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**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 ON GROUNDS FOR ANNULMENT**

**The facts show Mark used fraud to induce Allison into signing the Premarital Agreement and marrying him and Allison has not voluntarily cohabited with Mark since learning of the fraud. The Court should annul the marriage and find the Premarital Agreement is unenforceable except to the extent necessary to avoid an inequitable result.**

Petitioner, Allison Gelbe-Pinkus, files this Trial Brief on Grounds for Annulment and would respectfully show the Court as follows:

**Applicable Law**

1. A trial 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](http://www.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000175&cite=TXFAS6.107&originatingDoc=If2f58b00894f11e88d669565240b92b2&refType=LQ&originationContext=document&vr=3.0&rs=cblt1.0&transitionType=DocumentItem&contextData=(sc.Search)).

2. Fraudulent inducement is established by proving that a false material misrepresentation was made that:

a. was known to be false when it was made;

b. was intended to be acted upon;

c. was relied upon; and

d. caused injury.

*Desta v. Anyaoha*, 371 S.W.3d 596, 600 (Tex. App.—Dallas 2012, no pet.).

3. An actionable representation “must be a representation of a material fact.” *Trenholm v. Ratcliff*, 646 S.W.2d 927, 930-31 (Tex. 1983). “A representation is ‘material’ if it is important to the party to whom it is made in making a decision regarding the particular transaction.” *Burleson State Bank v. Plunkett*, 27 S.W.3d 605, 613 (Tex. App.—Waco 2000, pet. denied). “Whether a statement is an actionable statement of ‘fact’ or merely one of ‘opinion’ often depends on the circumstances in which a statement is made.” *Transport Ins. Co. v. Faircloth*, 898 S.W.2d 269, 276 (Tex. 1995). “When a speaker purports to have special knowledge of the facts, or does have superior knowledge of the facts—for example, when the facts underlying the opinion are not equally available to both parties—a party may maintain a fraud action.” *Paull v. Capital Res. Mgmt., Inc.*, 987 S.W.2d 214, 219 (Tex. App.—Austin 1999, pet. denied); *Matis v. Golden*, 228 S.W.3d 301, 307 (Tex. App.—Waco 2007, no pet.). “While a party’s intent is determined at the time the party made the representation, it may be inferred from the party’s subsequent acts after the representation is made.” *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 434 (Tex. 1986). “Since intent to defraud is not susceptible to direct proof, it invariably must be proven by circumstantial evidence.” *Id.* at 435.

4. In a suit for a dissolution of a marriage, the husband and the wife are competent witnesses for and against each other. Tex. Fam. Code § 6.704. If the husband or wife testifies, the court trying the case shall determine the credibility of the witness and the weight to be given to the witness’s testimony. *Id.* In a bench trial, the trial court, as factfinder, is the sole judge of the credibility of the witnesses. *In re JaD.Y.,* 2018 WL 3424359 at \*3 (Tex. App—Dallas 2018, no pet.) (mem. op.); *see also Sheetz v. Slaughter,* 503 S.W.3d 495, 502 (Tex. App.—Dallas 2016, no pet.).

5. “A premarital agreement becomes effective on marriage.” Tex. Fam. Code § 4.004. Section 4.007 of the Texas Family Code provides that if a marriage is determined to be void, an agreement that would otherwise have been a premarital agreement is enforceable only to the extent necessary to avoid an inequitable result. Tex. Fam. Code § 4.007. “A suit for annulment presumes that there never was a valid marriage and that therefore it should be declared void.” *Garcia v. Garcia*, 232 S.W.2d 782, 783 (Tex. Civ. App.—San Antonio 1950, no writ). “Wide latitude and discretion rests” with the trial courts in equitable claims and “that discretion should only be disturbed in the case of clear abuse.” *Murff v. Murff*, 615 S.W.2d 696, 700 (Tex. 1981).

6. If a marriage is determined to be void, an agreement that would otherwise have been a premarital agreement is enforceable only to the extent necessary to avoid an inequitable result. Tex. Fam. Code § 4.007.

**Application of the Law to the Facts**

6. On or about November 15, 2018, Allison learned from Ellie Natenberg, the wife of one of Mark Pinkus’s friends, that Mark was married to another woman before marrying her. Mark had lied to Allison about this fact before Allison and Mark married when Allison specifically asked him if he had been married before. Mark had said he had never been married.

7. Upon further investigation, Allison learned Mark had been married to Katie Custer from May 3, 2005 to August 7, 2005. Allison obtained a copy of the Final Decree of Divorce in Cause No. 2005-67006; *In the Matter of the Marriage of Mark Pinkus and Katie Custer;* in the 257th District Court in and for Harris County, Texas. On or about December 12, 2018, in response to Allison confronting him, Mark admitted to Allison for the first time that he had been married before and gotten divorced.

8. Allison holds very strong religious beliefs about marriage and divorce. Because of these religious convictions, Allison attached great importance to Mark’s representation of never having been married when Allison accepted his engagement proposal. Allison would have never married Mark if she had known Mark was still married in the eyes of God.

9. Mark knew the issue of whether Mark had been married before was critically important to Allison when the parties were engaged. Allison told him how important it was. Allison insisted that the Premarital Agreement the parties signed include a representation by Mark that Mark had never been married before.

10. Fraudulent inducement is established in this case. The actionable representations were of material facts: Mark had been married and Mark had been divorced. The representations were “material” because they were important to Allison when she was deciding whether to sign the Premarital Agreement and whether to marry Mark. Mark had special and superior knowledge of these facts. The preponderance of the evidence therefore shows:

a. Mark knew his denials about his previous marriage and divorce were false when he made them;

b. Mark intended for Allison to act on those false statements by signing a Premarital Agreement and marrying him;

c. Allison relied upon those false statements when she signed the Premarital Agreement and married Mark; and

d. Mark’s false statements injured Allison by inducing her to sign a premarital agreement under false pretenses and in violation of her devout religious beliefs, causing her to marry a man who, in God’s eyes, is an adulterer.

11. Only an annulment can keep Allison from becoming an adulterer too, if she ever wishes to marry again.

12. Allison has not voluntarily Allison cohabited with Mark since learning of the fraud. Mark and Allison have not lived together since June 1, 2018.

13. The facts of this case are similar to those in *JaD.Y.* In that case, the husband lied to the wife about having been married twice before. The wife testified that the husband lied to her about having been married twice before. The wife testified that “if she had known about the second marriage, she ‘very likely would not have married [the husband]’” *In re JaD.Y.,* 2018 WL 3424359 at \*3. The appellate court held that this evidence was legally and factually sufficient evidence to support the trial court’s finding of fact that the husband had lied to the wife about his former marriages, which was one of the bases for the trial court’s annulment of the marriage based on fraud. *Id.* at \*2-3. As a consequence of affirming the annulment, the appellate court also concluded the parties’ premarital agreement was unenforceable. *Id.* at \*6.

The Court should annul this marriage and find the Premarital Agreement to be unenforceable except to the extent necessary to avoid an inequitable result.

Respectfully Submitted,

Hays, Haston & Wrampelmeier

1850 Sycamore Street,

Denton, Texas 76025

Tel: (xxx) xxx-xxxx

Fax: (xxx) xxx-xxxx

E-mail: Chris@HHW.com

By: /s/ Christopher K. Wrampelmeier

 Christopher K. Wrampelmeier

 State Bar No. 00788721

 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 21, 2019.

/s/Christopher K. Wrampelmeier

Christopher K. Wrampelmeier

Attorney for Petitioner