

**DID YOUR CLIENT “GET HITCHED”
WITHOUT A HITCH?**

**DEFENDING AND ATTACKING PREMARITAL
AND POST-MARITAL AGREEMENTS**

**MARY JOHANNA M^cCURLEY
CARSON P. EPES**

M^cCURLEY, ORSINGER, M^cCURLEY & NELSON, L.L.P.
5950 Sherry Lane, Suite 800
Dallas, Texas 75225
(214) 273-2400 (Telephone)
(214) 273-2470 (Telefax)

Email: maryjo@momn.com
carson@momn.com

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CHAPTER 3.3

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MARY JOHANNA M^cCURLEY
M^cCurley, Orsinger, M^cCurley & Nelson, L.L.P.
5950 Sherry Lane, Suite 800
Dallas, Texas 75225
Phone: 214/273-2400

MARY JOHANNA M^cCURLEY: born Baton Rouge, Louisiana, October 3, 1953; admitted to bar, 1979, Texas.

EDUCATION:

Centenary College (B.A., 1975).

Louisiana State University; St. Mary's University of San Antonio (J.D., 1979).

Board Certified, Family Law, Texas Board of Legal Specialization (1984).

EXTRACURRICULAR RESPONSIBILITIES:

Delta Theta Phi (Vice President, 1978-1979).

President, Student Senate, St. Mary's School of Law, 1979.

PROFESSIONAL RESPONSIBILITIES:

Assistant Editor, Family Law Manual, State Bar of Texas, 1982-1989.

Co-Editor: Family Law Manual, State Bar of Texas 1989-1990.

Course Director, American Academy of Matrimonial Lawyers, Matrimonial Law - 1998, 1998.

FACULTY:

National Business Institute, Inc. - Child Custody and Child Visitation in Texas, 1992.

Co-Chairperson, Texas Supreme Court Child Support and Child Visitation Guidelines Committee, 1991 and 1992.

Course Director, Life, Lawyering and the Pursuit of Happiness, State Bar of Texas, 1995.

Member, Texas Supreme Court Child Support and Child Visitation Guidelines Committee, 1996-1997.

Course Director, Art and Advocacy of Family Law, State Bar of Texas, 1997.

Assistant Course Director, Advanced Family Law Course, State Bar of Texas, 2000.

AUTHOR AND LECTURER:

"Don't Forget the Child" - Lecture at Advanced Family Law Course, 2003

"Top Ten Things You Should Know to Ask About Handling Kid Cases" co-authored with Laura M. Hilliard, Marriage Dissolution Institute, 2003

"Maintenance is Alive and Well in Texas" co-authored with A. Michelle May, Advanced Family Law Course, 2002

"A Primer on Psychological Testing," Advanced Family Law Course, 2001. "Reimbursement Issues" co-authored with Drew Ten Eyck, Marriage Dissolution, 2000.

"Shrinking the Shrinks Down to Size" co-authored with Mike McCurley and Drew Ten Eyck, Advanced Family Law Course, 1999.

"Defending Against Malpractice" co-authored with Julie Pruet, Marriage Dissolution, 1999.

"Shrinking the Shrinks Down to Size" co-authored with Mike McCurley, Chris Lake and Ken Rockenbach, Advanced Family Law Course, 1998.

"Effectively Dealing with The Child's Choice of Managing Conservator" co-authored with R. Scott Downing and Kenneth W. Rockenbach, Texas Academy of Family Law Specialists, 1998.

"Effectively Dealing with the Child's Choice of Managing Conservator," co-authored with R. Scott Downing and Kenneth W. Rockenbach, Texas Academy of Family Law Specialists, 1997.

"Preparing for the Petitioner's Financial Temporary Hearing," co-authored with R. Scott Downing, Marriage Dissolution Course, 1997.

"Dealing with Ad Litem," co-authored with Jack W. Marr & Kathleen Cardone, Advanced Family Law Course, 1997.

"Pensions, Stock Options and Other New Sources of Wealth," Annual Divorce Conference of the Dallas Chapter, Texas Society of Certified Public Accountants, 1997.

"Attorney Ad Litem and Guardian Ad Litem Practice," (co-author with Reginald A. Hirsch and R. Scott Downing), Advanced Family Law Course, 1996.

"Gender Bias in Our Courts and Practice - Fact or Fiction?," Advanced Family Law Course, 1995.
"Peculiar Characterization Issues," 18th Annual Marriage Dissolution Institute, 1995.
"An Overview of Psychological Testing," Illinois State Bar Association Family Law Handbook, 1994.
"An Overview of Psychological Testing," Advanced Family Law Course, 1994. "Psychological Testing and the Expert Witness," The Practical Lawyer, October 1994.
"An Overview of Psychological Testing," Utah chapter of the American Academy of Matrimonial Lawyers, 1994.
"An Overview of Psychological Testing," American Bar Association Family Law Conference, 1993.
"Discovery," Marriage Dissolution Course, 1993.
"Social Studies and Psychological Evaluations: Their Use in Evidence and How to Cross Examine," Advanced Family Law Course, 1993.
"We Have Found The Enemy - It Is Us!" or Self Management, Not Stress Management, Advanced Family Law Course, 1993.
"Tracing," State Bar of Texas, Advanced Family Law Course, 1992.
"Child Support Issues - Modification, Second Family and Other Significant Problems," South Texas College of Law, 1992.
"Ethics," State Bar of Texas, Advanced Family Law Course, 1992.
"Modification, From Sole to Joint and Back Again," Annual Family Law Institute, South Texas College of Law, 1990, 1992.
"Managing Stress," New York Bar Association, 1991.
"Attorney and Guardian Ad Litem," State Bar of Texas Advanced Family Law Course, 1991.
"Divorce Taxation," American Academy of Matrimonial Lawyers, 1991.
"Dealing with Experts and Psychological Tests," Marriage Dissolution Course, 1991. "Alimony," co-authored with Jimmy L. Verner, Jr., Advanced Family Law Drafting Course, 1990.
"Innovative Ideas for Setting and Collecting Attorney Fees," American Academy of Matrimonial Lawyers, 1990.
"Managing Stress," Advanced Family Law Course, 1990.
"Psychological Testing: An Update," Marriage Dissolution Course, State Bar of Texas, 1989.
"Enforcement - Support and Visitation", Marriage Dissolution Course, 1986, State Bar of Texas.
"Jury Selection in Custody Cases," Advanced Family Law Course, 1987.
"Evidentiary Issues in Child Support, Texas Revolution in Child Support: Perspective, Pleading and Practice," State Bar of Texas, 1986.

MEMBER:

State Bar of Texas - Chair of Family Law Section of the State Bar of Texas, 2003 (Adjunct Member, Family Law Council, 1982-1985; Family Law Council, 1987 - present; Dallas (Family Law Section, Board of Directors, 1981-1982; Secretary-Treasurer, 1983; Vice Chairman, 1984; Chairman 1985; Past Chairman, 1986).
American Academy of Matrimonial Lawyers (AAML - Texas Chapter - Treasurer, 1993-1995; Secretary, 1995-1996; President-Elect, 1996-1997; President, 1997-1998)
(AAML - National - Secretary, November 2000 - 2002, Vice President 2002 - present. Special Concerns for Children Committee, 1997-present and Co-Chair of this Committee, 2001 and 2002.
Co-Chairperson, Continuing Legal Education, 1995 and 1997-1998.
Member, Interdisciplinary Relations - Mental Health, 1997 - present.
Member, Board of Governors, 1998 - present.
Member, Advertising Committee; Member, Marketing and Public Relations Committee. Member, Stepfamilies Rights and Adoption Committee, 1994.
Chairperson, Mediation Study Committee, 1993.
American Bar Association.
Chairman, Associate Judge's Training, 1998, 1999 .
Board of Directors, Texas Academy of Family Law Specialists, 1990-1992, current member.

Carson P. Epes

McCurley, Orsinger, McCurley & Nelson, L.L.P.
5950 Sherry Lane, Suite 800
Dallas, Texas 75225
Telephone: (214) 273-2400
Email: carson@momn.com

LICENSED: State of Texas, 1994

AREAS OF PRACTICE: Family Law

PROFESSIONAL EMPLOYMENT

McCurley, Orsinger, McCurley & Nelson, L.L.P.

5950 Sherry Lane

Suite 800

Dallas, Texas 75225

214/273-2400

Associate, April of 2003 to present

Smith & Moore, L.L.P., Dallas, Texas

Associate, March of 2003 to April 2003

Harrison & Hull, L.L.P., McKinney, Texas

Associate, September 2002 to March of 2003

Jackson Walker, L.L.P., San Antonio, Texas

Associate, April 2000 to July 2002

Duncan, Ulman, Weakley & Bressler, Inc., San Antonio, Texas

Associate, October 1997 to April 2000

Bexar County Criminal District Attorney's Office, San Antonio, Texas

Assistant Criminal District Attorney, December 1994 to October 1997

EDUCATION:

St. Mary's University, School of Law, San Antonio, Texas
J.D., 1994

- Trial Advocacy Competition - Fall 1993
- Mock Trial Competition, Octafinalist — Spring 1992
- Moot Court Competition — Spring 1991
- SBA

Hollins College, Roanoke, Virginia
B.A. Political Science, May 1991, *cum laude*

- Academic Affairs Chair — Student Government Association, 1990-1991
- Omicron Delta Kappa — National Leadership Honor Society
- Pi Sigma Alpha — National Political Science Honor Society
- Hollins Field Hockey Team — player, 1987-1989

PROFESSIONAL ASSOCIATIONS

- American Bar Association
- Federal Bar Association
- State Bar of Texas
- Dallas Bar Association, Family Law and Business Litigation sections
- Dallas Association of Young Lawyers
- Associate, Annette Stewart's American Inns of Court

CLE ARTICLES

“What, You Mean I Have To Go To Trial? - How To Prepare For And Win A Custody Case”,
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by

MARY JOHANNA M^cCURLEY and
CARSON P. EPESM^cCURLEY, ORSINGER, M^cCURLEY & NELSON, L.L.P.**I. INTRODUCTION.**

Generally speaking, one purpose of this article is to provide the practitioner with an overview of marital property agreements in Texas, including a brief history of the evolution of premarital and post-marital agreements, as well as sound drafting tips that will help ensure their enforceability. More importantly, however, this article will focus on how to attack and defend marital property agreements. In this article, post-marital agreements include partition and exchange agreements, as well as agreements between spouses concerning income and property arising from separate property, covered by Tex. Fam. Code §§ 4.101-4.106.

II. HISTORY OF MARITAL PROPERTY AGREEMENTS.

Premarital and post-marital agreements have not always been permissible in Texas. Both spouses and persons intending to marry were prohibited from entering into agreements for the purpose of converting the character of income or community property into separate property. *Williams v. Williams*, 569 S.W. 2d 867, 870 (Tex. 1978.) Such arguments were considered void as against public policy.

However, in 1948 art. XVI, §15 of the Texas Constitution was amended in order to allow spouses to partition community property then in existence. *Winger v. Pianka*, 831 S.W. 2d 853, 854 (Tex. App.—Austin 1992, writ denied.) Nonetheless, this particular amendment failed to afford persons about to marry the right to enter into an agreement that re-characterized property or income acquired during the marriage as separate property. In fact, the Texas Supreme Court held that premarital agreements that were entered into following this amendment were void as against public policy. *Williams* at 870.

It was not until 1980 that art. XVI, § 15 of the Texas Constitution was again amended, granting both spouses and persons about to marry the right to partition or exchange their interests in property then existing, as well

as any property to be acquired in the future. *Winger* at 854.

Moreover, the Texas Supreme Court reviewed the 1980 constitutional amendment and determined that, based on public policy, this amendment not only authorized future premarital agreements, but retroactively validated all premarital agreements entered into prior to 1980 as well, superceding the Court’s ruling in *Williams. Beck v. Beck*, 814 S.W. 2d 745, 749 (Tex. 1991), *cert. denied*, 503 U.S. 907 (1992.)

While the 1980 amendment mandated that persons about to marry could partition or exchange their interests in property to be acquired in the future, it did not make clear whether “salaries” and “personal earnings” constituted “property.” The question as to whether salaries and personal earnings fell within the definition of “property to be acquired” thus predictably became an issue. *Winger* at 855. In this particular case, the Court clarified that persons about to marry had the right to partition or exchange their salaries and earnings that would be acquired by them during marriage. *Id.* at 858, 859.

Initially and following the 1980 constitutional amendment, the burden of proof with regards to enforceability fell on the proponent of a marital agreement, requiring him to prove by clear and convincing evidence “that the party against whom enforcement is sought gave informed consent and that the agreement was not procured by fraud, duress or overreaching.” TEX. FAM. CODE § 5.45 (repealed.) However, this burden later shifted to the party contesting the enforceability of the agreement, when the Texas Legislature adopted the Uniform Premarital Agreement in 1987. Today, sections 4.006 and 4.105 of the Texas Family Code govern the enforceability of marital agreements, and are each more fully addressed below.

In 1993, section 4.006 of the Texas Family Code was amended, limiting the attack of premarital and post-marital agreements to the statutory defenses of voluntariness and unconscionability contained within the Code. However, it has been argued that common law

defenses remain available to those parties who entered into agreements prior to September 1, 1993. *Marsh v. Marsh*, 949 S.W.2d 734, 738 (Tex. App.–Houston [14th Dist.]1997, no writ.)

For a more comprehensive discussion of the history of premarital and post-marital agreements, see Edwin J. (Ted) Terry’s article entitled *Obtaining and Retaining the Benefit of the Bargain: Premarital and Marital Agreements*, 2002 New Frontiers in Marital Property Law.

III. CONSTITUTIONAL AND STATUTORY AUTHORITY FOR PREMARITAL AGREEMENTS.

Article XVI, § 15 of the Texas Constitution states 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.... (Emphasis added.)

In addition, Subchapter A of Chapter 4 of the Texas Family Code outlines the requisites of premarital agreements. In this particular sub-chapter Texas implemented the Uniform Premarital Agreement Act, having adopted the Act along with 25 other states after it was promulgated by the National Conference of Commissioners on Uniform State Laws.

The definition of “Premarital Agreement” is contained within section 4.001 of 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 ANN. § 4.001(1). See also TEX. FAM. CODE ANN. § 4.004 (“[a] premarital agreement becomes effective on marriage.”)

While not expressly set out within the statute or affirmed by case law, it appears that in order for a premarital agreement to be effectuated, a ceremonial marriage must be conducted. Uniform Premarital Agreement Act, §2 cmt., (noting that “[a] marriage is a prerequisite for the effectiveness of a premarital agreement under this act (see Section 4). This requires that there be a ceremonial marriage.”) See *Marshall v. Marshall*, 735 S.W. 2d 587 (Tex. App.–Dallas 1987, writ ref’d n.r.e.) (ruling that a premarital agreement preceding parties’ first marriage was inapplicable upon parties’ remarriage.)

In addition, a premarital agreement must be in writing and signed by both parties. TEX. FAM. CODE ANN. § 4.002. Although premarital agreements are regarded as contracts for all intents and purposes, such agreements are enforceable without consideration. *Id.*

Parties may amend or revoke a premarital agreement; however, in order for this to be accomplished, the parties must confirm the amendment or revocation in writing. TEX. FAM. CODE ANN. § 4.005.

The statutory definition of property otherwise subject to premarital agreements is broad in scope and includes any “interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings.” TEX. FAM. CODE ANN. § 4.001(2). See *Winger v. Pianka*, 831 S.W.2d 853 (Tex. App.–Austin 1992, writ denied) (establishing that prenuptial agreements may partition future earnings of persons about to marry.)

Parties to a premarital agreement can liberally contract with respect to many rights, 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 ANN. § 4.003(a).

Clearly, the Texas Legislature intended that parties have the broadest freedom available in terms of altering their marital property rights as they see fit. However, such freedom is limited such that a parties’ agreement cannot violate public policy, nor can it adversely affect the right of a child to support. TEX. FAM. CODE ANN. § 4.003(b). *See Williams v. Williams*, 569 S.W.2d 867 (holding that a person may waive all homestead rights otherwise created during marriage in a prenuptial agreement); *See also Koch v. Koch*, 27 S.W.3d 93 (Tex. App.–Fort Worth 2002, pet. denied) (parties may include a contractual arbitration clause in prenuptial agreement.)

IV. CONSTITUTIONAL AND STATUTORY AUTHORITY FOR POST-MARITAL AGREEMENTS.

Article XVI, § 15 of the Texas Constitution provides that spouses may enter into marital property agreements, in addition to authorizing agreements for persons about to marry. *See* TEX. CONST. art. XVI, § 15, *supra*.

Additionally, Subchapter B of Chapter 4 of the Texas Family Code sets out the requisites of marital property agreements in Texas. As with premarital agreements, post-marital agreements must be in writing and signed by both parties. TEX. FAM. CODE ANN. § 4.104. In addition, the definition of “property” as it relates to post-marital agreements is identical to that assigned by section 4.001 of the Texas Family Code pertaining to premarital agreements. TEX. FAM. CODE ANN. § 4.101.

Spouses may enter into post-marital agreements in order to “partition or exchange between themselves all or part of their community property, then existing or to be acquired, as the spouses may desire.” TEX. FAM. CODE ANN. § 4.102. Property or a property interest transferred to a spouse by a partition or exchange

agreement becomes that spouse’s separate property. *Id.* Furthermore, section 4.102 was amended by the 78th Texas Legislature effective September 1, 2003, providing that “[t]he partition or exchange of property *includes future earnings and income* arising from the property as the separate property of the owning spouse unless the spouses agree in a record that the future earnings and income will be community property after the partition or exchange.” *Id.* (Emphasis added.) However, it should be noted that this particular provision applies only to post-marital agreements made on or after September 1, 2003. An agreement entered into by spouses prior to the effective date of the Act is governed by the law in effect at the time the agreement was made. TEX. FAM. CODE ANN. § 4.102, cmt.

Spouses may also utilize post-marital agreements in order to effectuate an agreement 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 ANN. § 4.103.

In addition to reducing a post-marital agreement to writing, it appears that at least some jurisdictions require that partition and exchange agreements include an express intent by the parties 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) (ruling that a purported assignment by debtor husband to wife was not enforceable “partition or exchange agreement”, where there was no indication in the written document that there was a joint agreement to partition or exchange any community property interest in the suit, and the assignment lacked the wife’s signature). *See also Collins v. Collins*, 752 S.W. 2d 636, 637 (Tex. App.–Fort Worth 1988, writ ref’d.) (holding that although in writing and signed by the parties, a joint income tax return which lists individual assets as a party’s separate property is not sufficient to create a partition agreement due to lack of express intent.)

V. CONSIDERATIONS IN ATTACKING AND DEFENDING PREMARITAL AND POST-MARITAL AGREEMENTS.

As mentioned above, in 1993 the Texas Legislature amended the Family Code limiting the attack of premarital and marital property agreements to the defenses of voluntariness and unconscionability, overruling prior case law which suggested otherwise. However, for those agreements entered into and executed prior to September 1, 1993, it has been argued that common law defenses may still be available in addition to statutory defenses, since agreements entered into are governed by the law in effect at the time of execution. *See Sampson & Tindall*,

TEX. FAM. CODE ANN. p. 42 (August 1998.) Additionally, it should be noted that these common law defenses may also be available to parties having executed agreements post September 1, 1993 to the extent that they are subsumed into the statutory defenses adopted by the Texas Family Code, as more fully explained below.

A. Statutory Defenses

Section 4.006 of the Texas Family Code governs the enforceability of premarital agreements in Texas, and states that:

(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.

(Emphasis added.)

Moreover, section 4.105 of the Code, providing for the enforcement of partition and exchange agreements, is identical to the provisions set out within § 4.006 regarding premarital agreements:

(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.

While section 4.105 addresses “partition and exchange agreements” as defined by section 4.102 of the Code, it should be noted that the standard for enforceability contained within section 4.105 governs agreements between spouses concerning income or property derived from separate property as well. *See* TX. PATTERN JURY CHARGES, -FAMILY 207.4 (Vol.5 2002); *Daniel v. Daniel*, 779 S.W.2d 110, 113-114 (it seems evident that the legislature intended income arrangements between spouses, which were covered by former Texas Family Code § 5.53 (entitled “Agreements Between Spouses concerning Income from Property Derived”) to be enforced in the same manner as “partition and exchange agreements” covered by former Texas Family Code § 5.52.)

1. Voluntariness

A premarital agreement or marital property 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 ANN. § 4.006(a)(1); TEX. FAM. CODE ANN. § 4.105(a)(1). Whether a party voluntarily signed the 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. 50 (August 2001), the editors state that is “usually very difficult to establish” that a premarital agreement was signed involuntarily. However, the practical realities of the notion of “voluntary,” in the context of marital agreements, may not be as simplistic as the editors’ comment suggests. The panoply of common law defenses, currently excluded from consideration in the enforcement of post-1993 marital agreements, are now arguably subsumed into the defenses of “involuntary” execution and unconscionability. Such a merger can create difficult factual issues, to which difficult propositions of law must be applied.

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

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

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

2. Unconscionability

a. Definition of Unconscionability

The Texas Family Code expressly provides that whether a premarital agreement or marital property agreement was unconscionable at the time it was signed is a matter of law to be decided by the court. TEX. FAM. CODE ANN. §§ 4.006(b), 4.105(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 or marital property cases, Texas courts have turned to commercial law for direction. *Marsh*, 949 S.W.2d at 739-740. See *Pletcher v. Goetz*, 9 S.W.3d 442, 445 (Tex. App. – Fort Worth 1999, pet. denied). In *Marsh*, the Fourteenth Court of Appeals relied upon an opinion from a commercial law case involving a real estate listing agreement, quoting such opinion as follows:

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

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

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

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

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

(1) Proximity of Execution to Wedding

According to the Houston appellate court, the fact that the premarital agreement was signed shortly before the wedding (one day) did not make the agreement unconscionable. *Id.* at 741, citing, *Williams v. Williams*, 720 S.W.2d 246, 248-249 (Tex.App.-Houston [14th Dist.] 1986, no writ) (holding that an agreement signed on the day of marriage was not procured through fraud, duress or overreaching because the wife had substantial business experience and the husband testified they had discussed the agreement’s terms six months before the wedding); see also, *Huff v. Huff*, 554 S.W.2d 841, 843

(Tex.Civ.App.-Waco 1977, writ *dism'd*) (premarital agreement, signed two days before marriage, upheld); *Osorno v. Osorno*, 76 S.W.3d 509, 510-11 (Tex. App. – Houston [14th Dist.] 2002, no pet.) (premarital agreement was signed voluntarily even though the agreement was signed the day before the parties married).

(2) No Legal Representation

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

(3) Unfairness of Agreement

The Houston Court of Appeals also refused to accept the husband’s assertion that the one-sided nature of the agreement strongly preponderated toward a finding of unconscionability. *Id.* Even though a premarital agreement may be disproportionate, the appellate court stated, unfairness is not material to the enforceability of the agreement. *Id.*, *citing*, *Chiles v. Chiles*, 779 S.W.2d 127, 129 (Tex.App.-Houston [14th Dist.] 1989, writ denied). *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.

(4) Failure to Read Agreement

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

Marsh is consistent with Texas law on the issue of the effect of the failure to read an agreement before signing it. Generally, a party who has the opportunity to read an agreement, and then signs it, is presumed to know the contents of the agreement. *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).

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

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

Commercial Code does not impose a duty of good faith upon the formation or procurement of a final release of liability. 8 S.W.3d at 311. Consequently, the Court of Appeal’s discussion of unconscionability remains viable.

(1) Standard of Review

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

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

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

The Amarillo court’s position regarding the appropriate standard of review should be contrasted to that of Houston Fourteenth Court of Appeal’s position in *Marsh*. According to the Houston appellate court, since the issue of unconscionability is a question of law for the trial court, appellate review is in fact *de novo*, without deference to the lower court’s conclusions. *Marsh*, 949 S.W.2d at 739. Further, an appellate court has a duty to **independently** evaluate the trial court’s findings on matters of law. *Id.* (emphasis added), *citing*, *Daniel*, 779 S.W.2d at 114 (although the *Daniel* opinion does not directly address the issue).

(2) The Scope of Unconscionability

According to the Amarillo court, unconscionability, historically perceived as a way of protecting the downtrodden against the overpowering, serves the purpose of negating an advantage gained through oppression and unfair surprise. *El Paso*, 964 S.W.2d at 61. To be unconscionable, stated the Amarillo appellate court, the contract must arise through “procedural” and “substantive” abuse. *Id.*, *citing*, *Tri-Continental Leasing Corp. v. Law Office of Richard W. Burns*, 710 S.W.2d 604, 609 (Tex.App.-Houston [1st Dist.] 1985, writ ref’d n.r.e.); *Wade*, 524 S.W.2d at 85. In a footnote, the Amarillo court then added that existing authority indicated that both procedural and substantive abuse must be present). *Id.* at n. 5. The Amarillo Court of Appeals noted an interrelationship between the indicia used under both procedural and substantive abuse, and agreed that the assessment of unconscionability should be made based upon the totality of the circumstances, but nevertheless maintained that the two-pronged analysis was a way of categorizing the pertinent factors and, to that extent, was useful. *Id.*

(3) Procedural Abuse

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

In *El Paso*, the Amarillo appellate court examined the trial court’s finding that the challenged release was unconscionable. Under the procedural abuse prong, the appellate court noted that the trial court said nothing of

the plaintiff’s business expertise, financial status, and overall knowledge of the oil and gas trade, and did not comment upon the viable alternatives, if any, which were available. *Id.* at 63. Similarly, the trial court did not consider whether the plaintiff was “compelled” to sign the release. *Id.* Consequently, according to the Amarillo Court of Appeals, to the extent that the trial court did not consider such factors, the court failed to assess the totality of the circumstances, and therefore abused its discretion. *Id.*

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

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

The Amarillo appellate court also reviewed the trial court’s findings that termination letters signed by the plaintiff were unconscionable. The Amarillo Court of Appeals found that the trial court again failed to consider the relative bargaining strength of the parties at the time the items were signed, their relative business acumen, knowledge, education, and financial ability, or the presence or absence of viable business alternatives. *Id.* To the extent that all these factors were ignored, the court did not permissibly exercise its discretion. *Id.* The appellate court also noted that there was no evidence that the plaintiffs had ever even read the letters, attempted to

negotiate the terms of the documents, relied upon anything mentioned there as inducement to sign them, or felt compelled in any way to sign them for any particular reason. *Id.*

(4) Substantive Abuse

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

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

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

In *El Paso*, the trial court found substantive abuse because, in order to sell its gas to other buyers, the plaintiff had to release its causes of action against the defendant. Although the Amarillo Court of Appeals conceded that releasing its causes of action might have been “a distasteful option,” the appellate court held, as a matter of law on four grounds, that the release was not an instance of substantive abuse, or an act approaching a violation of public policy: (1) there was nothing “inimical” in releasing claims; (2) in exchange for the release, the plaintiff gained the opportunity to sell its gas

to third-parties without hindrance from the defendant; (3) the plaintiff undoubtedly considered the claims unimportant at the time since it did not even attempt to investigate their potential existence or extent; and (4) the plaintiff had the option to pursue those claims rather than release them. *Id.* at 65. Given the totality of the circumstances which went unmentioned by the trial court, the Amarillo Court of Appeals concluded that the trial court abused its discretion in finding that the plaintiff was the victim of substantive abuse. *Id.*

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

d. The Code v. the Case law

As previously discussed, Texas courts often turn to contract law in an effort to analyze a marital agreement for unconscionability. Commercial and contract decisions concerning unconscionability address the circumstances surrounding the transaction, and discuss whether or not the *entire transaction* was unconscionable, approaches adopted by many courts in examining a premarital agreement. *See, e.g., Wade*, 524 S.W.2d at 86; *Marsh*, 949 S.W.2d at 749.

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

Commercial and contract law sometimes also takes into account the effect of the agreement at the time it is being enforced to determine whether such agreements yield an unconscionable result. *See, e.g., Latham v. Castillo*, 972 S.W.2d 66, 68 (Tex. 1998); *see also*, TEX.BUS.& COM.CODE §17.45(5) (unconscionable action or course of action means an act or practice which, to a person's detriment, *results* in a gross disparity between the value received and consideration paid, in a transaction involving transfer of consideration) (emphasis added); *but cf., El Paso Natural Gas Co.*, 964 S.W.2d at 85 (situation assessed as of the time the agreement is signed, not later via hindsight); *Fanning*, 828 S.W.2d at 145 (“[a]s in *Wade*, we will focus upon the circumstances

at the time the agreement was executed rather than the disproportionate effect of the agreement”).

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

e. The Effect of the “Uniform Premarital Agreement Act”

The “Official Comment to Uniform Premarital Agreement Act,” Section 7, pertaining to enforcement procedures, states that “[i]n order to determine whether the agreement is unconscionable, the court may look to the economic circumstances of the parties *resulting* from the agreement...” (Emphasis added). Sampson & Tindall, TEXAS FAMILY CODE ANNOTATED, p. 41 (August 1998). Thus, according to the Official Comment, financial circumstances that *result* from the agreement are relevant to a determination of unconscionability. Apparently, the language of the Texas statute conflicts with the Official Comment to Section 7 of the Uniform Premarital Agreement Act.

Recall that in *Fanning*, 828 S.W.2d at 145, the Waco Court of Appeals stated that it would focus on the circumstances at the time the agreement was executed rather than any resulting disproportionate effect of the agreement. An issue unresolved in Texas is whether the Official Comment to the Uniform Premarital Act, or *Fanning*, controls the issue of the appropriate temporal context in which to analyze the unconscionability of a marital agreement (if a resulting financial effect is considered a probative evidentiary factor, then certainly the relevant time period is extended beyond that established by the plain language of Texas Family Code). In the opinion of these Authors, since *Fanning* follows the express language of the Texas Family Code on this point, *Fanning* should be considered authoritative.

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

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

Of the factors listed in *Wade*, discussed hereinabove, the first three, *i.e.*, (1) the entire atmosphere in which the agreement was made, (2) the alternatives, if any, which were available to the parties at the time of the making of the contract, and (3) the non-bargaining ability of one

party, arguably all are probative and evidentiary factors only as to whether or not the agreement was signed voluntarily. The remaining two, (1) whether the contract is illegal or against public policy, and (2) whether the contract is oppressive or unreasonable, address the substance of the contract itself, and, arguably, are the factors to which the court can look to determine whether or not the agreement was unconscionable at the time it was signed.

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

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

g. Reconciliation: The Family Code and Commercial Law

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

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

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

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

3. Fair and Reasonable Disclosure

Once the trial court determines that a premarital agreement is unconscionable, the party resisting enforcement must also prove that, before signing the agreement, that party was not provided a fair and reasonable disclosure of the property or financial obligations of the other party. Texas Family Code §4.006(a)(2)(A). In other words, disclosure forms the second prong of the test to rebut the presumption of

enforceability, and a lack of disclosure is material only if the premarital agreement has been determined to be unconscionable. *Marsh*, 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.

4. Waiver of Disclosure

In addition to proving unconscionability, and the lack of “fair and reasonable disclosure,” the party resisting enforcement must also prove that, before signing the agreement, that he or she did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided. 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.

5. Knowledge of Assets and Obligations

Finally, after establishing unconscionability, and the absence of disclosure or waiver of disclosure, the party resisting enforcement must also prove that, before signing the agreement, she or he did not have, or reasonably could not have had, adequate knowledge of the property or financial obligations of the other party. 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”).

B. Common Law Defenses

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

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

... [Duress, overreaching, and undue influence] inquired as to whether David Blonstein’s free will was overcome by threats or other acts of Esther Blonstein. The first question actually submitted to the jury asked “Did David Blonstein voluntarily execute the marital property agreement?” This broad-form question encompassed those three defensive issues. . . . Asking whether David Blonstein acted voluntarily is the same as asking whether he acted by free will.

. . . [Fraud, estoppel, and breach of fiduciary duty] concerned whether Esther Blonstein had

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

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

C. Evidentiary Considerations

1. Evidence and Contracts in General

Generally, in a breach of contract suit, the plaintiff must show the existence of a contract between the parties, duties created by the contract, a breach of the duties, and damages. *See, e.g., TCI Cablevision of Texas, Inc. v. South Texas Cable Television, Inc.*, 791 S.W.2d 269, 271 (Tex.App.-Corpus Christi 1990, writ denied). Such issues, therefore, define the general boundaries of “relevance” for a contract action under TEX.R.EVID. 401.

When construing unambiguous instruments, the court must “...give terms their plain, ordinary, and generally accepted meaning....” *Heritage Resources, Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). The court must also attempt to give effect to all contract provisions so that none will be rendered meaningless. *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 464 (Tex. 1998); *see also, Universal C.I.T. Credit Corp. v. Daniel*, 243 S.W.2d 154, 158 (Tex. 1951). In other words, the courts will give effect to the intention of the parties as it is apparent in an unambiguous writing. *City of Pinehurst v. Spooner Addition Water Co.*, 432 S.W.2d 515, 518 (Tex. 1968); *Dewey v. Dewey*, 745 S.W.2d 514, 517 (Tex.App.-Corpus Christi 1988, no writ) (a premarital agreement should be interpreted according to the true intentions of the parties as expressed in the instrument); *McClary v. Thompson*, 65 S.W.3d 829, 837 (Tex. App. – Fort Worth 2002, pet. denied).

However, if a contract is subject to two or more reasonable interpretations after applying the pertinent rules of construction, the contract is ambiguous, which

creates a fact issue on the parties’ intent. *Columbia Gas Transmission Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996). An ambiguity does not arise simply because both parties urge conflicting interpretations of the contract. *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 134 (Tex. 1994). For an ambiguity to exist, both interpretations must be reasonable. See, *Glover v. National Ins. Underwriters*, 545 S.W.2d 755, 761 (Tex. 1977).

2. Ambiguity and The Parol Evidence Rule

In *Kelley-Coppedge, Inc.*, 980 S.W.2d at 464, the Texas Supreme Court summarized the longstanding guidelines Texas courts are to follow when interpreting contracts (in *Kelley-Coppedge, Inc.*, an insurance contract):

The primary concern of a court in construing a written contract is to ascertain the true intent of the parties as expressed in the instrument. If a written contract is so worded that it can be given a definite or certain legal meaning, then it is not ambiguous. Parol evidence is not admissible for the purpose of creating an ambiguity.

If, however, the language of a...contract is subject to two or more reasonable interpretations, it is ambiguous. Whether a contract is ambiguous is a question 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. Only where a contract is first determined to be ambiguous may the courts consider the parties’ interpretation, and admit extraneous evidence to determine the true meaning of the instrument.

Parol evidence is not admissible to vary the terms of an unambiguous document. *Kennedy v. Kennedy*, 619 S.W.2d 409, 410 (Tex.Civ.App.-Houston [14th Dist.] 1981, no writ). Thus, parol evidence is not admissible to show that the terms of the contract do not agree with the previous understanding of the parties. See, e.g., *Boyett v. Boegner*, 746 S.W.2d 25, 28 (Tex.App.-Houston [1st Dist.] 1988, no writ); see also, *Massey v. Massey*, 807 S.W.2d 391, 405 (Tex.App.-Houston [1st Dist.] 1991), writ denied, 867 S.W.2d 766 (Tex. 1993) (under the parol evidence rule, the trial court correctly excluded testimony that, contrary to the terms of the deeds in question, the transactions were actually intended to be gifts, and were treated as gifts, but were made to look like credit transactions in order to avoid gift taxes, where the

offering party did not plead that the deeds were ambiguous and no evidence of ambiguity was introduced).

When a writing is intended as a completed memorial of a legal transaction, the parol evidence rule excludes other evidence of any prior or contemporaneous expressions of the parties relating to that transaction. *Muhm v. Davis*, 580 S.W.2d 98, 101 (Tex.Civ.App.-Houston [1st Dist.] 1979, writ ref’d n.r.e.). The parol evidence rule is not a rule of evidence, but a rule of substantive law. *Hubacek v. Ennis State Bank*, 159 Tex. 166, 317 S.W.2d 30,31 (1958). Further, the parol evidence rule is particularly applicable where the written contract contains a recital that it contains the entire agreement between the parties or a similarly worded merger provision. *Weinacht v. Phillips Coal Co.*, 673 S.W.2d 677, 679 (Tex.App.-Dallas 1984, no writ).

3. Admissibility of Parol Evidence

Exceptions exist to the general rule against parol evidence, and such exceptions may arise in the context of a premarital agreement. For example, extrinsic evidence is admissible to show fraudulent inducement to enter into a written contract. See, *Tracy v. Annie’s Attic, Inc.*, 840 S.W.2d 527, 532 (Tex.App.-Tyler 1992, writ denied) (the trial court did not err in admitting extrinsic evidence to show misrepresentations and concealment of material facts that induced the signing of a loan agreement).

Equally, evidence of circumstances surrounding the execution of the contract may be considered in the construction of an unambiguous instrument, even though oral statements of the parties’ intentions are inadmissible to vary or contradict the terms of the agreement. See, e.g., *Medical Towers, Ltd. v. St. Luke’s Episcopal Hosp.*, 750 S.W.2d 820, 822 (Tex.App.-Houston [14th Dist.] 1988, writ denied). Such circumstances help to illuminate the contractual language chosen by the parties and enable evaluation of the objects and purposes intended to be accomplished by them in entering into the contract. *Id.*

Fraudulent inducement arguments may well appear in family law cases involving premarital agreements. By offering proof of fraud, accident, or mistake, a spouse may be able to produce extrinsic evidence contradicting express recitals in a premarital agreement. See, e.g., *Henry S. Miller Co. v. Evans*, 452 S.W.2d 426, 431-32 (Tex. 1970) (under the parol evidence rule, a spouse who is a party to a deed transaction may not introduce parol or extrinsic evidence to contradict the express recitals in the deed without first tendering evidence of fraud, accident, or mistake).

4. Evidence Checklist Under Commercial Law Approach

Although the “commercial law” approach taken in *El Paso Natural Gas Co.* dealt explicitly with the issue of “unconscionability,” such an analysis, with its focus on both “procedural abuse” and “substantive abuse,” readily conforms to the Texas Family Code’s statutory “voluntary” or “unconscionable” inquiry. The following general checklist highlights the important evidentiary concerns involved in the *El Paso Natural Gas Co.* approach.

A. Procedural Abuse

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

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

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

(4) was the party resisting enforcement “compelled” to execute the agreement?

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

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

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

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

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

(10) are the circumstances surrounding execution “shocking?”

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

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

B. Substantive Abuse

(1) fairness or oppressiveness of the contract; “bad deal” vs. “unconscionable”

(2) is the agreement “inimical” to public policy?

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

(4) is the agreement shocking?

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

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

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

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

5. Evidence Checklist From Family Law Cases

Any dispute between two otherwise rational people as to the details surrounding their marital agreement may well (and probably will) devolve into a “swearing match.” *See, e.g., Blonstein*, 831 S.W.2d at 473 (a review of the entire record showed, at best, a swearing match). Consequently, the prudent practitioner, whether he or she seeks to enforce or resist the enforcement of a marital agreement, will pay acute attention to the “totality of the circumstances” surrounding the agreement.

A review of Texas cases involving marital agreements reveals a number of evidentiary factors repeatedly raised by the courts. The following checklist is not intended to be exhaustive. Further, such a checklist is not designed to particularize evidence of “voluntariness,” as opposed to evidence of “unconscionability,” since, as argued herein, such issues tend to be overlapped as a practical matter, by both courts

and litigants. Nonetheless, the checklist does highlight typical evidentiary concerns raised in marital agreement cases.

A. Personal Characteristics of the Parties

1. Capacity to Contract

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

2. General Character

See, Fanning, 828 S.W.2d at 146 (the psychologist who testified on the husband’s behalf characterized the husband as manipulative and secretive, and that, given his competitiveness, his manipulative tendencies, and his aggression, the husband “could get very angry and be retaliatory”); *Blonstein*, 831 S.W.2d at 473 (witnesses testified that the deceased husband could not be forced to sign anything).

3. Maturity of the Individuals

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

4. 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).

5. Educational Levels

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

6. 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).

7. Respective Ages

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

8. 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).

9. 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).

10. 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).

11. Experience With Prior Marital Agreement

See, Marsh, 949 S.W.2d at 741 (only the wife had previously executed a premarital agreement).

12. 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).

B. Negotiations Prior to Execution

1. 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).

2. 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).

3. 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).

C. Circumstances Surrounding Execution

1. 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).

2. 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).

3. 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).

4. 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).

5. 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).

6. 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).

7. Proximity of Execution to Wedding

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

8. 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).

9. 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).

D. Actions After Execution

1. 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).

2. Statements After Execution

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

3. 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).

4. 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).

5. 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).

6. 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).

E. 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).

F. 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).

G. 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).

VI. NEGOTIATING AND DRAFTING MARITAL AGREEMENTS.

It has been determined by both the Texas Legislature and the judiciary that premarital agreements are presumptively enforceable, based on public policy considerations. *Marsh v. Marsh*, 949 S.W.2d 734, 739 (Tex. App.–Houston [14th Dist.] 1997, no writ); *Grossman v. Grossman*, 799 S.W.2d 511, 513 (Tex.App.–Corpus Christi 1990, no writ.) Moreover, while it does not appear that there is a Texas case which concludes that post-marital agreements are presumptively enforceable, the enforcement provisions set out in the Family Code are identical for each type of agreement, and thus one could in all likelihood make a sound argument that post-marital agreements are presumptively enforceable as well.

That being said, practitioners should still exercise an extreme amount of caution when drafting and negotiating marital property agreements. Many things must be carefully evaluated when representing either a spouse or person about to marry. A non-exhaustive list of considerations is set out below.

A. **Timing and Drafting of Premarital Agreement in Relation to Marriage.**

Generally speaking, most couples put off dealing with the logistics of a premarital agreement until just a few weeks or even days prior to their wedding. Premarital agreements can be quite complex due to the nature of the parties’ individual estates, as well as the specific property rights they wish to alter or modify in the course of the agreement. As such, the practitioner must give due thought to timing considerations when deciding whether to represent a party contemplating marriage.

Common sense would tell you that you should not agree to representation if you adequately determine that there is insufficient time to negotiate and draft an agreement. The closer in proximity the execution of the agreement is to the wedding ceremony, the greater the likelihood that a spouse will raise claims of duress or undue influence in the event that the parties file for divorce.

On the other hand, it should be noted that Texas courts have held in certain instances that a premarital agreement executed just prior to the wedding is enforceable. *See Williams v. Williams*, 720 S.W.2d 246,

247-249 (Tex.App.–Houston [14th Dist.] 1986, no writ) (agreement signed on the day of the wedding enforceable, because wife had substantial business experience and the husband testified they had discussed the terms of the agreement six months prior to the wedding); *See also Huff v. Huff*, 554 S.W.2d 841, 843 (Tex.Civ.App.–Waco 1997, writ dismissed) (premarital agreement signed two days prior to wedding enforceable); *Osborne v. Osborne*, 76 S.W.3d 509, 510-511 (Tex.App.–Houston [14th Dist.] 2002, no pet.) (premarital agreement signed one day prior to wedding upheld.)

B. Independent Counsel

Another practice that attorneys should always follow is that both parties must be represented by independent counsel when negotiating, drafting, and executing a premarital agreement. While the court held in *Marsh v. Marsh* that the prenuptial agreement was enforceable although the husband was not represented by independent counsel, the better practice is to insist upon separate counsel to further ward off claims of involuntariness in the event of a divorce. *Marsh*, 949 S.W.2d 734 at 741-743 (fact that husband not represented by counsel in execution of premarital agreement not dispositive in and of itself in terms of enforceability of agreement.)

C. Full and Complete Financial Disclosure

According to sections 4.006(a) and 4.105(a) of the Texas Family Code, the party seeking to uphold a premarital or post-marital agreement must have given a “fair and reasonable disclosure of the property or financial obligations” of that party. TEX. FAM. CODE ANN. §§ 4.006(a), 4.105(a). Therefore, a prudent practitioner would be wise in obtaining a full and complete disclosure of all assets and liabilities of the parties, especially if he or she represents the party with the larger estate.

While a party may voluntarily and expressly waive in writing any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided, such waiver must be signed before execution of the marital agreement. If your client does decide to execute such a waiver, take care to note the date and time that the waiver signed, as well as the marital agreement itself, in order to avoid any claim later that the waiver was untimely executed.

D. Videotape

Another thing to take into consideration when scheduling an execution of a marital agreement is whether or not to have your client videotaped when he or she signs the actual documents. The use of a video will help insure that the agreement is enforceable in that it may provide

well documented evidence that the parties were not signing involuntarily or under duress in the event that a claim against enforceability should later arise.

VII. CONCLUSION

As illustrated herein, a review of the majority of Texas cases on premarital and marital property agreements establishes a trend towards enforcing the promises made between parties in recognition of the freedom to contract and do with their property what they want.

However, while premarital and post-marital agreements are presumptively enforceable, they are not fail-safe and thus strict attention must be paid to the drafting and negotiations of such agreements in order to effectuate the desires and needs of our clients. It is imperative that we as counselors advise our clients of all of the various rights and options available when entering into a premarital or marital property agreement. In addition, it is important to educate and familiarize ourselves with the various ways to attack, set aside, or enforce the provisions of these agreements in order to protect the interests of our clients.