HOPING FOR THE BEST AND PLANNING FOR THE WORST: CREATIVE PRE- AND POST-MARITAL AGREEMENTS

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Louisiana State University - B.S. - December 1984
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SPECIAL RECOGNITION

Texas Monthly Super Lawyer November 2003, October 2004
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Member, Family Law Council State Bar of Texas
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FREQUENT AUTHOR AND SPEAKER THROUGHOUT TEXAS

Speaker - "Case Law Update" - Child Custody and Visitation in Texas, 1992
Speaker - "Ten Top Family Law Cases of the 90s" - Grand Prairie Bar Association, 1992
Speaker - "Case Law Update" - Dallas Bar Family Law Section, 1992-1998
Speaker - "1993 Legislative Update" - Plano Bar Association, 1993
Speaker - "1993 Legislative Changes Affecting Texas Family Law Seminars, Inc., Houston and Dallas, 1993
Speaker - "Relocation" - "Divorce Camp 96" Minnesota Chapter of the American Academy of Matrimonial Lawyers - 1996
Participant - State Bar of Texas Marriage Dissolution Workshop - 1994
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Speaker -"Evidence Without Witnesses" - How to Offer and Exclude Evidence, Houston, 1996
Speaker -"Working as an Expert Witness" - 5th Annual Dallas Chapter TSCPA Divorce Conference - 1996
Speaker - "Child Custody Visitation in Texas" - National Business Institute - 1996
Speaker - "Why Mediation? Rules That Govern Alternatives" - Texas Center for the Judiciary, College of Advanced Judicial Studies - 1997
Speaker - "Trying a Property Case on a Shoestring" - State Bar of Texas Marriage Dissolution Institute - 1997
Speaker - "The Secrets to Preparing for the Certification Exam," Advanced Family Law Course, State Bar of Texas - 1997
Speaker - "Stock Options and Pension Plans," 6th Annual Dallas Chapter TSCPA Divorce Conference - Dallas Chapter TSCPA - 1997
Speaker - "Overview of the Texas Disciplinary Rules of Professional Conduct," "Bridge the Gap" Seminar, Dallas Association of Young Lawyers - 1997
Speaker - "Pre-Nuptial Agreements," Advanced Drafting: Estate Planning and Probate Course, State Bar of Texas - 1997
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Speaker - "Bankruptcy and Family Law", Family Law on the Front Lines, The University of Texas School of Law - 2001
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CO-AUTHORED PUBLICATIONS

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"Hague Convention" - 1992, 1993
"Habeas Corpus" 1992, 1993
"The Illusion of Goodwill: Now You See It, Now You Don't" - 1992
"Evaluation of a Closely Held Business" - 1993
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"Trying a Property Case on a Shoestring" - 1997
"The Secrets to Preparing for a Certification Exam" - 1997
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ARTICLES AND PUBLICATIONS:

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"Reimbursement Issues", State Bar of Texas, Marriage Dissolution Institute, 2000
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"Discovery in Family Law Cases Under the New Rules", University of Houston Family Law Seminar, 1999
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Co-author of various family law articles since 2000, including:
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HOPING FOR THE BEST AND PLANNING FOR THE WORST: CREATIVE PRE-AND POST MARITAL AGREEMENTS

I. INTRODUCTION

This article is designed to provide the family law practitioner with creative ideas that should be considered when preparing pre- and post-marital agreements. For ease of use and reference, the paper is divided into three main parts:

1) An overview of the agreements addressed in the paper and their history;
2) Creative drafting and issues to consider, including, helpful hints, practice tips and reminders for drafting the agreement; and
3) The substantive law that underlies all pre- and post-marital agreements.

II. DIFFERENT TYPES OF AGREEMENTS

A. Background

Premarital and marital property agreements in Texas have a long, complex history steeped in the community property presumption, the state constitution, statutes, and case law. Originally, such agreements were disfavored by the Texas courts and traditionally found to be unenforceable. However, as a result of amendments to the Texas Constitution, evolving statutes, recent case law, and improved draftsmanship, the agreements are generally held to be a valid and enforceable.

B. Premarital Agreements

Subchapter A of Chapter 4 of the Texas Family Code adopted the Uniform Premarital Agreement Act in Texas, slightly modified.

Section 4.001 defines a "premarital agreement" as one made between prospective spouses, in contemplation of marriage, which shall become effective on marriage. While not clear from the statutory text and unanswered in Texas case law, the Official Comments to the Act indicate that a ceremonial marriage is required. Uniform Premarital Agreement Act § 2 cmt.

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 Ann. §4.001(2).

A premarital agreement must be in writing and signed by both parties. TEX. FAM. CODE ANN.§ 4.002. No actual consideration is required; however, it may be wise in some cases to provide for benefits the non-monied party, to avoid a later finding of unconscionability, particularly if the financial condition of the non-monied party under the agreement will be poor. If the benefits are good enough, it may defuse any impetus to challenge enforceability.

Section 4.003 provides a comprehensive listing of matters which might be dealt with in a premarital agreement. These include:

(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.

Subsection (b) makes clear that child support may not be "adversely affected" by a premarital agreement. TEX. FAM. CODE ANN. § 4.003(b). Therefore, a provision providing for the elimination of or reduction of a parties' child support obligation in the event of divorce would be unenforceable. Other issues regarding the children of the contemplated marriage, however, might be properly included in a premarital agreement, including provisions for private education, college expenses, and choice of residence. All limitations on support obligations owed to minor children, and some restrictions on parental rights, are probably subject to review by the court as "a violation of public policy" if found to unduly limit a parent's obligations, violate a child's best interest, or impinge upon a parental right. *See, e.g., Zummo v. Zummo*, 574 A.2d 1130, 1148 (Pa. Super. Ct. 1990) (premarital promise to raise child in certain religion not enforceable; "while we agree that a parent's religious freedom may yield to other

compelling interests, we conclude that it may not be bargained away"); *In re Weiss*, 49 Cal.Rptr. 2d 339 (Calif. Ct. App. 1996) (mother's premarital written agreement to raise her children in Jewish faith is not legally enforceable).

C. Post-marital Agreements

Subchapter B of Chapter 4 sets out the statutory requirements of a property agreement executed as between spouses. Again, "property" is broadly defined in the post-marital agreement context. TEX. FAM. CODE ANN. § 4.101. Through marital property agreements, spouses can partition or exchange their community property interests between each other:

> At any time, the spouses may exchange between themselves any part of their community property, then existing or to be acquired, as the spouses may desire. Property or a property interest transferred by a partition or exchange agreement becomes the spouse's separate property.

Tex. Fam. Code § 4.102.

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 ANN. § 4.103.

Like premarital agreements, agreements between spouses must be in writing and signed by the parties. Tex. Fam. Code § 4.104. The intent of the parties to effectuate a present partition and exchange of property, on hand or to be acquired, should be included. *See Collins v. Collins*, 752 S.W.2d 636 (Tex. App.--Fort Worth 1988, writ ref'd) (finding that a mere listing of assets as separate property of one spouse on the parties' joint tax return, although a writing signed by the parties, does not amount to a marital property agreement).

III. CREATIVE DRAFTING

A. Don't Be Afraid to Put the Form Book Down

While the forms that have been promulgated for use by family law practitioners are often helpful, it is a disservice to any client to rely solely on form book language. When preparing premarital or post-marital agreements, some attorneys simply put in their client's information and leave all of the form book language in their client's agreement. Instead of using general language that may have no benefit to either your client or the other party, it is wise to be willing to put the form down and use some common sense.

In preparing this paper, the authors asked several prominent family law attorneys across the state to fill out a short survey about the most creative provisions they have seen in marital agreements, as well as what advice they had to lawyers regarding the drafting of premarital agreements. One lawyer put it best when they said, "Don't be wedded to form book proposals." Because of the unique nature of these agreements, some creativity is not just suggested, it is required. Premarital agreements and post-marital agreements can be as creative as the attorneys or parties want them to be. The balance between preparing documents that protect spouses' rights in the event of divorce, while the parties are eagerly preparing for their wedding, should remind the family law practitioner to be creative and careful in their drafting of the proposals.

B. Setting the Tone

Whether you represent the monied or the non-monied spouse, the tone that you take in negotiating in drafting the marital agreements can shape the course of a case. When meeting with the client for the first time in the initial consultation, is a good idea to discuss not only the client's goals, but the tenor and tone they want to take in the case. Sometimes these things conflict with each other and the client is unaware of the conflict. For example, the client may want to engage in negotiations from a very aggressive standpoint with a "take it or leave it" attitude. However, the client's overall goal may be to simply protect their separate property. In such a case, the tone in which they want to proceed may be counterproductive to achieving their goals.

As every family law practitioner knows, there are many ways to skillfully obtain their clients' goals without alienating the affections of the parties. In the case of the preparation and negotiation of premarital agreements, it is wise to consider the overall effect of the drafting and negotiating of the premarital agreement. Sometimes taking a hardline stance only ensures that the parties are setting themselves up for several difficult months and possibly not having a wedding at all.

-Practice Tip-

There is a fundamental dilemma in negotiating hard for your client. The more successful you are in wrestling concessions from the other party, the weaker your client's arguments will be to set aside the agreement in the future. It is prudent to explain this dilemma to your

client and allow him or her to make the decision on how they would like to proceed.

C. Keep Earnings as Community

The usual purpose of a premarital agreement is to eliminate or at least restrict the community estate. The party without the major income obviously wants narrower restrictions. Often the effect of a premarital agreement can be limited to passive income, on the basis that the marital partners should share in the earnings from labor during the marriage.

D. The "Signing Bonus"

Another way to address this is the non-monied party could receive a transfer of property in exchange for giving up rights through an agreement. This could involve a cash payment, or a transfer of an undivided one-half interest in the home, etc. The problem with a payment or transfer at the outset of the marriage is that it might over-reward a short marriage and under-reward a long marriage.

Negotiate for the transfer of as much property or money as you can up front, since there will be less chance of performance failures when the agreement is new and on everybody's minds. Such transfers could include not only money, but also an interest in the family home, furniture, jewelry, an automobile, retirement benefits, etc.

E. Recurrent Transfers

Bargain for monthly or annual transfers that go beyond paying for then-current living expenses. An attraction to recurrent transfers is the fact that they can be structured so that they will not come due unless the marriage continues.

F. Guaranteed Lifestyle During Marriage

If there is to be no community property income, or insufficient community property income during marriage, try to include a contractual duty of support during the marriage from the monied spouse's separate estate.

G. The "Exit Bonus"

One creative drafting technique to consider is the idea of a "exit bonus" for the non-monied spouse if the marriage ends. There are many ways this can be handled. One way is to pay one lump sum amount if the marriage ends. Another way is to pay the non-monied spouse a certain amount of money for each year the parties are married. This "exit bonus" provides two key things. First, it makes a clean break and clearly sets out what both parties are negotiating for in the premarital agreement. Second, it provides security and a sense of fairness to the non-monied spouse so that they do not feel like they are signing away everything.

There may be some resistance from the monied spouse to enter into such an agreement. If so, a creative way to overcome such resistance is to provide incentive for not contesting the agreement. This creative clause has been referred to by one family law practitioner as "the poison pill."

H. The "Poison Pill"

In order to provide incentive to the monied spouse to provide an "exit bonus", and to minimize the risk of the agreement being attacked, a creative technique is to insert a clause that says if the non-monied spouse attacks the validity of the agreement, they forfeit the "exit bonus". Of course, language should be included in this clause that clearly states that the non-monied spouse has every right to attempt to attack the agreement, however, if they do so, they do not receive the "exit bonus" and essentially receive nothing at all. The combination of these two creative provisions makes it more likely that the premarital or post-marital agreement will not be attacked and will be enforced as the parties intend.

I. Expiration Clause

A premarital agreement can contain a clause that the agreement expires after ten years, or after a child is born, etc. One wonders whether this type of expiration could retroactively alter ownership rights that have already vested, but the expiration certainly can apply on a prospective basis.

J. Deny at Your Own Risk

A creative clause that can be added to premarital agreements governs responses to requests for admissions. Request for admissions are an underused, valuable discovery tool. The family law practitioner could include a clause in the premarital or post-marital agreement that provides if the non-monied spouse answers a request for admission about the agreement being fully enforceable in any way other than "admit", the forfeiture of the "exit bonus" becomes automatic. This provision is easy to add to a premarital agreement and goes to the core of what the agreement means. If the parties are unwilling to admit that the agreement is enforceable when they are preparing it, there is an obvious problem already brewing. On the back end, if a party is unwilling to admit that the agreement is enforceable, the forfeiture of the "exit bonus" provides some incentive for them to reassess their desire to attack the validity of the agreement.

Caution should be used when being creative. The issues in this paper are designed to encourage attorneys to draft creatively, however, there are professional and ethical obligations that limit the "creativity" of overzealous attorneys. For example, while it is permissible to include a clause that a party forfeit the "exit bonus" if they fail to answer a request for admission that asks if the agreement is fully enforceable, it is not wise to include clauses that attempt to penalize or eliminate a party for wanting to go to mediation or to take away their right to a jury trial.

K. Recurrent Performance Obligations by the Monied Spouse

Recurrent obligations of the monied party may be breached, and could possibly serve as a basis to avoid the agreement. No case has ruled on whether material breach of an agreement is grounds to avoid the agreement, for contracts signed on or after September 1, 1993.

L. House, Car and "Nest Egg"

If you can obtain a guarantee upon dissolution of marriage of a nice place to live, a nice car to drive, and a chunk of money to save for a rainy day, this can make up somewhat for giving up a community property claim to community income.

M. Permit Gifts and Bequests

An agreement may define certain property to be separate property of a spouse, or as belonging to the owning or acquiring spouse. Gifts or bequests would contravene these descriptions, so a paragraph should be included that overrides the original characterization if there is a gift or bequest.

N. Right of Survivorship

A survivorship right in community property (if any) is a death-related term to be considered. However, a survivorship right cuts both ways, and can remove wealth from the non-monied party's probate estate, working to the disadvantage of any heirs. Required bequests from the monied spouse's estate, or claims against the monied spouse's estate, would operate one-way only, and might be preferable.

O. Life Insurance

Since the spouses will not be building a community estate (or at least not as much of one) because of the agreement, the non-monied spouse may want an insurance policy on the life of the monied spouse. The obligation might be extended to include children born or adopted as beneficiaries of life insurance on the life of the monied spouse.

P. Post-divorce Alimony in Lieu of Property

A popular term is one year of post-divorce alimony for every year of marriage.

Q. Choice of Law - Where Did They Go?

In thinking creatively, attorneys should incorporate choice of law provisions into the premarital and post-marital agreements that they prepare. Attorneys may want to include an arbitration clause that states that the agreement will be arbitrated by a neutral third party if any question regarding the validity of the agreement comes up. Problems arise when, fifteen or twenty years down the road, the parties have left the great state of Texas and have moved to Delaware. In order to avoid a choice of law problem, the arbitration clause can contractually bind the parties to apply Texas law thus eliminating a future question of what law applies to a premarital agreement drafted in Texas for parties who later move out of the state.

R. 2010 - an Enforcement Oddity

Another provision that family law attorneys should use in preparing premarital and post-marital agreements is a provision that the controlling law is the law on the day the agreement is signed. Though they only meet every two years, the Texas Legislature has proven that they are capable of drastically changing the status of the law in a legislative session. In order to protect against future changes that could have a negative impact on your client's rights that they are contractually bound to in the agreement, the agreement itself should state that if any question as to the validity or enforcement of the agreement is raised, the laws of the State of Texas on the date of the signing of the agreement will control the interpretation of said agreement.

S. Creative Provisions in a Changing World

There are already several states that have recognized, in varying degrees, either civil unions or same sex marriage. What is the effect of a Massachusetts same sex couple who lived in Boston for five years as a married couple, have a premarital agreement, then one or both of the spouses are transferred to Texas, and one party seeks enforcement of the agreement. What is the effect of the premarital agreement in a state that does not recognize same sex marriage?

In order to avoid such a problem for clients in Texas, the clients can contract and enter agreements between them that may be different from what is

permissible under the Family Code. For example, if a same sex couple in Texas wished to enter into an agreement regarding the division of their property, debts, and provisions for their children, they can do so. Such provisions would probably need to begin with language that states, "Whether the state recognizes the marriage of Mr. Greenacre and Mr. Blackacre, the agreement is intended to be a contract between the parties." Such provisions can provide some assurance and stability in an atmosphere where sister states are addressing the issue of same sex marriage differently than the State of Texas.

T. Setting the Fee

Some lawyers will not draft premarital or post-marital agreements because of the risk of a contest at a later time. In setting your fee, consider that you may later be required to testify to who drafted what, the circumstances surrounding execution, discussions with your client, etc. Worse yet, you may be the vehicle for an attack on the agreement, based on failing to advise your client properly, or worse, for conspiring with the monied party to take advantage of your client. Consider these possibilities when setting your fee. A straight hourly rate only compensates you for your time spent in negotiations and drafting, not the potential for later involvement.

U. Paper as You go

If your client decides to try to challenge enforcement of the agreement, the client may allege that he or she did not understand the agreement because you did not explain it to him or her adequately. The more one-sided the agreement is, the more important it is that your advice to the client be documented, preferably in the form of an extensive explanation, signed by the client.

If there are unusual or complicated terms, make a record of your discussions with the opposing lawyer as well as your client. Redline each set of changes and keep all drafts in case a dispute develops later over the meaning of a clause.

V. Disqualification from Divorce

It is possible, if a divorce occurs, that your client may wish to hire you to represent him or her. Many forms contain a waiver of disqualification provision. If the premarital agreement is contested, the opposing party may wish to disqualify you on the grounds that you will be a witness. In such a case, your ethical obligations may supercede the waiver provision. If you do accept employment in the divorce, be sure to disclose to the client at the time you accept employment, of the possibility of a motion to disqualify.

W. Loss of Confidentiality

Advise your client that, if he or she contests enforceability of the agreement, the "offensive use" doctrine of *Ginsberg v. Fifth Court of Appeals*, 686 S.W. 2d 105, 107 (Tex. 1985), may apply. In *Ginsberg*, the Supreme Court of Texas held that a party seeking affirmative relief cannot invoke a privilege to preclude the defendant from obtaining information necessary to defend against the claim. That is "using the privilege as a sword, not a shield," and in that situation the trial court can force the party invoking the privilege to either waive the privilege or suffer dismissal of his affirmative claims. In *Ginsberg*, a woman was contesting the validity of a deed to land, on the ground that she was fraudulently induced to sign the deed. The point at which she became aware of the transfer affected the statute of limitations, and the Supreme Court held that her psychiatrist's records on that issue were discoverable. In *Republic Ins. Co. v. Davis*, 856 S.W.2d 158, 163 (Tex. 1993), the Supreme Court articulated a three-pronged test to apply in such situations:

> First, before a waiver may be found the party asserting the privilege must seek affirmative relief. [FN9] Second, the privileged information sought must be such that, if believed by the fact finder, in all probability it would be outcome determinative of the cause of action asserted. Mere relevance is insufficient. A contradiction in position without more is insufficient. The confidential communication must go to the very heart of the affirmative relief sought. Third, disclosure of the confidential communication must be the only means by which the aggrieved party may obtain the evidence. [FN10] If any one of these requirements is lacking, the trial court must uphold the privilege. [FN11] [Content of footnotes omitted]

In *Republic Ins. Co. v. Davis*, the "offensive use" principle was applied to the attorney-client privilege. In *Owens-Corning Fiberglas v. Caldwell*, 818 S.W.2d 749 (Tex. 1991), it was applied to the attorney work product privilege. In *Parten v. Brigham*, 785 S.W.2d 165, 168 (Tex. App.--Fort Worth 1989, no writ), the offensive use doctrine was applied to a bill of review brought to set aside a property division upon divorce. The plaintiff alleged that community assets were hidden from her at the time of divorce. The appellate court held that her divorce lawyer's files were open to discovery to the

extent they reflected the plaintiff's knowledge of community property assets.

If the party seeking enforcement of the agreement can show affirmative relief, outcome determinative, and exclusive means to the information, they may be able to see your file and take your deposition and call you to testify at trial.

IV. CASE LAW AND STATUTORY AUTHORITY

A. Interspousal Fiduciary Obligations

One court has said that post-marital agreements are evaluated in the context of the fiduciary relationship that exists between spouses. *Daniel v. Daniel*, 779 S.W.2d 110, 115 (Tex. App.-- Houston [1st Dist.] 1989, no writ); *compare to Pearce v Pearce*, 824 S.W.2d 195, 197 (Tex. App.--El Paso 1991, writ denied) ("Texas courts have closely scrutinized property agreements made by spouses during the marriage"). In ordinary fiduciary litigation, the burden of proof is on the fiduciary to prove that his transaction with the beneficiary was fair. *See Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1964) ("The burden of establishing its perfect fairness, adequacy, and equity, is thrown upon the attorney, upon the general rule, that he who bargains in a matter of advantage with a person, placing a confidence in him, is bound to show that a reasonable use has been made of that confidence; a rule applying equally to all persons standing in confidential relations with each other"); *Jackson Law Office, P.C. v. Chappell*, 37 S.W.3d 15, 27-28 (Tex. App.--Tyler 2000, pet. denied) ("where 'self-dealing' by the fiduciary is alleged, a 'presumption of unfairness' automatically arises and the burden is placed on the fiduciary to prove (a) that the questioned transaction was made in good faith, (b) for a fair consideration, and (c) after full and complete disclosure of all material information to the principal"). If this rule were to be applied to a post-marital agreement, it would reverse the burden of proof in TEX. FAM. CODE §§ 4.006, 4.105, which provide that a premarital or marital agreement is not enforceable if the party against whom enforcement is sought proves the two statutory defenses.

V. THE EFFECT OF THE AGREEMENT DURING MARRIAGE

A. Partition of Community into Separate

Since 1980, both premarital and post-marital agreements can partition and exchange community property on hand and yet to be acquired. TEX. CONST. art. XVI, § 15, provides in part:

> . . . 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 of part of their property, then existing or to be acquired, or exchange between themselves the community interest of the other 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 . . . .

B. Agreement That Income from Separate Will Be Separate

TEX.CONST. art. XVI, § 15, provides in part:

> 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. ..

Note that the constitutional power to agree is limited to spouses, and thus does not include persons about to marry. In one case the Court held that a clause in a premarital agreement that income from separate would be separate was not enforceable. *Fanning v. Fanning*, 828 S.W.2d 135 (Tex. App.--Waco 1992), *aff'd in part and rev'd in part*, 847 S.W.2d 225 (Tex. 1993). However, the language in that agreement was peculiar, and a subsequent case held that persons about to marry could achieve such a recharacterization through partition and exchange of future income. *Winger v. Pianka*, 831 S.W.2d 853, 858 (Tex. App.--Austin 1992, writ denied) ("We hold that the 1980 amendment to Article XVI, section 15, of the Texas Constitution permits persons about to marry to partition or exchange between themselves salaries and earnings to be acquired by the parties during their future marriage").

C. Community Property Survivorship

By constitutional amendment in 1987, Texas spouses can create a right of survivorship in community property. Such agreements are governed by Tex. Probate Code §§ 451-457. An agreement must be in writing and signed by both spouses (§ 452).

VI. THE EFFECT OF THE AGREEMENT AT DIVORCE

A. Temporary Support

Texas Family Code § 4.003 specifically provides that a premarital agreement can cover the modification or elimination of spousal support. There is no statutory authority for spouses to modify or eliminate spousal support in a post-marital agreement.

B. Interim Attorney's Fees and Litigation Expenses

Texas Family Code § 4.003 does not specifically provide for the waiver in a premarital agreement of the right to recover attorneys' fees in connection to a divorce. An argument is sometimes made that Texas Family Code § 6.502, permitting the award of interim fees, provides a basis for the award of interim fees even in the face of a premarital agreement to the contrary.

C. Separate Property Is Indivisible

The case of *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137 (Tex. 1977), established that the Texas Constitution prohibits a court, in a divorce, from taking the separate property of one spouse and awarding it to the other spouse. Partitioning community property into separate property is the most effective way to protect ownership of that property in a divorce.

D. Division of Community Assets and Debts

Texas Family Code § 4.003(3) specifically provides that a premarital agreement can address "the disposition of property on separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event . . .". In *Fanning v. Fanning*, 828 S.W.2d 135 (Tex. App.--Waco 1992), *aff'd in part and rev'd in part*, 847 S.W.2d 225 (Tex. 1993), the appellate court noted that a clause requiring a 50-50 division of community property upon divorce "appears to encroach upon the trial court's statutory duty to' order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party' . . . ." In light of the Family Code language, however, the court ruled that the trial court erred in deviating from a 50-50 division of community property. *Id.* at 143.

E. Waiver of Reimbursement and Economic Contribution Claims

Although Texas Family Code § 4.003 does not specifically list the waiver of reimbursement and economic contribution claims as terms for a premarital agreement, Tex. Fam. Code § 3.410 provides that a waiver clause in a premarital or marital property agreement is "effective to waive, release, assign, or partition a claim for economic contribution under this subchapter to the same extent the agreement would have been effective to waive, release, assign, or partition a claim for reimbursement under the law as it existed immediately before September 1, 1999, unless the agreement provides otherwise."

F. Bifurcation and Discovery

PJC 207.1 recommends that the court consider a separate trial to determine the validity of a premarital or post-marital agreement, when contested. Separate trials raise the related issue of bifurcating discovery, to permit the contesting party to have discovery in advance of the first trial of only evidence relating to the enforceability of the agreement.

G. Fees upon Final Hearing

Chiles v. Chiles, 779 S.W.2d 127, 129 (Tex. App.–Houston [14th Dist.] 1989, writ denied), holds that where the premarital agreement precludes a community estate, attorneys' fees cannot be awarded in the final judgment.

VII. THE EFFECT OF THE AGREEMENT AT DEATH

A. Agreement to Make Will

When couples include in a premarital agreement provisions relating to the making of a will, as allowed by Tex. Fam. Code § 4.003(a)(5), special consideration should be given to Section 59A of the Texas Probate Code:

> Section 59A. Contracts Concerning Succession
>
> (a) A contract to make a will or devise, or not to revoke a will or devise, if executed or entered into on or after September 1, 1979, can be established only by provisions of a will stating that a contract does exist and stating the material provisions of the contract.
> (b) The execution of a joint will or reciprocal wills does not by itself suffice as evidence of the existence of a contract.

Tex. Probate Code § 59A.

B. Family Allowance

The Texas Probate Code provides for a family allowance, in appropriate cases, for the support of the

surviving spouse and minor children of the deceased during the first year after the deceased's death. Tex. Prob. Code § 286. The amount of the allowance is addressed to the trial court's discretion. *San Angelo Nat. Bank v. Wright*, 66 S.W.2d 804, 805 (Tex. Civ. App.--Austin 1934, writ ref'd). "The allowance shall be fixed with regard to the facts or circumstances then existing and those anticipated to exist during the first year after such death." Tex. Prob. Code § 287. "No such allowance shall be made for the surviving spouse when the survivor has separate property adequate to the survivor's maintenance; nor shall such allowance be made for the minor children when they have property in their own right adequate to their maintenance." Tex. Prob. Code §288. If the non-monied spouse doesn't have enough estate to be disqualified for a family allowance, he or she will need the allowance.

C. Survivor's Homestead Rights

In Texas, a surviving spouse may occupy the homestead during the spouse's lifetime without it being partitioned to the heirs of the deceased spouse until the survivor's death. Tex. Const. art. XVI § 52; Tex. Prob. Code § 272& 284. In *Williams v. Williams,* 569 S.W.2d 867 (Tex. 1978), the Texas Supreme Court ruled that persons about to marry can by premarital agreement waive the probate homestead right of a surviving spouse provided by Art. XVI, § 52, of the Texas Constitution. Unlike the family allowance, the homestead right is not based on need, and the surviving spouse's life estate can tie up the inheritance of the home for some time. The surviving spouse's homestead rights are a prime candidate for waiver, or limitation to a fixed term of years.

D. Allow for Gifts or Bequests

If the agreement describes certain assets, or types of assets, as belonging solely to one spouse, include a clause the recognizes that inter vivos gifts and bequests by will override the characterization of the property in the agreement.

VIII. OTHER CLAUSES TO PONDER

A. Merger Clause

A clause saying "This document contains the entire agreement between the parties with regard to the subject matter," is commonly called a merger clause. A merger clause establishes the parties' intent that the written agreement be their complete agreement. *Weinacht v. Phillips Coal Co.*, 673 S.W.2d 677, 679 (Tex. App.--Dallas 1984, no writ). The reason for placing a merger clause in a written contract is to invoke the parol evidence rule which excludes proof of extrinsic agreements. *Burleson State Bank v. Plunkett*, 27 S.W.3d 605, 615 (Tex. App.-Waco 2000, pet. denied). Since Fam. Code §§ 4.002 & 4.104 require premarital and post-marital agreements to be in writing, an oral side agreement would not be admissible, even without a merger clause. However, the merger clause would eliminate the possibility of any pre-existing or contemporaneous written agreement (perhaps an earlier hand-written agreement between the parties) that would survive the formal agreement.

In *Dallas Farm Machinery Co. v. Reaves*, 307 S.W.2d 233, 239 (1957), the Supreme Court held that a merger clause can be avoided based on fraud in the inducement and that the parol evidence rule does not bar proof of such fraud. However, *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 181 (Tex. 1997) (discussed below), said that a merger clause can sometimes bar a fraudulent inducement claim, depending on circumstances.

B. Disclaimer of Reliance

In *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997), the Supreme Court held that an express disclaimer of reliance on representations by the other party may in some instances preclude a fraud claim. "The contract and the circumstances surrounding its formation determine whether the disclaimer of reliance is binding." *Id.* at 179.

C. Attorneys' Representations

Some forms call for the attorneys to sign written representations of their client's competency, that the lawyers have explained the terms of the agreement to the client, and that the client understands, is acting voluntarily, etc. The lawyer would normally want to delete such a clause, since it turns the lawyer into a witness supporting enforcement of the agreement. However, the written recital does not bind the lawyer's later testimony–rather it is a matter to be explained if the later testimony is to the contrary.

IX. CONTESTING ENFORCEMENT

The Texas Family Code expressly provides that an attack on a written premarital, or partition and exchange (and by extension) income agreement, is limited to two defenses. The party attempting to attack the agreement must show 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, the 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 ANN. §§ 4.006(a); 4.105(a).

A. Voluntariness

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). One court of appeals has considered voluntariness in terms of duress. *See e.g., Osorno v. Osorno*, 76 S.W.3d 509, 511 (Tex. App.--Houston [14th Dist] 2002, no pet.).

In representing a client in the preparation and signing of such an agreement, you would not want the client to act involuntarily. You will naturally take steps to see that the client understands what he/she is doing, and is not acting under compulsion. If the signing is in your opinion not voluntary, document that point well in your file. You will no doubt be a witness when the agreement is challenged at a later time.

B. Unconscionability

Whether or not an agreement is unconscionable is a matter of law to be decided by the Court. TEX. FAM. CODE ANN. §§ 4.006(b); 4.105(b). Unconscionability in premarital and marital agreements has been evaluated in the context of unconscionability as it applies in 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). Because unconscionability is so ill-defined, document the circumstances surrounding the negotiation and signing, so you will make a better witness at the enforcement trial.

C. Common Law Defenses

Section 4.006(c) and 4.105(c) limit the attack of premarital and marital property agreements to the statutory defenses of voluntariness and unconscionability. However, the amendment applies only to agreements "executed on or after" September 1, 1993. *Daniel v. Daniel*, 779 S.W.2d 110, 114 (Tex. App.--Houston [1st Dist.] 1989, no writ). Because "an agreement executed before that date is governed by the law in effect at the time the agreement was executed," common law defenses regarding the enforcement of contracts may still be available to attack pre-Sept. 1, 1993 agreements. Exactly what common law defenses apply, and how they apply, has not been conclusively established in Texas caselaw.

One appellate court has held that such common law defenses as duress, overreaching, undue influence, fraud, estoppel, and breach of fiduciary duty are necessarily incorporated into the 1993 statutory defenses. In *Blonstein v. Blonstein*, 831 S.W.2d 468 (Tex. App.--Houston [14th Dist.] 1992, writ denied), the court of appeals affirmed the trial court's denial of jury instructions on common law defenses, finding that they were already included in the court's instructions regarding voluntariness, unconscionability, and disclosure:

> . . . [Duress, overreaching, and undue influence] inquired as to whether David Blonstein's free will was overcome by threats or other acts of Esther Blonstein. The first question actually submitted to the jury asked "Did David Blonstein voluntarily execute the marital property agreement?" This broad-form question encompassed those three defensive issues. . . .Asking whether David Blonstein acted voluntarily is the same as asking whether he acted by free will.
>
> . . . [Fraud, estoppel, and breach of fiduciary duty] concerned whether Esther Blonstein had misrepresented or failed to disclose information

> about the property schedule attached to the marital agreement. The question actually submitted to the jury asked: "Was David Blonstein provided a fair and reasonable disclosure of the property or financial obligations of Esther Blonstein or did David Blonstein have or reasonably could have had an adequate knowledge of the property or financial obligations of Esther Blonstein?" This question contained, because of his broad form, those defensive issues requested by the appellant.

Blonstein, 831 S.W.2d at 471. In a per curium opinion, the Texas Supreme Court denied the application for writ of error, but expressly stated that in doing so, it neither approved nor disapproved of the analysis of the court of appeals. *Blonstein v. Blonstein*, 848 S.W.2d 82 (Tex. 1982).

D. Contingent Fee

Contingent fees are frowned upon in many family law matters. Tex R. Disciplinary Conduct 1.04, Comment 9, provides:

> 9. Contingent and percentage fees in family law matters may tend to promote divorce and may be inconsistent with a lawyer's obligation to encourage reconciliation. Such fee arrangements also may tend to create a conflict of interest between lawyer and client regarding the appraisal of assets obtained for client. See also Rule 1.08(h). In certain family law matters, such as child custody and adoption, no res is created to fund a fee. Because of the human relationships involved and the unique character of the proceedings, contingent fee arrangements in domestic relations cases are rarely justified.

However, the only outright prohibition of a contingent fee in the Texas Rules of Disciplinary Conduct is in criminal cases. Tex R. Disciplinary Conduct 1.04(e). Especially where the agreement puts the non-monied spouse in a situation where he or she cannot afford to pay a reasonable fee for legal representation and professional assistance, then the right to be represented by counsel of choice may only be available through a contingent fee arrangement.

E. Summary Judgment

Summary judgment procedure is available with regard to premarital and post-marital agreements, and many appellate opinions review and some affirm summary judgments upholding premarital and post-marital agreements. *See e.g., Grossman v. Grossman*, 799 S.W.2d 511 (Tex. App.--Corpus Christi 1990, no writ) (court of appeals upheld husband's summary judgment seeking enforcement of a premarital agreement). Whether a summary judgment can be supported in a particular case is fact intensive, and can't be predicted in advance.

F. Trial

If you are challenging an agreement and you survive summary judgment, you get a trial on your voluntariness and unconscionability defenses. There is enough potential overlap in the two defenses that ordinarily both defenses will be alleged. Unconscionability is an issue to be tried to the Court. Voluntariness can be tried to a jury. But since unconscionability, under the case law, involves an assessment of "the entire atmosphere in which the agreement was made," *Marsh v. Marsh*, 949, S.W.2d 734, 740 (Tex. App.– Houston [14th Dist.] 1997, no writ), the trial judge will often listen to exactly the same evidence as the jury, before making a decision. Courts sometimes even wait until after the return of the jury verdict to render a decision or unconscionability.

In many instances, the parties will agree to-- or the Court will order--separate trials, with the first phase involving enforceability of the agreement to be concluded before discovery occurs on the remaining issues in the divorce. If there are not separate trials, then tracing can become very complicated since the enforceability of the agreement often will determine the character of property that is presumptively community, and two tracings will be required, one assuming that the agreement is valid and one assuming it is not.

G. Appeal

It is unclear whether the enforceability of an agreement is subject to an interlocutory appeal. (The *Marsh* case, 949 S.W.2d at 738, suggests that the issue can be brought separately, that's the test for severability.) If not, the validity of the first phase of the case cannot be tested on appeal until the remaining issues have been resolved and the judgment on the entire case is appealed.

In most Texas appellate cases involving the enforcement of premarital and post marital agreements, the appellate court has upheld the trial court's judgment upholding the agreement. Here is a partial list:

I. *Beck v. Beck*, 814 S.W.2d 745 (Tex. 1991), *cert. denied*, 112 S. Ct. 1266 (1992)–affirming trial court which upheld premarital agreement

II. Blonstein v. Blonstein, 831 S.W.2d 468 (Tex. App.--Houston [14th Dist.] 1992, writ denied)–affirming trial court which upheld premarital agreement

III. Chiles v. Chiles, 779 S.W.2d 127 (Tex. App.--Houston [14th Dist.] 1989, writ denied)–reversing the trial court which set aside a premarital agreement

IV. Daniel v. Daniel, 779 S.W.2d 110 (Tex. App.--Houston [1st Dist.] 1989, no writ)–affirming trial court which upheld premarital agreement

V. *Dokmanovic v. Schwarz*, 880 S.W.2d 272 (Tex. App.--Houston [14th Dist.] 1994, no writ)– affirming the trial court which upheld premarital agreement

VI. *Fanning v. Fanning*, 828 S.W.2d 135 (Tex. App.--Waco 1992), *aff'd in part and rev'd in part*, 847 S.W.2d 225 (Tex. 1993)–reversing trial court for failing to enforce premarital agreement

VII. *Fazakerly v. Fazakerly*, 996 S.W.2d 260, 265 (Tex. App.--Eastland 1999, pet. denied)–affirming trial court which upheld premarital agreement

VIII. *Fellows v. Fellows*, 2000 WL 1073609 (Tex. App.--Dallas 2000, no pet.)–affirming trial court which upheld premarital agreement

IX. *Grossman v. Grossman*, 799 S.W.2d 511 (Tex. App.--Corpus Christi 1990, no writ)–affirming trial court which upheld premarital agreement

X. *Larson v. Prigoff*, 2001 WL 13352 (Tex. App.--Dallas 2001, no pet.) (not for publication)–affirming trial court's which upheld premarital agreement.

XI. *Marsh v. Marsh*, 949 S.W.2d 734 (Tex. App.--Houston [14th Dist.] 1997, no writ)–affirming trial court which upheld premarital agreement

XII. *Pearce v Pearce*, 824 S.W.2d 195, 197 (Tex. App.--El Paso 1991, writ denied)--reversing trial court for failing to uphold premarital agreement

XIII. *Pletcher v. Goetz*, 9 S.W.3d 442, 446 (Tex. App.--Fort Worth 1999, pet. denied)--affirming trial court which upheld partition and exchange agreement

XIV. *Rathjen v. Rathjen*, 1995 WL 379322 (Tex. App.--Dallas 1995)–reversing trial court for failing to uphold premarital agreement

XV. *Winger v. Pianka*, 831 S.W.2d 853 (Tex. App.--Austin 1992, writ denied)–affirming trial court which upheld premarital agreement

XVI. *Young v. Young*, 854 S.W.2d 698 (Tex. App.--Dallas, no writ)–reversing trial court which upheld premarital agreement, on procedural ground that wife was entitled to trial de novo on appeal of master's ruling.

H. Shifting of Attorney's Fees

Whether the agreement in question shifts the payment of attorneys' fees can be a big factor in deciding whether to challenge the enforceability of a premarital or post-marital agreement.

X. CONCLUSION

There are many creative steps a family law practitioner can take in preparing pre- and post-marital agreements. Lawyers should always remember that they are not bound by the language in the form book and should use creativity in drafting marital agreements. Whether it is the inclusion of an "exit bonus" or a "signing bonus", an expiration clause or a poison pill clause, or contractual language that addresses the forum or controlling laws that control the agreement, the attorney has a vast canvas to creatively fill while preparing pre- and post-marital agreements. The best service an attorney can provide for their claim is to tailor the creative techniques discussed in this paper to the individual needs of their client on a case by case basis. Such a strategy will most appropriately address the client's needs, goals, and will most likely cut down on any future attack of the agreement, which benefits both the client and the attorney.