**NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA**

**NO. 43,647**

|  |  |  |
| --- | --- | --- |
| **IN THE MATTER OF** | **§** | **IN THE DISTRICT COURT** |
| **THE MARRIAGE OF** | **§** |  |
|  | **§** |  |
| **ALLISON GELBE-PINKUS** | **§** |  |
| **AND** | **§** | **510TH JUDICIAL DISTRICT** |
| **MARK PINKUS** | **§** |  |
|  | **§** |  |
| **AND IN THE INTEREST OF** | **§** |  |
| **TODD PINKUS, THOMAS PINKUS AND LUCY PINKUS, CHILDREN** | **§****§** | **DENTON COUNTY, TEXAS** |

**Mark Pinkus’ MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING ENFORCEABILITY OF PREMARITAL AGREEMENT**

The Respondent, MARK PINKUS, by and through his undersigned attorney of record and pursuant to the provisions of Tex.R.Civ.P.166a(c), files this Motion for Partial Summary Judgment, and moves the Court to render a partial summary judgment declaring the parties' Premarital Agreement fully enforceable.

In support, MARK PINKUS would respectfully show the Court as follows:

1. **BACKGROUND AND GROUNDS FOR SUMMARY JUDGMENT**

ALLISON GELBE (now ALLISON GELBE-PINKUS), Petitioner (at times referred to as “ALLISON”), and MARK PINKUS, Respondent (at times referred to as “MARK”), are now married. The parties were married on December 27, 2018. Prior to the parties’ marriage, on November 14, 2008, the parties executed a Waiver of Financial Disclosure and a Premarital Agreement, a true and correct copy of which are attached hereto as Exhibit 1 and Exhibit 2.

MARK filed his Original Counter-Petition for Divorce on January 16, 2019, a true and correct of which is attached hereto as Exhibit 3. As part of his Counter-Petition for Divorce, MARK requests the Court to confirm the enforceability of the parties’ Premarital Agreement. The parties' Premarital Agreement is presumptively enforceable as a matter of Texas law. There are no genuine issues of material fact and, for this reason, MARK is entitled to partial summary judgment declaring the Premarital Agreement enforceable as a matter of law.

1. **SUMMARY JUDGMENT EVIDENCE**

This motion is based upon the following summary judgment evidence:

1. Waiver of Financial Disclosure, attached hereto as Exhibit 1 and incorporated herein for all purposes;
2. Premarital Agreement, attached hereto as Exhibit 2 and incorporated herein for all purposes;
3. Original Counter-Petition for Divorce, attached hereto as Exhibit 3 and incorporated herein for all purposes;
4. Affidavit of Mark Pinkus, attached hereto as Exhibit 4 and incorporated herein for all purposes;
5. Affidavit of Cindy Tisdale, counsel for Mark Pinkus, attached hereto as Exhibit 5 and incorporated herein for all purposes;
6. Excerpts of the Oral deposition of Saul Goodman, attached hereto as Exhibit 6 and incorporated herein for all purposes;
7. Email correspondence from Mark Pinkus to Allison Gelbe dated September 16, 2008, attached hereto as Exhibit 7.
8. Email correspondence from Allison Gelbe to Mark Pinkus dated November 12, 2008, attached hereto as Exhibit 8.
9. **APPICABLE LAW AND ARGUMENT THAT PREMARITAL IS ENFORCEABLE**
10. **Summary Judgment Standard and Applicable Law**

MARK is entitled to summary judgment as a matter of law upon showing that there is no genuine issue of material fact. Tex. R. Civ. P. 166a. Under Rule 166a(e) of the Texas Rules of Civil Procedure, MARK is entitled to a partial summary judgment when he demonstrates entitlement to relief as to a part of, but not on the whole, case. *Texas United Ins. Co.* v. *Burt Ford Enter., Inc.,* 703 S.W.2d 828, 832 (Tex. App.—Tyler 1986, no writ). A summary judgment may be granted on separate issues within a single cause of action. *Chase Manhattan Bank, NA.* v. *Lindsay,* 787 S.W.2d 51, 53 (Tex. 1990).

1. Presumption of Enforceability

The Texas Family Code provides that premarital agreements must be in writing and signed by both parties, and are enforceable without consideration. Tex. Fam. Code §4.002. Premarital agreements are presumptively enforceable. *See Marsh* *v. Marsh,* 949 S.W.2d 734, 739 (Tex.App.—Houston [14th Dist.] 1997, no writ) ("The legislature and people of Texas have made a public policy determination that premarital agreements should be enforced."); *Blonstein v. Blonstein,* 831 S.W.2d 468 (Tex.App.—Houston [14th Dist.] 1992, writ denied) (challenger of a post-nuptial property agreement bears the burden of proof). In a summary judgment context, when the movant is seeking to enforce a marital property agreement to which he or she is a party, such a presumption operates without evidence other than that of the existence and terms of the agreement to establish that there is no genuine issue of material fact regarding the enforceability of the agreement. *Grossman v. Grossman,* 799 S.W.2d 511, 513 (Tex.App.—Corpus Christi 1990, no writ).

Sections 4.006 of the Texas Family Code track the Uniform Premarital Agreement Act adopted by the Texas legislature in 1987 and govern the enforceability of premarital agreements. Each statute places the burden on a party resisting enforcement of the pre-marital agreement by creating a rebuttable presumption that the agreement is enforceable. *Id.*; *see also Schwarz v. Schwarz,* 2000 WL 1708518 \*1 (Tex.App.—Houston [1st Dist.] 2000, no pet.); *Pletcher v. Goetz,* 9 S.W.3d 442, 445 (Tex.App.—Fort Worth 1999, pet. denied); *Blonstein,* 831 S.W.2d at 472.

Pre-marital agreements are enforceable unless the party against whom enforcement is requested proves that that party did not sign the agreement voluntarily or that the agreement was unconscionable when it was signed and, before signing the agreement:

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

(ii) 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

(iii) 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.

1. Voluntariness

 No definition exists within the Texas Family Code or the Uniform Premarital Agreement Act to explain what constitutes a voluntary execution of a premarital agreement. In construing section 4.006(a), Texas courts have previously referred to commercial law governing enforcement of contracts for guidance. In the commercial context, “voluntary” has been defined as an action taken “…by design, intentionally, purposefully, by choice, of one’s own accord, or by the free exercise of will.” *Sheshunoff v. Sheshunoff,* 172 S.W.3d 686, 696 (Tex.App.—Austin 2005, pet denied). Faced with determining what would constitute a voluntary execution of a post-marital agreement, the *Sheshunoff* Court used a dictionary definition:

The ordinary meaning of “voluntary,” as reflected in dictionary definitions, entails (1) intentional action, as opposed to inadvertent or accidental action, (2) that is the product of the exercise of free will.

*Id.* at 695.

Circumstances surrounding the signing of a premarital that are unusual or that put stress on a signer are generally insufficient to render the signing of the agreement involuntary. *Nesmith v. Berger,* 64 S.W.3d 110, 115 (Tex.App.—Austin 2001, pet. denied) (finding the threat by a party not to go on the parties’ honeymoon insufficient to render the signing involuntary); *Osorno v. Osorno*, 76 S.W.3d 509, 510-11 (Tex.App.—Houston [14th Dist.] 2002, no pet.) (holding that the threat not to marry future wife, who was forty years old and pregnant, if she failed to sign the premarital agreement did not make the execution an involuntary one).

1. Unconscionability

With respect to the issue an unconscionable agreement, while a marital agreement may be disproportionately beneficial to one party, unfairness is not material to the enforceability of the agreement. *See* *Chiles v. Chiles,* 779 S.W.2d 127, 129 (Tex.App.—Houston [14th Dist.] 1989, writ denied). A factual finding that an agreement is unfair does not satisfy the burden of proof required to establish unconscionability. *Id.*

The Texas Family Code makes clear that "marital property agreements should be enforced even if unconscionable (unless inadequate disclosure can be proven)." *Sheshunoff,* 172 S.W.3d at 692. Even if an agreement is found to be unconscionable, the party resisting enforcement must also prove that before signing the agreement (1) she was not provided a fair and reasonable disclosure of the other party's financial obligations or property; (2) she did not voluntarily and expressly waive, in writing, any right to that disclosure; and (3) she did not have, or reasonably could not have had, adequate knowledge of the other party's property or financial obligations. *Fazakerly v. Fazakerly,* 996 S.W.2d 260 (Tex.App.—Eastland 1999, pet. denied) (upholding a premarital agreement that “…recites that both George and Mary had 'full knowledge…as to the extent and probable value of the estate of the other.’”).

1. **Undisputed Facts**

Prior to their December 27, 2008 marriage, ALLISON and MARK executed a Waiver of Financial Disclosure on November 14, 2008. Exhibit 1. The Waiver of Financial Disclosure states, in pertinent part:

The parties are not now married and are executing this waiver in accordance with the provisions of section 4.006 of the Texas Family Code.

\*\*\*

I, ALLISON GELBE, in contemplation of my marriage to MARK PINKUS 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 MARK PINKUS. I voluntarily waive any further disclosures regarding the property, including its value, and the financial obligations of MARK PINKUS 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 MARK PINKUS. However, I waive the opportunity for further investigation.

*Id.*

Shortly after signing the Waiver of Financial Disclosure on November 14, 2008, ALLISON and MARK executed Premarital Agreement (the “Premarital Agreement”). Exhibit 2. The parties were married on December 27, 2008 in Dallas, Texas. Exhibit 4.

The Waiver of Financial Disclosure and Premarital Agreement were signed by both parties before a Notary Public authorized to administer oaths in the state of Texas. Exhibits 1, 2 and 4.

On January 26, 2019, MARK filed his Counter-Petition for Divorce specifically requesting this Court to enforce the parties’ Premarital Agreement. Exhibits 3 and 4.

1. **Argument**
2. **The summary judgment evidence establishes that Allison signed the Premarital Agreement voluntarily.**

The undisputed facts, evidence and actions of ALLISON and MARK surrounding the execution of their Premarital and Agreement demonstrate that the agreement was executed intentionally, by free will and with knowledge regarding the meaning and effect of the agreement.

Saul Goodman, represented ALLISON in relation to the negotiation of the Premarital Agreement. Exhibits 4, 5 and 6. Mr. Goodman testified that ALLISON had hired him on or about July 20, 2008, approximately 4 months prior to the execution of the premarital agreement. Exhibit 6. Mr. Goodman testified that, on the date of the execution of the Waiver of Financial Disclosure and the Premarital Agreement, ALLISON appeared to be in a pleasant mood, rational and fully coherent. Exhibit 6. ALLISON did not appear to be under the influence of drugs or alcohol when she signed the agreement on November 14, 2008. Exhibit 4. Mr. Goodman testified that, on November 14, 2008, ALLISON stated she was appreciative of his “…efforts in negotiating the pre-marital agreement and fighting for her rights” prior to the time the parties executed the pre-marital agreement. Exhibit 6.

Thus, there is no genuine issue of material fact that ALLISON signed the Premarital Agreement voluntarily, and ALLISON, therefore, cannot set either agreement aside on the basis of involuntary execution.

1. **The summary judgment evidence establishes the Premarital Agreement was conscionable, when executed.**

The Premarital Agreement was more than fair to ALLISON, when she signed it. On the face of the Premarital Agreement (and the Post Marital Agreement), ALLISON retains all of the property identified on her schedule of assets and all income and growth thereon. Exhibit 2. At the time of execution of the agreement, the assets owned by ALLISON were worth more than $650,000.00. *Id.* Additionally, based upon the duration of the marriage, the Agreement provides ALLISON a sizeable lump-sum payment in the event the parties marriage is dissolved. *Id.*

Thus, there is no fact question that the Premarital Agreement was conscionable when ALLISON signed it, and ALLISON, therefore, cannot set the agreement aside on the basis of unconscionability.

1. **Not only was the Premarital Agreement conscionable when signed, but the summary judgment evidence establishes ALLISON was fully apprised of MARK’s property and financial obligations prior to execution.**

A written memorandum setting out a detailed description of MARK’s property and debts was provided to ALLISON and Mr. Goodman in September of 2008—well in advance of the signing of the Premarital Agreement. Exhibits 4, 6 and 7. Mr. Goodman testified that ALLISON and MARK met him in his law office to review and discuss the contents of this memoranda. Exhibit 6.

Mr. Goodman also testified as follows:

“Q: Did you ever ask Mark Pinkus to clarify anything about the assets and liabilities in the memoranda?

A: Yes.

Q: Was Mr. Pinkus forthcoming to you with a response?

A: Yes.

Q: In what way was Mr. Pinkus forthcoming about his assets and liabilities prior to execution of the Premarital Agreement?

A: We had 2 or 3 in-person meetings, both attorneys and both parties, to discuss the terms of the premarital agreement and to clarify questions each party had about the other’s assets—mainly, the questions arose related to Mr. Pinkus’s business interests.

Q: Did you ever make any request of Mr. Pinkus or his attorney asking for additional information that Mr. Pinkus refused to comply with?

A: No, not that I recall.

Q: Are you aware of any occasion when Mr. Pinkus told your client that he would not give her information that she requested?

A: No.”

 Exhibit 6.

The undisputed facts and specific recitations within the Waiver of Financial Disclosure and Premarital Agreement demonstrate that both parties were provided and received fair and reasonable disclosure of the other party’s property and financial obligations. Exhibits 1, 2, 4, 6 and 7. MARK had prepared a schedule that identified his separate property and liabilities prior to the execution of the Premarital Agreement. Exhibits 2, 4, 6 and 7. The schedule attached to the Agreement not only makes a fair and reasonable disclosure of each party's separate property, but in most cases, sets out the corresponding values of each asset and liability. Exhibit 2. Further, MARK had previously provided a written memorandum setting out a description of his property and debts months in advance of the execution of the agreement. Exhibits 4, 6 and 7.

After the fair and reasonable disclosure by each party of their property and financial obligations, the parties then signed the Waiver of Financial Disclosure, waiving in writing any right to disclosure of the property or financial obligations of the other party beyond the disclosure previously provided. Exhibits 1, 4 and 7.

 As such, ALLISON cannot present any summary judgment evidence that she was not provided a fair and reasonable disclosure of MARK’s property and financial obligation, that she did waive the right to further disclosure, and that she did not have adequate knowledge of MARK’s assets and liabilities.

1. **As a Matter of Law, the Premarital Agreement is Enforceable**

The summary judgment evidence establishes conclusively that the Premarital Agreement attached hereto as Exhibit 2 is fully enforceable for all purposes.

1. **PRAYER**

For the reasons stated herein above, MARK PINKUS prays that the Court grant his Motion for Partial Summary Judgment and declare that the Premarital Agreement attached hereto as Exhibit 2 is fully enforceable.

MARK PINKUS prays for any further relief to which he may be justly entitled.

 Respectfully Submitted,

Cindy V. Tisdale

Tisdale, Indelicato & Key

227 Oak Street, Suite 1200

Denton, Texas 76201

Tel: (xxx) xxx-xxxx

Fax: (xxx) xxx-xxxx

E-mail: Cindy@TIK.com

By: /s/ Cindy V. Tisdale

 Cindy V. Tisdale

 State Bar No. 00792700

Attorney for Mark Pinkus,

Respondent

**CERTIFICATE OF SERVICE**

I certify that a true copy of the above Motion for Partial Summary Judgment was served on the following attorney of record in accordance with the Texas Rules of Civil Procedure on January 28, 2018:

***Via E-Service: Chris@HHW.com***

Christopher Wrampelmeier

Hays, Haston & Wrampelmeier

 /s/ Cindy V. Tisdale

Cindy V. Tisdale

**NOTICE OF HEARING**

The above motion is set for hearing on February 22, 2019 at 9:00 a.m. in the 510th Judicial District Court of Denton County, Texas.

SIGNED on January 28, 2019.

 \_\_\_\_

Judge or Clerk