

**DRAFTING IRON-CLAD PREMARITAL AND
POSTMARITAL AGREEMENTS IN TEXAS**

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DRAFTING IRON-CLAD PREMARITAL AND POSTMARITAL AGREEMENTS IN TEXAS

I. INTRODUCTION

"Iron-clad" is an aspiration, not a statutory category. Texas law strongly favors the enforcement of premarital and marital property agreements, but every agreement remains exposed, at the moment of divorce or death, to a statutory attack by the spouse who no longer likes the deal.

The drafter's job is narrow and concrete. The Family Code gives the challenger two defenses and only two. Tex. Fam. Code §§ 4.006(c), 4.105(c). An iron-clad agreement is one built so that the challenger cannot raise a genuine fact issue on either of them, and so that the agreement's own terms leave nothing to litigate once it is enforced.

That second point is underappreciated. Many agreements survive the enforceability fight and then generate years of litigation over what they mean: competing experts on value, disputes over formulas, and arguments over words like "payable" and "their." The best agreement wins the enforcement hearing and then applies itself.

This article proceeds in three parts. Parts II through VI set out the constitutional and statutory framework, the enforcement standards, and the recent appellate decisions. Parts VII through XII turn to practice: the three-document system the author uses (a written waiver of disclosure, the premarital agreement, and a postmarital agreement signed after the wedding), the execution record, the substantive drafting choices that eliminate post-enforcement litigation, the provisions that protect separate property while the divorce is pending, and the dispute-resolution provisions that decide who hears the challenge. Part XIV collects the lessons into two checklists: what makes an agreement more iron-clad, and what makes it less.

A caution at the outset. If one spouse truly committed fraud, or if the agreement truly was signed involuntarily, almost nothing in the paperwork will save it. Drafting cannot cure a bad process. What drafting and process together can do is make sure that an agreement signed freely, with real disclosure, is enforced as written.

II. THE CONSTITUTIONAL AND STATUTORY FRAMEWORK

A. Article XVI, Section 15 of the Texas Constitution

Spousal property agreements in Texas are creatures of the Texas Constitution. Article XVI, § 15 defines separate property as property owned or claimed before marriage and property acquired afterward by gift, devise, or descent. Everything else acquired during marriage is, by implication, community property. *Arnold v. Leonard*, 114 Tex. 535, 273 S.W. 799, 802 (1925).

Section 15 then authorizes several departures from that default. As Richard Orsinger catalogs them, the Constitution allows:

- persons about to marry, and spouses, to partition or exchange community property, then existing or to be acquired, so that it becomes separate property;
- spouses to agree in writing that the income or property from separate property shall be the separate property of the owner;
- a gift between spouses to carry with it the income from the gifted property;
- spouses to agree that community property passes to the survivor at death; and
- spouses to agree that separate property becomes community property.

Tex. Const. art. XVI, § 15; Richard R. Orsinger, *Drafting Pre- and Postmarital Agreements to Be Recognized in and Outside of Texas*, State Bar of Texas Advanced Family Law Drafting Course, ch. 3, § IV.A (2025).

Notice who holds each power. The partition-or-exchange power belongs to "persons about to marry and spouses." The power to agree that income from separate property is separate belongs to "spouses" alone. Tex. Const. art. XVI, § 15. That single word drives one of the most important drafting decisions in this article, discussed in Part VII.C.

B. Chapter 4 of the Family Code

The Legislature implemented § 15 in Chapter 4 of the Family Code, in three subchapters:

- **Subchapter A** (§§ 4.001–4.010): the Texas Uniform Premarital Agreement Act.
- **Subchapter B** (§§ 4.101–4.106): partition and exchange agreements during marriage, and agreements that income or property from separate property will be separate.
- **Subchapter C** (§§ 4.201–4.206): agreements converting separate property into community property.

Every provision a drafter writes should be traceable to one of these powers. Grady Reiff puts the point well: the drafter "should be able to identify, for each clause," whether it operates as a premarital-agreement term, a partition or exchange, an income-from-separate-property agreement, or a conversion. Grady Reiff, *Drafting Unique Marital Agreements*, State Bar of Texas 52nd Annual Advanced Family Law Course, ch. 64, § III.F (2026).

C. Related Statutes the Drafter Must Know

Several statutes outside Chapter 4 shape what an agreement can accomplish:

- **Section 3.410** provides that a premarital or marital property agreement may waive, release, assign, or partition reimbursement claims. As discussed below, courts now require the waiver to be express. Tex. Fam. Code § 3.410; *McCartney v. McCartney*, 720 S.W.3d 789 (Tex. App.—Houston [14th Dist.] 2025).

- **Section 6.6015** requires the trial court, not the arbitrator, to decide whether a contract containing an arbitration clause is valid and enforceable when a party challenges it. Tex. Fam. Code § 6.6015(a).
- **Section 6.703** gives either party in a divorce the right to demand a jury. Tex. Fam. Code § 6.703.
- **Chapter 112 of the Estates Code** governs community property survivorship agreements. Tex. Est. Code §§ 112.051–.052.
- **ERISA**, 29 U.S.C. § 1055, controls spousal survivor rights in qualified retirement plans and allows only a "spouse" to waive them.

III. PREMARITAL AGREEMENTS

A. Definition and Effective Date

A premarital agreement is "an agreement between prospective spouses made in contemplation of marriage and to be effective on marriage." Tex. Fam. Code § 4.001(1). It "becomes effective on marriage." *Id.* § 4.004. If the marriage never occurs, the agreement never takes effect.

"Property" is defined broadly to mean "an interest, present or future, legal or equitable, vested or contingent, in real or personal property, including income and earnings." *Id.* § 4.001(2).

B. Formalities

The formal requirements are minimal. A premarital agreement "must be in writing and signed by both parties," and it "is enforceable without consideration." Tex. Fam. Code § 4.002.

Nothing in the statute requires notarization, acknowledgment, witnesses, or independent counsel. "[T]he advice of counsel is not a prerequisite to the validity of a premarital agreement." *In re Marriage of Sauls & Worley*, 648 S.W.3d 359, 363–64 (Tex. App.—Texarkana 2021, no pet.).

That the statute does not require these things does not mean the drafter should skip them. Counsel, notarization, and timing are the raw material of the enforcement record, as Part VIII explains.

C. Permissible Content

Section 4.003(a) lists the subjects on which prospective spouses may contract. They include the parties' rights in property "whenever and wherever acquired or located"; management and control of property; the disposition of property on separation, dissolution, death, or "the occurrence or nonoccurrence of any other event"; the modification or elimination of spousal support; the making of a will, trust, "or other arrangement to carry out the provisions of the agreement"; life insurance death benefits; choice of law governing construction; and "any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty." Tex. Fam. Code § 4.003(a).

Two of these deserve emphasis for the system described in this article. Subsection (a)(5) supports a covenant in the premarital agreement obligating the parties to sign a postmarital agreement after the wedding. Subsection (a)(8) is the source of authority for fiduciary-duty waivers, no-contest clauses, jury waivers, and similar protective provisions.

D. The Child-Support Limit

"The right of a child to support may not be adversely affected by a premarital agreement." Tex. Fam. Code § 4.003(b). This limit cannot be drafted around, and no provision should try.

E. Amendment, Revocation, Limitations, and Void Marriages

After marriage, a premarital agreement may be amended or revoked "only by a written agreement signed by the parties," which is enforceable without consideration. Tex. Fam. Code § 4.005.

Limitations on a claim for relief under a premarital agreement are tolled during the marriage, but laches and estoppel remain available. *Id.* § 4.008.

If the marriage is void, the agreement is enforceable only "to the extent necessary to avoid an inequitable result." *Id.* § 4.007.

IV. MARITAL PROPERTY AGREEMENTS

Postmarital agreements are not one instrument. Chapter 4 recognizes several, with different formalities and different enforcement tests.

A. Partition or Exchange of Community Property

"At any time, the spouses may partition or exchange between themselves all or part of their community property, then existing or to be acquired." Tex. Fam. Code § 4.102. Property transferred by the partition becomes the recipient's separate property, and the agreement "may also provide that future earnings and income arising from the transferred property shall be the separate property of the owning spouse." *Id.*

A partition must be bilateral. A one-sided transfer of all community property to one spouse is a forfeiture, not a partition. *Byrnes v. Byrnes*, 19 S.W.3d 556, 559 (Tex. App.—Fort Worth 2000, no pet.); *McBride v. McBride*, 797 S.W.2d 689, 692 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (clause forfeiting wife's community interest if she filed for divorce was "a forfeiture rather than a partition").

B. Income from Separate Property

"At any time, the spouses may agree that the income or property arising from the separate property that is then owned by one of them, or that may thereafter be acquired, shall be the separate property of the owner." Tex. Fam. Code § 4.103.

Absent such an agreement, income from separate property (interest, dividends, rents) is community property. For a client whose separate estate produces substantial income, this is often the single most valuable term in the deal.

C. Formalities

A partition or exchange agreement, or a § 4.103 agreement, "must be in writing and signed by both parties" and "is enforceable without consideration." Tex. Fam. Code § 4.104.

D. Conversion of Separate Property to Community Property

Spouses may agree that separate property is converted to community property. Tex. Fam. Code § 4.202. Conversion agreements carry heightened formalities. The writing must be signed by the spouses, "identify the property being converted," and "specify that the property is being converted to the spouses' community property." *Id.* § 4.203(a). "The mere transfer of a spouse's separate property to the name of the other spouse or to the name of both spouses is not sufficient." *Id.* § 4.203(b).

Courts enforce these requirements strictly. In *In re Estate of Cunningham*, 390 S.W.3d 685 (Tex. App.—Dallas 2012, no pet.), a fill-in-the-blank form failed as a conversion agreement. Compare *Bouajram v. Bouajram*, No. 02-22-00001-CV, 2023 WL 8820214 (Tex. App.—Fort Worth 2023, no pet.) (mem. op.) (mediated settlement agreement that superseded a prior partition satisfied conversion requirements on its facts, though it never used the word "convert").

Conversion agreements also have their own enforcement test, discussed in Part V.F, and their own creditor and recording rules. Tex. Fam. Code §§ 4.205, 4.206.

V. ENFORCEABILITY: THE TWO STATUTORY DEFENSES

A. The Parallel Standard

Sections 4.006 (premarital agreements) and 4.105 (partition or exchange agreements) are drafted in parallel. Each provides that the agreement "is not enforceable if the party against whom enforcement is requested proves that":

- (1) "the party did not sign the agreement voluntarily"; or
- (2) "the agreement was unconscionable when it was signed and, before signing the agreement, that party: (A) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party; (B) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and (C) did not have, or reasonably could not have had, adequate knowledge of

the property or financial obligations of the other party."

Tex. Fam. Code §§ 4.006(a), 4.105(a).

These defenses are exclusive: "The remedies and defenses in this section are the exclusive remedies or defenses, including common law remedies or defenses." *Id.* §§ 4.006(c), 4.105(c).

The Texas Supreme Court has refused to add to them. In *In re Marriage of I.C. & Q.C.*, the Court rejected a proposed "just-cause or good faith exception," explaining that recognizing it "would both judicially expand section 4.006 and run afoul of our longstanding preference to protect the freedom of contract by enforcing contracts as written." 551 S.W.3d 119, 124 (Tex. 2018). "We rarely find a contract unenforceable on public policy grounds. Premarital agreements are no exception." *Id.*

B. The Burden and the Presumption of Validity

The agreement is presumptively enforceable, and the party resisting enforcement bears the burden of proving a statutory defense. *Marsh v. Marsh*, 949 S.W.2d 734, 739 (Tex. App.—Houston [14th Dist.] 1997, no writ); *Pletcher v. Goetz*, 9 S.W.3d 442, 445–46 (Tex. App.—Fort Worth 1999, pet. denied).

This allocation was a deliberate legislative choice. Before 1987, the party seeking enforcement had to prove informed consent by clear and convincing evidence. Dissatisfaction with that burden led the Legislature to adopt the Uniform Act and shift the burden to the challenger. *Sheshunoff v. Sheshunoff*, 172 S.W.3d 686, 694 (Tex. App.—Austin 2005, pet. denied).

C. Involuntary Execution

1. The Meaning of "Voluntarily"

The Code does not define "voluntarily." Courts give it its ordinary meaning: action taken intentionally, as the product of free will. *Sheshunoff*, 172 S.W.3d at 695–97; *Martin v. Martin*, 287 S.W.3d 260, 263 (Tex. App.—Dallas 2009, pet. denied).

Fraud, duress, and undue influence are not freestanding defenses, but evidence of them may prove involuntariness. The challenger "does not have to prove each element of these common-law defenses to establish the ultimate issue of involuntary execution." *Sheshunoff*, 172 S.W.3d at 697.

Whether a party signed voluntarily is ordinarily a fact question "dependent upon all the circumstances and the mental effect on the party claiming involuntary execution." *Martin*, 287 S.W.3d at 263.

2. The Moore Factors

In *Moore v. Moore*, the Dallas Court of Appeals identified four considerations: "(1) whether a party has had the advice of counsel, (2) misrepresentations made in procuring the agreement, (3) the amount of information provided and (4) whether information has been withheld."

383 S.W.3d 190, 195 (Tex. App.—Dallas 2012, pet. denied). The court also held that the challenger need not prove "an express direct threat or coercion." *Id.* at 195–96.

The facts of *Moore* are a catalog of what not to do. Four to five hours before a destination wedding, the husband produced a "completely new clean copy" of the agreement with "nothing to show what changes had been made." The schedules of his assets "did not contain values." He also presented a waiver of disclosure. The wife could not reach her lawyer. The husband called his own lawyer and told the wife her lawyer had approved the document. Her lawyer had never seen the final draft. *Id.* at 194. The court affirmed the trial court's refusal to enforce the agreement. *Id.* at 197. (The author was one of trial counsel for Mrs. Moore.)

Moore also holds that recitals cannot bootstrap voluntariness: the husband "cannot preclude [the wife] from making this showing by including recitations in the very agreement that she alleges was not voluntarily signed." *Id.* at 197. Recitals help, as Part VIII.E explains, but they are not a substitute for a clean process.

3. Pressure That Is Not Duress

Not every hard choice is involuntary. "[F]or duress to be a contract defense, it must consist of a threat to do something the threatening party has no legal right to do." *Osorno v. Osorno*, 76 S.W.3d 509, 511 (Tex. App.—Houston [14th Dist.] 2002, no pet.). In *Osorno*, the wife was "forty, unmarried, and pregnant," but the husband "had no legal duty to marry" her, and the agreement stood. *Id.* See also *Matelski v. Matelski*, 840 S.W.2d 124, 128–29 (Tex. App.—Fort Worth 1992, no writ).

The Texas Supreme Court upheld the waivers in an agreement signed four days before the wedding. *Williams v. Williams*, 569 S.W.2d 867 (Tex. 1978).

Even an ultimatum ("I am not going on our honeymoon until you sign something") did not establish involuntariness where the agreement had long been contemplated. The court could not say that the husband's "proposed bargain to finalize the terms of the long-contemplated agreement before leaving on a honeymoon exerted such undue influence as to deprive [the wife] of her free will." *Nesmith v. Berger*, 64 S.W.3d 110, 114–15 (Tex. App.—Austin 2001, pet. denied). The agreement survived, but only after an appeal.

The drafter should not plan to win these cases. The goal is never to have them.

D. Unconscionability

1. A Question of Law for the Court

"An issue of unconscionability of a premarital agreement shall be decided by the court as a matter of law." Tex. Fam. Code § 4.006(b); see *id.* § 4.105(b). The court looks to "the entire atmosphere in which the agreement was made," including the parties' alternatives, their relative bargaining ability, and whether the contract is oppressive. *Stankewich v. Stankewich*, No. 09-23-00156-CV, 2025 WL

1523266 (Tex. App.—Beaumont May 29, 2025, no pet.) (mem. op.) (quoting *Marsh*); see *Pletcher*, 9 S.W.3d at 446 (court considers "all of the circumstances").

2. Unfair Is Not Unconscionable

A finding that an agreement is unfair "does not satisfy the burden of proof required to establish unconscionability." *Marsh*, 949 S.W.2d at 741–42; *Chiles v. Chiles*, 779 S.W.2d 127, 129 (Tex. App.—Houston [14th Dist.] 1989, writ denied). The Fort Worth court recently reaffirmed that "unfairness is not material to the enforceability of the agreement," and rejected a wife's argument that she had not read it. *McDonald v. McDonald*, No. 02-22-00446-CV, 2023 WL 3878990 (Tex. App.—Fort Worth June 8, 2023, no pet.) (mem. op.).

3. Measured at Signing

Unconscionability is judged as of the date of signing, not with hindsight. *In re Marriage of Smith*, 115 S.W.3d 126 (Tex. App.—Texarkana 2003, pet. denied). In *Choudhury*, evidence of asset values four years after signing could not prove one-sidedness at signing. *Choudhury v. Choudhury*, No. 14-23-00825-CV, 2025 WL 2399148 (Tex. App.—Houston [14th Dist.] Aug. 19, 2025) (mem. op.).

The drafting lesson is to make the execution-date record of values part of the agreement itself, through dated schedules.

E. The Disclosure Elements

1. Conjunctive Elements, Reached Only After Unconscionability

The disclosure prong is conjunctive. The challenger must prove unconscionability plus all three disclosure failures: no fair and reasonable disclosure, no written waiver, and no actual or constructive knowledge. Tex. Fam. Code § 4.006(a)(2).

Because disclosure is part of the unconscionability defense, "lack of disclosure is material only if the premarital agreement is unconscionable." *Marsh*, 949 S.W.2d at 743. A court that finds the agreement not unconscionable never reaches disclosure. *Id.*; *Choudhury*, 2025 WL 2399148.

2. Potyondy: Unconscionable Is Not Enough

In *In re Marriage of Potyondy*, the trial court declared a premarital agreement "unconscionable and therefore void." The Dallas court reversed, holding that the trial court "erred by ignoring the plain language of section 4.006(a)(2)." No. 05-24-00312-CV, 2026 WL 1214429 (Tex. App.—Dallas May 4, 2026) (mem. op.).

The agreement there was signed two days before the wedding. The wife's own signed recitals, a "No Oral Representations" recital and a "Disclosure" recital acknowledging that she had or reasonably could have had full knowledge of the husband's property, "directly address[ed] and negate[d]" the third disclosure element. *Id.* The opinion is a memorandum opinion that withdrew and superseded an earlier April 28, 2026 opinion.

3. The Written Waiver Must Come First

Element (B) is the one practitioners most often overlook. The statute asks whether, "before signing the agreement," the party "voluntarily and expressly waive[d], in writing," further disclosure. Tex. Fam. Code § 4.006(a)(2)(B). As Orsinger observes, a waiver must be "in writing and signed before the premarital agreement is signed," and "[a] waiver of disclosure contained in the premarital agreement does not preclude an unconscionability defense." Orsinger, *supra*, § VII.H.4.

This is why the author uses a separate waiver document, signed, dated, and timed before the premarital agreement. See Part VII.A.

F. The Different Test for Conversion Agreements

A conversion agreement is unenforceable if the spouse proves that he or she did not "(1) execute the agreement voluntarily; or (2) receive a fair and reasonable disclosure of the legal effect of converting the property to community property." Tex. Fam. Code § 4.205(a).

Two differences matter. First, inadequate disclosure is a stand-alone defense; no unconscionability finding is required. Second, the disclosure required is of the *legal effect* of conversion, not of the other spouse's finances.

An agreement that prominently displays the statutory warning, in bold, capitals, or underlining, is rebuttably presumed to provide that disclosure. *Id.* § 4.205(b). Use the statutory language verbatim.

G. Postmarital Agreements and the Fiduciary Overlay

Spouses stand in a confidential relationship. For that reason, postmarital agreements are thought to be more susceptible than premarital agreements to involuntariness and unconscionability challenges. *Izzo v. Izzo*, No. 03-09-00395-CV, 2010 WL 1930179 (Tex. App.—Austin May 14, 2010, pet. denied) (mem. op.); *Loyd v. Loyd*, No. 02-24-00284-CV, 2025 WL 2087932 (Tex. App.—Fort Worth July 24, 2025, pet. denied) (mem. op.).

That susceptibility has limits. In *Choudhury*, the Fourteenth Court held that the general spousal fiduciary duty, "standing alone, is insufficient to raise a fact issue on involuntary execution of a marital property agreement," because the Legislature enacted § 4.105 knowing that spouses owe each other that duty. 2025 WL 2399148. *Izzo* was different because the husband was also his wife's lawyer and investment advisor. *Id.*

H. A Statutory Gap: Section 4.103 Agreements

By its terms, § 4.105 applies to "a partition or exchange agreement." It does not mention agreements under § 4.103 that income from separate property will be separate. Orsinger, *supra*, § IV.B.3; Reiff, *supra*, § VI.C.

If § 4.105 does not govern a pure § 4.103 agreement, a challenger may argue that common-law defenses survive. The practical answer is to draft the postmarital agreement as

both: a bilateral partition and exchange of each spouse's community interest in future income, and a § 4.103 agreement. Part VII.C returns to this.

VI. RECENT DEVELOPMENTS (2023–2026)

A. Hutcherson: A Valid Agreement Displaces "Just and Right"

In *Hutcherson v. Hutcherson*, the premarital agreement provided for an equal division of the community estate. The trial court upheld the agreement but then entered a \$900,000 judgment against the husband as part of a "just and right" division. The Austin court reversed. 731 S.W.3d 946, 961–63 (Tex. App.—Austin 2026, no pet.).

Treating the question as one of first impression for that court, the court held that when a valid agreement dictates the division of the community estate, the trial court lacks authority to override it through § 7.001. *Id.* The court also reaffirmed that premarital agreements are "narrowly construed in favor of the community estate." *Id.* at 957–58.

B. McCartney: Reimbursement Waivers Must Be Express

In *McCartney*, a marital property agreement allocated two properties to the wife as her separate property and made her responsible for the debt. The husband kept paying the mortgages. Because the agreement did not expressly waive reimbursement, the trial court could award the community estate roughly \$220,000 in reimbursement against the wife's separate estate. 720 S.W.3d 789 (Tex. App.—Houston [14th Dist.] 2025).

McCartney also held that a contractual promise to pay \$5,000 per month for 120 months was contractual alimony, not Chapter 8 maintenance, because the agreement did not invoke Chapter 8. The trial court could not add termination events (death, remarriage, cohabitation) the parties had not written. *Id.* at 804–05.

C. Loyd: Complexity Breeds Litigation

Loyd is the best recent illustration of why the author drafts simple, fixed-dollar provisions. The agreement provided that no community estate would exist. But it then gave the wife, on divorce, one-half of the cash in the husband's oil and gas company "net of all liabilities," including intercompany loans, plus one-half of the "depreciated cash value of undeveloped oil and gas leases." It also required the husband's salary from the company to be deposited into a joint account. 2025 WL 2087932.

Each of those formulas became a lawsuit. The parties litigated whether limitations-barred intercompany loans counted as "liabilities," whether "salaries payable" meant all of the company's net income, and whether the husband breached a fiduciary duty by redirecting company funds. The wife recovered roughly \$320,000 in damages. *Id.*

Loyd also held that spouses owe each other a fiduciary duty of good faith and fair dealing even when a premarital

agreement creates no community estate. *Id.* That holding is the reason to include an express fiduciary-duty waiver. See Part IX.H.

D. Choudhury and Stankewich: Process Decides the Case

Choudhury and *Stankewich* are a matched pair.

In *Choudhury*, the Fourteenth Court reversed and rendered that a postmarital partition was enforceable despite the wife's claim that the husband threatened her immigration status. She had her own lawyer, negotiated the monthly payment upward, chose the bank near her work as the signing location, initialed every term, and signed before a notary. Reporting suspected immigration fraud was a legal right, so the threat could not be duress, and her lawyer gave her a "means of protection." 2025 WL 2399148.

In *Stankewich*, the Beaumont court affirmed the invalidation of a postmarital agreement. The drafting spouse tricked the other into going to the lawyer's office, controlled the finances, threatened eviction, intercepted his mail, and had previously threatened his life. He was disabled, medicated, and the couple's only source of income. The agreement required payments exceeding his entire monthly income. 2025 WL 1523266.

E. Potyondy: Recitals That Work

Potyondy, discussed in Part V.E.2, shows that well-drafted disclosure and no-oral-representation recitals can defeat the third disclosure element as a matter of law, even where the agreement was signed two days before the wedding. 2026 WL 1214429.

F. Banigan: The Declaratory Judgment Shortcut Fails

Some practitioners have tried to "bulletproof" an agreement by filing an agreed declaratory judgment action shortly after the wedding. In *In re Banigan*, the Dallas court held that an agreed declaratory judgment validating the spouses' postnuptial partition agreement was void for lack of subject-matter jurisdiction, because there was no justiciable controversy when the parties sought it. 660 S.W.3d 307, 312–15 (Tex. App.—Dallas 2023, orig. proceeding). (The author was one of the lawyers in *Banigan*.)

A practitioner may still choose to file one where a genuine dispute about the agreement exists. But where the parties agree, there is no controversy, the judgment is void, and the exercise adds nothing.

VII. THE THREE-DOCUMENT SYSTEM

The author's practice uses three instruments, signed at three different moments: (1) a written waiver of disclosure, signed first; (2) the premarital agreement; and (3) a postmarital agreement, signed after the wedding, whose final form is attached to the premarital agreement as an exhibit.

Each document does what the others cannot. Together, they force a challenger to set aside multiple instruments

signed at different times, under different circumstances, and before different audiences.

A. Document One: The Written Waiver of Disclosure

1. Why a Separate Document

Section 4.006(a)(2)(B) asks whether the challenger, "before signing the agreement," waived further disclosure in writing. A waiver buried inside the premarital agreement is signed at the same instant as the agreement. A challenger will argue that it was not signed "before," and that argument has support. Orsinger, *supra*, § VII.H.4.

A separate waiver removes the argument. If it is signed, dated, and timed before the premarital agreement, element (B) is satisfied as a matter of record. That, in turn, defeats the unconscionability defense outright, because the challenger must prove all three disclosure elements. Tex. Fam. Code § 4.006(a)(2).

2. Date and Time Both

Record the time, not just the date. If both documents are signed the same day, a date alone does not prove which came first. A time entry on the waiver, followed by a later time on the premarital agreement, answers the question.

The author's forms build the time into each notary acknowledgment ("acknowledged before me at ____ .M. on ____"). The waiver recites that the parties signed it "before the execution of the premarital agreement," and the premarital agreement recites in turn that it "is signed after the execution of the Waiver of Disclosure of Financial Information." Each document confirms the sequence.

3. What the Waiver Should Say

The waiver should do more than waive. It should document the disclosure actually made. Orsinger recommends listing the items provided, "such as a financial statement and the last three years of personal tax returns." Orsinger, *supra*, § VII.H.3. The statute speaks of waiving disclosure "beyond the disclosure provided," which implies that some disclosure preceded the waiver. *Id.*

The author's form is short and bilateral. Each party signs a paragraph like this one, and each party's signature is separately acknowledged, with the time:

Waiver of Disclosure by [Party A]. I, [Party A], acknowledge receiving a copy of the proposed premarital agreement. I have read it and fully understand it. I have been provided a fair and reasonable disclosure of the property and financial obligations of [Party B]. I voluntarily waive any further disclosures of the property, including its value, and the financial obligations of [Party B] beyond the disclosures provided in the proposed premarital agreement. I acknowledge that I have been offered an opportunity to further investigate the property, including its value, and the financial obligations of [Party B]. However, I waive the opportunity for further investigation.

Two features matter. The waiver ties the disclosure to the proposed agreement and its schedules, which the party has already received and read. And it records that the party was offered, and declined, further investigation, which speaks directly to the knowledge element. Where additional documents were exchanged (tax returns, statements, a financial statement), list them as well.

4. Timing Matters to Voluntariness, Too

In *Moore*, the waiver of disclosure was one of the documents produced hours before the wedding. 383 S.W.3d at 194. A waiver signed in that setting proves little. Deliver the waiver with the early drafts so the other side has it for weeks, not hours.

B. Document Two: The Premarital Agreement

The premarital agreement does the heavy lifting: characterization, waivers, death provisions, payments on divorce, and dispute resolution. Parts IX and X address its content.

Two features specific to the three-document system belong in it:

- a partition-and-exchange framing of future income and earnings (Part VII.C.4); and
- a covenant to sign the attached postmarital agreement after the wedding (Part VII.D).

C. Document Three: The Postmarital Agreement

The author recommends a postmarital agreement in every case with a premarital agreement, for three reasons.

1. Reason One: Income from Separate Property

The constitutional power to agree that income from separate property is separate belongs to "spouses." Tex. Const. art. XVI, § 15; Tex. Fam. Code § 4.103. The partition-or-exchange power in the same section belongs to "persons about to marry and spouses." Tex. Const. art. XVI, § 15. That textual asymmetry is the source of the argument that a premarital agreement cannot make income from separate property separate. See 38 Tex. Prac., *Marital Property and Homesteads* § 11.3 (2025).

The courts of appeals have answered the argument. Prospective spouses may reach the same result through the partition-or-exchange power, by a bilateral exchange of their community interests in future income. The definition of "property" in a premarital agreement includes "income and earnings," Tex. Fam. Code § 4.001(2), and the parties may contract about property "whenever and wherever acquired." *Id.* § 4.003(a)(1).

2. The Cases Upholding Premarital Income Provisions

Dokmanovic v. Schwarz is the leading case. The Fourteenth Court acknowledged that only spouses may directly invoke the income provision, but upheld a premarital agreement making each party's separate-property income and earnings separate as an exchange of income to be

acquired during the marriage. 880 S.W.2d 272 (Tex. App.—Houston [14th Dist.] 1994, no writ).

Jurek v. Couch-Jurek applied the same framework. The agreement stated the parties' desire to "partition between themselves all of their property now existing or to be acquired as well as the income therefrom," and the court held that language a constitutionally permissible bilateral partition. 296 S.W.3d 864 (Tex. App.—El Paso 2009, no pet.).

The El Paso court later stated the rule directly: "[p]arties to a premarital agreement may partition or exchange the income from their respective separate properties into the separate property of the owner spouse," and "it is the public policy of the state of Texas to enforce" such agreements. *Fraccionadora y Urbanizadora de Juarez, S.A. de C.V. v. Delgado*, 632 S.W.3d 80 (Tex. App.—El Paso 2020, no pet.).

Other courts agree:

- *Winger v. Pianka*, 831 S.W.2d 853 (Tex. App.—Austin 1992, writ denied) (waiver of community rights and reservation of listed property "including any and all income" upheld as a partition or exchange);
- *In re Knott*, 118 S.W.3d 899 (Tex. App.—Texarkana 2003, no pet.) (premarital characterization of separate-property income was constitutionally permitted; that income was excluded from net resources for child support);
- *Fischer-Stoker v. Stoker*, 174 S.W.3d 272 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (all income or property arising from separate property, "whether from personal effort or otherwise," remained separate); and
- *Williams v. Williams*, 246 S.W.3d 207 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (revenues and income from each party's separate property were separate).

Recent decisions enforce premarital agreements providing that no community estate will arise at all, without suggesting the provision is illegal or against public policy. See *Loyd*, 2025 WL 2087932; *In re Marriage of Benavides*, 692 S.W.3d 526, 545 (Tex. App.—San Antonio 2023) (premarital agreement later ratified by spousal agreement), *rev'd on other grounds*, 712 S.W.3d 561 (Tex. 2025). And the Legislature amended § 4.102 in 2005 to provide that a partition or exchange "may also provide that future earnings and income arising from the transferred property shall be the separate property of the owning spouse." Tex. Fam. Code § 4.102.

3. Where Premarital Income Provisions Failed

The failures share a pattern. The language either promised future action instead of making a present exchange, invoked the spouses-only provision, or never addressed income at all.

- *Bradley v. Bradley*, 725 S.W.2d 503 (Tex. App.—Corpus Christi 1987, no writ); a promise that the

parties "will do any and all things necessary" to preserve the separate character of income "merely contemplate[d] a partition and exchange . . . in the future."

- *Fanning v. Fanning*, 828 S.W.2d 135, 140–42 (Tex. App.—Waco 1992), *aff'd in part, rev'd and remanded in part on other grounds*, 847 S.W.2d 225 (Tex. 1993) (per curiam): the court struck a paragraph that expressly invoked the spouses-only portion of the 1980 constitutional amendment and was conditioned on its passage, but upheld a separate paragraph keeping scheduled property and its income separate as a partition or exchange.
- *McClary v. Thompson*, 65 S.W.3d 829 (Tex. App.—Fort Worth 2002, pet. denied): a present-tense agreement that did not address future earnings left retirement contributions during marriage community.
- *Nash*, 644 S.W.3d at 693–95: an agreement that contemplated some community property did not negate the community presumption.
- *Jimenez*, 2025 WL 1160683: an internet-purchased agreement that did not define property to include income, or say that income during marriage would be separate, did not make the husband's earnings separate.

4. Drafting the Premarital Provision

The result turns almost entirely on drafting. 33 Tex. Prac., *Handbook of Texas Family Law* § 11:4 (2025).

- Frame the provision as a bilateral partition and exchange of community interests in future income, not as an exercise of § 4.103 or the spouses-only constitutional clause.
- Use present-tense language that makes the exchange effective on marriage. The words "partition" and "exchange" help.
- Avoid conditions, promises of future written acts, and any reference to the spouses-only provision, the language that failed in *Bradley* and *Fanning*.
- Name income, earnings, and reinvestments expressly.

The author's form does each of these: "The parties hereby partition and exchange their future property and implement their agreement."

5. The Postmarital Belt

The Supreme Court has never squarely decided the question. In *Beck*, the court of appeals upheld the agreement as an exchange of each party's community interest in future income. *Beck v. Beck*, 792 S.W.2d 813 (Tex. App.—Dallas 1990), *aff'd*, 814 S.W.2d 745 (Tex. 1991). The Supreme Court affirmed "for different reasons," resting on implied validation of former § 5.41. 814 S.W.2d at 748–49.

So the prudent course, as the treatise also recommends, is to confirm the agreement after marriage. 33 Tex. Prac., *supra*, § 11:4. The postmarital agreement makes the same income separate again under § 4.103 and § 4.102 together. If a court ever finds the premarital provision outside the parties'

power, the postmarital agreement stands as an independent exercise of the spousal power. The second document is inexpensive; losing the argument would cost the client the income stream itself.

6. Reason Two: ERISA Waivers Require a Spouse

ERISA requires qualified plans to provide survivor benefits to a participant's "spouse," and permits waiver only with the written consent of the spouse, witnessed by a plan representative or notary. 29 U.S.C. § 1055(c)(2).

A fiancé is not a spouse. Treasury regulations state that "[a]n agreement entered into prior to marriage does not satisfy the applicable consent requirements." Treas. Reg. § 1.401(a)-20, Q&A-28. The federal courts agree that premarital waivers fail. *Hagwood v. Newton*, 282 F.3d 285 (4th Cir. 2002); *Hurwitz v. Sher*, 982 F.2d 778, 781–82 (2d Cir. 1992) (waiver lacked the required acknowledgment; waiving party also not yet a spouse). *See also Manning v. Hayes*, 212 F.3d 866, 876–77 (5th Cir. 2000) (premarital language not explicit enough to waive beneficiary status in a life-insurance welfare plan).

MidAmerican Pension & Employee Benefits Plans Administrative Committee v. Cox shows the cost. The antenuptial agreement lacked the acknowledgment § 1055(c)(2)(A) requires, the waiver was ineffective, and the surviving spouse took the 401(k). 720 F.3d 715 (8th Cir. 2013).

The fix is the postmarital agreement: a written consent by the spouse, after the wedding, that designates the beneficiary, acknowledges the effect of the election, and is witnessed by a notary or plan representative. 29 U.S.C. § 1055(c)(2)(A).

Three practical points:

- Plans generally require their own consent forms. The postmarital agreement should obligate each spouse to sign any plan-specific consent on request, and should attach completed forms where the plans are known. The author's forms state candidly that the agreement "may not, standing alone, satisfy the requirements of ERISA, the Internal Revenue Code, or the governing documents" of a plan, and obligate each party, after marriage, to "timely execute any plan-specific spousal consent."
- Some waivers must be repeated, for example when a beneficiary designation changes or when a plan's election period opens later. The covenant should be continuing.
- Remedies after a plan pays the wrong person are unsettled. *Barnett v. Barnett*, 67 S.W.3d 107 (Tex. 2001) (ERISA preempted widow's constructive trust claim); Reiff, *supra*, § IV.E. Get the consent signed; do not plan to litigate around its absence.

IRAs are not subject to ERISA's spousal consent rules, but the agreement should still address them expressly.

7. Reason Three: Ratification

The postmarital agreement should expressly ratify and reaffirm the premarital agreement. The State Bar's form spousal agreement does exactly this, and Orsinger explains the payoff: "the party contesting the enforceability of a premarital agreement must set aside two instruments signed at different times." Orsinger, *supra*, § V.

The reaffirmation is signed after the wedding, when the pressure of an approaching ceremony is gone. A challenger who claims the premarital agreement was signed under wedding-week pressure must explain why he or she signed the same terms again weeks later, as a married person, with counsel. See *In re Marriage of Benavides*, 692 S.W.3d 526, 545 (Tex. App.—San Antonio 2023) (spousal agreement ratified premarital agreement; no community property to divide), *rev'd on other grounds*, 712 S.W.3d 561 (Tex. 2025).

8. Keep the Postmarital Agreement Lean

Because postmarital agreements are subject to the fiduciary overlay, the postmarital agreement should be short. It should ratify the premarital agreement, partition and exchange future income, exercise § 4.103, deliver the ERISA consents, and waive fiduciary duties to the extent permitted. Reiff, *supra*, § VI.C.

It should be supported by a fresh, dated schedule of property, and the parties' counsel should again be involved.

The author's form, the Property Agreement Between Spouses, does exactly these things and little else. It ratifies the premarital agreement and incorporates it by reference "as complementary parts of a single contractual scheme"; makes income from each spouse's separate property, and its reinvestment, that spouse's separate property; eliminates community presumptions and tracing requirements; repeats the retirement waivers with an express covenant to sign plan-specific consents; requires each spouse to sign implementing documents within seven days of receipt; repeats the fiduciary waiver; and addresses standing orders. Each notary certifies that he or she is not an attorney for either party.

D. Attach the Postmarital Agreement and Promise to Sign It

The final form of the postmarital agreement should be attached to the premarital agreement as an exhibit, and the premarital agreement should obligate both parties to sign it within a stated time after the wedding.

This does three things. It means no one drafts the postmarital agreement later from memory or guesswork. It means the postmarital terms were themselves disclosed and reviewed before the wedding. And it gives the covenant a statutory home: § 4.003(a)(5) authorizes agreements on "the making of a will, trust, or other arrangement to carry out the provisions of the agreement."

The author's form puts it this way:

Confirmation of Agreement and Income from Separate Property. The parties agree that, not later than thirty days after their marriage, they will each execute the Property Agreement between Spouses (the "Property Agreement"), a copy of which is attached to this agreement as an exhibit. The parties agree that, to the maximum extent allowed by law, the failure to execute the Property Agreement will not invalidate this agreement or affect any of its terms or provisions. . . . Confirmation of this agreement in the form of the Property Agreement is in effect a partition and exchange agreement.

Note the second sentence. If one party refuses to sign the postmarital agreement, the refusal cannot be used to unravel the premarital agreement. The retirement article separately obligates each party to sign the Property Agreement within five days of presentment, and the no-contest rider (Part IX.I) treats a refusal to sign a required document, after written demand, as a forfeiting event.

VIII. THE EXECUTION RECORD: DEFEATING INVOLUNTARINESS

A. Identify the Circumstances That Make a Prenup Vulnerable, Then Draft Toward Them

Before drafting, the lawyer should identify the facts that, if they exist on signing day, will become the challenger's narrative. The cases supply the list:

- signing close to the wedding (*Moore; Potyondy*);
- an unrepresented party, or a lawyer who speaks to the other party directly (*Moore*);
- final drafts that change without redlines (*Moore*);
- schedules without values (*Moore*);
- pregnancy, immigration dependence, illness, medication, or economic dependence (*Osorno; Choudhury; Stankewich*);
- threats to cancel the wedding or the honeymoon (*Nesmith*, where the agreement survived, but only on appeal);
- a monied spouse who personally presents and negotiates the agreement;
- a language barrier, with no translation; and
- a self-drafted or internet-form agreement, which will be construed against its drafter (*Morin v. Morin*, No. 02-23-00349-CV, 2024 WL 2854875 (Tex. App.—Fort Worth June 6, 2024, no pet.) (mem. op.)). The source of the form is not itself the problem; a LegalZoom agreement was enforced in *Schaefer v. Schaefer*, No. 13-22-00463-CV, 2023 WL 7860803 (Tex. App.—Corpus Christi—Edinburg Nov. 16, 2023, no pet.) (mem. op.). The problem is the loose drafting such forms invite.

Then build the process to eliminate each one. If a circumstance cannot be eliminated, the lawyer should tell the

client in writing that it weakens the agreement, and consider whether to wait.

B. Independent Counsel

Texas does not require independent counsel. *Sauls*, 648 S.W.3d at 363–64. But counsel is the first *Moore* factor, and in *Choudhury* the wife's counsel was a "means of protection" that defeated duress. 2025 WL 2399148.

Insist that the other party retain a lawyer of his or her own choosing. If the other party cannot afford one, the client should pay for that lawyer's fees, and the agreement should recite it. Orsinger, *supra*, § XVI.P.

If the other party will not retain counsel, give written advice to do so, communicate only in writing, and include a recital that the party was advised to obtain counsel and declined. Reiff, *supra*, § V.B; Orsinger, *supra*, § XVIII.N.2.

C. Time: Start Early and Do Not Sign Close to the Wedding

"The more time that passes between the presentation of a premarital agreement and the signing improves enforceability." Orsinger, *supra*, § XVIII.L. Texas has no statutory waiting period, but the cases show what happens without one.

Practical rules:

- Engage counsel as soon as the engagement is announced.
- Deliver the first draft, the schedules, and the waiver weeks before anyone plans to sign.
- Leave time for revisions. Every round of changes needs time for the other lawyer to review it.
- Set an internal deadline for signing well before the wedding, and tell the client about it at the first meeting.
- Never present a revised draft on signing day. If something must change, send a redline to both lawyers and let them review it.

D. Sign and Initial Everything

Have both parties sign the agreement and initial every page, including every page of every schedule and exhibit. In *Choudhury*, initialing each provision was part of the record that defeated the involuntariness claim. 2025 WL 2399148.

Notarization is not required, but a neutral notary adds a disinterested witness to the execution. The author's acknowledgments include the time of signing and a certification by the notary that he or she is not an attorney representing either party. Sign in a neutral or mutually chosen location, as the wife chose in *Choudhury*.

E. Recitals: Useful, Not Magic

Include recitals that map onto the statutory elements: voluntary execution, receipt of disclosure, the prior written waiver, adequate knowledge, advice of counsel, adequate

time, no oral representations, and that each party read and understood the agreement.

In *Potyondy*, those recitals were "the only relevant evidence" on the knowledge element and defeated it. 2026 WL 1214429. But under *Moore*, recitals cannot prevent a party from proving involuntariness with contrary evidence. 383 S.W.3d at 197. Recitals help a true record. They do not create one.

F. Video: The Author's Preference

Some practitioners video-record the signing. The author generally does not.

The agreement should rise or fall on the paperwork. A video creates a second record that can be mined for hesitation, tears, or an offhand remark, and it invites a fight over what a lawyer said on camera. If the documents, the timeline, and the counsel are right, the video adds little. If they are wrong, the video rarely saves the agreement. Practitioners who do record should treat the recording as evidence that will be watched frame by frame.

G. The Declaratory Judgment Option

After *Banigan*, an agreed declaratory judgment sought when the spouses have no actual dispute is likely void. 660 S.W.3d at 312–15. A practitioner may still consider one where a genuine dispute about the agreement exists. Absent a true conflict, the judgment is not worth the filing fee.

H. Draft Honestly

Orsinger warns against embedding "outs" designed not to catch the other lawyer's attention. Hidden outs invite claims of involuntariness and unconscionability. "The prudent approach is to plainly describe the 'outs.'" Orsinger, *supra*, § XVIII.M.

IX. SUBSTANTIVE DRAFTING: SIMPLE, FIXED, AND EXPLICIT

The author's agreements are longer and more robust than most, but the operative economic terms are deliberately simple. Length should come from completeness (every category of property, every waiver, every procedural protection), never from complicated formulas.

A. Less Is More

The Texas Supreme Court upheld the agreement in *Beck* on the strength of a single paragraph of fewer than one hundred words. 814 S.W.2d at 746; Reiff, *supra*, § III.C. Its enforceability was a function of its clarity, not its length.

Complex provisions create ambiguity, and ambiguity is resolved in favor of the community estate. *In re Marriage of Nash*, 644 S.W.3d 683, 693–95 (Tex. App.—Texarkana 2022, no pet.); *Hutcherson*, 731 S.W.3d at 957–58.

B. Use Fixed Dollar Amounts Tied to Years of Marriage

Clients often want the other spouse to earn a growing interest over time: a percentage of the house that increases each year, a share of a business's appreciation, or a formula tied to income. Resist this.

Every formula is a future trial. *Loyd* shows how: "net of all liabilities," "depreciated cash value," and "salaries payable" each became a contested issue with experts. 2025 WL 2087932.

The better approach is a fixed dollar amount per year of marriage. It is easy to calculate, easy to understand at signing, and almost impossible to litigate.

The author's form offers several options (no payment, an anniversary-based payment, a fixed lump sum, a temporary housing and transition allowance, or a combination). The anniversary-based option reads in part:

Anniversary-Based Contractual Payment. The Anniversary Payment shall equal \$[amount] for each completed year of marriage, subject to a maximum payment of \$[amount]. A year of marriage shall be considered completed only upon the occurrence of an anniversary of the parties' date of marriage. No partial-year amount shall accrue for any period between anniversaries. The Anniversary Payment shall be calculated according to the number of wedding anniversaries occurring before the filing of the first dissolution proceeding that results in a final decree dissolving the parties' marriage.

The form then gives an example (a petition filed after the fourth anniversary but before the fifth yields four times the annual amount), sets a maximum accrual period, fixes the due date at thirty days after the decree is signed, and states that only one payment may ever become due, regardless of dismissals, nonsuits, or refilings.

Define the measuring date precisely. A date-of-filing rule avoids a fight over when the divorce was "granted." The point is not academic: in *Hutcherson*, a gap of a few months between the end of trial and the signing of the decree moved the marriage across a thirty-year line and extended maintenance from seven to ten years. 731 S.W.3d 946.

If the client wants an inflation adjustment, use a published index and state the base value in the agreement. Orsinger, *supra*, § XVI.G. But every adjustment is one more calculation; often a fixed schedule is better.

C. When Valuation Is Unavoidable, Specify the Method

Sometimes a value cannot be avoided. Then the agreement should say exactly how the value is determined, so there are no dueling experts.

For a residence, the author frequently ties value to the appraisal district and prohibits appraisers:

VALUE OF THE RESIDENCE. The value of the Residence is the value shown for the Residence on the certified appraisal roll of the appraisal district for the county in which it is located for the tax year in which the petition for divorce is filed (or, if that roll has not been certified, the preceding tax year), without adjustment. Neither party may offer an appraisal, broker's opinion, or opinion testimony on the value of the Residence.

The tax-appraised value is public, already exists, and requires no witness. One drafting note: an appraisal district record can show more than one figure, and for a homestead the taxable appraised value may be capped below the district's market value. Tex. Tax Code § 23.23. Name the figure the parties intend, so that the number itself is never in dispute.

For accounts, use the ending balance on the last periodic statement before the filing date. For a business, use a fixed amount or a number taken directly from a document prepared in the ordinary course, such as a line on the entity's federal tax return for the last year ending before filing. Do not use "fair market value" and leave it to experts.

D. Characterize Explicitly

Because agreements are narrowly construed in favor of the community, silence can mean community property. Reiff, *supra*, § III.B; *Nash*, 644 S.W.3d at 694–95. The agreement should say, in plain words:

- that no community estate will be created, if that is the intent;
- that property held in one party's name is presumed that party's separate property;
- how joint accounts and jointly titled property are owned;
- that earnings, income from separate property, and increases in value are separate (framed as a partition and exchange; Part VII.C.4);
- how property acquired on credit is characterized, to overcome the community-credit presumption, *Cockerham v. Cockerham*, 527 S.W.2d 162 (Tex. 1975); Reiff, *supra*, § IV.A;
- how retirement accounts, stock options, and deferred compensation are characterized, see *Jimenez v. Jimenez*, No. 01-23-00087-CV, 2025 WL 1160683 (Tex. App.—Houston [1st Dist.] Apr. 22, 2025, pet. denied) (mem. op.) (agreement did not expressly designate husband's retirement accounts as separate); and
- how property acquired while domiciled outside Texas is treated, to avoid a quasi-community division under § 7.002. Reiff, *supra*, § III.E.

E. Waive Reimbursement and Equitable Claims Expressly

After *McCartney*, a general characterization scheme does not waive reimbursement. 720 S.W.3d 789. Waive

reimbursement, economic contribution, fraud on the community, and equitable claims expressly and in every direction (separate to community, community to separate, separate to separate). Tex. Fam. Code § 3.410; *Moroch v. Collins*, 174 S.W.3d 849, 859 (Tex. App.—Dallas 2005, pet. denied).

State, as *Hutcherson* allows, that the agreement's division controls over any just-and-right adjustment. 731 S.W.3d at 961–63.

F. Schedules: List Everything, Value Honestly

List all property and all liabilities on schedules attached to the agreement. Include income, even though the statute does not require it. Orsinger, *supra*, § VII.H.3.

Do not overstate or understate values. A value that later proves to be inflated or deflated becomes the centerpiece of a disclosure challenge. If a value is uncertain, say so and state its source and date ("balance per statement dated August 31, 2026"; "value not determined; most recent K-1 attached"). Never leave values blank, as the schedules in *Moore* did. 383 S.W.3d at 194.

Closely held businesses are the hardest case. An exact value is rarely knowable at signing, and false precision is its own risk. List each entity, give a good-faith value or range with its basis (a recent valuation, book value, or a tax-return figure), and say that it is an estimate. The disclosure then tells the truth about what is known.

Schedules matter after enforcement, too. In *Bean v. Bean*, a probate dispute, items listed on the premarital schedules were held separate property as a matter of law. 658 S.W.3d 401 (Tex. App.—Dallas 2022, pet. denied).

G. Spousal Support, Contractual Alimony, and Bankruptcy

Section 4.003(a)(4) permits the modification or elimination of spousal support. If the agreement waives maintenance, say so and disclaim Chapter 8.

If the agreement creates support, say whether it is Chapter 8 maintenance or contractual alimony, and write every termination event into it. *McCartney*, 720 S.W.3d at 804–05. Contractual support beyond a legal duty is a contractual debt that cannot be enforced by contempt. See *Dalton v. Dalton*, 551 S.W.3d 126, 131 n.8 (Tex. 2018).

Consider bankruptcy. Domestic support obligations are nondischargeable. 11 U.S.C. § 523(a)(5). Property-settlement debts to a former spouse are nondischargeable in Chapter 7, 11 U.S.C. § 523(a)(15), but may be discharged in Chapter 13. 11 U.S.C. § 1328(a)(2). Orsinger, *supra*, § XVI.R.

H. Waive Fiduciary Duties

Loyd held that the spousal fiduciary duty survives even an agreement that creates no community estate. 2025 WL 2087932. The agreement should waive, to the full extent permitted by law, fiduciary duties arising solely from the

marital relationship, particularly as to each party's management of his or her own separate property and business interests.

Whether such a waiver is fully enforceable has not been decided by the Texas Supreme Court. Reiff, *supra*, § IV.B. Draft it under § 4.003(a)(8), repeat it in the postmarital agreement, and protect it with a severability clause. No waiver will protect actual fraud.

I. No-Contest Clauses

A no-contest clause conditions a benefit on not challenging the agreement. The Texas Supreme Court enforced one in *I.C.*, where the wife forfeited a \$5 million payment by seeking rescission. "Application of a freely agreed-to and unambiguously worded no-contest clause is not the kind of 'forfeiture' Texas law seeks to avoid." 551 S.W.3d at 124.

The clause works only if there is a benefit to lose. If the client is giving a meaningful payment, the no-contest clause is a powerful deterrent, because the challenger must bet the payment on winning. If the agreement gives the other party nothing, the clause has little bite, though a fee-shifting provision still does.

The author's forms make the no-contest provision an optional rider to the payment section, so the business terms stay separate from the forfeiture issue. The receiving party forfeits any unpaid benefit by (1) seeking to invalidate the premarital agreement or the Property Agreement Between Spouses; (2) seeking a division or characterization materially inconsistent with them; (3) seeking support, maintenance, reimbursement, or other relief the agreements waive; or (4) refusing, after written demand, to sign a document the agreements require.

The rider also lists what is *not* a contest: asking the court to construe an ambiguous provision, seeking to enforce the agreements, disputing the calculation or timing of a payment, asserting a claim relating to a child, responding defensively, seeking relief that cannot lawfully be waived, and asking in good faith whether a particular asset is covered. A party who withdraws a disqualifying claim within ten days after written notice avoids forfeiture unless the other side suffered incurable prejudice. Amounts already paid need not be returned absent fraud.

These safe harbors are not generosity. They make the forfeiture look like what *I.C.* approved, a "freely agreed-to and unambiguously worded" condition, rather than a trap, and they leave a court little reason to strain against it.

Distinguish a no-contest clause from a penalty for filing for divorce. A clause forfeiting a spouse's community interest merely for filing is "a forfeiture rather than a partition" and fails. *McBride*, 797 S.W.2d at 692.

J. Severability with a Reformation Directive

Invalid provisions may be severed if they are not the "main or essential purpose" of the agreement. *Williams*, 569

S.W.2d at 871; *In re Poly-America, L.P.*, 262 S.W.3d 337, 360 (Tex. 2008). State that each provision is independent, that the parties would have signed without any one of them, and direct the court to reform an invalid provision to the narrowest enforceable version. Reiff, *supra*, § IV.G.

K. Merger and Non-Reliance

Include merger and non-reliance clauses. They worked in *Potyondy*. 2026 WL 1214429. But a non-reliance clause will not foreclose an involuntariness defense. *Moore*, 383 S.W.3d at 197; compare *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 180 (Tex. 1997).

L. Choice of Law

Section 4.003(a)(7) authorizes a choice of law "governing the construction of the agreement." Choose Texas, and state that Texas law also governs validity and enforcement, recognizing that the statute speaks only to construction. Reiff, *supra*, § IV.I; see *Fraccionadora y Urbanizadora de Juarez, S.A. de C.V. v. Delgado*, 632 S.W.3d 80 (Tex. App.—El Paso 2020, no pet.).

M. Death Provisions

Address homestead rights, exempt property, family allowance, life insurance, and the elective-share claims of other states. A general waiver can reach homestead rights, *Williams*, 569 S.W.2d 867, but an explicit one is better. Coordinate with the client's estate planning lawyer.

The author's form has each party accept the other's will "in full discharge, settlement, and satisfaction" of marital claims, then itemizes the statutory rights waived at death: probate homestead, exempt property and family allowance, elective and forced shares under other states' laws, intestate succession, priority to serve as executor or administrator, reimbursement and similar claims against the estate, and challenges to non-probate transfers. It expressly preserves either party's freedom to make a later gift by will or beneficiary designation, without that gift reopening the waivers.

N. Evidence Rules: Presumptions, Tracing, Gifts, and Joint Purchases

Characterization litigation is mostly evidence. The agreement can write the evidence rules in advance. The author's forms:

- provide that property in one party's name is presumed that party's separate property, and that omitted property belongs to the party who owns it;
- eliminate "the inception of title doctrine, tracing requirements, minimum sum balance rules, or any similar common law or statutory doctrine," and place the burden on the party claiming property is not separate, by clear and convincing evidence;
- list events that "may not, under any circumstances, be considered evidence of any intention to create community property," including joint tax returns, joint

title, beneficiary designations, commingling, payment of the other's mortgage or taxes, and joint occupancy of a separately owned homestead;

- set proof requirements for interspousal gifts (clear and convincing evidence; titled property passes only by retitling);
- provide that funds in a household account remain the contributor's until spent, and that amounts spent on household expenses are "conclusively deemed consumed" with no reimbursement or tracing claim; and
- make jointly acquired assets each party's separate property in proportion to contribution, with a contractual fifty-fifty presumption when records are missing.

Whether a court will honor a contractual change in the standard of proof has not been tested in Texas. The provisions sit comfortably within § 4.003(a)(8) and *I.C.*'s freedom-of-contract rationale, but they should be backed by the severability clause.

O. Payment Terms That End Disputes

Any payment term should answer every question a litigator would ask. The author's payment options specify: the trigger (signing of the final decree, not filing); the due date; that the payment is contractual and not support, maintenance, reimbursement, or a property division; that it creates no lien or interest in any asset; that only one payment is ever due, regardless of nonsuits and refilings; and what happens if a party dies before the decree.

Optional riders allow security for the payment (life insurance, escrow, a letter of credit, or a security agreement, reducible as the maximum exposure falls) and an installment election with interest and acceleration on default.

P. No Rescission for Breach; Nondisqualification

In *I.C.*, the wife sought to rescind the agreement for the husband's alleged material breach. 551 S.W.3d at 121–23. Justice Lehrmann's concurrence suggested § 4.006(c) may foreclose rescission for breach altogether. *Id.* at 126 (Lehrmann, J., concurring). Remove the question: the author's form provides that the agreement "cannot be rescinded by one party due to material breach by the other party," and limits remedies for nonmonetary breach to specific performance and fees.

The form also waives any disqualification claim against the lawyers who negotiated and drafted the agreement. Without it, a challenger may try to call opposing counsel as a fact witness on the execution, then move to disqualify.

X. PROTECTING SEPARATE PROPERTY WHILE THE DIVORCE IS PENDING

Many challenges are won or lost before trial. Temporary orders, standing orders, receiverships, and interim support awards give a challenger leverage over the monied spouse's separate estate long before anyone decides whether the

agreement is enforceable. A robust agreement addresses the pendency of the case, not just its end.

A. Standing Orders

Many Texas counties require a standing order to be attached to or filed with every divorce petition, and those orders typically restrain both parties' dealings with property. The author's forms acknowledge that practice and neutralize it. The "ministerial act of attaching, filing, or serving a standing order" is not a request to enforce it and does not waive the agreement. No standing order or temporary injunction "shall apply to or restrict either party's management, control, use, or disposition of his or her separate property." The parties agree to set aside any standing order by agreement to the extent it would, and neither may argue that a standing order supersedes the agreement.

B. No Injunctions or Receivers over Separate-Property Businesses

Each party disclaims any right to seek a temporary restraining order, injunction, receivership, "or other legal relief" that would restrict the other's separate-property entities from operating, borrowing, selling assets, raising capital, or reorganizing. The form adds that "[n]o court shall appoint a receiver, auditor, forensic accountant, or special master over any separate property entity absent the owning party's written consent."

These provisions take away the most effective pressure tactic against a business owner: freezing the business while the enforceability fight proceeds.

C. Interim Support: Waiver Plus Reimbursement

The agreement may waive temporary support, maintenance, and alimony. Tex. Fam. Code § 4.003(a)(4). But a trial court may still be asked to order temporary support while enforceability is contested. *Cf. In re Eaton*, No. 02-14-00239-CV, 2014 WL 4771608 (Tex. App.—Fort Worth Sept. 25, 2014, orig. proceeding) (mem. op.) (partition and waiver precluded temporary spousal support).

The author's form adds a backstop. Any temporary or permanent support actually paid "must be reimbursed to the party paying . . . within five days after receipt," and if it is not, the payor receives a dollar-for-dollar offset against later payments, on written notice. The waiver tells the court what the parties agreed; the reimbursement provision makes an order contrary to it economically pointless.

D. The Residence and Interim Fees

If the homestead is one party's separate property, the other waives any right to occupy it during or after the divorce and agrees to vacate within fifteen days after notice of filing. Neither party may be required to pay interim attorney's fees, and any contrary order triggers the reimbursement and offset provisions.

Where a client wants the other party to have a soft landing, the better tool is a defined, contractual transition allowance (a fixed monthly amount for a fixed number of months, not extended by delay or refiling), which the author's form provides as an option. A defined allowance answers the "how will I live during the case" argument without inviting a support hearing.

XI. WHO DECIDES THE CHALLENGE: ARBITRATION, JURIES, AND SEPARATE TRIALS

A. Think Hard About Arbitration

Arbitration in a marital agreement cuts both ways.

The case against. Texas premarital agreements are among the most enforceable contracts in Texas courts. An arbitrator may not follow Texas law as faithfully as a district judge, and an arbitration award is difficult to overturn. The Texas Arbitration Act limits vacatur to grounds such as fraud, partiality, or the arbitrator exceeding his or her powers. Tex. Civ. Prac. & Rem. Code § 171.088. A legal error alone is usually not enough, unless the parties expressly contract for expanded review and preserve a record. *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84 (Tex. 2011).

The case for. Arbitration can cut off creative arguments that sometimes find a receptive trial court, keeps the dispute private, and lets the parties choose a decision-maker with expertise.

The trap: § 6.6015. Arbitration does not take the enforceability fight out of the courthouse. When a party opposes arbitration and asserts that the contract containing the arbitration clause is not valid or enforceable, "notwithstanding any provision of the contract to the contrary, the court shall try the issue promptly and may order arbitration only if the court determines that the contract . . . is valid and enforceable." Tex. Fam. Code § 6.6015(a). The Supreme Court has enforced the statute by mandamus. *In re Ayad*, 655 S.W.3d 285, 289–90 (Tex. 2022) (orig. proceeding) (per curiam). (The author was one of the lawyers in *Ayad*.)

So a challenger first litigates enforceability in the trial court, then, if the agreement is upheld, arbitrates. Orders compelling or denying arbitration bring appeals or mandamus. Tex. Civ. Prac. & Rem. Code § 171.098. The result can be more layers of litigation, not fewer. *But see Roman v. Herrera*, No. 13-20-00111-CV, 2021 WL 1306407 (Tex. App.—Corpus Christi–Edinburg Apr. 8, 2021, no pet.) (mem. op.) (fraud challenge to agreement as a whole sent to arbitrator).

If the parties want a private decision-maker who must follow the rules of evidence and whose decision is reviewable on appeal, consider a special judge under Chapter 151 of the Civil Practice and Remedies Code instead. Reiff, *supra*, § IV.J.

B. Jury Issues and a Contractual Jury Waiver

Either party may demand a jury in a divorce. Tex. Fam. Code § 6.703. Unconscionability is for the court. *Id.* § 4.006(b). But voluntariness is a fact question, and the Pattern Jury Charges submit both voluntariness (PJC 207.2B) and the disclosure elements, including whether the waiver of disclosure was voluntary (PJC 207.2C). Orsinger, *supra*, § VII.H.4.

In other words, the one issue a jury cannot decide is the one the challenger rarely wins alone, and the issues a jury can decide are the ones where sympathy matters most.

The agreement should therefore include a conspicuous waiver of the statutory right to a jury on any issue concerning the agreement's validity, enforceability, or construction. Texas enforces contractual jury waivers that are knowing and voluntary. *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 132–34 (Tex. 2004) (orig. proceeding); *In re Bank of Am.*, N.A., 278 S.W.3d 342 (Tex. 2009) (orig. proceeding).

Two cautions. First, the waiver sits inside the contract whose voluntariness is under attack, so the challenger will argue it falls with the agreement. That is a reason to make the waiver conspicuous, specific, and independently acknowledged, so that its own voluntariness is apparent on its face. Second, its enforceability in this context has not been settled by the Texas Supreme Court.

The author's form gives the jury waiver its own article, in capitals, covering any claim relating to the premarital agreement or the Property Agreement Between Spouses, "the interpretation, validity, enforceability, or alleged breach of either Agreement; the marital relationship of the Parties; or the dissolution of marriage," with all such disputes "tried solely and exclusively to the court." The parties then acknowledge, point by point, that the right is constitutional, that each had counsel, that the waiver is conspicuous, that it was signed without duress, that it was a material inducement, and that "[e]ach Party's assent to this waiver is independent of the marriage itself." A separate severability sentence preserves the waiver claim by claim.

C. Separate Trial of Enforceability

The Pattern Jury Charges comment suggests that the court "should consider a separate trial to determine the validity of the agreement." Tex. R. Civ. P. 174(b); Orsinger, *supra*, § XVI.U. The Houston court has also observed that determining unconscionability before trial, rather than in the judgment, is the "better practice." *Blonstein v. Blonstein*, 831 S.W.2d 468 (Tex. App.—Houston [14th Dist.] 1992), *writ denied*, 848 S.W.2d 82 (Tex. 1992) (per curiam).

Write it into the agreement: any challenge to validity or enforceability will be tried first and separately, before discovery on the merits of the property division.

XII. WHAT NO DRAFTING CAN FIX

Some agreements cannot be saved. If a party was tricked, threatened with something the other had no legal

right to do, isolated from counsel, impaired, or deceived about the other's finances, the best-drafted agreement will fail, and it should. *Stankewich*, 2025 WL 1523266; *Moore*, 383 S.W.3d at 194–97.

The drafter's responsibility is to make sure the agreement fails only in those cases. That means a process that gives no foothold to a challenger who signed freely, and terms clear enough that a court can enforce them on summary judgment. Reiff calls this building "every marital agreement with a summary judgment standard in mind." Reiff, *supra*, § VI.A.

XIII. CHECKLISTS

A. What Makes an Agreement More Iron-Clad

- Independent counsel for each party, paid for by the client if necessary.
- First draft, schedules, and waiver delivered weeks before signing, with time for revisions.
- Signing well before the wedding, on a deadline set at the first meeting.
- A separate written waiver of disclosure, signed, dated, and timed before the premarital agreement.
- Complete schedules of property, liabilities, and income, with honest, sourced, dated values.
- Signature and initials on every page, including schedules and exhibits.
- A neutral notary and a neutral or mutually chosen signing location.
- Recitals tracking each statutory element.
- Bilateral partition-and-exchange language for earnings and income from separate property.
- The postmarital agreement attached as an exhibit, with a covenant to sign it after the wedding.
- A postmarital agreement that ratifies the premarital agreement, exercises § 4.103, and delivers ERISA spousal consents.
- Fixed dollar amounts tied to completed years of marriage, measured to the filing date.
- Any unavoidable valuation tied to a stated, objective source (for a home, appraisal-district market value) with expert testimony prohibited.
- Express "no community estate" language, if intended, and a separate-property presumption.
- Express waivers of reimbursement, equitable claims, and fiduciary duties.
- A no-contest clause wherever the other party receives a meaningful benefit, with defined safe harbors.
- Provisions neutralizing standing orders and barring injunctions and receivers over separate-property businesses.
- A waiver of interim support and fees, backed by reimbursement and offset.

- Contractual evidence rules: no community presumption, no tracing, and defined proof for gifts.
- No rescission for breach, and a nondisqualification clause.
- A conspicuous, separately acknowledged jury waiver in the premarital agreement.
- A separate-trial provision, a severability clause with a reformation directive, and merger and non-reliance clauses.
- A deliberate decision, made with the client, on whether to include arbitration.

An iron-clad agreement, then, has two qualities. Its execution record (counsel, time, disclosure, a prior written waiver, initials on every page, and a postmarital ratification) leaves the challenger no fact issue. And its terms (fixed numbers, objective valuation rules, and explicit characterization) leave the court nothing to decide but to enforce it.

The author discusses these issues further on his podcast, *The Family Law War Room*, including the episode "Navigating Prenuptial and Postnuptial Agreements," and in his writings at lamorgesefamilylaw.com.

B. What Makes an Agreement Less Iron-Clad

- Signing within days or hours of the wedding.
- A final draft that changed without a redline, or that opposing counsel never saw.
- One lawyer for both parties, or a lawyer who talks to the unrepresented party.
- A waiver of disclosure that appears only inside the premarital agreement.
- Schedules without values, or with values that later prove inflated or deflated.
- Growing percentage interests, appreciation sharing, and "net of liabilities" formulas.
- "Fair market value" left to competing experts.
- Silence on reimbursement, fiduciary duties, debt-financed property, or retirement benefits.
- Premarital "income from separate property" language with no partition framing and no postmarital agreement.
- A premarital "ERISA waiver" with no post-wedding spousal consent.
- An internet or self-drafted form.
- Reliance on recitals to cure a bad process.
- An agreed declaratory judgment in place of a sound execution record.
- Arbitration included by default, without considering § 6.6015 and limited review.
- Silence about standing orders, temporary orders, and interim support.

XIV. CONCLUSION

Texas law gives the drafter a strong tailwind. Premarital and partition agreements are presumptively valid, the defenses are exclusive and demanding, unfairness is not unconscionability, and courts enforce the parties' bargain as written. *I.C.*, 551 S.W.3d at 124; *Potyondy*, 2026 WL 1214429.

The recent cases confirm that agreements fail not because their terms are lopsided but because their process is defective, and that enforced agreements still generate litigation when their terms are complex.