**CAUSE NO. 43,647**

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| **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, Minor children** | **§** | **Denton County, Texas** |

**ALLISON GELBE-Pinkus’ RESPONSE TO MARK PINKUS’ MOTION FOR PARTIAL SUMMARY JUDGMENT REGARDING ENFORCEABILITY OF PREMARITAL AGREEMENT**

Petitioner, ALLISON GELBE-PINKUS (“ALLISON”), files this Response to Motion for Partial Summary Judgment Regarding Enforceability of Premarital Agreement and would show unto the Court the following:

1. **SUMMARY JUDGMENT EXHIBITS**

ALLISON submits the following summary judgment evidence in support of her Motion: A true and correct copy of:

1. ALLISON’s Declaration, attached hereto as Exhibit A and incorporated herein for all purposes.
2. A certified copy of the Agreed Final Decree of Divorce between Mark Pinkus and Katie Custer, dated August 7, 2005, attached hereto as Exhibit A-1 and incorporated herein for all purposes;
3. Premarital Agreement, in the form signed by ALLISON on November 14, 2008 (without schedules attached), attached hereto as Exhibit A-2 and incorporated herein for all purposes;
4. Premarital Agreement, in the form MARK attaches to his Motion for Summary Judgment (with schedules attached), attached hereto as Exhibit A-3 and incorporated herein for all purposes;
5. A true and correct copy of the correspondence from Saul Goodman to ALLISON dated March 23, 2009, enclosing the signed Premarital Agreement after schedules were attached, attached hereto as Exhibit A-4 and incorporated herein for all purposes.
6. **FACTS**
7. ALLISON and MARK PINKUS, Respondent (“MARK”) married on December 27, 2008. Before their marriage, MARK requested that ALLISON sign a premarital agreement to protect their pre-marital assets. The Premarital Agreement was drafted by MARK’s attorney, Cindy V. Tisdale, and ALLISON was represented by Saul Goodman.
8. On or about November 15, 2018, ALLISON learned of facts that she did not know prior to the parties’ marriage. Specifically, ALLISON learned from Ellie Natenberg, the wife of one of MARK’s friends, that MARK had been married to another woman prior to the parties’ marriage and that MARK had lied to her about this fact. Upon further investigation, ALLISON learned MARK had been married to Katie Custer from May 3, 2005 to August 7, 2005. *Exh. A-1.*
9. Due to ALLISON’s strongly held religious beliefs, prior to becoming engaged and marrying MARK, ALLISON specifically asked him whether or not he had been previously married. MARK denied having been previously married. Having knowledge of his prior marriage and divorce, MARK was aware that these statements to ALLISON were false. MARK further stipulated in writing within the Premarital Agreement signed by the parties prior to marriage that MARK had “…never been married.” *Exh. A-2.*
10. Because of her religious convictions, ALLISON attached importance to the representation that MARK had not previously been married when accepting his proposal and marrying him. MARK’s representation induced ALLISON to marry MARK.
11. MARK induced ALLISON to enter into the marriage by fraud. ALLISON has learned that MARK’s misrepresentations were made with the express intention that ALLISON would rely and act on them. MARK knew that ALLISON would not marry him if she were aware of the 2005 marriage and divorce and MARK shared this fact with ALLISON on December 12, 2018, the date ALLISON confronted MARK about the hidden marriage. Since learning of the fraud, ALLISON has not voluntarily cohabited with MARK.
12. ALLISON filed a Petition for Annulment and First-Amended Petition for Divorce on January 9, 2019, requesting an annulment based on fraudulent inducement under Tex. Fam. Code §6.107.

Select one of 7.A.–7.H.

7.A. Underage—Marriage before September 1, 2017
§ 6.102

This ground applies only to marriages entered before September 1, 2017. The marriage of an unemancipated person under eighteen years of age entered on or after that date is void. Tex. Fam. Code
§ 6.205. See form 62-6. Although the statute does not say so, presumably the underage party could sue after coming of age if he had not ratified the marriage by voluntarily cohabiting after age eighteen.

7.B. Under Influence of Alcohol or Narcotics
§ 6.105

7.D. Fraud, Duress, or Force
§ 6.107

1. MARK alleges that the Premarital Agreement attached hereto as Exhibit 3 is a true and correct copy of the Premarital Agreement signed by the parties. This allegation is incorrect. At the time ALLISON signed the Premarital Agreement, the Schedules referenced in the agreement were not attached. ALLISON had not seen the schedules referenced within the Premarital Agreement, and they were not attached to the Premarital Agreement.
2. The signing of the parties’ Premarital Agreement was scheduled to take place in the offices of Saul Goodman on November 16, 2008, but due to a last-minute meeting MARK scheduled in San Francisco, the signing date was changed. ALLISON learned of MARK’s scheduling conflict on the evening of November 13, 2008, when MARK told ALLISON he was traveling to San Francisco on the evening of November 14, 2008. MARK insisted that he and ALLISON sign the Premarital Agreement on November 14, 2008.
3. Saul Goodman, the attorney representing ALLISON, was in the middle of a trial on November 14, 2008 and was not available to attend the signing on that date. ALLISON scheduled a brief meeting with Mr. Goodman at his office at 7:00 a.m. on December 5, 2008. At the time of the meeting, Mr. Goodman was unclear if the Premarital Agreement was in final form and he had not yet received from MARK’s attorney Schedules A-D that were referenced within the Premarital Agreement.
4. MARK and ALLISON were to travel together to Cindy V. Tisdale’s office to sign the Premarital Agreement on November 14, 2008. Due to MARK’s tight schedule, he just asked his lawyer to email him a copy of the Waiver of Financial Disclosure and Premarital Agreement so that he could print it at home for signature. MARK called in a favor and a friend who was a notary traveled to the residence MARK and ALLISON for the execution. MARK presented ALLISON with the Waiver of Financial Disclosure and the Premarital Agreement (without schedules attached). ALLISON asked about the schedules referenced in the Premarital Agreement and MARK erupted, complaining that he was already late to catch his plane to San Francisco. ALLISON felt the effects of extreme pressure and duress, and proceeded with signing the Waiver of Financial Disclosure and the signature page to the Premarital Agreement. MARK maintained the originals of all documents that were signed on November 14, 2008.
5. ALLISON and MARK only generally discussed the Premarital Agreement before the time these documents were signed. ALLISON understood that the intent for the agreements was just to protect the separate property that each party had at the time of the marriage.
6. The first time, ALLISON saw a “complete” Premarital Agreement, along with schedules A-D, was approximately 90 days following the marriage. On or about March 23, 2009, ALLISON received correspondence from Mr. Goodman enclosing an original copy of the executed Waiver of Financial Disclosure and a “complete” Premarital Agreement.
7. **ARGUMENT & AUTHORITIES**
8. **Summary Judgment Standard**

To prevail on a motion for summary judgment, the movant has the burden of showing that there is no issue of material fact and that it is entitled to judgment as a matter of law. *Nixon v. Mr. Prop. Mgmt. Co*., 690 S.W.2d 546, 548-49 (Tex. 1985). In deciding whether there is a disputed issue of material fact precluding summary judgment, the court takes as true all evidence favorable to the non-movant. *Id*.; *Limestone Pods. Distrub., Inc. v. McNamara*, 71 S.W.3d 308, 311 (Tex. 2002). “The purpose of a summary judgment “…is not to provide either a trial by deposition or a trial by affidavit, but to provide a method of summarily terminating a case when it clearly appears that only a question of law is involved and that no genuine issue of fact remains.” *American Medical Elec. v. Korn*, 819 S.W.2d 573, 577 (Tex.App.—Dallas 1991, writ denied). The Court must view the evidence in a light most favorable to the non-movant and must indulge every reasonable inference and resolve all doubts in favor of the non-movant. *Limestone Prods*., 71 S.W.3d at 311. The movant bears the burden on the summary-judgment motion. Tex.R. Civ. P. 166a(c)(Vernon 2010); *Rhone-Poulenc, Inc. v. Steel,* 997 S.W.2d 217, 222 (Tex. 1999).

1. **There is a genuine issue of material fact about the validity of the Parties marriage, and therefore, the validity of the Premarital Agreement.**

ALLISON’s primary claim is annulment of the marriage.[[1]](#footnote-1) A suit for annulment presumes If the annulment presumes there was never a valid marriage, and therefore, the marriage should be declared void. *In re JA. D.Y.,* 2018 WL 3424359 \* 1 (Tex.App.—Dallas 2018, no pet.)*.* In fact, if the annulment is granted, the Parties’ marriage is void *ab initio*, such that there was never a valid marriage. *Garcia v. Garcia,* 232 S.W.2d 782, 783 (Tex.Civ.App.—San Antonio 1950, no writ). If a marriage is annulled, i.e. declared void, then the Parties’ Premarital Agreement will have never come into effect and is enforceable only to the extent necessary to avoid an inequitable result. Tex. Fam Code §§ 4.004; 4.007; *see also In re D.Y.,* 2018 WL 3424359 at\* 5.

As such, in this summary judgment proceeding, the Court must begin with the presumption that there was never a valid marriage. *In re D.Y.,* 2018 WL 3424359 at\* 5.MARK’s motion for summary judgment completely ignores this presumption, and instead, tries to make an end run at enforcing the Premarital Agreement. Moreover, given the factually intensive inquiry that must be undertaken to determine an annulment claim, determination of the claim is not proper by summary judgment. *Estate of Matthews III,* 510 S.W.3d 106, 116 (Tex.App.—San Antonio 2016, no pet.)(holding annulment of marriage based on incapacity presented a question of fact). By logical extension, determining the validity of the Premarital Agreement in this case is also not proper by summary judgment.

Because there is a genuine question of material fact regarding the validity of the Premarital Agreement, this Court should deny MARK’s motion for summary judgment.

1. **In the alternative, even if the Parties’ marriage is declared to be valid, there is a genuine issue of material fact about the enforceability of the Premarital Agreement.**

A premarital agreement that was not signed voluntarily is not enforceable. Tex. Fam. Code § 4.006; §4.105. A premarital agreement is also void if it was unconscionable when it was signed, and before signing the premarital agreement, the party against whom it is being enforced (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. *Id.*

1. ***ALLISON did not sign the Premarital Agreement Voluntarily***.

 Whether a premarital agreement was signed involuntarily is a factual, case-by-case determination. *Moore v. Moore,* 383 S.W3d 190, 195 (Tex.App.—Dallas 2012, pet. denied). Involuntariness does not necessarily mean direct threats or coercion. *Id.* at 196. A Recitation or representation in the agreement that the parties are signing the agreement voluntarily is not outcome determinative and cannot over-ride other indicia of involuntariness. *Id.* Texas courts have recognized the following as evidence of involuntary execution:

1. Advice of counsel – Courts can consider whether the party was represented by counsel and whether the party received advice from counsel. For instance, in *Moore v. Moore,* the court held the agreement was signed involuntarily because wife’s attorney had not reviewed the agreement before she signed it. *Id.*
2. Misrepresentation – Courts can consider any misrepresentation made by the other party in procuring the agreement. *Id.*
3. Information conveyed – Courts can consider whether information was withheld. For instance, in *Moore v. Moore,* the court held the agreement was signed involuntarily for the additional reason that wife did not know her lawyer had not reviewed the agreement. *Id.*
4. Proximity of execution to wedding – Courts can consider how close in time the date of execution was to the wedding date. *Nesmith v. Berger,* 64 S.W.3d 110, 115 (Tex. App. – Austin 2001, pet. denied).

The summary judgment evidence establishes that due to last minute scheduling changes initiated by MARK, ALLISON had to sign the Premarital Agreement without her attorney Saul Goodman being present at the signing. Exhibit A, p. 2. Moreover, when she reviewed the Premarital Agreement with Mr. Goodman, he was not sure he had a final draft of the Premarital Agreement and he did not have the schedules that included MARK’s financial information. Exhibit A, p. 2. At the time of signing the agreement, the schedules containing a description of MARK’s assets and liabilities were withheld from ALLISON. Exhibit A, p. 2. When ALLISON inquired about the missing schedules, MARK erupted at her. Exhibit A, p. 2. After signing the Agreement, MARK maintained the only original copy and left for San Francisco. Exhibit A, p. 2. MARK and ALLISON married twenty-two days later, at which time neither ALLISON nor Mr. Goodman had been provided a fully executed copy of the Premarital Agreement. Exhibit A, p. 3.

The summary judgment evidence clearly establishes ALLISON did not sign the Premarital Agreement voluntarily, or at a minimum, it creates a genuine question of material fact about whether ALLISON signed the Premarital Agreement voluntarily. As such, summary judgment is not proper.

1. ***The Premarital Agreement was unconscionable at the time of signing, and ALLISON did not receive proper disclosures prior to signing.***

Unconscionability is a question of law. Tex. Fam. Code § 4.006. The purpose of unconscionability is the prevention of oppression and unfair surprise. *In re First Merit Bank,* 52 S.W.3d 749, 757 (Tex. 2001). In determining whether an agreement is unconscionable, a court should conduct a procedural and substantive review of the contract. *In re Halliburton,* 80 S.W.3d 566, 571 (Tex. 2002). Procedural conscionability focuses on the bargaining process and how the agreement came into existence. *In re Rangel,* 45 S.W.3d 783, 786 (Tex.App.—Waco 2001, orig. proceedings). Relevant factors include: (1) deception, over-reaching, and sharp business practices, (2) the absence of a viable alternative, and (3) the relative acumen, education, and financial ability of the parties. *El Paso Nat. Gas. Co. v. Minco Oil & Gas Co.,* 964 S.W.2d 54, 61 (Tex.App.—Amarillo 1997). Substantive unconscionability focuses on the terms and conditions of the agreement at the time it was made. *In re Rangel,* 45 S.W.3d at 786.

An unconscionable premarital agreement is unenforceable, if in addition to it being unconscionable, before signing the agreement, the contesting party (1) was denied a fair and reasonable disclosure of the property and obligations of the other party, (2) did not voluntarily waiver further disclosure, and (3) did not have, and could not have had, adequate knowledge of the other party’s financial obligations. Tex. Fam. Code § 4.006.

Neither ALLISON nor Mr. Goodman received a copy of the schedules disclosing MARK’s property and obligations prior to executing the Premarital Agreement. Exhibit A, p. 2. Moreover, ALLISON had to sign the Premarital Agreement without her attorney Saul Goodman being present at the signing. Exhibit A, p. 2. At the time of signing the agreement, the schedules containing a description of MARK’s assets and liabilities were withheld from ALLISON. Exhibit A, p. 2. When ALLISON inquired about the missing schedules, MARK erupted at her. Exhibit A, p. 2. After signing the Agreement, MARK maintained the only original copy and left for San Francisco. Exhibit A, p. 2. MARK and ALLISON married twenty-two days later, at which time neither ALLISON nor Mr. Goodman had been provided a fully executed copy of the Premarital Agreement. Exhibit A, p. 2.

The summary judgment evidence clearly establishes the Premarital Agreement is unenforceable for this additional reason, or at the least, there is a genuine question of material fact about the enforceability of the Agreement. As such, this Court should deny MARK’s motion for summary judgment.

1. **PRAYER**

For the reasons stated herein above, ALLISON GELBE-PINKUS prays that the Court deny MARK PINKUS’ Motion for Partial Summary Judgment.

ALLISON GELBE- PINKUS prays for any further relief to which he may be justly entitled.

 Respectfully Submitted,

Hays, Haston & Wrampelmeier

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 Attorney for ALLISON GELBE-PINKUS,

Petitioner

**Certificate of Service**

I certify that a true copy of the above was served on Cindy V. Tisdale through the electronic filing manager in accordance with the Texas Rules of Civil Procedure on February 14, 2019.

/s/Christopher K. Wrampelmeier

Christopher K. Wrampelmeier

Attorney for Petitioner

1. A Court may annul a marriage if (1) the other party used fraud, duress, or force to induce the petitioner to enter into the marriage; and (2) the petitioner has not voluntarily cohabited with the other party since learning of the fraud or since being released from the duress or force. Tex. Fam. Code § 6.107. Fraudulent inducement is established by proving that a false material representation was made that (1) was known to be false when it was made; (2) was intended to be acted upon; (3) was relied upon; and (4) caused injury. *Desta v. Anyaoha*, 371 S.W.3d 596, 600 (Tex. App.—Dallas 2012, no pet.). [↑](#footnote-ref-1)