract. Such dominion and control must reach the level that the free will and free agency of the person signing the contract is overcome, and instead, the will of the “influencing party” is substituted so as to cause the signor to do what he or she otherwise would not have done but for such dominion and control. *Bailey v. Arlington Bank & Trust Co.*, 693 S.W.2d 787 (Tex. App.–Fort Worth 1985, no writ); *Board of Regents of University of Texas v. Yarbrough*, 470 S.W.2d 86 (Tex. Civ. App.–Waco 1972, writ ref’d n.r.e.).

I. 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....”

Section 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. In this situation, the aggrieved spouse is not faced with a limitations issue until a divorce is rendered. Therefore, the parties could attempt to work out problems during the marriage, without the aggrieved spouse losing his or her right to sue under the agreement. *See Fazakerly v. Fazakerly*, 996 S.W.2d 260 (Tex. App. – Eastland 1999, pet. denied)(claim seeking a declaratory judgment that a premarital agreement was void was barred by limitations).

The statute of limitations for breach of contract, or to enforce a contract, is four years. *Tex Civ. Prac. & Rem. Code 16.004; Tex. Civ. Prac. & Rem. Code 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).

J. Laches and Estoppel

Texas Family Code Section 4.008 specifically provides that equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party. 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.” Such equitable defenses are not

defenses to the premarital agreement itself, but rather, are defenses against the ability to contest the agreement. *Tex. Fam. Code 4.006; Tex. Fam. Code 4.105.*

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. *Fazakerly v. Fazakerly*, 996 S.W.2d 260 (Tex. App.—Eastland 1999, pet. denied)(a party’s claim seeking a declaratory judgment that the premarital agreement was void was barred by laches).

K. Contractual Interpretation

As with any contract, there are the issues of construction and interpretation with respect to premarital and partition agreements.

1. Construction and Interpretation

Courts interpret premarital agreements like other written contracts. *In re Estate of Loftis*, 40 S.W.3d 160 (Tex. App.—Amarillo 2015, no pet.); *Williams v. Williams*, 246 S.W.3d 207 (Tex. App.—Houston [14th Dist.] 2007, no pet.). The court’s primary concern is ascertaining the intent of the parties as expressed in the instrument. *Reeder v. Wood County Energy, LLC*, 395 S.W.3d 789 (Tex. 2012).

In construing a contract, a court’s primary concern is determining the parties’ true intent. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323 (Tex. 2011). Accordingly the court “must examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless.” *Id.* (Quoting *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223 (Tex. 2003)). Contract terms are given their plain and ordinary meaning unless the instrument indicates the parties intended a different meaning. *Reeder v. Wood County Energy, LLC*, 395 S.W.3d 789 (Tex. 2012). The parties’ intent is governed by what is in the contract, not by what one party contends it intended but failed to say and not by whether the contract was wisely made. *U.W. Denro Steels, Inc. v. Lieck*, 342 S.W.3d 677 (Tex. App.—Houston [14th Dist.] 2011, pet. denied). The court cannot rewrite or add to the contract’s language. *Am. Mfrs. Inc. Co. v. Schaefer*, 124 S.W.3d 154 (Tex. 2003). Courts construe marital property agreements narrowly in favor of the community estate. *Fischer-Stoker v. Stoker*, 174 S.W.3d 272 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

Understanding the parties’ intent requires a court examine the entire agreement in light of the circumstances present at the time when the parties entered into the agreement. *Anglo-Dutch Petrol, Int’l, Inc. v. Greenberg Peden, P.C.*, 352 S.W.3d 445 (Tex. 2011); see *Dewey v. Dewey*, 745 S.W.2d 514 (Tex. App.—Corpus Christi 1988, writ denied)(premarital agreement should be interpreted according to the true intentions of the parties as expressed in the instrument). No single provision taken alone should control – instead the court should consider all provisions with reference to the entire agreement. *see In re*

Estate of Loftis, 40 S.W.3d 160 (Tex. App.–Amarillo 2015, no pet.)(premarital agreement provision that wife was to receive house and car upon husband’s death binding on his estate).

2. Extrinsic Evidence and Surrounding Circumstances

Extrinsic evidence can be used to prove a premarital agreement. *Jurek v. Couch-Jurek*, 296 S.W.3d 864 (Tex. App.–El Paso 2009, no pet.)(where original or copy of signed premarital agreement could not be found, wife allowed to use extrinsic evidence to establish contents of the agreement, including a copy of her sister’s agreement which mirrored hers – further, throughout the marriage, the behavior of both parties was consistent with there being the existence of a premarital agreement).

3. Plain Meaning

The language of a contract should be given its plain grammatical meaning. *Faakerly v. Fazakerly*, 996 S.W.2d 260 (Tex. App.–Eastland 1999, pet. denied); *In re Marriage of McNelly*, 2014 WL 2039855 (Tex. App.–Houston [14th Dist.] 2014, pet. denied)(premarital agreement was not ambiguous because the plain meaning of “bank” was ascertainable and does not include brokerage firms – separate property was mischaracterized as community).

The question of a contract’s ambiguity is one of law for the court to decide by looking at the contract as a whole in light of the circumstances present when the contract was entered. *Nat’l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517 (Tex. 1995)(per curiam). When a potential ambiguity arises, deciding whether the language is ambiguous is an issue of contract interpretation. *Burlington N. & Santa Fe Ry. Co. v. S. Plains Swietching, Ltd.*, 174 S.W.3d 348 (Tex. App.–Fort Worth 2005, no pet.). Parol evidence is not admissible for the purpose of creating an ambiguity. *Id.* at 358. A contract is not ambiguous when the language can be given a definite or certain meaning as a matter of law. *See Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857 (Tex. 2000).

If the written instrument permits the court to ascertain a definite interpretation as to which one of two possible meanings is proper, the contract is not ambiguous, and the court will interpret the contract as a matter of law. *Burlington*, 174 S.W.3d at 356 (citing *R & P Enters. v. LaGuarta, Gavrel & Kirk, Inc.*, 595 S.W.2d 517 (Tex. 1980)). If the meaning of a contract is uncertain and doubtful or reasonably susceptible to more than one meaning, however, the contract is ambiguous and its meaning must be resolved by the fact finder. *Burlington*, 174 S.W.3d at 356. The construction of an unambiguous contract is a question of law for the court and is reviewed de novo. *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647 (Tex. 1999).

4. The Agreement as a Whole

When constructing or interpreting a contract, the entire agreement should be read and taken as a whole to effectuate the parties' true intentions. *Coker v. Coker*, 650 S.W.2d 391 (Tex. 1983); *Miller v. Miller*, 700 S.W.2d 941 (Tex. App.–Dallas 1985, writ ref'd n.r.e.) Therefore, "an interpretation which gives a reasonable, lawful, and effective meaning to all of the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect." Restatement (Second) of Contracts § 203(a).

To avoid nullification of the entire agreement based upon the failure of one provision it is suggested to include severability language that the parties' intend for the agreement to survive, such as the following:

"If it should be determined that any provision, clause, section or paragraph of this agreement is invalid, is void, or unenforceable for any reason, it shall be deemed severable from the remainder of the agreement. It is the expressed intention of the parties that the remaining provisions, sections, clauses, and paragraphs of this agreement shall continue in full force and effect without being impaired or invalidated in any way and shall be considered valid and enforceable to the maximum extent possible since valid consideration exists for each and every portion of this agreement independent from other portions of this agreement."

5. Prior Terms in the Agreement

Just as express terms are favored over implied terms and specific terms are favored over general terms, "terms stated earlier in an agreement are favored over the subsequent terms." *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983).

L. No-Contest Clauses

In the recent case of *In re S.C.*, ___ S.W.3d ___, 61 Tex. Sup. Ct. J. 1721 (June 29, 2018), the Texas Supreme Court addressed a no-contest clause in a premarital agreement. The issue in the case was whether the wife's attempt to rescind the premarital agreement triggered the agreement's no-contest clause. The premarital agreement provided that the husband would make a lump-sum payment of \$5 million to the wife upon entry of the divorce. The agreement also contained a no-contest clause where the wife would forfeit the payment if she "sought to recover property in a manner at variance from the agreement."

The husband filed for divorce and he missed certain periodic payments due under the agreement. The wife sued to enforce the agreement and compel the payments, and she was successful. The wife then repeatedly requested rescission of the agreement alleging that the husband breached it by failing to pay. The trial court granted the husband's motion for summary judgment, holding that, in requesting rescission of the agreement, the wife sought to recover in a manner at variance with it and triggered the

no-contest clause. The Court of Appeals affirmed, and the Supreme Court affirmed.

The Supreme Court rejected the wife's argument that her attempts at recisions were not enough to trigger the no-contest clause merely because they were made "in the alternative." They also declined her invitation to imply a just-cause exception to the no-contest clause. The result was that the wife lost \$5 million by triggering the no-contest clause.

V. Creditor's Rights

The Texas Constitutional provision which allows for premarital and marital property agreements specifically provides that such agreements must be made "without the intention to defraud pre-existing creditors." *Tex. Const. Art. XVI Section 15*. While the Uniform Premarital Agreement Act, as adopted and included in the Texas Family Code, does not include any provisions with regards to creditor's rights, Section 4.106 states that partition and exchange agreements made with the intent to defraud the rights of a pre-existing creditor are void as to those rights. *Tex. Fam. Code 4.106(a)*; *In re Hinsley*, 201 F.3d 638 (5th Cir. 2000)(Tex.)(partition agreement found to be invalid transfer of property as an attempt to impair rights of creditors); *Calmes v. United States*, 926 F. Supp. 582 (N.D. Tex. 1996)(premarital agreement upheld and IRS unable to levy wife's personal earnings which were her separate property).

Partition and exchange agreements may be recorded in the deed records in the county in which a party resides and in the county in which the real property is located. This will provide constructive notice to good faith purchasers of real property for value. *Tex. Fam. Code 4.106(b), 4.206(b-c)*. However, it would seem that very few agreements are actually recorded since most people would want to keep this information confidential.

VI. Practice and Drafting Tips

A. Separate Counsel

Several court decisions have held that lack of separate representation does not make an agreement unenforceable. *Marsh v. Marsh*, 949 S.W.2d 734 (Tex. App.–Houston 1997, no writ); *Pearce v. Pearce*, 824 S.W.2d 195 (Tex. App.–El Paso 1991, writ denied); *Sadler v. Sadler*, 765 S.W.2d 806 (Tex. App.–Houston [14th Dist.] 1988), *rev'd on othe grounds*, 769 S.W.2d 886 (Tex. 1989); *Chiles v. Chiles*, 779 S.W.2d 127 (Tex. App.-- Houston [14th Dist.] 1989, writ denied)(the wife was represented by counsel at all times during extensive negotiations and drafts of the agreement). However, the lack of assistance of counsel may be one factor in determining enforceability. *Uniform Premarital Agreement Act*. The best practice would be for both parties to be represented by independent counsel in the negotiation, drafting, reviewing, and execution of a premarital or partition agreement.

If the other party chooses not to retain independent counsel, provisions should be included in the agreement that the party was encouraged to have independent representation but knowingly and willfully waived his or her right to do so. Also, the document should reflect that the lawyer of one party has provided no advice, legal or

otherwise, to anyone other than his or her client. Finally, the agreement should be drafted as simple as possible.

It is a conflict of interest for a lawyer to represent opposing parties to the same litigation, and a lawyer should not represent both parties when preparing a premarital or marital property agreement. *Tex. Disc. Rules of Prof. Conduct 1.06*. A lawyer also may not provide legal advice to the other party to a marital property agreement.

B. Timing of Agreement

Whenever possible, the negotiations, drafting, and execution of the premarital agreement should be completed as far in advance of the wedding date as possible. An agreement executed too close to the wedding date may be more likely to be challenged on the grounds of duress or undue influence. However, several cases have upheld premarital agreements that were executed close in time to the wedding. *Williams v. Williams*, 720 S.W.2d 246 (Tex. App.--Houston [14th Dist.] 1986, no writ)(signing premarital agreement one day before wedding did not invalidate agreement, especially in light of prior conversations for 6 months prior to the wedding and the sophistication of the parties); *Marsh v. Marsh*, 949 S.W.2d 734 (Tex. App.--Houston [14th Dist.] 1997, no writ)(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).

C. Full and Complete Financial Disclosure

Each party should provide a full and complete disclosure of all of his or her assets and liabilities. In order to comply with the requirements of the Texas Family Code, the party seeking to uphold a premarital or post-marital provision must have given a "fair and reasonable disclosure of the property or financial obligations" of that party. *Tex. Fam. Code 4.006(a), 4.105(a)*.

While a party may "voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided," such waiver must be signed "before execution of the agreement." It is important to indicate the time and date that the waiver, if any, and agreement are signed to avoid any question later as to the timeliness of execution.

D. Videotape

Videotaping the signing ceremony could insure the enforceability of a premarital or postmarital agreement. A videotape may provide evidence of a lack of duress and involuntariness should a disagreement later arise.

VII. Summary Judgment

Summary judgment is a good method to test an agreement for unconscionability early in the process. *See 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). In *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), 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.

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. 166(a)*. Texas courts have expressed a desire to eliminate patently unmeritorious claims through summary judgment procedures. *Ross v. Texas One Partnership*, 796 S.W.2d 206, 209 (Tex. App.-Dallas 1990), *writ denied per curiam*, 806 S.W.2d 222 (Tex. 1991).

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 (Tex. App.–Corpus Christi 1990, 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 “no evidence” summary judgment is a useful tool for the proponent of a premarital agreement to dispose of the issue of enforceability early in the case. Since the burden to defeat a premarital agreement rests on the party resisting its enforceability, carefully drafted discovery will bring out any claims that could challenge the enforceability of the agreement.

VIII. Declaratory Judgment

Some practitioners advocate obtaining a declaratory judgment to seek a judicial determination as to the validity of a premarital or marital property agreement prior to a future dispute regarding its enforcement. A declaratory judgment has the force and effect of a final judgment or decree. *CPRC 37.003(b)*.

A. Declaratory Judgment Act

The Uniform Declaratory Judgment Act set forth in Chapter 37 of the Texas Civil Practice and Remedies Code covers the types of controversies that can be determined by declaratory judgment:

1. A person interested under a deed, will, written contract, or other writings constituting a written contract or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder. *Tex. Civ. Prac. & Rem. Code 37.004(a)*.
2. A contract may be construed either before or after there has been a breach. *Tex. Civ. Prac. & Rem. Code 37.004(b)*.

B. Appropriateness of Declaratory Judgment

The theory is that having a premarital or marital property agreement declared valid and enforceable at the time of execution will preclude the issues of enforcement at a later time. However, there is an argument that a declaratory judgment is not proper in these situations.

1. No Justiciable Controversy

A declaratory judgment is not available when there is no justiciable controversy. *Bonham State Bank v. Beadle*, 907 S.W.2d 465 (Tex. 1995). A declaratory judgment is appropriate only when there is a justiciable controversy about the rights and status of the parties, and the declaration would resolve the controversy. *Etan Indus. V. Lehmann*, 359 S.W.3d 620 (Tex. 2011). The controversy must be real and substantial, involving a genuine conflict of tangible interests and not merely a theoretical dispute. *City of Dallas v. VSC, LLC*, 347 S.W.3d 231 (Tex. 2011).

Unless there is a justiciable controversy, the trial court does not have subject matter jurisdiction under the Texas Declaratory Judgment Act. *J.E.M. v. Fidelity & Cas. Co. of New York*, 928 S.W.2d 668, 671 (Tex.App.-Houston [1st Dist.] 1996, no writ). Subject matter jurisdiction refers to the court's power to hear a particular type of suit, a power that exists by operation of law only, and cannot be conferred upon any court by consent or waiver. *Federal Underwriters Exch. v. Pugh*, 541, 174 S.W.2d 598, 600 (Tex. 1943).

2. Future Controversy

A declaratory judgment is not available to resolve issues that are not yet mature and are subject to change. *Lane v. Baxter Healthcare Corp.*, 905 S.W.2d 39 (Tex. App.-Houston [1st Dist.] 1995, no writ). The controversy does not need to be fully ripe, but it must indicate that immediate litigation is unavoidable. *Unauthorized Practice of Law Cmt. v. Nationwide Mutual Ins.*, 155 S.W.3d 590 (Tex. App.-San Antonio 2004, pet. denied).

3. Application to Premarital Agreements

Arguably, testimony given in a declaratory judgment action to validate a premarital agreement would conclusively establish there was no controversy. Accordingly, a collateral attack on declaratory judgment affirming the enforceability of a premarital agreement might successfully allege that no justiciable issue existed at the time the court entered the judgment, *i.e.*, there was no existing controversy concerning the enforcement of the agreement and thus the issue was not ripe. Further,

because no justiciable issue existed, the court rendering the judgment lacked subject matter jurisdiction, and the parties' attempt to bestow such jurisdiction was ineffective.

There are no reported Texas cases that have discussed the validity of a declaratory judgment affirming the enforceability of a premarital agreement. Since a premarital agreement is a contract, there are contract cases where declaratory judgment actions were found to be impermissible to settle issues between the parties to the contract that had not ripened into actual disputes.

The practical effect is that obtaining a declaratory judgment to determine the validity of a premarital agreement doesn't hurt, except for the extra expense for the client. Even if the judgment is void, the benefit could be the sworn testimony. Further, the judgment itself can contain findings that may make the agreement more difficult to attack.

IX. Ratification after Marriage

A ratification agreement signed by the parties after marriage is not necessary, except if the agreement is to waive a prospective spouses survivor benefits in an ERISA retirement plan. A premarital agreement cannot waive a prospective spouse's survivor benefits in an ERISA retirement plan. *See National Auto. Dealers & Assocs. Ret. Trust v. Arbeitman*, 89 F.3d 496 (8th Cir. 1996). Under ERISA, survivor benefits can be waived only by a spouse. 29 U.S.C. 1055(c)(2)(A). Even though a premarital agreement cannot waive survivor benefits, a party can include a provision in a premarital agreement that requires a prospective spouse to execute a waiver of survivor benefits under 29 U.S.C. 1055(c)(2)(A) after the parties are married.

There are still some practitioners who believe that a ratification agreement signed by the parties after marriage is necessary to validly partition future earnings and income from separate property. However, several Texas cases have held that provisions in a premarital agreement that income arising from separate property during marriage and earnings received during marriage are not unconstitutional and these agreements are being upheld. *Beck v. Beck*, 814 S.W.2d 745 (Tex. 1991), cert denied, 112 S. Ct 1266 (1992); *Winger v. Pianka*, 831 S.W.853 (Tex. App.–Austin 1992, writ denied).

X. Arbitration

A. Arbitration Procedures

Section 6.601 of the Texas Family Code provides the following regarding arbitration procedures:

- (a) On written agreement of the parties, the court may refer a suit for dissolution of a marriage to arbitration. The agreement must state whether the arbitration is binding or nonbinding.
- (b) If the parties agree to binding arbitration, the court shall render an order reflecting the arbitrator's award.

B. Determination of Validity and Enforceability of Contract Containing Agreement to Arbitrate

Texas Family Code Section 6.6015 provides as follows:

- (a) If a party to a suit for dissolution of a marriage opposes an application to compel arbitration or makes an application to stay arbitration and asserts that the contract containing the agreement to arbitrate is not valid or enforceable, notwithstanding any provision of the contract to the contrary, the court shall try the issue promptly and may order arbitration only if the court determines that the contract containing the agreement to arbitrate is valid and enforceable against the party seeking to avoid arbitration.
- (b) A determination under this section that a contract is valid and enforceable does not affect the court's authority to stay arbitration or refuse to compel arbitration on any other ground provided by law.
- (c) This section does not apply to:
 - (1) a court order;
 - (2) a mediated settlement agreement described by Section 6.602;
 - (3) a collaborative law agreement described by Section 6.603;
 - (4) a written settlement agreement reached at an informal settlement conference described by Section 6.604; or
 - (5) any other agreement between the parties that is approved by a court.

C. Texas Civil Practice and Remedies Code

Parties may contractually agree to use an alternative dispute resolution method to resolve any subsequent issues of interpretation or enforcement. Section 172.051 of the Texas Civil Practice and Remedies Code provides the statutory authority for such agreements to arbitrate: "*An arbitration agreement may be an arbitration clause in a contract or a separate agreement.*" *Tex Civ. Prac. & Rem. Code 172.051(a)*. The parties may contractually agree to binding or nonbinding arbitration, the use of a specific arbitrator, the allocation of the fees associated with an arbitration or mediation, and the mediator to use in the case of a future dispute. *See Koch v. Koch*, 27 S.W.3d 93 (Tex. App.—San Antonio 2000, no pet.)(provision to arbitrate any future disputes over premarital agreement binding on divorce court); *Preston v. Dyer*, 2012 WL 5960193 (Tex. App.—Beaumont 2012, pet. denied)(spousal support, child support and attorney's fees subject to arbitration under terms of premarital agreement; Texas Arbitration Act authorized award for fees).

XI. Agreements to Convert Separate Property to Community Property

A. Conversion Agreements

Spouses may agree that all or part of the separate property owned by either or both spouses is converted to community property provided that certain formalities are met.

Tex. Fam. Code 4.201-4.206; Alonso v. Alvarez, 409 S.W.3d 754 (Tex. App.—San Antonio 2013, pet. denied)(converting separate property into community may be accomplished by a series of agreements); *Monroe v. Monroe*, 358 S.W.3d 711 (Tex. App.—San Antonio 2011, pet. denied)(premarital and postmarital agreements converted husband’s separate property to community; divorce division restored much of husband’s former separate property to him, a factor the court was authorized to consider).

B. Formalities of Conversion Agreements

An agreement to convert separate property to community property (conversion agreement):

- (1) must be in writing and:
 - (a) be signed by the spouses;
 - (b) identify the property being converted; and
 - (c) specify that the property is being converted to the spouses’ community property; and
- (2) is enforceable without consideration. *Tex. Fam. Code 4.203*.

The mere transfer of a spouse’s separate property to the name of the other spouse or to the name of both spouses is not sufficient to convert the property to community property. *Tex. Fam. Code 4.204*.

C. Property to be Converted

A partition or exchange agreement can only affect community property. *Robertson v. Robertson*, 2015 WL 7820814 (Tex. App.—Corpus Christi 2015, no pet. h.)(mem. op.). In *Robertson*, the court of appeals held that the parts of the agreement that attempted to partition property that already belonged to the separate estate of the husband had no effect. The court further held that the terms of the agreement that attempted to allocate income from the husband’s personal injury settlement in the future did not constitute a valid conversion of separate property, because it failed to include the warning language statutorily required under Texas Family Code Section 4.205(b).

D. Enforcement

An agreement to convert property to community property is not enforceable if the spouse against whom enforcement is sought proves that the spouse did not:

- (1) execute the agreement voluntarily; or
- (2) receive a fair and reasonable disclosure of the legal effect of converting the property to community property. *Tex. Fam. Code 4.205(a)*.

An agreement that contains the statement set forth in Texas Family Code Section 4.205(b), or substantially similar words, prominently displayed in bold-faced type,

capital letters, or underlined, is rebuttably presumed to provide a fair and reasonable disclosure of the legal effect of converting property to community property. *Tex. Fam. Code 4.205(b)*; *Robertson v. Robertson*, 2015 WL 7820814 (Tex. App.—Corpus Christi 2015, no pet. h.)(mem. op.)(the terms of partition agreement that attempted to allocate income from the husband’s personal injury settlement in the future did not constitute a valid conversion of separate property, because it failed to include the warning language statutorily required under Texas Family Code Section 4.205(b).

E. Rights of Creditors

A conversion of separate property to community property does not affect the rights of preexisting creditor of the spouse whose separate property is being converted. *Tex. Fam Code 4.206(a)*.

A conversion of separate property to community property may be recorded in the deed records of the county in which a spouse resides and of the county in which any real property is located. *Tex. Fam. Code 4.206(b)*.

A conversion of real property from separate property to community property is constructive notice to a good faith purchaser for value or a creditor without actual notice only if the agreement to convert the property is acknowledged and recorded in the deed records of the county in which the real property is located. *Tex. Fam. Code 4.206(c)*.

XII. Conclusion

Most courts uphold premarital and marital property agreements, however, there are cases where such agreements have not been upheld. Great care should be taken in the drafting and execution of these documents. Hopefully this paper will provide a great reference for all matters pertaining to marital agreements.