**NOTICE: THIS DOCUMENT CONTAINS SENSITIVE DATA**

**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, CHILDREN** | **§****§** | **DENTON COUNTY, TEXAS** |

**TRIAL BRIEF REGARDING PENALTY AND FORFEITURE CLAUSE**

COMES NOW, the Respondent, MARK PINKUS, and files this Trial Brief Regarding Penalty and Forfeiture Clause. In support, MARK PINKUS (“MARK”) would respectfully show the Court the following:

**INTRODUCTION**

Petitioner, ALLISON GELBE-PINKUS (“ALLISON”) and MARK executed a Premarital Agreement on November 14, 2008. Section 9.17 of the parties’ Premarital Agreement provides as follows:

In the event ALLISON or MARK (or any third party acting at the request of either of them, or on behalf of either of them) initiates or prosecutes any legal action or seeks any ancillary remedy in any action seeking to invalidate any provision of this Agreement or obtain property, property rights or benefits contrary to, in excess of, or otherwise at variance with this Agreement (the “Contesting Party”), then the Contesting Party shall be liable to the other Party for all reasonable and necessary attorney’s fees and costs incurred by such other Party in defending his or her rights under this Agreement. Additionally, if ALLISON initiates or prosecutes any legal action or seeks any ancillary remedy in any action seeking to invalidate any provision of this Agreement or obtain property, property rights or benefits contrary to, in excess of, or otherwise at variance with this Agreement, then ALLISON shall forfeit the cash payment otherwise payable to her under Section 7.3 herein.

Section 7.3 of the Premarital Agreement provides a lump sum payment to ALLISON in the event of dissolution, as follows:

The Parties agree that MARK will pay to ALLISON, within thirty days of dissolution of the Marriage, the following amount of cash based upon the duration of marriage, as set forth below:

**Date Dissolution Proceeding Filed Amount to ALLISON**

Before 1st Anniversary of Marriage $0.00

After 1st, but before 3rd Anniversary of Marriage $500,000.00

After 3rd, but before 7th Anniversary of Marriage $1,000,000.00

After 7th, but before 15th Anniversary of Marriage $3,000,000.00

After 15th Anniversary of Marriage $5,000,000.00

Despite the clear contractual language in Section 9.17 of the Premarital Agreement, ALLISON filed a *Petition to Annul Marriage or, In the Alternative, First Amended Petition for Divorce* (“Petition”) through which she seeks to “…obtain property, property rights or benefits contrary to, in excess of, or otherwise at variance with [the] Agreement.”

By the requests for relief contained within the Petition, ALLISON has triggered the penalty and forfeiture clause within Section 9.17 of the Agreement. As a result, ALLISON is liable to MARK for his reasonable and necessary attorney’s fees and costs incurred to defend his rights under the Agreement. Further, ALLISON has lost her contractual entitlement to the lump-sum cash payment payable upon dissolution by MARK to ALLISON under Section 7.3 of the Agreement.

**ARGUMENT AND AUTHORITIES**

The Texas Supreme Court has repeatedly recognized that parties "shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts." *Gym-N-I Playgrounds, Inc. v. Snider,* 220 S.W.3d 905, 912 (Tex. 2007). Strong public policy favors freedom of contract, and that is "firmly embedded in our jurisprudence." *Phila. Indem. Ins. Co. v. White,* 490 S.W.3d 468, 471 (Tex. 2016). The interpretation of an unambiguous contract is a question of law for the court. *MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.,* 995 S.W.2d 647, 650 (Tex. 1999). The court’s primary objective in contract interpretation is to “…ascertain and give effect to the parties' intent as expressed in the instrument. Objective manifestations of intent control," not the subjective intent of the parties. *URI, Inc. v. Kleberg Cty.,* 543 S.W.3d 755, 763-64 (Tex. 2018). Contractual terms are given their plain, ordinary, and generally accepted meaning unless the contract indicates that the parties used a term in a technical or unusual sense. *Dynegy Midstream Servs. v. Apache Corp.,* 294 S.W.3d 164, 168 (Tex. 2009); *Heritage Res., Inc. v. Nations Bank,* 939 S.W.2d 118, 121 (Tex. 1996).

In Texas, “…courts interpret premarital agreements like other written contracts." *Williams v. Williams,* 246 S.W.3d 207, 210 (Tex. App. — Houston [14th Dist.] 2007, no pet.). "The legislature and the people of Texas have made the public policy determination that premarital agreements should be enforced. If we refuse to enforce [a] premarital agreement, we would thwart, rather than advance, our state's public policy enforcing these contracts." *Beck v. Beck,* 814 S.W.2d 745, 748-49 (Tex. 1991). Equitable exceptions to the enforcement of contracts as written are disfavored. Courts will not rewrite agreements to insert provisions parties could have included or to imply restraints for which they have not bargained. *Tenneco Inc. v. Enter. Prod. Co.,* 925 S.W.2d 640, 646 (Tex. 1996). “Where a valid contract prescribes particular remedies or imposes particular obligations, equity generally must yield unless the contract violates positive law or offends public policy." *Fortis Benefits v. Cantu,* 234 S.W.3d 642, 648-49 (Tex. 2007).

Texas Courts have routinely upheld forfeiture clauses. *See Gunter v. Pogue*, 672 S.W.2d 840, 842 (Tex. App.—Corpus Christi 1984, writ ref’d n.r.e.)(“As a general rule forfeiture provisions, or *in terrorem* clauses, in a will are to be construed strictly, and a breach of such clause should be declared only when the acts of the parties come within the express terms of the clause.”). When parties in unambiguous language write into their agreement a provision for forfeiture, the courts will enforce the provision. *See Anderson v. Powell*, 38 S.W.3d 365, 366 (Tex. App.—Dallas 1964, no writ). A clear and specific forfeiture provision in a contract will be honored. *Meridien Hotels, Inc. v. LHO Financing Partnership I, L.P.*, 255 S.W.3d 807, 819 (Tex. App.—Dallas 2008, no pet.).

**ALLISON’S PLEADINGS TRIGGER THE PENALTY AND FORFEITURE CLAUSE**

In this case, ALLISON and MARK entered into a Premarital Agreement and stipulated to their mutual desire that “…conflicts regarding financial matters be minimized during their planned marriage…”, and their mutual intention that “…the Agreement is intended to prevent such conflicts.” To that end, Section 7.3 of the Agreement provided ALLISON a right to a generous sum of cash in the event of a dissolution of the parties’ marriage. ALLISON AND MARK also expressly agreed to a penalty and forfeiture clause in Section 9.17, which provides clear consequences if ALLISON seeks to invalidate any provision of the Agreement or obtain property, property rights or benefits contrary to, in excess of, or otherwise at variance with the Agreement.

By the terms of the Premarital Agreement, ALLISON and MARK agreed in relevant part to the following:

1. Stipulations and Recitals – Page 2:

“By this Agreement, ALLISON and MARK intend to…waive certain rights that either of them, or the survivor of them, could claim to the property or the estate of the other;”

1. Stipulations and Recitals – Page 2:

“By this Agreement, ALLISON and MARK intend to…avoid the accumulation of any community property during their marriage;”

1. Stipulations and Recitals – Page 2:

“ALLISON and MARK further intend that the only way for there to be community property of their Marriage is with a written conversion agreement properly executed under Texas law.”

1. Section 2.7 – Page 5-6:

“Notwithstanding anything in this Agreement to the contrary, the Parties specifically agree that any property acquired solely in the name of ALLISON or MARK during their Marriage, regardless of the source of the consideration paid for the acquired property, will be owned only as the separate property of the Party in whose name the property is purchased or title is taken, and said property will be free of any claim of reimbursement on the part of the other Party. ALLISON shall retain, as her sole and separate property, all property standing solely in ALLISON’s name, whether now owned or hereafter acquired, and ALLISON shall have the absolute and unrestricted right to dispose of such separate property, by sale, gift, devise or in any other manner, free from any claim that may be made by MARK by reason of their marriage or otherwise, and with the same effect as if no marriage had been consummated between ALLISON and MARK. MARK shall retain, as his sole and separate property, all property standing solely in MARK’s name, whether now owned or hereafter acquired, and MARK shall have the absolute and unrestricted right to dispose of such separate property, by sale, gift, devise or in any other manner, free from any claim that may be made by ALLISON by reason of their marriage or otherwise, and with the same effect as if no marriage had been consummated between ALLISON and MARK.”

Within ALLISON’s Petition, ALLISON requests for the Court to:

1. Find that the premarital agreement never went into effect and for a division of accumulated property in a manner that the Court deems just and right, as provided by law;
2. Find that the premarital agreement is unenforceable in part or in whole;
3. Find that Respondent is estopped from enforcing some or all of the terms of the premarital agreement;
4. Set aside the premarital agreement;
5. Award Petitioner a disproportionate share of the parties’ estate.

By pursuing an annulment, asking the court to find that the Premarital Agreement never came into effect, and requesting a division of the property accumulated between the parties, ALLISON seeks a greater distribution of property under the Texas Family Code and related Texas common law than she would receive if the Premarital Agreement remains in place. ALLISON seeks to avoid the Premarital Agreement in favor of whatever property division an annulment would otherwise yield.

ALLISON requests a division of property determined by the Texas Family Code and common law, instead of the Premarital Agreement. By pleading for remedies not permitted under the terms of the Premarital Agreement, ALLISON seeks to “obtain property, property rights or benefits contrary to, in excess of, or otherwise at variance with [the] Agreement.”

ALLISON’s actions render her a “Contesting Party” as defined by Section 9.17 of the Agreement. ALLISON did not have an absolute right to the sizeable lump-sum payment afforded to her in Section 7.3 of the Agreement. She had a *conditional* right premised on her compliance with the Section 9.17 forfeiture clause. In addition to forfeiting the lump sum payment upon dissolution, her actions as a Contesting Party render her liable to MARK for all reasonable and necessary attorney’s fees and costs incurred by MARK in defending his rights under this Agreement.

**CONCLUSION**

By filing her *Petition to Annul Marriage or, In the Alternative, First Amended Petition for Divorce*, and pursuing the relief therein through final trial, ALLISON is rendered a Contesting Party under the parties’ Premarital Agreement. She has initiated and prosecuted legal action to invalidate the Premarital Agreement and to obtain property, property rights or benefits contrary to, in excess of, or otherwise at variance with this Agreement. The Court should find that ALLISON has triggered the penalty and forfeiture clause within Section 9.17 of the Agreement. Further, the Court should find that ALLISON lost all entitlement to the lump sum payment under Section 7.3 of the Premarital Agreement and is liable to MARK for his reasonable and necessary attorney’s fees and costs incurred to defend his rights under the Agreement.

 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 Respondent,

MARK PINKUS

**Certificate of Service**

I certify that a true copy of the above was served on Christopher K. Wrampelmeier through the electronic filing manager in accordance with the Texas Rules of Civil Procedure on February 22, 2019.

/s/Cindy V. Tisdale

Cindy V. Tisdale

Attorney for Respondent