
PRENUPS, POSTNUPS, AND PROBLEMS



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TYPES OF MARITAL AGREEMENTS

- There are four types of relationship/marital agreements:
 - Premarital agreements
 - Postmarital or partition agreements
 - Conversion agreements
 - Cohabitation agreement



PREMARITAL AGREEMENTS

- Purpose: allow persons about to marry to confirm and modify the characterization of property, award alimony, address earnings or income during marriage, designate or waive homestead interests, and provide choice of law for future disputes.
 - Tex. Fam. Code 4.003
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HISTORY LESSON

LAWS OF 1840

- The Congress of the Republic of Texas enacted the first premarital contract statute as part of the Laws of 1840. Tex. Laws 1840, Act of Jan. 20, 1840, at 3-6, 2 H. Gammel, Laws of Texas 177-80 (1898).
 - The original statute provided for substantial freedom for the parties to contract but included express limitations on the scope of validity for premarital agreements: "[P}arties intending to enter into the marriage state may enter into what stipulations they please, provided they be not contrary to good morals or some rule of law, and in no case shall they enter into any agreement... to alter the legal orders of descent."
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EARLY RULINGS AGAINST PREMARITAL AGREEMENTS

- *Ellington v. Ellington*, 29 Tex. 2 (1867): the court held that a premarital contract could not be given effect unless it was executed before a notary public and two witnesses as required by law.
 - *Castro v. Illies*, 22 Tex. 479 (1858): the court held that a premarital contract entered into by the parties in Louisiana had no effect in determining the character of property acquired after the parties married and moved to Texas.
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GORMAN V. GAUSE, 56 S.W.2D 855 (TEX. COMM'N APP. 1933, HOLDING APPROVED).

- The court invalidated a premarital agreement that declared void all the community property laws of the State of Texas, so far as the property owned or acquired by the parties was concerned. The court held that the agreement was void because the premarital contract statute expressly prohibited agreements "contrary to some rule of law." The court stated that precedents had established that the constitutional definition of separate property" prevented spouses from changing the status of property acquired during marriage from that prescribed by law." The court reasoned that certainly the constitution and statutes defining the status of property acquired during marriage constituted a "rule of law;" therefore, the agreement was invalid because it violated the statute.
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BURTON V. BELL, 380 S.W.2D 561 (TEX. 1964)

- The court held a premarital contract invalid that attempted to preserve to each party the property owned prior to marriage and the income arising from such property during marriage as the separate property of the owner because the agreement violated the statute by undertaking to "alter the legal orders of descent."
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1968 AMENDED STATUTE

- When portions of the marital property laws were revised in 1967, the Texas Legislature deleted the prohibition against premarital agreements contrary to "good morals or some rule of law" and the prohibition against agreements that altered "the legal orders of descent."
 - The amended statute, effective January 1968, simply provided: "[B]efore marriage, persons intending to marry may, by a subscribed, written instrument enter into a matrimonial property agreement as they may desire."
 - Shortly after the new statute became effective, it was codified without significant change as section 5.41 of the Texas Family Code.
 - By deleting the express limitations to validity of premarital agreements and by delegating broad authority for prospective spouses to determine respective rights in matrimonial property, the Texas Legislature provided impetus for a trend favoring flexibility in premarital agreements."
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WILLIAMS V. WILLIAMS, 569 S.W.2D 867 (TEX. 1978)

- Balanced the competing interests of flexibility in premarital agreements versus the surviving spouse's security in homestead protection and ended up favoring the flexibility of premarital agreements.
 - The court upheld the agreement's waiver of homestead rights allowed in a premarital agreement.
 - The *Williams* court identified two obstacles to validity for premarital agreements executed under section 5.41 of the Texas Family Code: "Provisions in premarital agreements that violate the constitutional definition of separate property are invalid," and "agreements that violate public policy are unenforceable." Where the constitutional definition of separate property and the requirements of public policy are not violated, section 5.41 of the Texas Family Code will be broadly construed to permit parties to premarital agreements maximum flexibility in determining property or other rights incident to marriage. "Under this rule of construction, general language is sufficient to waive rights not expressly stated."
 - Adoption of the "clear and explicit" test advocated by Justice Chadick would prevent inadvertent waiver of important interests that may not be within the contemplation of the parties at the time the contract is executed.
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TEXAS CONSTITUTIONAL AMENDMENT

- In 1980, Texas voters approved an amendment to the Texas Constitution that for the first time in Texas history allowed parties to “partition and exchange” prospective income from separate property, as well as salary and wages, and other forms of income to be acquired in the future. This constitutional amendment allowed persons who were contemplating marriage to enter into prenups that were more comprehensive than ever before, because the parties could provide for the characterization, as separate or community, of property to be acquired in the future.
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BECK V. BECK, 814 S.W.2D 745 (TEX. 1991)

- The Texas Supreme Court wrote in 1991: “We hold that the 1980 amendment to article XVI, section 15, of the Texas Constitution demonstrates an intention on the part of the legislature and the people of Texas to not only authorize future premarital agreements, but to impliedly validate section 5.41 of the Texas Family Code and all premarital agreements entered into before 1980 pursuant to that statute. **The legislature and the people of Texas have made the public policy determination that premarital agreements should be enforced.**”
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CURRENT LAW

TEX. CONST. ART. XVI, §15

- The Constitution of the State of Texas, Art. XVI, section 15 includes: “...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;...”
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UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT

- The Uniform Premarital Agreements Act was originally drafted in 1983 to promote uniformity and predictability of laws between states regarding premarital agreements. In 2012 the Act was revised to include marital agreements as well as premarital agreements.
 - 28 states and D.C. have adopted the Act.
 - Texas first adopted the Act in 1987 as set forth in Chapter 4 of the Texas Family Code.
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PREMARITAL AGREEMENT – DEFINITION

- Definition: a premarital agreement is an agreement between prospective spouses made in contemplation of marriage and to be effective on marriage. Tex. Fam. Code 4.001.
 - Property subject to a premarital agreement is broadly defined to include any “interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings. Tex. Fam. Code 4.001.
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ENFORCEABILITY

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



CONTENT

- Generally, a premarital agreement can cover any matter as long as it does not violate public policy or a statute imposing criminal penalties, adversely affect a child's right to support or defraud a creditor. See Tex. Fam. Code 4.003(a)(8), (b), 4.106(a).
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- 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;
 - 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;
 - the disposition of property on separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;
 - the modification or elimination of spousal support;
 - the making of a will, trust, or other arrangement to carry out the provisions of the agreement;
 - the ownership rights in and disposition of the death benefit from a life insurance policy;
 - the choice of law governing the construction of the agreement; and
- any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty. Tex. Fam. C. Ann. 4.003(a); see *Williams v. Williams*, 569 S.W.2d 867 (Tex. 1978)(homestead rights may be waived in a premarital agreement); *Dokmanovic v. Schwarz*, 880 S.W.2d 272 (Tex. App.–Houston [14th Dist.] 1994, no writ)(premarital agreement which provided income from all separate property to remain separate property precluded creation of any community property during marriage); *Winger v. Pianka*, 831 S.W.2d 831 S.W.2d 853 (Tex. App.–Austin 1992, writ denied)(prenuptial agreement may partition future earnings of persons about to marry); *Scott v. Scott*, 805 S.W.2d 835 (Tex. App.–Waco 1991, writ denied)(premarital agreement may provide for “excess” income to be separate property).
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CHILDREN IN PRENUPS

- The right of a child to support may not be adversely affected by a premarital agreement. Tex. Fam. Code 4.003(b). Therefore, any provision in a premarital agreement that eliminates or reduces a party's child support obligation in the event of divorce would be unenforceable.
 - Agreements for private education, college expenses, or cars for children might be enforceable as a contract between the parties as long as it was found not to be a "violation of public policy" if it infringes on a parent's rights or against a child's best interests.
 - The phrase "adversely affect" does not mean parties cannot contract for child support in a premarital agreement; it just means that any provision affecting child support must be in the child's best interest or it can be disregarded. See *Radtke v. Radtke*, 521 S.W.2d 749 (Tex. App.–Houston [14th Dist.] 1975, no writ); *Preston v. Dyer*, 2012 WL 5960193 (Tex. App.–Beaumont 2012, pet. denied)(spousal support, child support and attorney's fees subject to arbitration under terms of premarital agreement); see also Tex. Fam. Code 154.124(b)(court must order child support in conformity with agreement if court finds agreement is in child's best interest).
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PUBLIC POLICY

- The Family Code permits the parties to contract in a premarital agreement with respect to any matter listed Cohabitation, Pre-Marital and Post-Marital Agreements Chapter 23 3 and any other matter not in violation of public policy or any statute imposing a criminal penalty. Tex. Fam. Code 4.003(a)(8). All provisions of a premarital agreement are subject to a public policy review standard.
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COMMON PROVISIONS

- It is common for premarital agreements to confirm already existing Texas law such as a confirmation that certain assets brought into the marriage by a spouse remain the owner's separate property. The agreement may also confirm that anything acquired during the marriage by gift or inheritance will be separate property.
 - Parties may agree that income from separate property is the owner's separate property. Tex. Const. Art. XVI, 15; *Dokmanovic v. Schwarz*, 880 S.W.2d 272 (Tex. App. – Houston [14th Dist.] 1994, no writ).
 - Persons about to marry may partition or exchange between themselves salaries and earnings to be acquired by them during their future marriage. *Winger v. Pianka*, 831 S.W.2d 853 (Tex. App.–Austin 1992, writ denied). However, the agreement must specifically provide for such a division. See *Fanning v. Fanning*, 828 S.W.2d 135 (Tex. App.–Waco 1992) aff'd in part, and remanded in part on other grounds, 847 S.W.2d 225 (Tex. 1993); *Dewey v. Dewey*, 745 S.W.2d 514 (Tex. App.–Corpus Christi 1988, writ denied); *Bradley v. Bradley*, 725 S.W.2d 503 (Tex. App.–Corpus Christi 1987, no writ).
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- Although a premarital agreement may state that income from separate property is separate property, salaries from a separate property business should be specifically addressed in order to be considered separate property. *Dewey v. Dewey*, 745 S.W.2d 514 (Tex. App.- Corpus Christi 1988, writ denied).
 - Parties to a premarital agreement may agree as to the disposition of their property on the death of one of them. *In re Estate of Loftis*, 40 S.W.3d 160 (Tex. App.– Amarillo 2015, no pet.).
 - The Family Code allows parties to a premarital agreement to contract with respect to the choice of law governing the construction of the agreement. Tex. Fam. Code 4.003(a)(7).
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- A premarital agreement cannot waive a prospective spouse's survivor benefits in an ERISA retirement plan. See *National Auto. Dealers & Assocs. Ret. Trust v. Arbeitman*, 89 F.3d 496 (8th Cir. 1996). Under ERISA, survivor benefits can be waived only by a spouse. 29 U.S.C. 1055(c)(2)(A). Even though a premarital agreement cannot waive survivor benefits, a party can include a provision in a premarital agreement that requires a prospective spouse to execute a waiver of survivor benefits under 29 U.S.C. 1055(c)(2)(A) after the parties are married. Strict construction of the federal statute seems to invalidate premarital waivers of survivor benefits only.
 - A waiver of a party's interest in the qualified retirement benefits of a spouse or future spouse is governed by both state and federal law. The federal ERISA statute expressly provides that it supersedes state laws regulating qualified employee benefit plans. 29 U.S.C. § 1144(a). Thus, state law is preempted generally in that area of regulation.
 - Specifically, ERISA provides that a spouse's waiver of rights to "qualified joint and survivor annuity" and the "qualified preretirement survivor annuity" is not valid unless 1) it is in writing; 2) it either names the alternative beneficiary or states that the employee spouse may designate an alternative beneficiary without further consent of the nonemployee spouse; and 3) the waiver "acknowledges the effect" of the waiver and is notarized or witnessed by a plan representative. 29 U.S.C. § 1055(c)(2)(A). Several courts have held that unlike survivor benefits, ERISA does not place restrictions on a prospective spouse's ability to waive an interest in other ERISA retirement benefits in a premarital agreement. *Savage-Keough v. Keough*, 861 A.2d 131 (N.J. Super.Ct. App. Div. 2004); *Critchell v. Critchell*, 746 A.2d 282 (D.C. 2000); *Deo v. Morello*, 906 A.2d 1145 (N.J. Super.Ct. 2006).
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FORFEITURE OR NO-CONTEST CLAUSE

- If either party brings an action or other proceeding to enforce this Agreement or to enforce any judgment, decree, or order made by a court in connection with this Agreement, the prevailing party shall be entitled to reasonable attorney's fees and other necessary costs from the other party. If either party seeks to invalidate some or all of this Agreement or seeks to recover property in a manner at variance with this Agreement, then such party shall be liable to the other party for all reasonable and necessary attorney's fees and costs incurred by such other party in defending this [sic] or her rights under this Agreement. In addition, if a party seeks to invalidate some or all of this Agreement or seeks to recover property in a manner at variance with this Agreement, then that party shall forfeit the cash payment set forth in Section 13(h).
 - See *I.C. v. Q.C.*, 551 S.W.3d 119 (Tex. 2018)
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EFFECT OF MARRIAGE

- A premarital agreement becomes effective on marriage. Tex. Fam. Code 4.004; see *Marshall v. Marshall*, 735 S.W.2d 587 (Tex. App.–Dallas 1987, writ ref'd n.r.e.). Although the issue has not been decided in Texas, and is not expressly addressed in any statute, the Official Comments to the Uniform Premarital Agreement Act indicate that a ceremonial marriage is required before a premarital agreement falls under the statute.
 - No authority on the interplay between a premarital agreement and informal marriage.
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AMENDMENT OR REVOCATION

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

- If a marriage is determined to be void, an agreement that would otherwise have been a premarital agreement is enforceable only to the extent necessary to avoid an inequitable result. Tex. Fam. Code 4.007; see *Davis v. Davis*, 521 S.W.2d 60 (Tex. 1975)(good faith putative spouse entitled to same property rights as legal spouse). An inequitable result can arise when the parties have married and lived together for a substantial period of time and one or both have relied on the existence of the premarital agreement. Tex. Fam. Code 4.007, comment 7.
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STATUTE OF LIMITATIONS

- A statute of limitations applicable to an action asserting a claim for relief under a premarital agreement is tolled during the marriage of the parties to the agreement. The Official Comment to the Uniform Premarital Agreement Act, Section 8, states that the applicable statute of limitations is tolled “in order to avoid the potentially disruptive effect of compelling litigation between the spouses in order to escape the running of an applicable statute of limitations ...”
 - 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;
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LACHES AND ESTOPPEL

- Texas Family Code Section 4.008 specifically provides that equitable defenses limiting the time for enforcement, including laches and estoppel, are available to either party. The Official Comment to the Uniform Premarital Agreement Act, Section 8, provides that “a party is not completely free to sit on his or her rights because the section does preserve certain equitable defenses.”
 - Such equitable defenses are not defenses to the premarital agreement itself, but rather, are defenses against the ability to contest the agreement. Tex. Fam. Code 4.006; Tex. Fam. Code 4.105.
 - The elements of laches are: (1) unreasonable delay by one having legal or equitable rights in asserting them, and (2) a good faith change of position by another to his detriment because of the delay. *Fazakerly v. Fazakerly*, 996 S.W.2d 260 (Tex. App.—Eastland 1999, pet. denied)(a party’s claim seeking a declaratory judgment that the p
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NO PREJUDICE TO RIGHTS OF THIRD PARTIES

- Nothing in a marital agreement can prejudice the rights of third parties such as creditors or other owners of a business interest.



RECORD IN DEED RECORDS

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

- Ratification is required if the agreement waives a prospective spouse's survivor benefits in an ERISA retirement plan.
 - Otherwise, ratification is not required in order to confirm waiver of community property rights or income from separate property.
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POSTMARITAL OR PARTITION AGREEMENTS

- Purpose: allow spouses to convert their interest in existing or future community property into separate property, provide for characterization of future earnings and income.
 - Tex. Fam. Code 4.102
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EARLY RULINGS ON POSTMARITAL AGREEMENTS

- Early Texas postmarital contracts were invalidated as a matter of public policy because they altered the legal orders of descent.
 - *Hilley v. Hilley*, 161 Tex. 565, 568 (1961)
 - *Proetzel v. Schroeder*, 83 Tex. 684, 19 S.W. 292, 294 (1892)
 - *Groesbeck v. Groesbeck*, 78 Tex. 664, 14 S.W. 792, 793 (1890).
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KING V. BRUCE, 145 TEX. 647, 201 S.W.2D 803 (1947)

- The court struck down post-marital contracts that purported to partition community property because these contracts violated the constitutional definition of separate property.
 - "Movables held by the spouses in community at the time the New York dealings were had continued to be community when taken into that state and subjected to the dealings there had pursuant to the contract of the parties made there. Not only were the Bruces citizens and domiciliaries of Texas when the Under these facts the dealings with the property in New York in no wise affected its character as property so far as the law of this state is concerned. The 'segregation' accomplished nothing toward bringing about the declared purpose of Mr. and Mrs. Bruce. The law of Texas remained applicable regardless of the dealings of the parties."
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1948 TEXAS CONSTITUTIONAL AMENDMENT AUTHORIZING PARTITION AGREEMENTS

- The Texas Constitution was amended in 1948, making it possible for spouses to partition their existing community property. Tex. Const, art. XVI, § 15 (1948).
 - In 1948, the Texas Constitution was amended to allow spouses to partition community property by post-marital contract: “Husband and wife, without prejudice to pre-existing creditors, may from time to time by written instrument as if the wife were a feme sole partition between themselves in severalty or into equal undivided interests all or any part of their existing community property, or exchange between themselves the community interest of one spouse in any property for the community interest of the other spouse in other community property, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property of such spouse.” TEX. CONST, art. XVI, § 15 (1948).
 - This constitutional amendment was later codified in the Texas Family Code. TEX. FAM. CODE. ANN. § 5.42 (Vernon 1975).
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1980 TEXAS CONSTITUTIONAL AMENDMENT AUTHORIZING PARTITION AGREEMENTS

- In 1980 the Texas Constitution again was amended, authorizing spouses as well as persons about to marry to partition or exchange their interests in property then existing or to be acquired in the future. The amendment was incorporated into the Texas Family Code as well.
 - The amended article provided in relevant part:
 - “All property, both real and personal, of a spouse owned or claimed before marriage, and that acquired afterward by gift, devise or descent, shall be the separate property of that spouse; and laws shall be passed more clearly defining the rights of the spouses in relation to separate and community property; provided that persons about to marry and spouses, without the intention to defraud preexisting 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; and the spouses 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 by one of them, or which thereafter might be acquired, shall be the separate property of that spouse; and if one spouse makes a gift of property to the other that gift is presumed to include all the income or property which might arise from that gift of property.
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CURRENT LAW

TEX. CONST. ART. XVI, §15

- Under the Texas constitution, spouses may: “...partition between themselves all or part of their property, then existing or to be acquired, or exchange between themselves the community interest of one spouse or future spouse in any property for the community interest of the other spouse or future spouse in other community property then existing or to be acquired, 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;...” (Tex. Const. art. XVI, §15)
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TEX. FAM. CODE §4.102

- Texas Family Code §4.102 says: “At any time, the **spouses may partition or exchange between themselves all or part of their community property**, then existing or to be acquired, as the spouses may desire. Property or a property interest transferred to a spouse by a partition or exchange agreement becomes that spouse’s separate property. The partition or exchange of property may also provide that future earnings and income arising from the transferred property shall be the separate property of the owning spouse.”
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UNIFORM PREMARITAL AND MARITAL AGREEMENTS ACT

- In 2012 the Act was updated and revised to include marital agreements.

PURPOSES OF POSTMARITAL AGREEMENT IN TEXAS

- Convert their interest in community property to separate property – called partition and exchange agreement.
 - Convert future earnings and income arising from transferred community property to be the separate property. If the agreement doesn't specifically state this, then it remains community property. *Dewey v. Dewey*, 745 S.W.2d 514 (Tex. App. – Corpus Christi 1988, writ denied).
 - Note, however, due to some back-and-forth changes in the law between 2003 and 2005, 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.
 - Agreement regarding income or property from separate property that is owned by them or thereafter acquired will be separate property.
 - This statute does not authorize converting separate property to community property.
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FORMALITIES

- Must be in writing and signed by all parties.
 - Must contain a reference to partition or show an intent to convert community property to separate property.
 - A separation agreement can be a valid marital property agreement even if the word partition isn't mentioned in the agreement. *In re Eaton*, 2014 WL 4771608 (Tex. App. – Fort Wroth 2014, orig. proceeding).
 - Intent to effectuate an actual partition and exchange of property should be included. A mere listing of assets designated as separate property of one spouse does not constitute a partition and exchange agreement. *Collins v. Collins*, 752 S.W.2d 636 (Tex. App. – Fort Wroth 1988, writ ref'd).
 - Does not require judicial approval. *Patino v. Patino*, 687 S.W.2d 799 (Tex. App. – San Antonio 1985, no writ).
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FIDUCIARY DUTY BETWEEN SPOUSES IN PARTITION AND EXCHANGE AGREEMENTS

- In postmarital agreements, the spouses owe each other a fiduciary duty of good faith and fair dealing.
 - *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).
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NO PREJUDICE TO RIGHTS OF THIRD PARTIES

- Nothing in a marital agreement can prejudice the rights of third parties such as creditors or other owners of a business interest.



RECORD IN DEED RECORDS

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

PRESUMPTIONS AND DEFENSES

- There is a rebuttable presumption that a premarital agreement and marital property agreement are enforceable. *Sheshunoff v. Sheshunoff*, 172 S.W.3d 686 (Tex. App. – Austin 2005, pet. denied); *Grossman v. Grossman*, 799 S.W.2d 511 (Tex. App.– Corpus Christi 1990, no writ); *Sadler v. Sadler*, 769 S.W.2d 886 (Tex. 1989).
 - Defenses:
 - involuntary execution or
 - The agreement was unconscionable when it was signed and before signing that party was not provided a fair and reasonable disclosure of the property or financial obligations of the other party; did not voluntarily and expressly waive the right to disclosure; and did not have or could not have adequate knowledge of the property or financial obligations of the other party.
 - Tex. Fam. Code 4.105
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BURDEN OF PROOF

- The burden of proof is on the party attacking the agreement in a proceeding to determine the validity of a premarital agreement or marital property agreement. Tex. Fam. Code 4.006, 4.105;



LAW APPLICABLE TO INTERPRETATION OF PREMARITAL AGREEMENT

- The law to be applied to premarital agreement is the applicable law at the time of divorce.
Sadler v. Sadler, 769 S.W.2d 886 (Tex. 1989).

EQUITABLE ARGUMENTS FOR DIVISION OF MARITAL PROPERTY DO NOT APPLY

- Factors for disproportionate division do not apply in divorce where the marital property agreement addresses the specific property division. See *Bufkin v. Bufkin*, 259 S.W.3d 343 (Tex. App.–Dallas 2008, rev. denied)(evidence of fault properly excluded where parties had agreed to a specific division of the community estate in premarital agreement).
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EXTRINSIC EVIDENCE

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

- A premarital agreement or partition agreement is not enforceable if the party against whom enforcement is requested proves that he or she did not sign the agreement voluntarily. Tex. Fam. Code 4.006(a)(1); Tex. Fam. Code 4.105(a)(1).
 - Whether a party voluntarily signed a marital agreement is a question of fact dependent upon all the circumstances and the mental effect on the party claiming involuntary execution. *Martin v. Martin*, 287 S.W.3d 260 (Tex. App.–Dallas 2009, pet. denied).
 - While Sections 4.006 and 4.105 of the Texas Family Code do not define “voluntarily,” courts have “generally construed it to mean an action that is taken intentionally or by the free exercise of one’s will.”
 - Voluntary has been defined as being “done by design or intentionally or purposely or by choice or of one’s own accord or by the exercise of will. A voluntary act proceeds from one’s own free will or is done by choice on or of one’s own accord, unconstrained by external interference, force, or influence.” *Prigmore v. Hardware Mutual Ins. Co.*, 225 S.W.2d 897 (Tex. Civ. App.—Amarillo 1949, no writ).
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MOORE V. MOORE, 383 S.W.3D (TEX. APP.— DALLAS 2012, PET. DENIED)

- Premarital agreement set aside as not signed voluntarily upon evidence of fraud and duress in the signing by wife. Even though the agreement contained recitations that the wife's attorney had reviewed the agreement and wife executed voluntarily, husband's representations that wife's attorney had approved the final agreement were false and that was sufficient to make the execution involuntary.
 - In determining whether any evidence of involuntariness existed, courts have considered (1) whether a party has had the advice of counsel, (2) misrepresentations made in procuring the agreement, (3) the amount of information provided, and (4) whether information has been withheld.
 - Direct threats or coercion are not required in order to show an agreement was signed involuntarily. Trickery or deceit is sufficient.
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DURESS, UNDUE INFLUENCE, FRAUD, LACK OF CAPACITY AS A DEFENSE

- Duress, fraud, undue influence and lack of capacity, along with the parties' relative bargaining power and knowledge regarding the meaning and effect of the agreement, are common law concepts that could have a bearing upon the ultimate determination of voluntariness but such common law defenses are not independent defenses by themselves.
 - *Sheshunoff v. Sheshunoff*, 172 S.W.3d 686 (Tex. App. – Austin 2005, pet. denied).
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DURESS IS A SUBPART OF VOLUNTARINESS

- An agreement signed under duress is not signed voluntarily. *Izzo v. Izzo*, 2010 WL 1930179 (Tex. App.– Austin 2010, pet. denied).

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.
 - “There can be no duress unless there is a threat to do some act which the party threatening has no legal right to do. Such threat must be of such character as to destroy the free agency of the party to whom it is directed. It must overcome his will and cause him to do that which he would not otherwise do, and which he was not legally bound to do. The restraint caused by such threat must be imminent. It must be such that the person to whom it is directed has no present means of protection.”
 - “In deciding whether there has been undue influence, the court should consider three factors: (1) the existence and exertion of an influence; (2) whether the influence operated to subvert or overpower the person’s mind when executing the document; and (3) whether the person would have executed the document but for the influence.”
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SHESHUNOFF V. SHESHUNOFF, 172 S.W.3D 686 (TEX. APP. – AUSTIN 2005, PET. DENIED)

- “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.
 - Look 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.”
 - 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.”
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PARTICIPATION IN NEGOTIATIONS PRECLUDES INVOLUNTARINESS

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



UNCONSCIONABILITY

- The issue of whether a premarital agreement or partition agreement is unconscionable is a question of law to be decided by the court. Tex. Fam. Code 4.006(b); 4.105(b); Pletcher v. Goetz, 9 S.W.3d 442 (Tex. App.–Fort Worth 1999, pet. denied).
 - “In determining whether a contract is unconscionable or not, the court must look to the entire atmosphere in which the agreement was made, the alternatives, if any, which were available to the parties at the time of making the contract; the non-bargaining ability of one-party; whether the contract is illegal or against public policy, and whether the contract is oppressive or unreasonable.” Wade v. Austin, 524 S.W.2d 79 (Tex. Civ. App.—Texarkana 1975, no writ); Pletcher v. Goetz, 9 S.W.3d 442 (Tex. App.–Fort Worth 1999, pet. denied).
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MARSH V. MARSH, 949 S.W.2D 734 (TEX. APP.-- HOUSTON [14TH DIST.] 1997, NO WRIT)

- The premarital agreement was not unconscionable as a matter of law despite the husband's arguments that the parties had disparate bargaining power, the agreement was signed shortly before the wedding, he was not represented by counsel, and the agreement was allegedly one-sided.
 - “In reviewing the validity of a marital property agreement, this court has considered such factors as the maturity of the individuals, their business backgrounds, their educational levels, their experiences in prior marriages, their respective ages and their motivations to protect their respective children.”
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PEARCE V. PEARCE, 824 S.W.2D 195, 199 (TEX. APP.--EL PASO 1991, WRIT DENIED)

- Unconscionability must be evaluated on a “case-by-case basis looking to the entire atmosphere in which the agreement was made”.
 - Agreement found to be conscionable even when the wife did not have an attorney, did not read or understand the agreement, and had no understanding of the effect of the agreement’s terms upon her.
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PROXIMITY OF EXECUTION TO WEDDING IS NOT A DEFENSE

- The proximity of the execution of the premarital agreement to the wedding is not a factor in determining unconscionability.
 - *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);
 - *Huff v. Huff*, 554 S.W.2d 841, 843 (Tex.Civ.App.-Waco 1977, writ dism'd) (premarital agreement, signed two days before marriage, upheld);
 - *Osorno v. Osorno*, 76 S.W.3d 509, 510-11 (Tex. App. – Houston [14th Dist.] 2002, no pet.) (premarital agreement was signed voluntarily even though the agreement was signed the day before the parties married).
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NO LEGAL REPRESENTATION IS NOT A DEFENSE

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

FAILURE TO READ AGREEMENT IS NOT A DEFENSE

- Failure to Read Agreement Failing to read an agreement will not make the agreement unenforceable on that fact alone. *Pearce v. Pearce*, 824 S.W.2d 195, 199 (Tex. App.--El Paso 1991, writ denied)(absent fraud, one is presumed to know the contents of a document he has signed and has an obligation to protect himself by reading a document before signing it).
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DISCLOSURE AS SECOND PRONG OF UNCONSCIONABILITY

- Once a court finds that a premarital or marital property agreement is unconscionable as a matter of law, the complaining party must further show that there has been an inadequate disclosure of the property or financial obligations of the other party. Tex. Fam. Code 4.006(a)(2)(A); 4.105(a)(2)(A).
 - It must be shown that the complaining party did not have, or reasonably could not have had, adequate knowledge of the other party's property or financial obligations, and that there had been no waiver of the required disclosure. Tex. Fam. Code 4.006(a)(2)(B)-(C); 4.105(a)(2)(B)-(C); see *Fanning v. Fanning*, 828 S.W.2d 135 (Tex. App.–Waco 1992) aff'd in part, and remanded in part on other grounds, 847 S.W.2d 225 (Tex. 1993); *Blonstein v. Blonstein*, 848 S.W.2d 82 (Tex. 1982).
 - Non-disclosure of property or financial obligations is relevant only if the court finds that the agreement is unconscionable.
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FANNING V. FANNING, 828 S.W.2D 135 (TEX. APP.–WACO 1992) AFF'D IN PART, AND REMANDED IN PART ON OTHER GROUNDS, 847 S.W.2D 225 (TEX. 1993).

- Agreement invalidated based on lack of fair and reasonable disclosure because wife testified 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”.
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ADDITIONAL PRONGS OF DISCLOSURE

- Once unconscionability and lack of fair and reasonable disclosure has been shown, the party resisting enforcement must also prove that, before signing the agreement, he or she did not voluntarily and expressly waive in writing the right to disclosure AND that he or she did not have, or could not reasonably have had, adequate knowledge of the property or financial obligations of the other party. Tex. Fam. Code 4.006
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VIOLATION OF FIDUCIARY DUTY AS DEFENSE TO POSTMARITAL AGREEMENT

- A court can also consider the fiduciary duty spouses owe to each other when analyzing whether a postmarital agreement was involuntarily executed. *Izzo v. Izzo*, 2010 WL 1930179 (Tex. App.–Austin 2010, pet. denied)(mem op.). This factor is unique to postmarital agreements because it does not exist before marriage. See *Sheshunoff v. Sheshunoff*, 172 S.W.3d 686 (Tex. App. – Austin 2005, pet. denied); *In re Marriage of Smith*, 115 S.W.3d 126 (Tex. App.–Texarkana 2003, pet. denied).
 - A court can consider the fiduciary duty spouses owe to each other when analyzing whether a postmarital agreement was involuntarily executed. *Izzo v. Izzo*, 2010 WL 1930179 (Tex. App.–Austin 2010, pet. denied)(mem op.).
 - However, adverse parties who have retained independent counsel may not owe fiduciary duties to one another. See *Miller v. Ludeman*, No. 03-03-00630- CV, 2004 WL 1269321 (Tex. App.—Austin 2004, pet. denied); see also *Toles v. Toles*, 113 S.W.3d 899, 916 (Tex. App.—Dallas 2003, no pet.).
 - In addition, breach of fiduciary duty is arguably a defensive issue which is subsumed into the issue of whether each spouse was provided a fair and reasonable disclosure of the property or financial obligations of the other spouse (i.e., the unconscionability prong of section 4.105). See, *Blonstein v. Blonstein*, 831 S.W.2d 468, 471 (Tex.App.–Houston [14th Dist]), writ denied per curiam, 848 S.W.2d 82 (Tex. 1992).
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NO CONTEST CLAUSE

- By seeking to rescind prenuptial agreement in order to create community estate and her share of it, wife attempted to “recover property in a manner at variance” with the agreement, within meaning of agreement's no-contest provision. Wife lost all benefits under the agreement by attempting to contest it. *I.C. v. Q.C.*, 551 S.W.3d 119 (Tex. 2018).
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ENFORCEMENT OF AGREEMENTS PRIOR TO SEPTEMBER 1, 1993

- Chapter 4 of the Texas Family Code regarding enforcement of premarital and postmarital agreements only applies to agreements executed on or after September 1, 1993.
 - The common law defenses regarding the enforcement of contracts may still be available to attack agreements executed prior to September 1, 1993. *Marsh v. Marsh*, 949 S.W.2d 734 (Tex. App.—Houston [14th Dist.] 1997, no writ).
 - The three most popular common law defenses are fraud, duress, and undue influence. *Daniel v. Daniel*, 779 S.W.2d 110 (Tex. App.—Houston [1st Dist.] 1989, no writ); *Matelski v. Matelski*, 840 S.W.2d 124 (Tex. App.—Fort Worth 1992, no writ) (“no duress unless there is a threat to do some act which the party threatening has no legal right to do . . . of such character as to destroy the free agency of the party . . . overcome his will and cause him to do that which he would not otherwise do”).
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PRE 1993 FRAUD DEFENSE

- A contract may be avoided on the ground of fraudulent inducement; however, the fraudulent representation must have been the material factor in enduring the making of the contract and without which the contract would not have been made. *Bernal v. Garrison*, 818 S.W.2d 79 (Tex. App.–Corpus Christi 1991, writ denied).
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PRE 1993 MUTUAL MISTAKE DEFENSE

- When the parties have contracted under a misconception or ignorance of a material fact, the agreement will be avoided. *Williams v. Glash*, 789 S.W.2d 261 (Tex. 1990). The parol evidence rule does not bar proof of the mistake. Unilateral mistake by one party, and knowledge of that mistake by the other party is equivalent to mutual mistake. *Marcuz v. Marcuz*, 857 S.W.2d 623 (Tex. App.–Houston [1st Dist.] 1993, no writ).
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PRE 1993 UNDUE INFLUENCE DEFENSE

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

- Purpose: agreements that allow spouses to convert all or part of the separate property owned by either or both of them to community property.

HISTORY

- The law permitting conversion of separate property into community property was passed in 2000.
 - Prior to 2000 parties could not convert separate property into community property. Likewise, they could not gift separate property to the community (because a gift is, by definition, separate property).
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WHAT IS A CONVERSION AGREEMENT?

- Converts separate property into community property.
 - Spouses may agree that all or part of the separate property owned by either or both spouses is converted to community property provided that certain formalities are met. Tex. Fam. Code 4.201-4.206.
 - *Alonso v. Alvarez*, 409 S.W.3d 754 (Tex. App.–San Antonio 2013, pet. denied)(converting separate property into community may be accomplished by a series of agreements);
 - *Monroe v. Monroe*, 358 S.W.3d 711 (Tex. App.–San Antonio 2011, pet. denied)(premarital and postmarital agreements converted husband’s separate property to community; divorce division restored much of husband’s former separate property to him, a factor the court was authorized to consider).
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FORMALITIES

- An agreement to convert separate property to community property (conversion agreement):
 - Must be in writing
 - Be signed by the spouses;
 - Identify the property being converted; and
 - Specify that the property is being converted to the spouses' community property.
 - A conversion agreement is enforceable without consideration. Tex. Fam. Code 4.203.
 - The mere transfer of a spouse's separate property to the name of the other spouse or to the name of both spouses is not sufficient to convert the property to community property. Tex. Fam. Code 4.204.
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WARNING LANGUAGE REQUIRED

- Tex. Fam. Code 4.205b: An agreement that contains the following statement, or substantially similar words, prominently displayed in bold-faced type, capital letters, or underlined, is rebuttably presumed to provide a fair and reasonable disclosure of the legal effect of converting property to community property:

THIS INSTRUMENT CHANGES SEPARATE PROPERTY TO COMMUNITY PROPERTY. THIS MAY HAVE ADVERSE CONSEQUENCES DURING MARRIAGE AND ON TERMINATION OF THE MARRIAGE BY DEATH OR DIVORCE. FOR EXAMPLE: EXPOSURE TO CREDITORS. IF YOU SIGN THIS AGREEMENT, ALL OR PART OF THE SEPARATE PROPERTY BEING CONVERTED TO COMMUNITY PROPERTY MAY BECOME SUBJECT TO THE LIABILITIES OF YOUR SPOUSE. IF YOU DO NOT SIGN THIS AGREEMENT, YOUR SEPARATE PROPERTY IS GENERALLY NOT SUBJECT TO THE LIABILITIES OF YOUR SPOUSE UNLESS YOU ARE PERSONALLY LIABLE UNDER ANOTHER RULE OF LAW.

LOSS OF MANAGEMENT RIGHTS. IF YOU SIGN THIS AGREEMENT, ALL OR PART OF THE SEPARATE PROPERTY BEING CONVERTED TO COMMUNITY PROPERTY MAY BECOME SUBJECT TO EITHER THE JOINT MANAGEMENT, CONTROL, AND DISPOSITION OF YOU AND YOUR SPOUSE OR THE SOLE MANAGEMENT, CONTROL, AND DISPOSITION OF YOUR SPOUSE ALONE. IN THAT EVENT, YOU WILL LOSE YOUR MANAGEMENT RIGHTS OVER THE PROPERTY. IF YOU DO NOT SIGN THIS AGREEMENT, YOU WILL GENERALLY RETAIN THOSE RIGHTS.”

LOSS OF PROPERTY OWNERSHIP. IF YOU SIGN THIS AGREEMENT AND YOUR MARRIAGE IS SUBSEQUENTLY TERMINATED BY THE DEATH OF EITHER SPOUSE OR BY DIVORCE, ALL OR PART OF THE SEPARATE PROPERTY BEING CONVERTED TO COMMUNITY PROPERTY MAY BECOME THE SOLE PROPERTY OF YOUR SPOUSE OR YOUR SPOUSE'S HEIRS. IF YOU DO NOT SIGN THIS AGREEMENT, YOU GENERALLY CANNOT BE DEPRIVED OF OWNERSHIP OF YOUR SEPARATE PROPERTY ON TERMINATION OF YOUR MARRIAGE, WHETHER BY DEATH OR DIVORCE.”

ENFORCEMENT

- An agreement to convert property to community property is not enforceable if the spouse against whom enforcement is sought proves that the spouse did not: (1) execute the agreement voluntarily; or (2) receive a fair and reasonable disclosure of the legal effect of converting the property to community property (warning language). Tex. Fam. Code 4.205(a).
 - Note the statute does not provide for a defense of unconscionability.
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FIDUCIARY DUTIES BETWEEN SPOUSES

- Spouses to a conversion agreement owe each other a fiduciary duty of good faith and fair dealing. While rare, there could be a scenario where conversion of property from separate into community is harmful to the other spouse or the community estate.
 - The statute doesn't have any disclosure requirements for conversion agreements.
 - It is unknown whether there would be a possible defense to enforcement based on breach of fiduciary duty since that defense is a subpart of unconscionability and the statute doesn't provide for an unconscionability defense.
 - Not much law interpreting conversion agreements.
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NO PREJUDICE TO RIGHTS OF THIRD PARTIES

- Nothing in a marital agreement can prejudice the rights of third parties such as creditors or other owners of a business interest.



RECORD IN DEED RECORDS

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

CONSTRUCTION OF CONTRACTS

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

- In construing a contract, a court's primary concern is determining the parties' true intent. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323 (Tex. 2011).
 - Accordingly, the court “must examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless.” *Id.* (Quoting *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223 (Tex. 2003)).
 - Contract terms are given their plain and ordinary meaning unless the instrument indicates the parties intended a different meaning. *Reeder v. Wood County Energy, LLC*, 395 S.W.3d 789 (Tex. 2012)
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CONSTRUCTION FAVORING THE COMMUNITY ESTATE

- Courts construe marital property agreements narrowly in favor of the community estate.
Fischer-Stoker v. Stoker, 174 S.W.3d 272 (Tex. App.–Houston [1st Dist.] 2005, pet. denied).

EXAMINE THE ENTIRE AGREEMENT

- When construing or interpreting a contract, the entire agreement should be read and taken as a whole to effectuate the parties' true intentions. *Coker v. Coker*, 650 S.W.2d 391 (Tex. 1983); *Miller v. Miller*, 700 S.W.2d 941 (Tex. App.–Dallas 1985, writ ref'd n.r.e.) Therefore, “an interpretation which gives a reasonable, lawful, and effective meaning to all of the terms is preferred to an interpretation which leaves a part unreasonable, unlawful, or of no effect.” Restatement (Second) of Contracts § 203(a).
 - No single provision taken alone should control – instead the court should consider all provisions with reference to the entire agreement. see *In re Estate of Loftis*, 40 S.W.3d 160 (Tex. App.–Amarillo 2015, no pet.)(premarital agreement provision that wife was to receive house and car upon husband's death binding on his estate).
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PLAIN MEANING

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

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

- The question of a contract's ambiguity is one of law for the court to decide by looking at the contract as a whole in light of the circumstances present when the contract was entered. *Nat'l Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517 (Tex. 1995)(per curiam). When a potential ambiguity arises, deciding whether the language is ambiguous is an issue of contract interpretation. *Burlington N. & Santa Fe Ry. Co. v. S. Plains Switching, Ltd.*, 174 S.W.3d 348 (Tex. App.– Fort Worth 2005, no pet.).
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PAROL EVIDENCE

- Parol evidence is not admissible for the purpose of creating an ambiguity. *Id.* at 358. A contract is not ambiguous when the language can be given a definite or certain meaning as a matter of law. See *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857 (Tex. 2000).

RULES OF CONTRACT CONSTRUCTION

- Express terms are favored over implied terms
- Specific terms are favored over general terms
- Terms stated earlier in an agreement are favored over the subsequent terms.
- *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983).

NONMARITAL COHABITATION AGREEMENTS

COHABITATION AGREEMENTS

- The Texas Family Code authorizes nonmarital cohabitation agreements between people who do not intend to marry. The code uses the term “nonmarital conjugal cohabitation”, implying that the agreements cannot be between roommates.
 - Formalities: must be in writing and signed by the parties.
 - Also recognized by the Texas Business & Commerce Code 26.01 (statute of frauds).
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DEFINITION OF CONJUGAL

- Neither the Texas Family Code nor the Texas Business & Commerce Code define the term “conjugal.”
 - Miriam Webster defines “conjugal” as “of or relating to the married state or to married persons and their relations” while “conjugal rights” are defined as “the sexual rights or privileges implied by and involved in the marriage relationship; the right of sexual intercourse between husband and wife.” Miriam Webster’s Online (2009).
 - Since the word “conjugal” is preceded in the statute by the word “non-marital” the terms seem completely at odds with the type of agreement intended to be covered by the statute and its inclusion in the statute seems wholly unnecessary. Tex. Bus. & Com. Code 26.01.
 - Not sure why the word is necessary in the context of the statute other than to distinguish between roommates not in a romantic relationship versus people living together romantically or sexually.
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WHAT LAW APPLIES?

- Because neither the Texas Family Code nor the Texas Business & Commerce Code explains how to handle these agreements, general contract laws apply to the validity, enforceability, and construction/interpretation of these agreements.



STATUTE OF FRAUDS

- Nonmarital conjugal cohabitation agreements are included within the statute of frauds. See TEX. BUS. & COM. CODE 26.01(b)(3).
 - A promise or agreement described in Subsection (b) of this section is not enforceable unless the promise or agreement, or a memorandum of it, is (1) in writing; and (2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.
 - There have been many creative attempts to utilize this type of agreement.
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ZAREMBA V. CLIBURN, 949 S.W.2D 822 (TEX. APP. – FORT WORTH 1997, WRIT DENIED).

- Because an agreement for nonmarital conjugal cohabitation must be in writing per the statute of frauds, cohabitating persons cannot sue each other for partnership or contract claims that are based on their relationship.
 - “Because we hold Zaremba’s claims that allegedly arise from the purported oral or implied partnership agreement are founded on the basis that he was entitled to recovery for any services rendered in consideration of nonmarital conjugal cohabitation, those claims are barred by the statute of frauds and that defect could not be cured by any amendment to the pleadings.”
 - All Zaremba’s various claims that allegedly arose from the purported oral or implied partnership agreement were founded on the basis that he was entitled to recover for any services that were rendered in consideration of a nonmarital conjugal cohabitation and as such, these claims were barred by the statute of frauds.
 - The statute was passed and included in the statute of frauds to eliminate palimony suits for support between nonmarried persons (or persons who could not marry under the law then existing).
 - Only properly plead tort claims could go forward.
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COONS-ANDERSEN V. COONS, 104 S.W.3D 630 (TEX. APP. – DALLAS 2003, NO PET.)

- “Where persons are living together as one household, services performed for each other are presumed to be gratuitous, and an express contract for remuneration must be shown or that circumstances existed showing a reasonable and proper expectation that there would be compensation.”
-