

# **PREMARITAL AND POSTMARITAL AGREEMENTS**

**KATHRYN J. MURPHY**

Goranson, Bain, Larsen, Greenwald, Maulsby & Murphy, PLLC

6900 North Dallas Parkway, Suite 400300

Plano, Texas 75024

(214) 473.9696

[kmurphy@gbfamilylaw.com](mailto:kmurphy@gbfamilylaw.com)

February 2009

## **ACKNOWLEDGMENT**

Thank you to Jimmy Vaught for generously allowing me to borrow from and utilize substantial portions of his prior paper on the subject – “Marital Property Agreements: Still Crazy after all These Years.”

## **I. Constitutional and Statutory Authority**

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

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

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

### **A. Premarital Agreements**

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

Under the Texas Family Code, a “premarital agreement” is defined as “an agreement between prospective spouses made in contemplation of marriage and to be effective on marriage.” TEX. FAM. CODE §4.001(1); *see also*, TEX. FAM. CODE §4.004 (“[a] premarital agreement becomes effective on marriage”). 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. Additionally, if a marriage is determined to be void, an agreement that would otherwise have been a premarital agreement is enforceable only to the extent necessary to avoid an inequitable result. TEX. FAM. CODE §4.007.

For the purposes of a premarital agreement, “property” means “an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings.” TEX. FAM. CODE §4.001(b). Texas law defines “property” very broadly to include every species of valuable right and interest. *Winger v. Pianka*, 831 S.W.2d 853, 854 (Tex.App.-Austin 1992, writ denied).

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

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

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

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

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

## **B. Marital Property Agreements**

Subchapter B of Chapter 4 of the Texas Family Code authorizes a “marital property agreement” between spouses. For the purposes of a marital property agreement under

Subchapter B, “property” is defined in the same broad manner as it was in Subchapter A, for premarital agreements. TEX. FAM. CODE §4.101.

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

As with a premarital agreement, a marital property agreement must be in writing and signed by both parties. TEX. FAM. CODE §4.104; *see also, Miller v. Miller*, 700 S.W.2d 941, 951 (Tex. App.-Dallas 1985, writ ref’d n.r.e.)(partition agreement must be in writing); *Recio v. Recio*, 666 S.W.2d 645, 649 (Tex.App.-Corpus Christi 1984, no writ) (partition or exchange agreements must be in writing to be enforceable).

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

(repealed, recodified at current Texas Family Code §4.104)).

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

### **C. Premarital vs. Postmarital Agreements**

Most reported Texas cases discussing enforcement of marital property agreements deal with those entered during marriage, rather than before. *Marsh*, 949 S.W.2d at 745, n. 4. The statutory defenses for premarital and postmarital agreements are, however, identical. It has been stated that, in post-marital agreements, a fiduciary duty exists that is not present in premarital agreements between prospective spouses. *Id.*; see also, *Daniel v. Daniel*, 779 S.W.2d 110, 115 (Tex.App.-Houston [1st Dist.] 1989, no writ) (recognizing the confidential relationship between a husband and wife imposes the same duties of good faith and fair dealing on spouses as required of partners and other fiduciaries). However, adverse parties who have retained independent counsel may not owe fiduciary duties to one another. See *Miller v. Ludeman*, No. 03-03-00630-CV, 2004 WL 1269321 at \*4 (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, under Texas law, breach of fiduciary duty is arguably a defensive issue which is subsumed into the issue of whether each spouse was provided a fair and reasonable disclosure of the property or financial obligations of the other spouse (*i.e.*, the unconscionability prong of section 4.105). See, *Blonstein v. Blonstein*, 831 S.W.2d 468, 471 (Tex.App.–Houston [14<sup>th</sup> Dist]), *writ denied per curiam*, 848 S.W.2d 82 (Tex. 1992). In other words, an alleged breach of fiduciary duty relates exclusively to the “unconscionability” prong of section 4.105. It may also be possible for spouses to waive (or discharge) any possible fiduciary duty with respect to entering into a marital property agreement.

## II. Enforceability

### A. **Statutory Provisions**

#### 1. Premarital Agreements

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

(a) A premarital agreement is not enforceable if the party against whom enforcement is requested proves that:

- (1) the party did not sign the agreement voluntarily; or
- (2) the agreement was unconscionable when it was signed and, before signing the agreement, that party:

- (A) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
- (B) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
- (C) did not have, or reasonably could not have had, adequate knowledge of the property or financial obligations of the other party.

(b) An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law.

---

(c) The remedies and defenses in this section are the exclusive remedies or defenses, including common law remedies or defenses.

## 2. Partition and Exchange Agreement

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

(a) A partition or exchange agreement is not enforceable if the party against whom enforcement is requested proves that:

(1) the party did not sign the agreement voluntarily; or

(2) the agreement was unconscionable when it was signed and, before execution of the agreement, that party:

(A) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;

(B) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and

(C) did not have, or reasonably could not have had, adequate knowledge of the property or financial obligations of the other party.

(b) An issue of unconscionability of a partition or exchange agreement shall be decided by the court as a matter of law.

(c) The remedies and defenses in this section are the exclusive remedies or defenses, including common law remedies or defenses.

Furthermore, although section 4.105 deals specifically with “partition and exchange” agreements, it does not expressly cover agreements between spouses concerning income or property derived from separate property.

## **B. Public Policy**

As already stated, the legislature and people of Texas have made a public policy determination that premarital agreements should be enforced. *Beck*, 814 S.W.2d at 749; *Marsh*, 949 S.W.2d at 739. Therefore, premarital agreements are presumptively enforceable. *Marsh*, 949 S.W.2d at 739; *Grossman v. Grossman*, 799 S.W.2d 511, 513 (Tex.App.-Corpus Christi 1990, no writ).

---

### C. Burden of Proof

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

### D. Applicable Law

The law to be applied to premarital agreements is the applicable law at the time of divorce. *Sadler v. Sadler*, 769 S.W.2d 886, 887 (Tex. 1989). It should be noted, however, that the law at the time of divorce trumps the law at the time of execution of the agreement, **except** as to certain defenses to enforcement as discussed hereinbelow.

### E. Limitations

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

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

In *Fazakerly v. Fazakerly*, 996 S.W.2d 260 (Tex. App. – Eastland 1999, pet. denied), George and Mary Fazakerly signed a premarital agreement prior to their marriage in 1973. Before his death in 1992, George executed a will naming his daughter from a prior marriage, Jill, as his executrix. After George’s death, in May 1993, Jill and Mary signed a partial settlement agreement which disposed of some of the property in George’s estate but specifically preserved Mary’s right to assert the premarital agreement as a defense. In 1993, Jill filed suit against Mary requesting a declaratory judgment that certain stock was community property and that the community estate was entitled to reimbursement for George’s efforts in managing certain companies. In 1998, Jill filed her second amended petition adding a claim seeking a declaratory judgment that the premarital agreement was void. Mary filed a

---

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

#### **F. Laches and Estoppel**

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

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

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

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

---

Laches provided another ground for the trial court to strike Jill's pleadings attacking the antenuptial agreement's validity. 996 S.W.2d at 265.

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

Another unresolved issue surrounding §4.008 concerns the interplay between the two sentences of the section. Presumably, under the statute, at some point a tolled "statute of limitations" situation becomes a "laches" problem. Neither the statute nor any reported case provides any guidance regarding at what specific point the "laches" principle arises, or as to the effect the marriage, with its concomitant fiduciary responsibilities, has on the "reasonableness" of any delay in acting on the part of one spouse.

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

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

---

benefits of the attorney's services; a party cannot assert, to another's disadvantage, a right inconsistent with a position he or she has previously taken).

The statute of limitations for breach of contract, or to enforce a contract, is four years. TEX.CIV.PRAC.& REM..CODE §16.004; 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).

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

### **G. Defenses to Enforcement**

Both Texas Family Code §4.006(c) and Texas Family Code §4.105(c) provide that "[t]he remedies and defenses in this section are the exclusive remedies or defenses, including common law remedies or defenses." See, *Marsh*, 949 at 738 (wife conceded that the 1991 premarital agreement was subject to common law defenses). The 1993 amendment to the Texas Family Code that first provided the exclusivity of the remedies provided in the Code was intended to overrule those cases, such as *Fanning* and *Daniel*, suggesting that other defenses to marital agreements continued to exist.

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

#### **1. Voluntariness**

A premarital agreement is not enforceable if the party against whom enforcement is requested proves that he or she did not sign the agreement voluntarily. Texas Family Code §4.006(a)(1); Texas Family Code §4.105(a)(1). Whether a party voluntarily signed a marital agreement is a question of fact. See, e.g., TEXAS PATTERN JURY CHARGES-FAMILY 207.2B (Vol. 5 2002).

One Texas court of appeals has defined "voluntary" as doing something "by design or intentionally or purposely or by choice or of one's own accord or by the free exercise of the will." *Prigmore v. Hardware Mut. Ins. Co. of Minn.*, 225 S.W.2d 897, 899 (Tex.Civ.App.-Amarillo 1949, no writ). Thus, according to the Amarillo Court of

---

Appeals, “[a] voluntary act proceeds from one’s own free will or is done by choice or of one’s own accord, unconstrained by external interference, force or influence.” *Id.*

In Sampson & Tindall, TEXAS FAMILY CODE ANNOTATED, p. 56 (August 2005), the editors state that it is usually very difficult to establish that a premarital agreement was signed involuntarily. Moreover, one who signs a contract is presumed to know its contents. *Emerald Texas, Inc. v. Peel*, 920 S.W.2d 398, 402 (Tex.App.–Houston [1<sup>st</sup> Dist.] 1996, no writ). In the specific context of a marital agreement, the Houston Fourteenth Court of Appeals has stated “one is presumed to know the contents of a document he has signed and has an obligation to protect himself by reading a document before signing it.” *Marsh v. Marsh*, 949 S.W.2d 734, 744 (Tex.App.–Houston [14<sup>th</sup> Dist.] 1997, no writ); *see and cf*, *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 90 (Tex. 1996) (a party’s failure to read an arbitration agreement does not excuse such party from arbitration); *G-W-L, Inc. v. Robichaux*, 643 S.W.2d 392, 393 (Tex. 1982) (parties to a contract have an obligation to protect themselves by reading what they sign).

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

There can be no duress unless there is a threat to do some act which the party threatening has no legal right to do. Such threat must be of such character as to destroy the free agency of the party to whom it is directed.

It must overcome his will and cause him to do that which he would not otherwise do, and which he was not legally bound to do. The restraint caused by such threat must be imminent. It must be such that the person to whom it is directed has no present means of protection.

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

The “voluntary” defense is not always as easy to defeat as some lawyers and judges may believe. This is not to say that the easy case does not exist. For example, during the give and take of negotiations surrounding a proposed marital

---

agreement, changes are often made upon the request of one party, or perhaps even both parties. Under such factual circumstances, it seems a stretch for the party who requested, and received, from negotiations a modification to the proposed marital agreement to later argue that he or she did not sign the agreement voluntarily. Nonetheless, the argument is made, although sometimes unsuccessfully. See, e.g., *Margulies v. Margulies*, 491 So.2d 581, 583 (Fla. Dist. Ct. App.-1986) (a party who, during pre-execution negotiations, effects a modification of a proposed marital agreement, should not be allowed to later take the position that he or she did not sign the agreement voluntarily); see also, *Marsh*, 949 S.W.2d at 740 (the husband had participated in preparing the premarital agreement, and indeed had dictated portions of it); See *Osorno v. Osorno*, 76 S.W.3d 509, 510-11 (Tex. App. – Houston [14<sup>th</sup> 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).

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 [1<sup>st</sup> Dist.] 1989, no writ), parties cannot assert common-law defenses *in addition* to the defenses enumerated in section 4.105. It does not prohibit us from considering as potential evidence of involuntary execution proof of conduct that [the husband] asserts constitutes fraud or duress.

In sum, we conclude that section 4.105 sets out the exclusive remedies available to prevent enforcement of a postmarital agreement, and that, although common-law defenses may inform our analysis of “voluntariness,” they will not necessarily control.

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

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

Concerning his first theory, the husband argued that the wife had threatened that if he did not sign the marital property agreement, she would withdraw her loan guarantee she had advanced his company and have the bank immediately call the line of credit resulting in dire consequences for the company. The Court noted that the husband’s summary judgment evidence showed that the wife threatened to withdraw her loan guarantee and that doing so would have entitled the bank to cut off the line of credit. However, the husband did not offer any evidence regarding the likelihood that the bank in fact would have exercised its contractual right to cut off the line of credit at the wife’s request or otherwise. *Id.* at 699-700. The Court concluded that “[a]bsent such proof, the jury could not reasonably infer-and could only speculate-that [the wife’s] alleged threat to withdraw the loan guarantee presented the sort of imminent threat that Texas law has considered capable of overwhelming free will and rendering [the husband’s] execution of the Marital Property Agreement involuntary.” *Id.* at 700.

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

---

## 2. Unconscionability

### a. Definition of Unconscionability

The Texas Family Code expressly provides that whether a premarital agreement was unconscionable at the time it was signed is a matter of law to be decided by the court. TEX.FAM.CODE §4.006(b). Neither the legislature nor Texas courts have defined “unconscionable” in the context of premarital property agreements. *Marsh*, 949 S.W.2d at 739. Instead, Texas courts have addressed the issue of unconscionability on a case-by-case basis, looking to the entire atmosphere in which the agreement was made. *Pearce*, 824 S.W.2d at 199.

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

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

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

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

In determining whether a contract is unconscionable or not, the courts must look to the entire atmosphere in which the agreement was made, the alternatives, if any, which were available to the parties at the time of the making of the contract; the non-bargaining ability of one party; whether

---

the contract is illegal or against public policy; and, whether the contract is oppressive or unreasonable. At the same time, a party who knowingly enters a lawful but improvident contract is not entitled to protection by the courts. In the absence of any mistake, fraud, or oppression the courts, as such, are not interested in the wisdom or impolicy of contracts and agreements voluntarily entered into between parties *compos mentis* and *sui juris*.

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

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

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

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

c. 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 [14<sup>th</sup> Dist.] 2002, no pet.) (premarital agreement was signed voluntarily even though the agreement was signed the day before the parties married).

d. No Legal Representation

Likewise, the fact that the husband was not represented by independent counsel was not dispositive. *Marsh*, 949 S.W.2d at 741-743, *citing*, *Pearce*, 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. *Id.*

e. Unfairness of Agreement

The Houston Court of Appeals also refused to accept the husband's assertion that the one-sided nature of the agreement strongly preponderated toward a finding of unconscionability. *Id.* Even though a premarital agreement may be disproportionate, the appellate court stated, unfairness is not material to the enforceability of the agreement. *Id.*, *citing*, *Chiles v. Chiles*, 779 S.W.2d 127, 129 (Tex.App.-Houston [14th Dist.] 1989, writ denied). *See* *Fazakerly v. Fazakerly*, 996 S.W.2d at 265 (The mere fact that a party made a hard bargain does not allow her relief from a freely and voluntarily assumed contract – parties may contract almost without limitation regarding their property.). Thus, a factual finding that a premarital agreement is unfair does not satisfy the burden of proof required to establish unconscionability. *Id.*; *see also*, *Chiles*, 779 S.W.2d at 129.

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

---

presumption of enforceability. *Id.* at 743.

f. Failure to Read Agreement

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

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

3. Overlap Between “Voluntary” and “Unconscionable”?

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

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

An argument can be made that, under the express provisions of the Texas

---

Family Code, to determine whether a marital agreement is unconscionable, the trial court should look **only** to the terms of the marital agreement, as set forth in the document itself, and not to the totality of the circumstances surrounding the agreement.

Arguably, all other factors surrounding the execution of a marital agreement, or how a marital agreement came to be, should be included in the factual determination of whether the document was signed “voluntarily.”

For example, in *Matthews v. Matthews*, 725 S.W.2d 275, 279 (Tex.App.–Houston [1st Dist.] 1986, writ ref’d n.r.e.), the Houston appellate court upheld the trial court’s finding that the husband, who was seeking to enforce a post-marital indenture, had made threats and engaged in conduct for the purpose of coercing his wife into signing the document, and that the wife’s free will had been destroyed by such acts and threats. In affirming the trial court’s finding of duress, the First Court of Appeals considered the fiduciary relationship between the husband and wife, the contents of the document, the circumstances surrounding the couple’s relationship, and the nature of the demands made by the husband. *Id.* All of these evidentiary factors were evaluated to determine whether or not the wife had voluntarily signed the indenture. *Cf.*, *Prigmore*, 225 S.W.2d at 899 (“[a] voluntary act proceeds from one’s own free will or is done by choice or of one’s own accord, unconstrained by external interference, force or influence”).

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

On the other hand, the Houston Fourteenth Court of Appeals has also observed that “in reviewing the validity of a marital property agreement, [it has] previously considered factors such as ‘the maturity of the individuals, their business backgrounds, their educational levels, their experiences in prior marriages, their respective ages, and their motivations to protect their respective children.’” *Marsh*, 949 S.W.2d at 740, *citing*, *Williams*, 720 S.W.2d at 249. However, the factors listed in *Williams* were reviewed in determining whether or not a premarital agreement was obtained by fraud, duress or overreaching, rather than whether the agreement, an instrument in and of itself, was unconscionable. *Williams* did not address, or even mention, the issue of unconscionability (at the time, former Texas Family Code §5.45 provided that party seeking to enforce the agreement had to prove that the other party gave informed

---

consent and that the agreement was not procured by fraud, duress, or overreaching). See, *Id.* at 248. Thus, in light of *Matthews* and *Blonstein* (which specifically addressed the point), it can be argued that the Houston appellate court in *Marsh* overlapped elements of “voluntary” with “unconscionable.”

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

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

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

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

The circumstances or atmosphere in which the agreement is made consists of evidentiary facts for the court or the jury to utilize in deciding whether an agreement was executed “voluntarily” or whether “adequate disclosure was made” (if the document

---

is determined to have been unconscionable). Those facts, however, should not be a part of the determination of unconscionability of the document.

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

As a litigation matter, it may be possible to use the “voluntary” issue to take away the issue of “unconscionability” from the trial judge by making the two overlap, in essence, by collapsing the two defenses into one, and thereby creating “fact issues” to be considered by the trier of fact. Even under the analysis of unconscionability dictated by *El Paso Natural Gas Co.*, with its independent determinations of procedural abuse and substantive abuse, the issue of whether the complaining party was “compelled” to sign the agreement appears in both prongs of the unconscionability test.

*See, El Paso Natural Gas Co.*, 964 S.W.2d at 63; *Id.* at 61-62; *Id.* at 61, n. 5 (noting “an interrelationship between the indicia used under both procedural and substantive abuse”).

#### 4. Fair and Reasonable Disclosure

Once the trial court determines that a premarital agreement is unconscionable, the party resisting enforcement must also prove that, before signing the agreement, that party was not provided a fair and reasonable disclosure of the property or financial obligations of the other party. Texas Family Code §4.006(a)(2)(A). In other words, disclosure forms the second prong of the test to rebut the presumption of enforceability, and a lack of disclosure is material only if the premarital agreement has been determined to be unconscionable. *Marsh*, 949 S.W.2d at 743. Thus, the premarital agreement must be found to be unconscionable before the jury is allowed to decide any disclosure issue.

In *Fanning*, the trial court found that the wife had not been provided “fair and reasonable disclosure” of the property or financial obligations of the husband. 828 S.W.2d at 144. On appeal, the husband argued that such finding was supported by legally and factually insufficient evidence. *Id.* at 146. However, the Waco appellate court looked to the wife’s testimony that she had not received the required disclosure, that her husband wanted to keep her “ignorant of everything,” and that she did not know how much money was in their account, how much her husband made, or how much property he actually owned, as well as the testimony of the husband’s own

---

psychologist, who described the husband as “secretive,” in holding that sufficient evidence supported the trial court’s finding. *Id.*

In *Daniel*, the husband complained that his wife and her attorney failed to disclose the existence of over \$1 million of community income, which had accumulated to her separate property in a grantor trust governed by the terms of the parties’ postnuptial agreement. 779 S.W.2d at 115. The husband contended that he was not given complete access to this information, and that the wife’s failure to disclose the accumulation of her income amounted to constructive fraud. *Id.*

The First Court of Appeals held that the trial court did not err in refusing to submit issues to the jury as to “fair and reasonable disclosure,” the husband’s knowledge of the property and financial obligations of the wife, and whether the husband waived any right to disclosure, because there was no evidentiary basis for submission of such issues to the jury. *Id.* at 117-118. In reaching its conclusion, the Houston appellate court noted first that the husband was a licensed attorney, a certified public accountant, and an experienced businessman. *Id.* at 117. The husband also admitted that he read and understood the terms of the postnuptial agreement, as well as the joint income tax returns he and his wife filed during the six years of their marriage. *Id.* Although the husband knew of the sizeable amount of income accruing to his wife’s separate estate, for his own, albeit laudable motives, *i.e.* his concern for the mental comfort of his wife, he voluntarily chose not to make any inquiry into those matters, and he also instructed his attorney not to make any such inquiry for him. *Id.* Moreover, when the husband executed the written marital agreement, he confirmed in writing his choice not to make any inquiry into the value and extent of his wife’s property. *Id.*

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

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

##### 5. 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. Texas Family Code §4.006(a)(2)(B).

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

#### 6. Knowledge of Assets and Obligations

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

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

#### **H. EVIDENTIARY CONSIDERATIONS**

##### 1. Maturity of the Individuals

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

##### 2. Business Backgrounds

---

See, *Id.* at 740 (husband was active in trading stocks); *Id.* at 741 (both parties had business experience); *Fanning*, 828 S.W.2d at 139 (both parties were practicing attorneys when the marital agreement was executed); *Williams*, 720 S.W.2d at 248-249 (wife's job exposed her to contracts which dealt with banking financial records, and both parties had experiences with the sale of properties); *Daniel*, 779 S.W.2d at 115 (husband was a licensed attorney and a certified public accountant, and once was employed as vice-president and assistant to the president of an engineering firm before he started his own venture capital firm).

3. Educational Levels

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

4. Experiences in Prior Marriages

See, *Marsh*, 949 S.W.2d at 741 (both parties had been married before, and the wife saw her assets diminished through the lengthy illness of her late former husband); *Daniel*, 779 S.W.2d at 115 (both parties had prior marriages, and children by those marriages).

5. Respective Ages

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

6. Motivations to Protect Respective Children

See, *Marsh*, 949 S.W.2d at 741 (the wife had grown children to consider, whereas the husband was childless); *Williams*, 720 S.W.2d at 249 (husband testified that he was motivated to protect his children by prior marriages).

7. Relationship Prior to Marriage

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

8. Relationship Prior to Execution

See, *Fanning* 828 S.W.2d at 145-146 (severe marital problems); *Matthews*, 725 S.W.2d at 279 (the record reflected that the couple was having severe marital problems); *Blonstein*, 831 S.W.2d at 473 (the jury heard how the couple had been happily married for approximately forty years at the time the agreement was signed); *Pearce*, 824 S.W.2d at 199 (the trial court could have properly considered the fact that

---

the wife “kept the books” for the husband, both before and after the marriage).

9. Experience With Prior Marital Agreement

See, *Marsh*, 949 S.W.2d at 741 (only the wife had previously executed a premarital agreement); *Sheshunoff*, 172 S.W.3d at 688 (husband and wife had executed a premarital agreement and a post-marital agreement).

10. Awareness of Personal Financial Condition

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

11. Negotiations Prior to Execution

a. Providing Documents

See, *Marsh*, 949 S.W.2d at 740 (the wife’s attorney, who prepared the agreement, testified that the husband provided all the financial documents needed to draft the premarital agreement).

b. Participation in Drafting

See, *Marsh*, 949 S.W.2d at 740 (husband dictated portions of the agreement, and offered to have his accountant prepare any tax return required because of the effect of the agreement); *Id.* at 742 (the husband corrected the wife’s counsel as to the total amount money transferred to a trust pursuant to the agreement); *Daniel*, 779 S.W.2d at 116 (on the day the agreement was executed, at the written suggestion of the husband, the drafting attorney, who was a mutual friend of both parties, inserted specific additional language in the final draft).

c. Circumstances of Negotiation

See, *Daniel*, 779 S.W.2d at 115-116 (the lawyer, a personal friend of both parties, who prepared drafts of the proposed agreement, which culminated in the agreement executed by the parties, testified that the matter was a “vigorously negotiated transaction,” negotiated at “arms-length”); *Daniel*, 779 S.W.2d at 116 (the husband had the proposed agreement reviewed by a lawyer, who later testified that the agreement had been negotiated in a friendly and amicable manner, and that the husband had agreed to make the agreement to preserve marital harmony with his wife); *Matthews*, 725 S.W.2d at 277 (an attorney testified that he met with both parties regarding the partition agreement, and that the wife seemed calm and normal, that she

---

never indicated to him that she believed the agreement to be fraudulent, and that, in his opinion, both parties were fully aware of what they were doing).

## 12. Circumstances Surrounding Execution

### a. Prior Discussion Concerning Agreement

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

### b. Awareness of Agreement

*See, Williams*, 720 S.W.2d at 249 (the wife was also familiar with the contents of the agreement, was of the opinion that the items designated in the agreement as the respective separate property of the parties were, in fact, their respective separate property at the time the agreement was executed, and conceded that at the time she executed the agreement, she had no objection to the division of the property as set forth therein); *Marsh*, 949 S.W.2d at 740-741 (the lawyer who drafted the agreement testified that he believed the parties were provided a copy of the documents to review before they were executed and he was sure that the husband understood the documents); *Grossman*, 799 S.W.2d 513 (in his affidavit in support of his request for summary judgment, the husband stated “[p]rior to signing the premarital agreement, it was explained to my wife and she indicated that she understood what she was signing”); *Sadler*, 765 S.W.2d at 808 (the appellate court held that the wife could not escape her agreement by a mere denial of understanding it; a conclusory averment of ignorance was insufficient to avoid the agreement).

### c. Reading the Agreement

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

### d. Threats, Etc.

*See, Marsh*, 949 S.W.2d at 740 (the husband admitted that there were no threats, fraud, overreaching, duress, or misrepresentations made to him to induce him to execute the agreement, and the wife testified that she never threatened or dominated the husband, and that the agreement was not procured through fraud or duress); *Fanning*, 828 S.W.2d at 146 (the husband threatened that the wife would not see their children again); *Matthews*, 725 S.W.2d at 277 (the wife testified that during the time

---

period before the signing, the husband threatened that if she did not sign the indenture she would never see her son again).

e. Legal Representation Prior to Execution

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

f. Actions During Execution

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

g. Proximity of Execution to Wedding

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

h. Available Alternatives

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

---

i. Relative Bargaining Abilities

See, *Fanning*, 828 S.W.2d at 146 (given the husband's aggressive, manipulative, and retaliatory character, the wife's bargaining power was much less than that of the husband).

13. Actions After Execution

a. Legal Advice After Execution

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

b. Statements After Execution

See, *Marsh*, 949 S.W.2d at 741 (the wife testified that the husband told her the agreement was worthless).

c. Actions Pursuant to the Agreement

See, *Marsh*, 949 S.W.2d at 741 (contrary to his attorney's advice, the husband requested transfers from his account to an account established pursuant to the agreement).

d. Re-execution of the Agreement

See, *Chiles*, 779 S.W.2d at 129 (the agreement was executed a second time, immediately after the marriage, to further express the intent of the parties that there would be no community property).

e. Obstinate Behavior

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

f. Inconsistent Behavior

---

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

#### 14. Language of Agreement Itself

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

#### 15. Disclosure and Knowledge

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

#### 16. Due Diligence

---

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

### III. Summary Judgment

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

Rule 166a of the Texas Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the issues expressly set out in the motion..." TEX. R. CIV. P. 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).

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

Because the statute governing enforcement of premarital agreements creates a rebuttable presumption that the agreement is enforceable, the party who seeks to set aside the premarital agreement bears the burden to prove that the agreement is unenforceable. Tex. Fam. Code §4.006. The respective burdens in a summary judgment motion, filed by the party seeking enforcement of a premarital agreement, were set forth in *Grossman*, 799 S.W.2d at 513, as follows:

In a summary judgment context, when the movant is seeking to enforce a premarital agreement to which he is a party, such a presumption operates

---

without evidence other than that of the existence and terms of the agreement to establish that there is not a genuine issue of material fact regarding the enforceability of the agreement.

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

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

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

#### **IV. ENFORCEMENT: SPECIAL ISSUES**

##### **A. The Effect of Pregnancy on Enforcement**

In Texas, the effect of the woman being pregnant at the time a marital agreement is negotiated and executed was decided in *Osorno v. Osorno*, 76 S.W.3d 509 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2002, no pet.). In *Osorno*, after Gloria became pregnant, Henry agreed to marry her if she would sign a premarital agreement. Gloria signed a premarital agreement and they were married the next day. When Henry filed for divorce six years later, Gloria unsuccessfully contested the enforceability of the premarital agreement. On appeal, Gloria argued that she signed the premarital agreement involuntarily because she was forty, unmarried and pregnant. *Id.* at 510-11.

The Fourteenth Court of Appeals stated the “for duress to be a contract defense, it must consist of a threat to do something the threatening party has no legal right to do.” *Id.* at 511. The appellate court concluded that Henry had no legal duty to marry Gloria

---

and that his threat to do something he had the legal right to do is insufficient to invalidate the premarital agreement. *Id.*

## **B. Interaction With Homestead Rights**

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

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

## **C. Surplusage**

In general, in construing a contract, all language is presumed to have some meaning and is not regarded as surplusage. *See, e.g., R.H. Sanders Corporation v. Haves*, 541 S.W.2d 262 (Tex. Civ. App.-Dallas 1976, no writ). No provision may properly be interpreted so as to make it mere surplusage, unless it irreconcilably conflicts with other contract terms. *See, e.g., Williams v. J. & C. Royalty Co.*, 254 S.W.2d 178, 179 (Tex. Civ. App.-San Antonio 1952, writ ref'd).

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

---

honoring the draft; general references to underlying agreements are surplusage).

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

Separate property increases, income, or proceeds which the law of Texas classifies as separate property shall remain the separate property of the owner of the separate property producing the increase, income, or proceeds; and

All income of the separate property of each party shall be treated as the separate property of the party owning the separate property producing the income. All earnings for personal services of each party shall be treated as the separate property of the party earning the income.

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

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

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

#### **D. Ratification**

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

---

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

An express ratification is not necessary; any act based upon a recognition of the contract as subsisting or any conduct inconsistent with an intention of avoiding it has the effect of waiving the right of rescission. *Id.* In other words, ratification may be inferred from conduct *Spellman*, 687 S.W.2d at 29.

One who asserts ratification must prove that the ratifying party acted upon full knowledge of all material facts. See, e.g., *K.B. v. N.B.*, 811 S.W.2d 634, 638 (Tex.App.-San Antonio 1991, writ denied) (the husband, who did not consent in writing to the artificial insemination procedure performed on his wife, ratified the parent-child relationship with the child born as the result of the procedure, where the husband knew about the artificial insemination process and participated in it willingly from the beginning, acknowledged the child, and publicly held him out as his son for several years). Ratification is an issue that is normally a question of fact, but it may become one of law if the facts and circumstances are admitted or clearly established. *Williams*, 932 S.W.2d at 685.

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

#### **E. The Effect of Prior Declaratory Relief**

The Declaratory Judgments Act is a procedural device for deciding cases that are within the court's jurisdiction. *State v. Morales*, 869 S.W.2d 941, 947 (Tex.1994); *Chambers County v. TSP Development, Ltd.*, 63 S.W.3d 835, 840 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2001, pet. filed). The purpose of the Declaratory Judgments Act is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations. *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467

---

(Tex.1995); *Rush v. Barrios*, 56 S.W.3d 88, 105 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2001, pet. denied) (The purpose of a declaratory judgment is to establish existing rights, status, or other legal relations). The Declaratory Judgments Act is remedial only. *Bonham State Bank v. Beadle*, 907 S.W.2d at 467.

The Declaratory Judgments Act does not confer jurisdiction on the trial court, rather makes available the remedy of a declaratory judgment for a cause of action already within the court's jurisdiction. *State v. Morales*, 869 S.W.2d at 947; *Rush v. Barrios*, 56 S.W.3d at 105. A declaratory judgment is appropriate only if a justiciable controversy exists as to the rights and status of the parties and the controversy will be resolved by the declaration sought. *Bonham State Bank v. Beadle*, 907 S.W.2d at 467; *City of Longview v. Head*, 33 S.W.3d 47, 51 (Tex. App. – Tyler 2000, no pet.); *Rush v. Barrios*, 56 S.W.3d at 105. A justiciable controversy must be distinguished from an advisory opinion. *Longview v. Head*, 33 S.W.3d at 51.

Texas courts do not have the authority to render judgments that merely constitute advisory opinions. *Patterson v. Planned Parenthood of Houston & S.E. Tex., Inc.*, 971 S.W.2d 439, 443 (Tex.1998); *Waite v. Waite*, 64 S.W.3d 217, 223 (Tex. App. – Houston [14<sup>th</sup> Dist.] 2001, pet. denied); *Texas Dept. of Public Safety v. Moore*, 985 S.W.2d 149, 153 (Tex. App. – Austin 1998, no pet.). An opinion is advisory when the judgment sought would not constitute specific relief to a litigant or affect legal relations. *Continental Cas. Co. v. Texas Bd. of Chiropractic Examiners*, 2001 WL 359632 at \*2 (Tex. App. – Austin April 12, 2001, no pet.); *Brinkley v. Texas Lottery Comm'n*, 986 S.W.2d 764, 767 (Tex.App.-Austin 1999, no pet.). The distinctive feature of an advisory opinion is that it decides an abstract question of law without binding the parties. *Continental Cas. Co. v. Texas Bd. of Chiropractic Examiners*, 2001 WL 359632 at \*2; *Brinkley v. Texas Lottery Comm'n*, 986 S.W.2d at 767.

Unless there is a justiciable issue, 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).

Lack of subject matter jurisdiction renders a judgment void, rather than merely voidable, so that it may be challenged either directly or collaterally. See, *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985) (on collateral attack judgment was not shown to have been rendered by a court without jurisdiction); see also, *Mapco, Inc. v. Forrest*, 795 S.W.2d 700, 703 (Tex. 1990) (an order is void only if the court rendering it had no jurisdiction over the parties, no jurisdiction of the subject matter, no jurisdiction to enter the judgment, or no capacity to act as a court). Errors other than lack of jurisdiction

---

render the judgment merely voidable and must be attacked within prescribed time limits. *Browning*, 698 S.W.2d at 363 (Tex. 1985). The distinction between a void and voidable judicial act is: while a void act is entirely null within itself, not binding on either party, and not susceptible of ratification or confirmation, so that its nullity cannot be waived, a voidable act is not absolutely void within itself, but rather is binding until disaffirmed, and may be made finally valid by failure within the proper time to have it annulled, or by subsequent ratification or confirmation. *Brazzel v. Murray*, 481 S.W.2d 801, 803 (Tex. 1972), quoting *Murchison v. White*, 54 Tex. 78, 81 (1880).

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. Thus, the declaratory judgment represents, at best, an impermissible advisory opinion.

No reported Texas case discusses the validity of a declaratory judgment affirming the enforceability of a premarital agreement. In their article, Tindall and Pence cite nine opinions from courts of other states. See, Tindall and Pence at 12; see also, *Bavido v. Weixel*, 459 So.2d 701 (La. Ct. App. 1984); *Eaton v. Eaton*, 366 A.2d 121 (Md. Ct. App. 1976); *Richardson v. Richardson*, 606 N.E.2d 56 (Ill. App. Ct. 1992); *Wolfe v. Wolfe*, 491 A.2d 281 (Pa. Super. Ct. 1985); *Stenson v. Stenson*, 359 N.E.2d 787 (Ill. App. Ct. 1977); *Kosik v. George*, 452 P.2d 560 (Or. 1969); *Miller v. Miller*, 151 So.2d 869 (Fla. Dist. Ct. App. 1963); *Trossman v. Trossman*, 165 N.E.2d 368 (Ill. App. Ct. 1960).

It must be stated again that a collateral attack on a declaratory judgment affirming the enforceability of a premarital agreement is untested in Texas law. Counter-arguments to such an attack may well exist.

For example, the Texas Supreme Court has stated that, if a court having potential jurisdiction renders a judgment when the potential jurisdiction has not been activated, **and** the defect is apparent from the face of the judgment, then the judgment is void and subject to either direct or collateral attack. *Fulton v. Finch*, 346 S.W.2d 823, 827 (Tex. 1961) (emphasis added). If, however, the court having potential jurisdiction renders a judgment regular on its face that contains recitations stating that potential jurisdiction has been activated, then the judgment is voidable, not void, and may be set aside only by a direct attack. *Akers v. Simpson*, 445 S.W.2d 957, 959 (Tex. 1969). The unassailability of the judgment arises because a court of potential jurisdiction has the power to determine whether its jurisdiction has been activated, and the recitations making that determination are immune from attack in a collateral

proceeding. *McEwen v. Harrison*, 345 S.W.2d 706, 710 (Tex. 1961).

Consequently, depending on how the declaratory judgment is drafted, a collateral attack may not be possible. The issue, if and when finally visited by a Texas appellate court, will make for interesting reading. (Even if a collateral attack on the declaratory judgment is possible, the existing declaratory judgment may well constitute evidence--perhaps dispositive--as to issues of "voluntariness" or intent).

If a collateral attack is not possible, the Texas lawyer also may not have many viable options for direct attack upon a declaratory judgment affirming the enforceability of a premarital agreement. It is unlikely that a direct appeal will still be available, since an appeal must be perfected within 30 days after the judgment was signed. TEX.R.APP.P. 26.1.

If the declaratory judgment was signed within the preceding six months, a restricted appeal (formerly an appeal by writ of error) may be available. See, TEX.R.APP.P. 30. To bring a restricted appeal, a litigant must demonstrate that (1) he or she is a party to the suit, (2) he or she filed the restricted appeal within six months of judgment; (3) he or she did not participate at trial; and (4) error is apparent on the face of the record. It is very unlikely that a declaratory judgment, entered by consent of the parties, will show error on the face of the record.

Finally, the equitable bill of review may be available. To be successful in a bill of review, the plaintiff must allege and prove: (1) a meritorious defense to the cause of action alleged to support the judgment, (2) which fraud, accident, or the opposing party's wrongful act prevented him from presenting, (3) without any fault or negligence of his own. *Baker v. Goldsmith*, 582 S.W.2d 404, 406-407 (Tex. 1979). It is doubtful that a bill of review will correct a declaratory judgment affirming the validity of a marital agreement entered by consent of the parties.