THE LAW OF INTERPRETING CONTRACTS: HOW TO DRAFT CONTRACTS TO AVOID OR WIN LITIGATION

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---*A Guide to Proceedings Under the Texas Parent Notification Statute and Rules*, SOUTH TEXAS LAW REVIEW (2000) (co-authored)

---*Obligations of the Trial Lawyer Under Texas Law Toward the Client Relating to an Appeal*, 41 SOUTH TEXAS LAW REVIEW 111 (1999)

---*Asserting Claims for Intentionally or Recklessly Causing Severe Emotional Distress, in Connection With a Divorce*, 25 ST. MARY'S L.J. 1253 (1994), republished in the AMERICAN JOURNAL OF FAMILY LAW (Fall 1994) and Texas Family Law Service *NewsAlert* (Oct. & Dec., 1994 and Feb., 1995)

---Chapter 21 on *Business Interests* in Bancroft-Whitney's TEXAS FAMILY LAW SERVICE (Speer's 6th ed.)

---*Characterization of Marital Property*, 39 BAY. L. REV. 909 (1988) (co-authored)

---*Fitting a Round Peg Into A Square Hole: Section 3.63, Texas Family Code, and the Marriage That Crosses States Lines*, 13 ST. MARY'S L.J. 477 (1982)

SELECTED CLE ARTICLES AND SPEECHES

State Bar of Texas' [SBOT] **Advanced Family Law Course**: Intra and Inter Family Transactions (1983); Handling the Appeal: Procedures and Pitfalls (1984); Methods and Tools of Discovery (1985); Characterization and Reimbursement (1986); Trusts and Family Law (1986); The Family Law Case in the Appellate Court (1987); Post-Divorce Division of Property (1988); Marital Agreements: Enforcement and Defense (1989); Marital Liabilities (1990); Rules of Procedure (1991); Valuation Overview (1992); Deposition Use in Trial: Cassette Tapes, Video, Audio, Reading and Editing (1993); The Great Debate: Dividing Goodwill on Divorce (1994); Characterization (1995); Ordinary Reimbursement and Creative Theories of Reimbursement (1996); Qualifying and Rejecting Expert Witnesses (1997); New Developments in Civil Procedure and Evidence (1998); The Expert Witness Manual (1999); Reimbursement in the 21st Century (2000); Personal Goodwill vs. Commercial Goodwill: A Case Study (2000); What Representing the Judge or Contributing to Her Campaign Can Mean to Your Client: Proposed New Disqualification and Recusal Rules (2001); Tax Workshop: The Fundamentals (2001); Blue Sky or Book Value? Complex Issues in Business Valuation (2001); Private Justice: Arbitration as an Alternative to the Courthouse (2002); International & Cross Border Issues (2002); Premarital and Marital Agreements: Representing the Non-Monied Spouse (2003); Those Other Texas Codes: Things the Family Lawyer Needs to Know About Codifications Outside the Family Code (2004); Pearls of Wisdom From Thirty Years of Practicing Family Law (2005); The Road Ahead: Long-Term Financial Planning in Connection With Divorce (2006); A New Approach to Distinguishing Enterprise Goodwill From Personal Goodwill (2007)

SBOT's **Marriage Dissolution Course**: Property Problems Created by Crossing State Lines (1982); Child Snatching and Interfering with Possess'n: Remedies (1986); Family Law and the Family Business: Proprietorships, Partnerships and Corporations (1987); Appellate Practice (Family Law) (1990); Discovery in Custody and Property Cases (1991); Discovery (1993); Identifying and Dealing With Illegal, Unethical and Harassing Practices (1994); Gender Issues in the Everyday Practice of Family Law (1995); Dialogue on Common Evidence Problems (1995); Handling the Divorce Involving Trusts or Family Limited Partnerships (1998); The Expert Witness Manual (1999); Focus on Experts: Close-up Interviews on Procedure, Mental Health and Financial Experts (2000); Activities in the Trial Court During Appeal and After Remand (2002)

UT School of Law: Trusts in Texas Law: What Are the Community Rights in Separately Created Trusts? (1985); Partnerships and Family Law (1986); Proving Up Separate and Community Property Claims Through Tracing (1987); Appealing Non-Jury Cases in State Court (1991); The New (Proposed) Texas Rules of Appellate Procedure (1995); The Effective Motion for Rehearing (1996); Intellectual Property (1997); Preservation of Error Update (1997); TRAPs Under the New T.R.A.P. (1998); Judicial Perspectives on Appellate Practice (2000)

SBOT's **Advanced Evidence & Discovery Course**: Successful Mandamus Approaches in Discovery (1988); Mandamus (1989); Preservation of Privileges, Exemptions and Objections (1990); Business and Public Records (1993); Grab Bag: Evidence & Discovery (1993); Common Evidence Problems (1994); Managing Documents--The Technology (1996); Evidence Grab Bag (1997-1998); Making and Meeting Objections (1998 & 1999); Evidentiary Issues Surrounding Expert Witnesses (1999); Predicates and Objections (2000 & 2001); Building Blocks of Evidence (2002); Strategies in Making a Daubert Attack (2002); Predicates and Objections (2002); Building Blocks of Evidence (2003); Predicates & Objections (High Tech Emphasis) (2003)

SBOT's **Advanced Civil Appellate Practice Course**: Handling the Appeal from a Bench Trial in a Civil Case (1989); Appeal of Non-Jury Trials (1990); Successful Challenges to Legal/Factual Sufficiency (1991); In the Sup. Ct.: Reversing the Court of Appeals (1992); Brief Writing: Creatively Crafting for the Reader (1993); Interlocutory and Accelerated Appeals (1994); Non-Jury Appeals (1995); Technology and the Courtroom of the Future (1996); Are Non-Jury Trials Ever "Appealing"? (1998); Enforcing the Judgment, Including While on Appeal (1998); Judges vs. Juries: A Debate (2000); Appellate Squares (2000); Texas Supreme Court Trends (2002); New Appellate Rules and New Trial Rules (2003); *Supreme Court Trends* (2004); Recent Developments in the *Daubert* Swamp (2005); Hot Topics in Litigation: Restitution/Unjust Enrichment (2006); The Law of Interpreting Contracts (2007)

Various CLE Providers: SBOT Advanced Civil Trial Course: Judgment Enforcement, Turnover and Contempt (1990-1991), Offering and Excluding Evidence (1995), New Appellate Rules (1997), The Communications Revolution: Portability, The Internet and the Practice of Law (1998), Daubert With Emphasis on Commercial Litigation, Damages, and the NonScientific Expert (2000), Rules/Legislation Preview (State Perspective) (2002); College of Advanced Judicial Studies: Evidentiary Issues (2001); El

Paso Family Law Bar Ass'n: Foreign Law and Foreign Evidence (2001); American Institute of Certified Public Accounts: Admissibility of Lay and Expert Testimony; General Acceptance Versus Daubert (2002); Texas and Louisiana Associations of Defense Counsel: Use of Fact Witnesses, Lay Opinion, and Expert Testimony; When and How to Raise a Daubert Challenge (2002); SBOT In-House Counsel Course: Marital Property Rights in Corporate Benefits for High-Level Employees (2002); SBOT 19th Annual Litigation Update Institute: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Raising a Daubert Challenge (2003); State Bar College Spring Training: Current Events in Family Law (2003); SBOT Practice Before the Supreme Court: Texas Supreme Court Trends (2003); SBOT 26th Annual Advanced Civil Trial: Distinguishing Fact Testimony, Lay Opinion & Expert Testimony; Challenging Qualifications, Reliability, and Underlying Data (2003); SBOT New Frontiers in Marital Property: Busting Trusts Upon Divorce (2003); American Academy of Psychiatry and the Law: Daubert, Kumho Tire and the Forensic Child Expert (2003); AICPA-AAML National Conference on Divorce: Cutting Edge Issues–New Alimony Theories; Measuring Personal Goodwill (2006); New Frontiers` - Distinguishing Enterprise Goodwill from Personal Goodwill; Judicial Conference (2006); New Frontiers: Tracing, Reimbursement and Economic Contribution Claims In Brokerage Accounts (2007)

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The Law of Interpreting Contracts: How to Draft Contracts to Avoid or Win Litigation

by

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I. INTRODUCTION. As family law practice matures, family lawyers are increasingly faced with litigating family law contracts that have been drafted over the last twenty years or so. The suits can involve divorce decrees, agreements incident to divorce, premarital and postmarital agreements, mediated settlement agreements, informal settlement agreements, alimony agreements, collaborative law agreements, and the like.

Very little has been written for family lawyers on the principles of contract law, and the law of contract interpretation. While much uncertainty has been taken out of family law contracts by the State Bar of Texas' excellent **Texas Family Law Practice Manual (TFLPM)**, some of the forms in the manual have deficiencies, and some forms by necessity are stated in general terms which cannot adequately address the particular requirements of a specific case. Therefore the family lawyer who is drafting a document should develop an awareness of the "world of contract interpretation," and the fundamentals of creating a contract to accurately reflect a well-thought out bargain.

This article can be used as a tool not only to litigate the meaning of contracts, but also to draft contracts to avoid litigation. A draftsperson can write toward or write away from certain rules of contract construction. A drafting lawyer who has a conscious awareness of the components of a contract, and the way they interrelate, can do a better job of draftsmanship.

II. TEXAS LAW OF CONTRACT INTERPRETATION.

A. FUNDAMENTAL CONCEPTS.

The following fundamental concepts are important to understanding the law of interpreting contracts.

1. The Objective View of Contract Interpretation. The most basic concept of contract interpretation in Texas is not explicitly stated by the courts, but it is inherent in nearly all they do: it is the idea that a contract is interpreted objectively and not subjectively. The idea was originated at Harvard Law School, not Texas, but it took root in Texas and still holds sway to this day.

The classical view of contract interpretation grew up in the USA in the latter part of the 19th century, and was dominant in American law throughout the twentieth century. The classical view of contract interpretation ignored what the contracting parties thought the bargain to be and instead asked what a reasonable third party would interpret the words of the contract to mean. This approach relied upon the judge (not a jury) to interpret the words of the contract, assisted by standard rules of construction that didn't vary from case to case. The classical approach to contract interpretation is reflected in this famous quotation from Federal District Judge Learned Hand:

> A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent.

Hotchkiss v. Nat'l City Bank, 200 F. 287, 293 (S.D.N.Y. 1911). Professor Eisenberg described the classical approach: "[a] contract involved what is called a meeting of the minds of the parties. But this does not mean that they must have arrived at a common mental state touching the matter at hand. The standard by which their conduct is judged and their rights are limited is not internal, but external." Melvin Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CAL. L. REV. 1756 (2000). This view was reflected in the original RESTATEMENT OF CONTRACTS (1932):

> The meaning that shall be given to manifestations of intention is not necessarily that which the party from whom the manifestation proceeds, expects or understands.

Restatement of Contracts § 226, Comment b.

While it might seem odd that the classical approach to contract interpretation (now called "formalism"). focused on the meaning of the words to a stranger to the contract and excluded testimony of what the words meant to the contracting parties, it makes sense considering the times. During the latter part of the 19th century, people were increasingly coming to realize that, in nearly all areas of human knowledge from chemistry to physics to medicine to economics to human psychology, methodological analysis could reveal underlying structures that connected things together in an understandable way. The objective view of contract interpretation grew in this environment, but it was not simply a product of quasi-scientific thinking in a time of structured thought. At that time of the nation's economic development, commercial transactions were becoming increasingly impersonal, increasingly complex, were involving more parties to one transaction, who did business in several states. The central concern of the time was to lend credibility to commercial transactions and thus encourage economic activity by having reliability in the interpretation and enforcement of contractual obligations, no matter where they were litigated.

The classical approach to contracts moved to preeminence through the efforts of Samuel Williston (1861-1963), a Harvard law professor who served as the Reporter for the Uniform Sales Act of 1906, and authored a treatise on sales law in 1909, which was expanded into a 5-volume treatise on the law of contracts (1920). Professor Williston also served as the Reporter for the American Law Institute's Restatement of Contracts (1932). Williston lived to the age of 101. See Mark Movsesian, *Rediscovering Williston*, 62 WASHINGTON & LEE L. REV. 207 (2005). Williston elevated predictability to a primary place in contract law. "A system of law cannot be regarded as successful unless rights and duties can, in a great majority of instances, be foretold without litigation." SAMUEL WILLISTON, LIFE AND LAW 209 (1941), quoted in Allen D. Boyer, *Samuel Williston's Struggle With Depression*, 42 BUFF. L. REV. 1, 23 (1994). In Williston's view:

> In the formation of a bargain, intention of the parties does not mean secret intention, nor generally even intention manifested to third persons, but only the intention manifested to the other party. If the offeror understood "the transaction to be different from that which his words plainly expressed, it is immaterial, as his obligation must be measured by his overt acts."

1 WILLISTON ON SALES, p. 5, § 5, quoted in *Whaley Lumber Co. v. Reliance Brick Co.*, 2 S.W.2d 911, 916 (Tex. Civ. App. 1928, no writ). It is easy to see how formalism lent predictability in contractual relationships that might span several communities, or several states. In an era without long-arm jurisdiction, where the practice of law was parochial, where there were no Restatements to normalize the law of different states, uniformity in the rules of interpreting contracts was the only predictability the law could offer to encourage contractual relations.

For a more complete examination of the classical or objective view of contract interpretation, including Oliver Wendell Holmes, Jr.s' variation of it, and the later schools of Legal Realism, Law

and Economics, and Dynamic Contract Law, see Orsinger, *The Law of Interpreting Contracts*, State Bar of Texas Advanced Civil Appellate Course (2007), www.orsinger.com/articles.shtml.

While formalism has been unpopular with contracts professors and law review article writers for over 50 years, and has been somewhat relaxed in the Uniform Commercial Code & Restatement (Second) of Contracts, formalism continues to be the predominant approach to contract interpretation of courts in America, and particularly of courts in Texas. Thus you find the Texas Supreme Court saying, in *Luckel v. White*, 819 S.W.2d 459, 462, 463 (Tex. 1991): "Even if the court could discern the actual intent, it is not the actual intent of the parties that governs, but the actual intent of the parties as expressed in the instrument as a whole, 'without reference to matters of mere form, relative position of descriptions, technicalities, or arbitrary rules.'"

The unstated policy underlying the Texas law of interpreting contracts is that Texas courts do not want contract cases to degenerate into fact-intensive swearing matches that must be resolved by a jury. By holding that contracts can be interpreted on their face using standardized rules of construction to determine the meaning to an objective reader, Texas courts keep contract interpretation in the domain of the judge and more susceptible to summary judgment. This increases predictability and reduces transaction cost (by avoiding or at least streamlining the litigation component of contracting).

2. Meeting of the Minds. You may have heard that formation of a contract requires a meeting of the minds. Some lawyers have argued that, if two people misunderstood the contract, that their minds did not meet and therefore no contract was created. "The determination of whether there was a meeting of the minds must be based on objective standards of what the parties said and did and not on their alleged subjective states of mind." *In re Hudgins*, 188 BR. 938, 942 (E.D. Tex. Bankr. 1995), cited in *Spectrum Creations L.P. v. Carolyn Kinder Int'l LLC*, 2008 WL 416246, *45 (W.D. Tex 2008).

3. Integration. "An integrated agreement may be either fully integrated or only partially integrated. A fully integrated contract is one that is a final and complete expression of all the terms agreed upon between or among the parties. A contract is partially integrated if the written agreement is a final and complete expression of some or all of the terms therein, but not all of the terms agreed upon . . . are contained in the written agreement." Keith A. Rowley, *Contract Construction and Interpretation: From the "Four Corners" to Parol Evidence (and Everything in Between)*, 69 Miss. L. J. 73, 101-02 (1999) ("Rowley"). "If the evidence ... does not indicate that the writing is intended as an integration, i.e., 'a final expression of one or more terms of an agreement' . . . then 'the agreement is said to be unintegrated. . . .'" *Conn Acoustics, Inc. v. Xhema Const., Inc.*, 870 A.2d 1178, 1181 (Conn. App. 2005).

4. The Parol Evidence Rule. "Under the parol evidence rule, if the parties have integrated their agreement into a single written memorial, all prior negotiations and agreements with regard to the same subject matter are excluded from consideration, whether they were oral or written." *Baroid Equip., Inc. v. Odeco Drilling, Inc.*, 184 S.W.3d 1, 13 (Tex. App.–Houston [1st Dist.] 2005, pet. denied). "When a contract is a final and complete expression of all the terms regarding that agreement, but not a final and complete expression of all the terms agreed upon between the parties, it is considered a partially integrated contract. See generally David R. Dow, et al., TEXAS PRACTICE: CONTRACT LAW § 8.3 (2005). With respect to a partially integrated contract, parol evidence is admissible to supplement or explain the contract, but is not admissible to contradict it." *Lowe v. Lowe*, 2006 WL 3239852 (Tex App.--Beaumont 2006, no pet.) (memorandum opinion).

5. Four Corners Rule. "The primary duty of a court when construing such a deed is to ascertain the intent of the parties from all of the language in the deed by a fundamental rule of construction known as the 'four corners' rule'. . . ." *Luckel v.*

White, 819 S.W.2d 459, 462, 463 (Tex. 1991). The Four Corners Rule requires the court to look to the words of the contract, not prior drafts of the contract, or exchanges of letters, or other documents, or testimony, to determine the intent of the parties. If there are several contracts that are part of one transaction, then all contracts will be read together. "It is a generally accepted rule of contracts that 'Where several instruments, executed contemporaneously or at different times, pertain to the same transaction, they will be read together although they do not expressly refer to each other.'" *Board of Ins. Com'rs v. Great Southern Life Ins. Co.*, 150 Tex. 258, 239 S.W.2d 803, 809 (Tex. 1951).

6. Ambiguity. When a contract is ambiguous, the search for the contract's meaning is entirely different from the foregoing.

a. Definition of Ambiguity. "A contract is ambiguous when its meaning is uncertain and doubtful or is reasonably susceptible to more than one interpretation." *Heritage Resources, Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996); *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). "A contract is not ambiguous if it can be given a certain or definite legal meaning or interpretation." *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 860 (Tex. 2000). "If a written instrument is so worded that a court may properly give it a certain or definite legal meaning or interpretation, it is not ambiguous. On the other hand, a contract is ambiguous only when the application of the applicable rules of interpretation to the instrument leave it genuinely uncertain which one of the two meanings is the proper meaning." *R & P Enterprises v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 519 (Tex. 1980). "An ambiguity does not arise simply because the parties advance conflicting interpretations of the contract. . . . For an ambiguity to exist, both interpretations must be *reasonable*." *Columbia Gas Trans. Corp. v. New Ulm Gas, Ltd.*, 940 S.W.2d 587, 589 (Tex. 1996).

b. Patent vs. Latent Ambiguity. "An ambiguity in a contract may be said to be 'patent' or 'latent.' A patent ambiguity is evident on the face of the contract. . . . A latent ambiguity arises when a contract which is unambiguous on its face is applied to the subject matter with which it deals and an ambiguity appears by reason of some collateral matter. . . . [If a latent ambiguity arises from this application, parol evidence is admissible for the purpose of ascertaining the true intention of the parties as expressed in the agreement.]" *Nat'l Union Fire Ins. Co. v. CBI Indus. Inc.*, 907 S.W.2d 517, 520 (Tex. 1995). "FN4. For example, if a contract called for goods to be delivered to 'the green house on Pecan Street,' and there were in fact two green houses on the street, it would be latently ambiguous." *Id.*

c. Question of Law Vs. Question of Fact. "The question of whether a contract is ambiguous is one of law for the court." *Heritage Resources, Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). "This Court may conclude a contract is ambiguous, even though the parties do not so contend." *EOG Resources, Inc. v. Wagner & Brown, Ltd.*, 202 S.W.3d 338, 344 (Tex. App.--Corpus Christi 2006, pet. denied).

d. What Evidence of Meaning? Once a contract is determined to be ambiguous, the parol evidence rule is suspended. If after applying the established rules of interpretation, a written instrument remains reasonably susceptible to more than one meaning, extraneous evidence is admissible to determine the true meaning of the instrument." *R & P Enterprises v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 519 (Tex. 1980). "The ambiguity must become evident when the contract is read in context of the surrounding circumstances, not after parol evidence of intent is admitted to create an ambiguity." *Nat'l Union Fire Ins. Co. v. CBI Indus. Inc.*, 907 S.W.2d 517, 521 (Tex. 1995). This extraneous evidence can include testimony of the parties, testimony of their lawyers, letters back and forth during the negotiation process, prior drafts of the contract, lawyers' notes, evidence of subsequent course of conduct by the contracting parties, and the like.

7. Gap-Filling. "The parol evidence rule provides that, in the absence of fraud, accident, or mistake, extrinsic evidence is not admissible to vary, add to, or contradict the terms of a written instrument that is facially complete and unambiguous. 36 TEX.JUR.3d Evidence § 315 (1984). But, if the instrument is incomplete on its face, extrinsic evidence may be admitted to show the part that is missing, provided the evidence does not conflict with the written provisions." *Martin v. Ford*, 853 S.W.2d 680, 681-82 (Tex. App.--Texarkana 1993, writ den'd); *Accord, First Victoria Nat. Bank v. Briones*, 788 S.W.2d 632 (Tex. App.--Corpus Christi 1990, writ ref'd n.r.e.).

B. RULES OF CONSTRUING CONTRACTS. The following rules are used to construe the meaning of a contract.

1. Construe Contract as a Whole. "This court is bound to read all parts of a contract together to ascertain the agreement of the parties. . . . The contract must be considered as a whole. . . . Moreover, each part of the contract should be given effect." *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex. 1994). "In construing an unambiguous oil and gas lease our task is to ascertain the parties' intentions as expressed in the lease. . . . To achieve this goal, we examine the entire document and consider each part with every other part so that the effect and meaning of one part on any other part may be determined. . . . We presume that the parties to a contract intend every clause to have some effect." *Heritage Resources, Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). "No one phrase, sentence, or section [of a contract] should be isolated from its setting and considered apart from the other provisions." *Guardian Trust Co. v. Bauereisen*, 132 Tex. 396, 121 S.W.2d 579, 583 (1938).

2. Plain Meaning Rule. "We give terms their plain, ordinary, and generally accepted meaning unless the instrument shows that the parties used them in a technical or different sense." *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). "Language used by parties in a contract should be accorded its plain, grammatical meaning unless it definitely appears that the intention of the parties would thereby be defeated." *Lyons v. Montgomery*, 701 S.W.2d 641, 643 (Tex. 1985).

3. Noscitur a Sociis (Take Words in Their Immediate Context). This is a Latin maxim which means "a word is known by the company it keeps." *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 750 (Tex. 2006). The point is that the meaning of a word or phrase must be considered in light of the context of the surrounding words.

4. Expressio Unius est Exclusio Alterius. "The maxim, that 'the express mention of one thing implies the exclusion of another,' is ordinarily used to control, limit, or restrain the otherwise implied effect of an instrument, and not to 'annex incidents to written contracts in matters with respect to which they are silent.'" *Morrow v. Morgan*, 48 Tex. 304 *3 (Tex. 1877). "The maxim expressio unius est exclusio alterius, meaning that the naming of one thing excludes another, though not conclusive, is applicable to these facts." *CKB & Assocs., Inc. v. Moore McCormack Petroleum, Inc.*, 734 S.W.2d 653, 655 (Tex. 1987). "[I]n construing the agreement we must adhere to the maxim that 'the expression of one thing is the exclusion of another thing.'" *Phillips Petroleum Co. v. Gillman*, 593 S.W.2d 152, 154 (Tex. Civ. App.–Amarillo 1980, writ ref'd n.r.e.).

5. Ejusdem Generis. "[W]hen words of a general nature are used in connection with the designation of particular objects or classes of persons or things, the meaning of the general words will be restricted to the particular designation." *Hilco Elec. Coop. v. Midlothian Butane Gas Co.*, 111 S.W.3d 75, 81 (Tex. 2003); It sometimes happens that a list of consistent terms will include an overly-broad term that seem to reach beyond the scope of the other things listed. Ejusdem generis will limit the overly-broad term to be consistent with the rest of the list. The doctrine is not limited to lists. It can also apply to sentences in a paragraph. *Dynamic Pub. & Distributing L.L.C. v. Unitec Indus. Center Property Owners Ass'n, Inc.*, 167 S.W.3d 341

(Tex. App.--San Antonio 2005, no pet.) ("The principle of ejusdem generis . . . applies only when a contract is ambiguous").

6. Specific Terms Prevail Over General Terms. "In a contract, a specific term controls over a more general one." *Shell v. Austin Rehearsal Complex, Inc.*, 1998 WL 476728 * 12 (Tex. App.--Austin 1998, no pet.). "[T]he contract in question appears on the surface to be ambiguous; however, we believe the apparent ambiguity may be resolved by the application of a well-settled rule of construction, to wit: that if general terms appear in a contract, they will be overcome and controlled by specific language dealing with the same subject." *City of San Antonio v. Heath & Stich, Inc.*, 567 S.W.2d 56, 60 (Tex. Civ. App.--Waco 1978, writ ref'd n.r.e.).

7. Earlier Terms Prevail Over Later Terms (But Not in Wills). "Another [rule of construction] is the rule which gives effect to an earlier over a later provision." *Southland Royalty Co. v. Pan Am. Petroleum Corp.*, 378 S.W.2d 50, 578 (Tex. 1964)."[P]rovisions stated earlier in an agreement are favored over subsequent provisions." *Wells Fargo Bank, Minnesota, N.A. v. North Cent. Plaza I, L.L.P.*, 194 S.W.3d 723 (Tex. App.--Dallas 2006, pet. denied). However, several cases have held that, in interpreting a will, "if there is an irreconcilable conflict in an earlier and a later clause, the earlier clause must give way to the later one, which prevails as the latest expression of the testator's intention on that particular subject." *Kaufhold v. McIver*, 682 S.W.2d 660, 666 (Tex. App.–Houston [1st Dist.] 1984, writ ref'd n.r.e.); *Morriss v. Pickett*, 503 S.W.2d 344 (Tex. Civ. App.--San Antonio 1973, writ ref'd n.r.e.). *See Dougherty v. Humphrey*, 424 S.W.2d 617, 20 (Tex. 1968) ("The court of civil appeals applied the rule that when there is a conflict among provisions in a will, the last clause in the will controls. That rule is only applicable when it clearly appears that the clauses conflict and cannot be reconciled.").

8. Handwritten Over Typed and Typed Over Preprinted. "[T]here are other secondary rules of construction for resolving apparent conflicts . . . . One is the rule which gives effect to written or typewritten provisions over printed provisions." *Southland Royalty Co. v. Pan Am. Petroleum Corp.*, 378 S.W.2d 50, 578 (Tex. 1964).

9. Words Prevail Over Numbers or Symbols. "When there is a variance between unambiguous written words and figures the written words control. . . ." *Guthrie v. Nat'l Homes Corp.*, 394 S.W.2d 494, 496 (Tex. 1965).

10. "Notwithstanding Anything Else" Clause. "The expression 'anything in this lease to the contrary notwithstanding,' when used in the final section of a written contract, has priority over any contrary provision of the contract directed to the same question." *See N.M. Uranium, Inc. v. Moser*, 587 S.W.2d 809, 814 (Tex. Civ. App.--Corpus Christi 1979, writ ref'd n.r.e.). "When parties use the clause 'notwithstanding anything to the contrary contained herein' in a paragraph of their contract, they contemplate the possibility that other parts of their contract may conflict with that paragraph, and they agree that this paragraph must be given effect regardless of any contrary provisions of the contract." *Helmerich v. Payne Int'l Drilling Co. v. Swift Energy Co.*, 180 S.W.3d 635, 643 (Tex. App.--Houston [14th Dist.] 2005, pet. denied).

11. Surrounding Circumstances. "In determining whether a contract is ambiguous, we look to the contract as a whole, in light of the circumstances present when the contract was executed. . . These circumstances include the commonly understood meaning in the industry of a specialized term, which may be proven by extrinsic evidence such as expert testimony or reference material." *XCO Production Co. v. Jamison*, 194 S.W.3d 622 , 627-28 (Tex. App.–Houston [14th Dist.] 2006, pet. denied).

12. Utilitarian Standpoint. "We construe contracts 'from a utilitarian standpoint bearing in mind the particular business activity sought to be served' and 'will avoid when possible and proper

a construction which is unreasonable, inequitable, and oppressive.' *Frost Nat. Bank v. L & F Distributors, Ltd.*, 165 S.W.3d 310, 312 (Tex. 2005).

13. Construction Must Be "Reasonable." "Courts will avoid when possible and proper a construction which is unreasonable, inequitable, and oppressive." *Reilly v. Rangers Mgmt., Inc.*, 727 S.W.2d 527, 530 (Tex. 1987). "We construe a contract by determining how the 'reasonable person' would have used and understood its language, considering the circumstances surrounding the contract's negotiation and keeping in mind the purposes intended to be accomplished by the parties when entering into the contract." *7979 Airport Garage, L.L.C. v. Dollar Rent A Car Systems, Inc.*, 2007 WL 1732223 (Tex. App.--Houston [14 Dist.] 2007, n.p.h.).

14. Use Rules of Grammar. "Courts are required to follow elemental rules of grammar for a reasonable application of the legal rules of construction." *General Financial Services, Inc. v. Practice Place, Inc.*, 897 S.W.2d 516, 522 (Tex. App.--Fort Worth 1995, no pet.).

15. Exceptions. "The ordinary purpose of an exception is to take something out of the contract which would otherwise have been included in it. . . . When the meaning of an exception is reasonably certain, it must be given effect unless wholly repugnant to the provision intended to be limited by it." *Lyons v. Montgomery*, 701 S.W.2d 641, 643 (Tex. 1985).

16. Contra Proferentem (Construe Against the Drafter). "Under the doctrine, an ambiguous contract will be interpreted against its author." *Evergreen Nat. Indem. Co. v. Tan It All, Inc.*, 111 S.W.3d 669, 677 (Tex. App.--Austin 2003, no pet.). "In Texas, a writing is generally construed most strictly against its author and in such a manner as to reach a reasonable result consistent with the apparent intent of the parties. . . ." *Temple-Eastex Inc. v. Addison Bank*, 672 S.W.2d 793, 798 (Tex. 1984). "[T]he doctrine of contra proferentem is applied only when construing an ambiguous contract." *Lewis v. Vitol, S.A.*, 2006 WL 1767138 (Tex. App.--Houston [1 Dist.] 2006, no pet.). "[A] contract generally is construed against its drafter only as a last resort under Texas law– i.e., after the application of ordinary rules of construction leave a reasonable doubt as to its interpretation." *Forest Oil Corp. v. Strata Energy*, 929 F.2d 1039, 1043-44 (5th Cir. 1991), *accord*, *Evergreen Nat. Indem. Co.*, at 676 ("The doctrine of contra proferentem is a device of last resort employed by courts when construing ambiguous contractual provisions").

17. Don't Render Clauses Meaningless. "In the interpretation of contracts the primary concern of courts is to ascertain and to give effect to the intentions of the parties as expressed in the instrument. . . . To achieve this object the Court will examine and consider the entire instrument so that none of the provisions will be rendered meaningless." *R & P Enters. v. LaGuarta, Gavrel & Kirk, Inc.*, 596 S.W.2d 517, 518-19 (Tex. 1980).

18. Validity Preferred Over Invalidity. "It is a rule universally recognized that if an instrument admits of two constructions, one of which would make it valid and the other invalid, the former must prevail." *Dahlberg v. Holden*, 150 Tex. 179, 238 S.W.2d 699, 702 (Tex. 1951).

19. Presumption Against Illegality. "While of course courts have no right to depart from the terms in which the contract is expressed to make legal what the parties have made unlawful, nevertheless when the contract by its terms, construed as a whole, is doubtful, or even susceptible of more than one reasonable construction, the court will adopt the construction which comports with legality. It is presumed that in contracting parties intend to observe and obey the law." *Walker v. Temple Trust Co.*, 124 Tex. 575, 80 S.W.2d 935, 936-37 (1935). *Accord*, *Smart v. Tower Land & Inv. Co.*, 597 S.W.2d 333, 340 (Tex. 1980).

20. Avoid Forfeitures. "[C]ourts will not declare a forfeiture, unless they are compelled to do so, by

language which will admit of but one construction, and that construction is such as compels a forfeiture." *Automobile Ins. Co. v. Teague*, 37 S.W.2d 151, 153 (Tex. Comm'n App. 1931, judgmt. adopted).

21. Avoid Implied Terms. "[W]hen parties reduce their agreements to writing, the written instrument is presumed to embody their entire contract, and the court should not read into the instrument additional provisions unless this be necessary in order to effectuate the intention of the parties as disclosed by the contract as a whole." *Danciger Oil & Ref. Co. v. Powell*, 154 S.W.2d 632, 635 (Tex 1941).

III. GENERAL CONCEPTS FOR DRAFTING CONTRACTS. The next three sections of this article use Charles M. Fox, WORKING WITH CONTRACTS (What Law School Doesn't Teach You) (Practicing Law Institute, NY 2002) ["Fox"] as a springboard for ideas.

A. PRECISION. Most writing is designed to entertain, persuade, or convey information; "the goal of a contract is to describe *with precision* the substance of the meeting of two minds, in language that will be interpreted by each subsequent reader *in exactly the same way*." Fox, p. 4. In some negotiations, however, the scrivener uses general words or leaves terms vague on purpose, because parties have been unable to agree on precise words or terms, and it is deemed better to leave the precise meaning of that word or term to a later day. There are also some contracts, in certain industries, that are drafted with no expectation that one of the contracting parties will read and understand the terms. And even if precision is a goal, there is a trade off between the clarity and comprehensiveness of a contract and the cost and time it takes to draft it.

B. AWARENESS OF THE PARTIES. Contracts can be drafted in a way to inform the parties of their rights, and what they might be gaining or giving up in the contract. For example, a premarital agreement can recite the definitions of separate and community property, describe commingling and tracing, explain reimbursement and economic contribution claims, and discuss the equitable powers of the court in a divorce property division. The parties may make a more informed decision, and it reduces the likelihood that someone will claim at a later time that they did not understand what they were signing.

C. TRANSACTION COST. The transaction cost of the contracting process is normally thought of as the cost of negotiating and drafting the contract which expresses an agreement. Justice Posner points out, however, that the transaction cost of a contract includes the cost of litigating a breach of the contract, as well. Richard Posner, *The Law and Economics of Contract Interpretation*, 83 TEX. L. REV. 1581, 1583 (2005). The client's desire to hold down the cost of drafting an agreement may thereby be increasing the cost of enforcing it, thus driving up total transaction cost. The nature of the bargain may drive up the transaction cost. Compare the transaction cost of a premarital agreement that makes all income, except salary and bonuses separate property, to the transaction cost that makes all income separate property but provides for a fixed payment in the case of divorce, based on the number of years of marriage. Under the former arrangement there can still be commingling and tracing problems and economic contribution claims and reimbursement claims that can be quite expensive and make settlement difficult and delayed. Under the latter formulaic approach, the clients themselves can calculate the payment required upon divorce, without regard to bank records and electronic spreadsheets.

D. CONTINGENCIES. In contract drafting it is good to cover contingencies. But it is bad to cover contingencies that are too remote. A contract that merely states obligations, without discussing what happens in the event of non-performance, leaves the parties to the vagaries of litigation if a breach occurs. It is better to address breaches that are most likely to occur, and to agree upon the remedy in event of such a breach. Ideally, the contract would anticipate and answer every question either

party might have about their rights and obligations in various circumstances, without their having to consult a lawyer. If the contract tells them what to do, they don't have to go to court to find out what to do. However, contingencies of non-performance can create disagreements at the time of contracting that otherwise would have gone unnoticed. In the worst case, a deal may fall apart because of a disagreement over a contingency that may never occur!

E. DEFINING BREACHES. In contracts that require complicated performance, it is sometimes useful to describe various types of non-compliance, and to indicate which are material enough to jeopardize the contract, and which can be fixed only by some adjustment to the other party's obligation under the contract.

F. REMEDIES. Remedies for breach of contract include damages, specific performance, injunction and rescission.

1. Damages. "Damages for breach of contract protect three interests: a restitution interest, a reliance interest, and an expectation interest. Calamari & Perillo at § 14-4. In order to put the aggrieved party in the same position he or she would occupy if the other party had fully performed, each of these interests must be protected. Id." *O'Farrill Avila v. Gonzales*, 974 S.W.2d 237, 249 (Tex. App.--San Antonio 1998, writ denied).

> Actual damages are either "direct" or "consequential." *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 816 (Tex. 1997). Direct damages are those that flow naturally and necessarily from the breach. *Id*. "Direct damages compensate for the loss, damage, or injury that is conclusively presumed to have been foreseen or contemplated by the party as a consequence of his breach of contract or wrongful act." *Id*. "Consequential damages" are those which result naturally, but not necessarily, from the breach. *Id*. Consequential damages must be foreseeable and must be directly traceable to the wrongful act and result from it.

Tennessee Gas Pipeline Co. v. Technip USA Corp., 2007 WL 4465555, *6 (Tex. App.--Houston [1st Dist.] 2007, no pet.).

> A general measure of damages is subject to any agreement that the parties might have made with respect to damages because parties to a contract are free to limit or modify the remedies available in the event of a breach of the contract. GT & MC, Inc. v. Tex. City Refining, Inc., 822 S.W.2d 252, 256 (Tex. App.--Houston [1st Dist.] 1991, writ denied); see also Heafner, 12 S.W.3d at 110-11 (reversing award of consequential damages when contract excluded liability for consequential damages).

Tennessee Gas Pipeline Co., 2007 WL 4465555, *6 (Tex. App.--Houston [1st Dist.] 2007, no pet.)

2. Equitable Remedies. Equitable remedies for breach of contract include specific performance, injunction, and rescission. Ordinarily, equitable remedies are not available if damages are an adequate remedy. *Ganske v. WRS Group, Inc.*, 2007 WL 1147357, *4 (Tex. App.--Waco 2007, no pet.) ("Generally, specific performance and injunctive relief are not available as a remedy for a breach of contract. . . . . Recovery for either form of equitable relief typically requires a showing that money damages are inadequate."). However, a provision in the contract, agreeing that money damages would be inadequate, will overcome these impediments to equitable relief. *Id.* at *4.

3. Specification of Remedies. "[P]arties to an agreement may contractually specify the remedies available to redress its breach and, thereby, modify the legal and equitable remedies generally applicable." *Limestone Group, Inc. v. Sai Thong, L.L.C.*, 107 S.W.3d 793, 797 (Tex. App.--Amarillo 2003, no pet.). A term in a contract providing a specific remedy is not exclusive unless the parties clearly indicate that it be such.

4N Intern., Inc. v. Metro. Transit Auth., 56 S.W.3d 860, 863 (Tex. App.--Houston [1st Dist.] 2001, pet. denied); *Accent Builders Co. v. Southwest Concrete Sys.*, 679 S.W.2d 106, 109 (Tex. App.--Dallas 1984, writ ref'd n.r.e.). In the event of a breach of a contract, a party may pursue any remedy which the law affords in addition to remedies provided in the contract. *Ganske v. WRS Group, Inc.*, 2007 WL 1147357, *4 (Tex. App.--Waco 2007, no pet.). That is, unless they are excluded by the contract.

You may wish to agree that only damages, and not rescission, will be available in the event of breach. Or you may wish to agree that damages are not an adequate remedy, so that equitable remedies are available.

4. Stipulated Damages. In *Stewart v. Basey*, 245 S.W.2d 484, 486 (1952), the Texas Supreme Court held that "[t]he universal rule for measuring damages for the breach of a contract is just compensation for the loss or damage actually sustained" and that "[a] party has no right to have a court enforce a stipulation which violates the principle underlying that rule." According to *Presnal v. TLL Energy Corp.*, 788 S.W.2d 123, 127 (Tex. App.--Houston [1st Dist.1990], writ denied):

> The Texas Supreme Court held that in order to enforce a liquidated damage clause, the court must find: (1) that the harm caused by the breach is incapable or difficult of estimation; and (2) that the amount of liquidated damages called for is a reasonable forecast of just compensation. The court emphasized that damages, to be enforceable as liquidated damages, must be uncertain and the stipulation must be reasonable.

IV. BUILDING BLOCKS OF CONTRACTS.

A. STRUCTURE OF THE CONTRACT. As Charles Fox points out, contracts are constructed of building blocks. Fox, p. 8. These include: identifications; contextual recitals; expressions of intent; representations and warranties (and exceptions to them); covenants; conditions precedent; operative provisions; remedial provisions; and miscellaneous clauses.

1. Identifications. Identifications are introductory statements in a contract identifying the contracting parties and, if a lawsuit is involved, the name, cause number, and court of the pending case. Parties should be identified by their full legal names, and entities by their correct legal names (not assumed names or trade names). Nicknames can be set up using parentheses if they are desired, after the correct name is given.

2. Recitals. Contextual recitals explain the circumstances giving rise to the contract. It could be that the parties are about to marry; it could be that the parties are settling a divorce. It could be that the agreement incident to divorce is an elaboration of a previously-signed mediated settlement agreement or informal settlement agreement. If the document settles a lawsuit, recitals can state the claims of the parties that are being compromised.

3. Expressions of Intent. Many contracts do not expressly state the parties' intent in contracting, but it is often wise to do so. In Texas, under the four-corners-rule the court must determine the intent of the parties from the face of the contract. "Intent clauses" are a way to directly communicate with the Court (or jury) about the intent of the agreement. While intent clauses are often listed at the beginning of a contract, they can be placed at different places in the agreement, and sometimes they should be repeated as a reminder to the reader that all clauses in the contract should be construed to accomplish the stated intent. In a prenuptial agreement, an intent clause might say: "The parties intend that there will be no community estate."

4. Representations and Warranties. Representations and warranties are statements made by parties to the contract about facts at the time the warranties or statements are made. Fox, p. 9. Fox explains the distinction between a representation and a warranty: a representation is

a "statement of fact upon which another party is expected to rely." A warranty is "a party's assurance as to a particular fact coupled with an implicit indemnification obligation if that fact is false." Fox, p. 9.

An example of a representation/warranty is in the TFLPM form premarital agreement (Form 48-3), para. 1.2 "Disclosure," which states:

> "Each party represents and warrants to the other party that he or she has [**include if applicable**: , to the best of his or her ability,] made to the other party a [complete and accurate/fair and reasonable] disclosure of the nature and extent of his or her property, including values, and financial obligations, contingent or otherwise, and that the disclosure includes but is not limited to the properties and liabilities set forth in Schedules A, B, C, and D attached to this agreement and other documentation exchanged between the parties before their signing of this agreement.

This representation/warranty gives some assurance of the degree of disclosure. What the form does not say is "what happens if the representation/warranty proves to be wrong?" See the discussion of the problems this paragraph could cause in Section IV.C.8 below. Another sample representation is in the TFLPM form mediated settlement agreement (Form 15-16):

> *15. Full Disclosure*
>
> Each party represents that he or she has made a fair and reasonable disclosure to the other of the property and financial obligations to him or her.

Consider the representation contained in the mediated settlement agreement in *Boyd v. Boyd*, 67 S.W.3d 398, 404 (Tex. App.--Fort Worth 2002, no pet.):

> Each party represents that they have made a fair and reasonable disclosure to the other of the property and financial obligations known to them.

The court of appeals found that this representation placed upon the husband the duty to tell the wife about a possible bonus he expected to receive in the future. *Id.* at 405. The court held that the "intentional failure to disclose substantial marital assets" rendered the agreement unenforceable. *Id.*

The failure of a representation or warranty can give rise to remedies under the contract– if those remedies are specified in the contract–or under common law. It is sometimes desirable to specify in the contract the remedy if a representation or warranty proves to be wrong or even false. The other party could be given an option to cancel the agreement (this is not, however, feasible if the agreement settles a suit where a judgment is signed and becomes final before the problem becomes known). Or the other party could have a claim for damages, according to a measure of damages stated in the contract. Fox notes that "remedies are almost always provided in the event there is a breach of a representation." Fox, p. 24. The form premarital agreement para. 1.2 does not specify remedies if the representation/warranty is wrong or false.

As noted, a standard representation in divorce settlements is a representation that both parties have disclosed all assets and liabilities. A problem with this language is the uncertainty of when and where this disclosure occurred. Disclosure could occur in responses to written discovery, in depositions, through production of documents, in letters, and in conversations. It might take a jury trial to determine whether disclosure occurred. It is better to limit the range of disclosure to an easily verifiable thing, like "Husband's Third Amended Sworn Inventory dated December 12, 2008," or something like that.

If a party is unable or unwilling to unqualifiedly make a representation or warranty, perhaps they will do so "to the best of its knowledge." Fox, p. 89. See TFLPM Form 17-6, § 7.4 (representation that there is no *known* litigation pending or

threatened") [emphasis added].

5. Covenants. A covenant is an ongoing promise by one party to take or not take certain actions. A covenant is a continuing obligation, while a representation is a statement of fact at a specific point-in-time. Fox, p. 15. Covenants are generally affirmative (promises to do something) or negative (promises to refrain from doing something). Covenants are designed to ensure that a party receives the benefit it bargained for. Fox, p. 16. Covenants can be made subject to exceptions, either "carveouts" or "baskets." "Carveouts" entirely remove something from the operation of the covenant. "Baskets" permit the party making the covenant to deviate from the covenant by a specified amount. Fox, pp. 18-19.

6. Conditions Precedent. A condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation. *Centex Corp. v. Dalton*, 840 S.W.2d 952, 956 (Tex. 1992). The Texas Supreme Court said this about conditions precedent:

> A condition precedent may be either a condition to the formation of a contract or to an obligation to perform an existing agreement. Conditions may, therefore, relate either to the formation of contracts or to liability under them. . . .Conditions precedent to an obligation to perform are those acts or events, which occur subsequently to the making of a contract, that must occur before there is a right to immediate performance and before there is a breach of contractual duty. . . . While no particular words are necessary for the existence of a condition, such terms as 'if,' 'provided that,' 'on condition that,' or some other phrase that conditions performance, usually connote an intent for a condition rather than a promise. In the absence of such a limiting clause, whether a certain contractual provision is a condition, rather than a promise, must be gathered from the contract as a whole and from the intent of the parties. [citations omitted]

Hohenberg Bros. Co. v. George E. Gibbons & Co., 537 S.W.2d 1, 3 (Tex. 1976). The Supreme Court went on to say:

> However, where the intent of the parties is doubtful or where a condition would impose an absurd or impossible result then the agreement will be interpreted as creating a covenant rather than a condition. . . . This Court has on numerous occasions discussed the nature of conditions and covenants and as a general rule has noted that, 'Because of their harshness in operation, conditions are not favorites of the law.' . . . The rule, as announced in *Henshaw v. Texas Natural Resources Foundation*, 147 Tex. 436, 216 S.W.2d 566 (1949), is that:
>
> > 'Since forfeitures are not favored, courts are inclined to construe the provisions in a contract as covenants rather than as conditions. If the terms of a contract are fairly susceptible of an interpretation which will prevent a forfeiture, they will be so construed' [some citations omitted].

Id. at 3.

In a family law context, a parent's obligation to pay a certain medical expense for a child may be conditioned upon the other parent presenting an invoice. See the TFLPM form final decree of divorce (Form 17-1), para. 10.F.12.i (p. 12-68 of the 5/06 edition) which appears to condition the obligee's duty to pay uninsured medical expenses of a child within 30 days of the incurring party's furnishing the bills within 30 days. This is a "trigger." Fox, p. 24. Where there are triggering events, care should be taken to be clear whether a trigger affects just the timing of the performance or instead the existence of the obligation. *See In re T.J.L.*, 97 S.W.3d 257, 260, (Tex. App.--Houston [14th Dist.] 2002, no pet.) (where the decree required the mother to submit to the father all bills and other documents reflecting any insured medical expense that she incurred for the children within ten days after she received them, and she failed to do so, the trial court did not

abuse its discretion in absolving the father from paying the expenses). For example, the draftsperson may want a parent to be obligated to pay a medical expense even if the invoice is not presented by the other parent, such as when a third party sues for payment of the expense. The TFLPM Form 17-1, para. 10.F.12.i does this by making it clear that, even if the incurring party fails to provide copies of the bills within 30 days, the obligee nonetheless has the duty to pay his/her share of uninsured medical expenses of the child within 120 days of receiving the bills. Taken together the condition of submitting bills within 30 days is a condition to the obligee's duty to pay within 30 days, failing which the obligee has a duty to pay within 120 days. In other words, the condition affects timing, not the underlying duty to pay.

The TFLPM form agreement incident to divorce (Form 17-6), para. 1.5, contains a condition precedent to the parent's obligation to pay college expenses for a child. The "condition for payment of this obligation" includes the grades of the child being reported "within ten days after they are received. . . ." The clause does not say received "by whom." Worse, though, is the uncertainty if the grades are reported more than ten days after they are received. Does a late reporting delay payment, or is the obligation fully discharged if the grades are reported late?

7. Operative Terms. The operative terms of the contract are the substantive rights and obligations created by the contract–the heart of the deal. Fox, p. 24.

8. Remedial Provisions. As noted in Section III.E. above, the parties can define what constitutes a material breach of contract, and can determine the consequences of that breach. As noted in Section III.F. above, parties are free to contract that the legal remedy of damages will or will not be available for breach of the agreement. They can also agree that equitable remedies will or won't be available. The parties can even stipulate damages within the parameters allowed by case law. This power gives the parties more control over the outcome of litigation. Fox notes that "remedies are almost always provided in the event there is a breach of a representation." Fox, p. 24. Possible remedies include rescission of the contract, acceleration of payment, indemnification, and stipulated damages. Fox, pp. 25-27.

9. Miscellaneous Clauses. Very many contracts will group miscellaneous clauses into the tail end of the contract. Just because they are miscellaneous doesn't mean they are unimportant. The TFLPM form premarital agreement (Form 48-3) does this in Article 18, "General Provisions." This form includes terms regarding the effective date, execution of follow-up documents, a presumption of separate property, a recital of estoppel by acceptance of benefits, place of performance and choice-of-law, successors, limitations of waivers, amendments and modifications must be in writing, attorneys' fees, remedies for nonmonetary breach, severability, anti-assignment, merger of prior agreements, titles and captions, no presumption against drafter, names of lawyers, incorporation of schedules, non-disqualification of lawyers from later representation, disclaimer regarding SAPCR, and multiple originals. The TFLPM form agreement incident to divorce (Form 17-6) includes in its "General Provisions" section approval by court, release of all claims, indemnification, warranty as to other litigation, execution of documents, merger clause, severability clause, limitation of waivers, amendments and modifications must be in writing, successors and assigns, notice, choice-of-law, attorneys' fees, venue selection (i.e., place of performance), fees on bill of review, sealing of records, discharge of attorneys from record retention, merger clause, and voluntariness.

B. DRAFTING TECHNIQUES. The following drafting techniques can be used in constructing a contract.

1. Form Contracts. The use of forms as a basis for family law contracts is widespread. Some form contracts in use in Texas today were drafted by a neutral organization to be thorough and balanced. Examples would be the State Bar of

Texas' Real Estate Forms Manual, and the Texas Family Law Practice Manual (TFLPM), which are neutral, reduce negotiation and drafting costs, and anticipate the most likely problems with performance, thereby reducing the chance and cost of litigation. The TFLPM forms reduce the chance of errors or oversight, but they by necessity are stated in general terms, and must be adapted to the particular case if an unusual term is needed. Because the TFLPM forms are designed to be useful in a wide variety of cases, they may contain provisions that are unrelated to the case at hand, or may fail to address a particular problem with the specificity needed.

Take, as an example, the TFLPM form premarital agreement (Form 48.3). The form is drafted to eliminate community property. If the desire of the parties is to make earned income (wages, salary, bonuses, etc.) community property, then the form must be modified, and no sample language is suggested for that purpose. If the desire of the parties is to provide a stipulated benefit to the less wealthy spouse upon death or divorce (i.e., a payment or payments based on length of marriage or income earned during marriage), then the drafter must create the language without help from the form.

2. Prior Contracts. A drafting lawyer can also reuse prior contracts in his/her possession as the basis for a new contract. One danger is that the prior contract may have consciously or unconsciously been drafted with a bias toward or against a party, and that bias may be carried forward into the new contract even where it is not appropriate. It may be a better practice to start with a form, and to use prior contracts as a model for crafting specific provisions. An example would be reusing an old agreement as a model for a complicated provision in an Agreement Incident to Divorce relating to selling the family house with a right of first refusal to each spouse.

3. Accretive Drafting. "Accretive drafting" is a term Charles Fox uses to describe the process of successive revisions to a contract. Fox, p. 77. Each step is reasonable, but cumulatively the effect is a hodgepodge. Sometimes the new ideas suggested after the initial draft are added to the end of previous language, instead of being woven into the language. To guard against that issue, the drafter must reassess whether it would be better to start the provision afresh, rather than to modify it.

4. Checklists. Checklists are a good way to assure that various aspects of the transaction are addressed in the contract. The table of contents for complicated forms can serve as a checklist. There are books that contain checklists you can use for drafting. A sample of a checklist is TFLPM form "disputed issues checklist." (Form 15-20). The table of contents of the form agreement incident to divorce (Form 17-6) can be used as a checklist. See also the table of contents to the form Final Decree of Divorce (Form 17-1). A checklist of management rights for children is set out at the TFLPM form "allocation of parental rights and duties," Form 15-15.

5. Table of Contents. For complicated agreements, Fox recommends a table of contents based on "carefully crafted section headings." Fox, p. 161. It helps the draftsperson see the structure of the agreement and to notice omissions. It helps the reader to find particular clauses. Fox says to include exhibits and schedules in the table of contents.

6. Date. Your contract should have a date, and it's better if the date is in the first paragraph. If the contract is being executed by parties on different dates, you may want the date of the contract to be the date of the last signature, in which event the date line at the beginning of the contract should say so. Fox, p. 162. The use of an "as of" date suggests that the document was signed after the effective date of the contract. It is not inherently bad to have a retroactive effective date, as long as that is not used to evade a law or commit a fraud. If there are recitals of fact or warranties of existing conditions in the contract, an "as of" date might render them inaccurate, creating problems if someone later decides to claim a misrepresentation or that a warranty was breached.

7. Recitals. To Fox, recitals are paragraphs at the beginning of a contract that list the parties and give the factual background to the contract. Fox, p. 163. Often these are "whereas clauses." Recitals can do more. They can also state the purpose of the agreement and express the parties' intent in entering into the agreement.

8. Intent Clauses. In the TFLPM form premarital agreement (Form 48-3), Stipulation 8 says: "[name of party A] and [name of party B] intend by this agreement that no community property will be created during marriage." This broad statement of intent can help a court (or jury) to resolve uncertainties that may arise regarding specific clauses in the agreement. "Intent clauses" also appear elsewhere in the form premarital agreement outside of the "stipulations." *See* paras. 3.4, 3.5, and 7.1.

9. Repetition. Key concepts in the agreement can be repeated several times throughout the agreement. That serves to emphasize the point, makes it less likely that a judge or jury will miss the point, and makes it less plausible for a party to the contract to claim a lack of awareness of that aspect of the contract. In the TFLPM form premarital agreement (Form 48-3), the intent that there will be no community estate is mentioned several times: Stipulation 8, para. 3.5, para. 3.9, para. 7.1. However, para. 9.8 requires a 50-50 division of community property. Perhaps that clause should be qualified by adding: "if any community property shall arise despite the parties' intent to the contrary."

10. Consistent Wording. "Inconsistent contract provisions can be a breeding ground for ambiguity and differing interpretations." Fox, p. 78.

Fox says to avoid: treatment of similar requirements in an inconsistent manner; inconsistent use of individual words; inconsistent use of word strings; inconsistent numbering of articles, sections, and subsections; and inconsistencies between related documents. Fox. pp. 79-80.

11. Exceptions. Exceptions can be used to simplify drafting by allowing the scrivener to use simply-stated but overbroad propositions, and then to scale them back using exceptions. "Exceptions" can also be used to create exclusions from generally-stated representations or warranties. It is sometimes easier to agree upon a broadly-stated representation or warranty and to negotiate specific exceptions than it is to agree how narrowly to draft a general representation or warranty. See TFLPM form premarital agreement (Form 48-3), para. 3.4, which states an intent never to commingle funds but sets out a sole exception. If there are a number of exceptions, Fox says that they should be placed into a list or an attached schedule. Examples would be warranty deeds and land title policies that list exceptions to the conveyance, exceptions to the warranty, or exceptions to coverage. See Fox, pp. 13, 92, 106, and 108. "The ordinary purpose of an exception is to take something out of the contract which would otherwise have been included in it. . . .When the meaning of an exception is reasonably certain, it must be given effect unless wholly repugnant to the provision intended to be limited by it." *Lyons v. Montgomery*, 701 S.W.2d 641, 643 (Tex. 1985). Fox warns against unnecessary exceptions. These can creep in where the main provision is edited after the exceptions are first drawn, and the original reason for the exception is later removed. Stating an exception that does not fall within the primary provision creates the potential for someone to argue that the primary provision is broader than it would otherwise seem. Fox, p. 108. Sometimes it is necessary to make an exception to an exception. If that is carried too far it can lead to pretzels of logic that result in confusion and perhaps create an ambiguity..

12. Cross-Referencing. Cross-referencing to other provisions in the contract can help the reader to navigate through the agreement. Cross-referencing to a specific provision is particularly helpful when an exception is involved. For example, an exception can be stated: "notwithstanding Section III.4(a) . . . ." Or a statement can be linked to an exception stated

elsewhere, as in: "Subject to the exception stated in Section III.4(a) . . . ." There is a problem with "empty cross-references." A typical technique used in form contracts is a clause providing: "Unless otherwise provided herein, so-and-so." The form is written this way because the drafters of the form don't know what other contrary terms might exist in the agreement being drafted. Leaving in the "unless otherwise provided herein" clause suggests to the reader that an exception exists to the provision in question. If no exception really exists in the contract, the reader may spend time on a fruitless search for the exception. If you are using a form, weed out the empty cross-references.

13. Incorporation by Reference. When one contract needs to include language in another document, it can either be stated verbatim or it can be incorporated by reference. Fox, p. 111. Attached schedules are often incorporated into the body of the contract, but the schedules are not prepared or attached at the time the contract is written at are not later completed and attached. Sometimes the scrivener attaches the schedules with blanks to be filled in and the blanks are never filled in. Sometimes the incorporated document cannot be found at a later time, leaving a gap in the contract.

14. Provisos/Notwithstanding Clauses. A "proviso" is a clause beginning with "provided" or "provided, however," that has the effect of overriding the concept immediately preceding it in the same sentence. Fox, p. 95. "Notwithstanding the foregoing" serves the same function as to the preceding sentence. Fox, pp. 96-97. Fox comments that sometimes provisos are given emphasis (e.g., underlining) to make them easy to spot. Fox warns against using provisos as a substitute for "if" or "to the extent that." A proviso overrides the preceding concept; "if" sets a condition. *Id.* at 96.

There are broader exceptions, however, that conflict with parts of the contract other than the same or preceding sentence. For these exceptions scriveners use words like "notwithstanding anything else in this contract to the contrary," or "notwithstanding Section 5 of this agreement." Fox, pp. 96-97. "When parties use the clause 'notwithstanding anything to the contrary contained herein' in a paragraph of their contract, they contemplate the possibility that other parts of their contract may conflict with that paragraph, and they agree that this paragraph must be given effect regardless of any contrary provisions of the contract." *Helmerich v. Payne Int'l Drilling Co. v. Swift Energy Co.*, 180 S.W.3d 635, 643 (Tex. App.--Houston [14th Dist.] 2005, pet. denied).

15. Inclusions/Exclusions. Fox suggests that contract provisions often take the form of a general proposition, that requires further clarification. This clarification can take the form of "inclusions" or "exclusions." Fox, p. 105. Inclusions are signaled by the phrase "including" followed by a description of the included terms. Typically exclusions are signaled by the phrase "except for" followed by a description of the excluded items. Another signal of an exclusion is "provided however" clause. Beware of the rule of expressio unius est exclusio alterius.

16. Lists. Constructing lists raises three rules of contract interpretation: expressio unius est exclusio alterius ("the express mention of one thing excludes all others"); ejusdem generis ("of the same kind, class, or nature"); and noscitur a sociis ("take words in their immediate context"). *See* Section II.B.3, 4 and 5 above. A common method used to avoid the expressio . . . alterius rule is to use the words "including, without limitation" when starting a listing. *See* Fox, pp. 109-10. However, you may want the rule to apply, in which event you should not use the phrase "including only the following." The TFLPM form premarital agreement (Form 48-3), para. 3.9, concludes a list of eight facts that cannot be considered as evidence with intent to create community property with the sentence "The provisions of this Section 3.9 re not comprehensive."

The rule of ejusdem generis operates to limit the scope of terms that could be construed to go

beyond their context. The best way to avoid the uncertainty that ejusdem generis might be invoked to cure is to avoid overly-broad terms in the first place.

Another rule to help with overly-broad terms is noscitur a sociis. Again, instead of relying on a judge to cure an overly-broad term using the rule of noscitur a sociis, it is better to avoid the confusion caused by using overly-broad terms in the first place.

17. "Including Without Limitation" Clauses. A proposition can be clarified by listing examples that exemplify the proposition. However, when you start a list you run the risk that the list may be deemed to be an exclusive listing. If the draftsperson says "including without limitation the following," that statement would negate the application of expressio unius est exclusio alteruis. Fox, p. 109. Ending the list with "et cetera" might accomplish the same purpose.

18. Definitions. According to Fox, "[d]efinitions isolate a term or concept that is used repeatedly in the agreement, and ensure that it will be given the same meaning each time." Fox, p. 301. This avoids the risk that the same concept might be described in slightly different language in different places in the contract, creating confusion. *Id.* at 30. Fox points out that definitions occur in two places: either in the text where the word occurs; or in a separate section of definitions. *Id.* at 29. If the special term is repeated in the contract, the reader may have to frequently flip back to its first use to review the definition. Underlining the defined term at the place where it is defined would make it easier to find. Frequently quotation marks are put around the word being defined to set it off from the rest of the sentence. Where there are several documents in a transaction that use the same definitions, the common definitions can be included on a list that is appended to each document. *Id* at 29.

Definitions are also used, even with terms that are not repeated, to establish a special meaning for the term that differs from ordinary usage.

19. Formulas. Sometimes the best way to express a concept is to give a mathematical formula in algebraic notation. Fox warns that the contract must clearly spell out the mathematical functions and their order (i.e., the order in which to perform the additions, subtractions, multiplications and divisions). Fox, p. 100. Here is an example of a mathematical table that could be used in a prenuptial agreement to describe a payment the husband will make to the wife upon divorce, based on the difference between the sizes of their respective separate property estates at the time of divorce:

Year of Marriage	Adjusting Payment Equal to the % of Difference Between Spouses' Separate Estates
1 (0-12 mos)	5%
2	10%
3	15%
4	20%
5	25%
6	30%
7	35%
8	40%
9	45%
10+	50%

On the other hand, in a premarital agreement it is probably easier to say in words, rather than in a formula, that the husband will pay to wife, upon divorce, a non-taxable property payment of $50,000 for each complete year of the marriage up to the filing of divorce.

20. Examples. Examples are a nice way to confirm the proper interpretation of complicated provisions. Take care that the example doesn't show just a simple application of the principal, while leaving difficult ones unmentioned. Also, take special care that the example doesn't conflict with the principle stated in words, or else an ambiguity may be created. One type of example is a general proposition, followed by an application of that principle to a specific situation. The danger is the rule of interpretation that the specific controls over the general, and the application of

the general principle to a specific situation might be construed to limit the general statement to the specific application. This can be combated with the phrase: "without limiting the generality of the foregoing . . . ." Fox, p. 98. The TFLPM premarital agreement form (Form 48-3), para. 9.5 contains an example spelling out how a spouse receiving temporary alimony in a divorce is required to deliver that payment back to the payor-spouse.

21. Contingencies. Anticipating circumstances that might arise, and addressing how they should be handled, can help avoid the kinds of interpretation problems that might otherwise require litigation to resolve. Describing contingencies also helps the parties at the time of contracting to see how the contract will operate under different circumstances. The solutions to these kinds of problems can be negotiated at the time of contracting, when the parties are motivated to reach a consensus. Such a consensus may be harder to achieve once one party has breached the contract and someone is incentivized to try to get out of the contract. The cost in attorney time in negotiating and drafting for contingencies must be balanced against the likelihood of the contingency arising. In a worst case scenario, an otherwise successful negotiation might break down over how to handle a contingency that may never occur.

22. Stating Rules of Construction. Many contracts specifically negate certain rules of construction. Often a contact will reject the rule of contra proferentem (construe the contract against the drafter) by saying that neither party is the drafter and the agreement should not be construed against either party based on this rule. The TFLPM form premarital agreement (Form 48-3) para. 18.15, does this, but the form agreement incident to divorce (Form 17-6) does not. Presumably the parties could contract away the presumption in favor of arbitration, or agree that the rule of expressio alterius will not apply to a particular list.

23. Numbering Pages/Sections/Paragraphs. Numbering pages is so basic it should go without mention, and yet I have seen long contracts where the pages are not numbered. It makes discussing the contract more difficult. Page numbering also gives an assurance that pages have not been added or deleted.

Anyone who has studied the Bible knows how important it can be to number paragraphs. (Imagine trying to refer to this passage in *Daniel 2* without numbered paragraphs: "2:31 Thou, O king, sawest, and behold a great image. This great image, whose brightness [was] excellent, stood before thee; and the form thereof [was] terrible. 2:32 This image's head [was] of fine gold, his breast and his arms of silver, his belly and his thighs of brass, 2:33 His legs of iron, his feet part of iron and part of clay. 2:34 Thou sawest till that a stone was cut out without hands, which smote the image upon his feet [that were] of iron and clay, and brake them to pieces. 2:35 Then was the iron, the clay, the brass, the silver, and the gold, broken to pieces together, and became like the chaff of the summer threshingfloors; and the wind carried them away, that no place was found for them: and the stone that smote the image became a great mountain, and filled the whole earth.")

Without numbering paragraphs it is very difficult to make cross-references to places in the contract. A good numbering system can also serve as the foundation for a good table of contents. Each different section of the contract can have a Roman numeral, and subparagraphs have arabic numerals. See Fox, p. 165.

24. Section Headings. Fox suggests that headings are used to make the contract more user friendly, Fox, p. 164, but not to serve a substantive role. Fox. p. 248. He suggests that the headings "accurately reflect the contents of a provision, in a manner that will be useful to the reader." The headings should be "sufficiently abundant so that the user can find provisions without too much effort." Fox, p. 164. If a section contains a topic that does not fit under the section heading, Fox suggests that it be placed in a different section. *Id.* Many forms specifically state that section headings do not have substantive effect. The

TFLPM premarital agreement (Form 48-3) para. 18.14 says that "Article headings, titles, and captions contained in this agreement are merely for reference and do not define, limit, extend, or describe the scope of this agreement or any provision."

25. A Second Pair of Eyes. Many people who draft documents for a living will show the writing to someone unfamiliar with the transaction to see if the language is understandable and conveys the ideas accurately. Having another lawyer in the office, or even another lawyer hired in for the purpose, review the contract can be beneficial. It should be done before the initial draft is turned over to the other party, or else they may be resistant to changes you want to make to your own draft. Ask the friendly reader to look not only for typographical errors, but also to see whether the concepts are understandable.

26. Thought Experiment. The "thought experiment" is a way of testing a theory or model by running it through an imaginary test. If you are drafting a provision that must be implemented in the future, you can conduct thought experiments of how the mechanism you have created, or the language you have used, will operate in various situations. Ask yourself "what if" a dozen times for a dozen different situations, and see how the contract works in each situation.

27. Hiring an Expert Draftsperson. Do you draft oil and gas leases, or intellectual property conveyances, or transfers of businesses for a living? You do if you try to pass ownership of mineral interests or intellectual property rights or companies in your agreements incident to divorce. If you are dealing with a valuable property right that is outside your normal routine, consider hiring a lawyer who specializes in drafting such documents to draft that particular provision of your contract.

28. Avoiding Pronouns. In some descriptions there are so many he's, she's and they's that you cannot make sense of the sentence. Fox says "[d]o not use a pronoun unless it is clear who or what is being referred to." Fox, p. 69.

29. Exact Time References. Fox notes that a provision calling for performance should be clear as to when performance is required. Fox, p. 69. "Husband shall provide Wife with a copy of page one of his tax return on an annual basis." This is a great way to be sure that Husband is paying the right amount of child support. But when in the year is the tax return to be provided? A good rule is to provide a specific deadline (specific day, or sometimes even an hour of a day) every time performance is due.

30. Present Versus Future Tense. Terms of the contract that are to become effective immediately should be stated in the present tense, not the future tense. If you say "Husband will receive so-and-so," then the question becomes when he will receive it. In an agreement incident to divorce, for example, it is better to state that certain property is "hereby awarded to Husband."

31. Redundancy. Writers normally avoid redundancy because it is distracting and frustrating for the reader. In drafting a contract, however, the purpose is not to write something that people will buy to read, but rather to write something that is so clear that no one will dispute what it says. It therefore may be advantageous to repeat certain principles in the contract in several different places. It may be desirable to use the same qualifier to restrict the scope of a broad statement every time it is made. Care should be taken to be sure that repeated concepts are stated with the exact same language to discourage efforts to try to use small differences in wording to manufacture an ambiguity.

32. Emphasis. Techniques such as **bolding**, *italicizing*, <u>underlining</u>, and ALL CAPS, are different forms of emphasis. Emphasis can be very effective if not overused. Emphasis can be used to call attention to important terms, like a provision of non-revocability in a mediated settlement agreement, s*ee* Tex. Fam. Code § 6.602(b) (mediated settlement agreement is binding if it provides "in a prominently displayed

statement that is boldfaced type or capital letters or underlined"), or like an agreement to convert separate to community property, "*see*" Tex. Fam. Code § 4.205 (presumption of fair and reasonable disclosure of the legal effect arises if the statutorily-prescribed language is in bold-faced type, capital letters, or underlined). Emphasis can also be used to call attention to terms that will need to be referred back to later, such as definitions.

33. Priority in the Event of Inconsistencies. Fox suggests that you be aware of the possibility of inconsistencies and prescribe a hierarchy of relative importance in resolving them. Fox, p. 99. The TFLPM form Agreement Incident to Divorce (Form 17-6) does this in para. 7.18, where it says: "To the extent there exist any differences between the [mediation/collaborative law] agreement and this agreement, this agreement shall control in all instances."

34. Spelling and Writing Numbers. It is a wise precaution to spell out numbers and then immediately restate them inside of parentheses. This increases the likelihood that the scrivener will realize a mistake, or that a typographical error in a number will not inadvertently alter the contract. If a discrepancy occurs where words and figures are used to express the same number, and they do not agree, the words must prevail. That is because people are more liable to mistake in writing figures than words." *Gran v. Spangenberg*, 54 N.W. 933, 934 (Minn. 1893).

C. RECOMMENDED TOPICS TO COVER IN CONTRACTS.

1. Definitions. According to Fox, "the process of defining important terms increases the likelihood not only that there has been a true meeting of the minds but that it was properly reflected in the agreement." Fox, p. 29. See discussion at Section IV.B.18.

2. Alternate Dispute Resolution Procedures. It is popular to provide that the parties will mediate future disputes before they are litigated, absent an emergency. See TFLPM form agreement incident to divorce (Form 17-6), Article 5, which provides that future controversies, which cannot be settled by negotiation, will be mediated. Also, the parties may wish to give some consideration to requiring binding arbitration of future disputes in lieu of litigating in court. The TFLPM form premarital agreement incident (Form 48-3), para. 17.1, provides for binding arbitration.

3. Merger Clause. Multiple contemporaneous documents are construed as one agreement. "It is a generally accepted rule of contracts that 'Where several instruments, executed contemporaneously or at different times, pertain to the same transaction, they will be read together although they do not expressly refer to each other.'" *Board of Ins. Com'rs v. Great Southern Life Ins. Co.*, 150 Tex. 258, 239 S.W.2d 803, 809 (Tex. 1951). "[C]ourts are to give effect to all provisions of a contract, whether a contract is comprised of one, or more than one, document." *City of Galveston v. Galveston Mun. Police Ass'n*, 57 S.W.3d 532, 538 (Tex. App.--Houston [14 Dist.] 2001, no pet.). For this reason, it is dangerous to allow preliminary agreements to continue to survive the signing of the more complete and final agreement. A frequent example from family law practice is a mediated settlement agreement (MSA) versus the final agreement incident to divorce (AID) and decree of divorce. The language of the final two instruments will be more comprehensive than the MSA, and the failure to merge the MSA into the AID and decree could require a court to reconcile the wording of the MSA to the AID and decree. The TFLPM form premarital agreement (Form 48-3) contains a merger clause in para. 18.13. The TFLPM form agreement incident to divorce contains a general merger clause in para. 7.6, and a specific one in para. 7.18 that merges an MSA or collaborative law agreement into the agreement incident to divorce.

4. Forum/Venue Selection. A forum selection clause is a provision in which the parties agree that litigation over the contract must take place in a specified jurisdiction. In the case of *In Re AutoNation, Inc.*, 228 S.W.3d 663, 667 n. 15 (Tex.

2007), the Texas Supreme Court adopted the U.S. Supreme Court's approach to enforcing forum selection clauses: "the correct approach is to enforce a forum-selection clause unless the opposing party makes a clear showing that (1) enforcement would be unreasonable or unjust; (2) the clause is invalid for reasons such as fraud or overreaching; (3) enforcement would contravene a strong public policy of the forum where the suit was brought; or (4) 'the contractually selected forum would be seriously inconvenient for trial.'"

Venue selection is a effort to specify the Texas county where any lawsuit over the contract must be filed. "[T]he fixing of venue by contract, except in such instances as [specifically permitted by statute], is invalid and cannot be the subject of private contract." *Fid. Union Life Ins. Co. v. Evans*, 477 S.W.2d 535, 537 (Tex. 1972); *Bristol-Myers Squibb Co. v. Goldston*, 957 S.W.2d 671, 674 (Tex. App.--Fort Worth 1997, pet. dism'd by agr.) ("Because venue is fixed by law, any agreement or contract whereby the parties try to extend or restrict venue is void as against public policy"). Since the Texas venue statute does not recognize the parties' choice of venue as determinative of proper venue, drafters attempt to fix venue for contract litigation by specifying the county for performance of the contract. For example, the TFLPM form agreement incident to divorce (Form 17-6), para. 7.14, provides that "All rights, duties, and obligations under this agreement are payable and enforceable in [county] County, Texas." This is an effort to come within the scope of Tex. Civ. Prac. & Rem. Code § 15.002, Venue: General Rule: "(a) Except as otherwise provided by this subchapter or Subchapter B or C, all lawsuits shall be brought: (1) in the county in which all or a substantial part of the events or omissions giving rise to the claim occurred . . . ." "Contract claims generally accrue in any county where the contract was formed, where it was to be performed or where it was breached." *Killeen v. Lighthouse Elec. Contractors, L.P.*, 248 S.W.3d 343, 348 (Tex. App.--San Antonio 2007); *Southern County Mut. Ins. Co. v. Ochoa*, 19 S.W.3d 452, 459 (Tex. App.--Corpus Christi 2000, no pet.).

5. Choice-of-Law. A choice-of-law clause is a provision in which the parties select the state whose law will be applied to lawsuits over the contract. The Texas Supreme Court has adopted the "limited party autonomy" rule of the Restatement (Second) of Conflict of Laws § 187 for enforcing choice-of-law clauses: the parties' choice will be respected, except that "[t]hey cannot require that their contract be governed by the law of a jurisdiction which has no relation whatever to them or their agreement . . . [a]nd they cannot by agreement thwart or offend the public policy of the state the law of which ought otherwise to apply." *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 677 (Tex. 1990). The TFLPM form Agreement Incident to Divorce (Form 17-6) provides, at para. 7.12, that Texas law will govern the interpretation and enforcement of the agreement. A choice-of-law clause is particularly important in a premarital agreement because a couple may move to another state during a long marriage. *See* TFLPM form premarital agreement (Form 48-3), para. 18.5. The form premarital agreement contains what may be a tacit choice-of-law clause in paragraph 10.3, providing that in the event of death, the surviving spouse may seek a family allowance in accordance with the Texas Probate Code. If the spouses are domiciled outside Texas when a spouse dies, does this specification of Texas law lapse, or must the probate court of another state apply Texas law?

6. Burden of Proof/Burden of Persuasion. There is no case law on it, but parties may be able to agree upon presumptions and burdens of proof and the burden of persuasion in the event of litigation. The TFLPM premarital agreement form (Form 48-3) does this. Paragraph 18.3 says that property held in a spouse's individual name is presumed to be that spouse's separate property. Paragraph 3.4 negates any presumptive ownership resulting from commingling. Paragraph 3.9 lists facts that cannot be considered evidence of intent to create community (why not preclude the items as "evidence of community property"?). Paragraph 7.1 says that jointly-held property "may not be deemed to be community property," and

that absent *records* of each party's contribution (that is, oral testimony has no probative weight), ownership is conclusively presumed to be 50-50.

The form premarital agreement, para. 12.1, provides terms on how you can and cannot prove a gift. There are problems in interpreting these clauses. According to "item 1," "Gifts of wearing apparel, jewelry, and athletic equipment" can be proven by oral testimony. Does the expressio unius est exclusia alterius apply to this list? Item 2 "says that gift of "other items of personal property not covered by item 1. above, such as furnishings, art work, cash, and collections, must be established by clear and convincing evidence . . . ." That list is apparently not exclusive of other items. But is item 2 limited to tangible personal property since all listed items are tangible? Since assets fitting in item 2 require proof by clear and convincing evidence, does that mean proof under item 1 is by a preponderance of the evidence?

7. Severability. A severability clause provides that a court's decision that part of a contract is unenforceable does not cause the balance of the contract to fail. Although a severability clause is routinely used, there may be provisions of a contract that are so central to the bargain that failure of that provision should invalidate certain related provisions, or perhaps invalidate the contract as a whole. The Texas Supreme Court has applied this standard of severability to a premarital agreement. In *Williams v. Williams*, 569 S.W.2d 867, 871 (Tex. 1978), the Supreme Court upheld a premarital agreement, after invalidating a significant portion of the agreement, saying: "We are of the opinion that the agreement here is controlled instead by the rule that where the consideration for the agreement is valid, an agreement containing more than one promise is not necessarily rendered invalid by the illegality of one of the promises. In such a case, the invalid provisions may be severed and the valid portions of the agreement upheld provided the invalid provision does not constitute the main or essential purpose of the agreement. "According to *In re Kassachau*, 11 S.W.3d 305, 313 (Tex. App.--Houston [14th Dist.] 1999, orig. proceeding). "Severability is determined by the intent of the parties as evidenced by the language of the contract . . . . The issue is whether the parties would have entered into the agreement absent the illegal parts." In *City of Beaumont v. International Ass'n of Firefighters, Local Union No. 399*, 241 S.W.3d 208 (Tex. App.--Beaumont 2007, no pet.), the court found that an arbitration agreement failed in its entirety because one clause was invalidated, despite the presence of a severability clause. The court said: "a severability clause does not transmute an otherwise dependent promise into one that is independent and divisible." *Id.* At 216. The TFLPM form agreement incident to divorce (Form 17-6) contains, at para. 7.7, a "partial invalidity" clause that says that unenforcabiltiy of one provision will not render other portions of the agreement unenforceable.

8. Anti-Fraud Clauses. Scriveners will sometimes include a recital designed to negate a claim of fraud in the inducement. A recital that an agreement is not the result of fraud suffers from a logical problem, however, because the essence of fraud is the victim's lack of awareness of the fraud at the time of signing. If the contract is procured by fraud, then the clause saying there was no fraud was also procured by fraud. Lawyers have tried to avoid this problem by including in their contracts "non-reliance clauses," in which they recite that the parties are not relying upon representations made by the other party in entering into the contract. If you negate reliance, ergo you negate fraud, since an element of fraud is reliance upon a misrepresentation.

The Texas Supreme Court considered such a non-reliance clause in *Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997). There two major businesses signed documents bringing to an end their association in an industrial transaction. The contract contained a disclaimer of reliance clause:

> [E]ach of us [the Swansons] expressly warrants and represents and does hereby state ... and represent ... that no promise or agreement which is not herein expressed has

> been made to him or her in executing this release, and that **none of us is relying upon any statement or representation of any agent of the parties being released hereby. Each of us is relying on his or her own judgment** and each has been represented by Hubert Johnson as legal counsel in this matter. The aforesaid legal counsel has read and explained to each of us the entire contents of this Release in Full, as well as the legal consequences of this Release .... (emphasis added)

Id. at 180. The Supreme Court ruled that the clause negated a fraudulent inducement claim as a matter of law. In doing so, the Court pointed out that "[i]n negotiating the release, highly competent and able legal counsel represented both parties and, as we have said above, the parties were dealing at arm's length. Further, both Schlumberger and the Swansons are knowledgeable and sophisticated business players." *Id.* at 180. The Court went on to say, however:

> In sum, we hold that a release that clearly expresses the parties' intent to waive fraudulent inducement claims, or one that disclaims reliance on representations about specific matters in dispute, can preclude a claim of fraudulent inducement. We emphasize that a disclaimer of reliance or merger clause will not always bar a fraudulent inducement claim.

Id. at 181. The Beaumont court of appeals said: "Disclaimers of reliance on extra-contractual representations that arise from negotiated transactions between sophisticated parties are generally valid." *Morgan Bldgs. and Spas, Inc. v. Humane Society of Southeast Texas*, 249 S.W.3d 480, 490 (Tex. App.--Beaumont 2008, no pet.).

Note that the case law on nonreliance clauses does not involve representations or warranties contained in the agreement itself. The TFLPM form premarital agreement (Form 48-3) contains a nonreliance clause in para. 1.1: "*No Oral Representations* -- Neither party is relying on any representations made by the other party about financial matters of any kind, other than the representations stated in this agreement and in any schedule or exhibit attached to it." This nonreliance clause thus expressly indicates that the parties *are* relying on representations (what about warranties?) in the agreement. The next paragraph of the form, para. 1.2 contains the following representation/warranty: "Each party represents and warrants to the other party that he of she has **[include if applicable:** , to the best of his or her ability,] made to the other party a [complete and accurate/fair and reasonable] disclosure of the nature and extent of his or her property, including values, and financial obligations, contingent or otherwise, and that the disclosure includes but is not limited to the properties and liabilities set forth in Schedules A, B, C and D attached to this agreement and other documentation exchanged between the parties before their signing of this agreement . . . ." So, the non-reliance clause of para. 1.1 is impacted by para. 1.2, and the two clauses combined serve to convert a fraudulent inducement claim by the party seeking to avoid the contract into a misrepresentation or breach of warranty claim. Whether that claim would defeat enforcement of the premarital agreement, or instead would only give rise to a claim for damages for breach of contract (and how would damages be measured?) is a substantive question of law involving the scope of the defenses of voluntariness and unconscionability that merits some discussion.

The TFLPM form premarital agreement (Form 48-3) contains another nonreliance clause at para. 18.16, denying that either party received legal, financial, or other advice from the opposing party and his/her attorney. This nonreliance clause does not seem to be affected by the representation/warranty in para. 1.2.

9. Negation of Defenses. The contract can explicitly negate possible defenses to enforcement of the agreement. The TFLPM form premarital agreement (Form 48-3), para. 1.2, provides:

> Each party additionally acknowledges that, before the signing of this agreement, he or she has been provided a fair and reasonable disclosure of the other party's income, property, and financial obligations. Furthermore, and before their execution of this agreement, [**name of party A**] and [**name of party B**] have previously offered to provide, or have provided, to the other party all information and documentation pertaining to all income, all property and its value, and all financial obligations that have been requested by the other party. [**Name of party A**] and [**Name of party B**] each acknowledge that he or she has, or reasonably could have had, full and complete knowledge of the property owned by the other party, as well as complete knowledge of all financial obligations of the other party."

This language negates part of the unconscionability defense to enforcement of the premarital agreement. *See* Tex. Fam. Code § 4.006(a)(2). It's hard to tell whether these clauses are legally binding, but they would seem to support the enforceability of the contract.

10. Estoppel to Contest Enforcement. Under the doctrine of quasi-estoppel, a party may be precluded from maintaining a position that is contrary to a prior position from which one benefitted. The Supreme Court said, in *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000):

> [A]cceptance of the benefits, is a species of quasi-estoppel. *See Atkinson Gas Co. v. Albrecht*, 878 S.W.2d 236, 240 (Tex. App.--Corpus Christi 1994, writ denied). Quasi-estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken. *See id*. The doctrine applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit. *See id; Vessels v. Anschutz Corp.*, 823 S.W.2d 762, 765-66 (Tex. App.--Texarkana 1992, writ denied).

If you are drafting a contract with concern that the other party may try to repudiate it when time for enforcement comes, and it is possible to have the other contracting party receive benefits under the contract prior to breach, you may be able to trigger quasi-estoppel. For example, in a premarital agreement, provide from some benefit to flow to the other party, such as an up-front payment, or regular payments during the life of the contract. You can even provide explicitly that accepting such payments will constitute acceptance of benefits that precludes a later attack on the contract.

11. Deadlines. All obligations to be performed in the future should have a specific deadline. *See* TFLPM Practice Notes § 17.3 (2006). Where that is not possible, the words "immediately" or "timely" can be used. "For timely performance to be a material term of the contract, the contract must expressly make time of the essence or there must be something in the nature or purpose of the contract and the circumstances surrounding it making it apparent that the parties intended that time be of the essence." *Deep Nines, Inc. v. McAfee, Inc.*, 246 S.W.3d 842, 846 (Tex. App.--Dallas 2008, no pet.). In *Deep Nines, Inc.*, although the contract did not specifically state that time was of the essence, it did provide a specific cure period if payment is not made when due, and provided that if payment is not received within the cure period, the party would be considered to be in default. "To construe the agreement in a manner that does not make timely payment a material term would render the cure period and default provisions meaningless." *Id.* So time was held to be "of the essence."

12. Events of Default. It may be desirable to list certain actions or inactions that constitute a default that triggers a contractual remedy. That eliminates the issue of whether the breach is sufficiently material to trigger a remedy. A sample list of events of default are set out in the **Texas Real Estate Forms Manual [TREFM]** form additional clauses for promissory notes (Form 14-6), clause

14-6-15. Some of these events of default would have no application to a typical family law contract, but others would, such as failure to timely perform a covenant, bankruptcy, and impairment of collateral. *See* events of default in the TREFM form Security Agreement with collateral pledge (Form 18-17), para. 7.

13. Notice of Default. Contracts often provide for notice of default and a time to cure default ("cure period") before remedies for breach of contract may be exercised. Sample language is contained in TREFM Form 14-6, clause 12-6-8 "Notice to Cure Default." It provides for notice and ten days to cure default before acceleration. The TFLPM form agreement incident to divorce (Form 17-6) does not provide for notice of default before unpaid alimony is accelerated. *See* para. 4.7. Nor does the TFLPM form real estate lien note (Form 18-6) or the form unsecured promissory note (Form 18-8.)

14. Acceleration. When a contract calling for payments over time is breached, the contract often gives the injured party the right to accelerate the due dates on the stream of payments so that all future payments become due immediately. If acceleration occurs, the scrivener should consider whether the accelerated amount should be the present value of the stream of payments, in order to take into account the time value of money. That is not appropriate for a principal balance being repaid over time. It may be appropriate for accelerated alimony. The TFLPM form agreement incident to divorce (Form 17-6) provides for acceleration of future alimony payments, but, because the accelerated amount is not reduced to present value, the form utterly fails to recognize the time value of money. *See* para. 4.7.

15. Specifying Remedies for Breach. Parties have the ability to specify that equitable remedies will be available to enforce the contract. *See* Section III.F above. And parties can specify that damages are an adequate remedy at law. *Id.* However, parties can stipulate to damages only in certain circumstances. *Id.* In one situation you might want to include specific performance as a remedy while in other situations you might want to provide for damages as the only remedy.

16. Third-Party Beneficiaries. "A third party may recover on a contract made between other parties only if the parties intended to secure some benefit to that third party, and only if the contracting parties entered into the contract directly for the third party's benefit." *MCI Telecommunications Corp. v. Texas Utilities Elec. Co.*, 995 S.W.2d 647, 651 (Tex. 1999). The Fort Worth Court of Appeals said, in *Brunswick Corp. v. Bush*, 829 S.W.2d 352, 354 (Tex. App.--Fort Worth 1992, no writ):

> There is a presumption against third-party beneficiary agreements. . . . The intent of the contracting parties is controlling when determining whether parties are third party beneficiaries of a contract. . . . In determining intent, courts presume that the parties contracted only for themselves and not for the benefit of third parties, unless the obligation to the third party is clearly and fully spelled out. . . . In other words, the party claiming third-party beneficiary status will succeed or fail according to the terms of the contract [citations omitted].

In the *MCI Telecommunications Corp.* case, the Supreme Court gave effect to a recital in a contract that third party beneficiaries were not intended. "In light of the clear language in the contract that the agreement not be construed as being for the benefit of any nonsignatory, we conclude that TU is not a third-party beneficiary." *Id.*

It is a simple matter to explicitly state whether someone is or is not a third-party beneficiary of a contract. For example, in a family law agreement, where one parent is agreeing with the other parent to provide benefits to the parties' children, an explicit statement regarding the children's third-party beneficiary status can eliminate the need to litigate that question.

17. Allocation of Risk. A contract can specify the allocation of risk associated with a future

event. An example is TFLPM form agreement incident to divorce (Form 17-6), para. 4.5, which places the risk that alimony payments are non-deductible on the payee (who suffers a reduction of payment measured by the increased taxes paid by the paying party at a higher tax bracket, rather than the reduction in taxes paid at a lower tax bracket by the payee).

18. Escape Clauses. Escape clauses are conditions that permit a party to the contract to avoid performing some obligation under the contract. Fox calls these "outs." Fox, p. 21. Most "outs" occur during the period between a preliminary contract and the ultimate contract. In a typical house purchase, the earnest money contract will contain several outs that permit the buyer to back out of the transaction. The same is true of many contracts to purchase a business, where a number of conditions must be met before the buyer is obligated to close on the sale.

19. Reasonableness. Where parties cannot agree on a precise rule to govern future performance, the contract can use a "reasonableness" standard. Fox, pp. 86-87. If something is allowed only in the discretion of the other party, the contract can provide that consent not be unreasonably withheld. Fox, p. 88.

The reasonableness standard puts the ultimate decision in the hands of a court or jury, if consent is withheld. The TFLPM form Decree of Divorce (Form 17-1), p. 17-68 of the 5/06 edition, para. 10.F.12.i. contains a contractually-based presumption of reasonableness of charges for health-care expenses, which reverses the ordinary burden of proof in a suit between parents seeking reimbursement for paying such expenses.

The case of *Kurtz v. Kurtz*, 158 S.W.3d 12 (Tex. App.--Houston [14th Dist.] 2004, pet. denied), said this about an agreement to pay the other party's future attorneys' fees:

> As part of the division of the parties' estate, the [agreed] Decree provided for the payment of attorney's fees and costs as follows ("attorney's fees provision"):
>
> > Further, RONALD D. KURTZ IS ORDERED to pay the attorney's fees and costs incurred by JULIA L. KURTZ in a subsequent motion to modify child support. The attorney for JULIA L. KURTZ will provide to RONALD D. KURTZ on or before the Order Modifying Prior Order is executed by the Court a statement of the fees and costs incurred and IT IS ORDERED that RONALD D. KURTZ will pay said fees and costs within thirty (30) days from his receipt thereof.
> >
> > * * *
> >
> > [W]e hold that reasonableness is an implied term in the Decree's attorney's fees provision and construe the term "attorney's fees and costs" to unambiguously require that Ronald pay only reasonable and necessary attorney's fees and costs.

20. Insurance. An obligee may wish to have life insurance to provide payment if the obligor dies. Or an obligee may want to require that collateral for a delayed payment be insured against loss in value. The parties must decide who will own the policy and who will pay the premiums. If the obligor will own the policy, the obligee should require a non-revocable designation of the obligee as beneficiary. The obligor should have the right to verify that coverage is maintained.

The TFLPM form agreement incident to divorce (Form 17-6), para. 4.2, provides for the payor to maintain life insurance on his/her life, at payor's expense, "in an amount sufficient to pay the sum of the then-remaining alimony payments under this article. The "Claim Against Estate" paragraph has an optional clause saying that the alimony obligation may be discharged by life insurance equal to the then-unpaid alimony payments (but not discounted to present value).

21. Contingencies. You may wish to anticipate

the most likely future events (contingencies) that may cause a problem under the contract. *See* Section IV.B.21 above.

22. Anti-Assignment Clause. An anti-assignment clause is often included in a family law contract requiring payments over time to keep the obligee from assigning the contract to an investor at a discounted price. It also keeps creditors of the obligee from taking the contract right from the obligee. Assigning an alimony contract would destroy its deductibility.

23. Security Provisions. The promisee will usually want collateral to secure the promise of future performance. Sometimes identifying good collateral is difficult. First liens in land are usually good collateral, if there is substantial equity in the property. Liens in shares of stock in a closely-held business are usually not very good collateral, unless safeguards are put in place to control the business giving liens in its inventory and equipment, and the owners taking capital out of the business without paying the debt secured by the lien. If a business is to be the collateral of a significant debt, a family lawyer may wish to engage a commercial lawyer to negotiate the terms of security, and to draft the paperwork.

24. In Terrorem Clause. Drafters of wills sometimes include an "in terrorem" or forfeiture clause to discourage beneficiaries from challenging the will. Under such a clause, the beneficiary forfeits any benefit under the will if he or she challenges the will. Some Texas cases appear to recognize a "good faith" exception for will contests, saying forfeiture will not be allowed if the contest was filed in good faith and upon probable cause. See Gerry Beyer, *The Fine Art of Intimidating Disgruntled Beneficiaries With In Terrorem Clauses*, 51 SMU L. Rev. 225, 249-259 (1998). An in terrorem clause is useful in the family law area, as well. For example, a premartial agreement can be drafted in such a way that the non-monied spouse receives a benefit under the contract upon dissolution of marriage, provided that he or she does not contest the enforcement of the agreement, and enters into an agreed decree in accordance with its terms.

25. Inflation Adjustments. Inflation decreases the purchasing power of the dollar. It takes $2.61 today to buy what a dollar bought in 1980. It takes $1.64 today to buy what a dollar bought in 1990. It takes $1.25 today to buy what a dollar bought in 2000. Payments stretched over time will lose part of their value to inflation. For this reason, some people put inflation adjustments, or "escalation" clauses in their contracts.

People routinely use the Federal Bureau of Labor Standard's Consumer Price Index (CPI) to measure inflation.

The Bureau of Labor Standard's publishes four major CPI's: one for all urban consumers and including all items; one for all urban consumers but excluding food and energy; one for medical care expenses; and one for urban wage earners and clerical earners. Each index is either seasonally adjusted or not seasonally adjusted. *See* <www.bls.gov/CPI>. CPI's are published for different regions of the country, and twenty-six metropolitan areas. The BLS has a web page on "How to Use the Consumer Price Index for Escalation," <www.bls.gov/cpi/cpi1998d.htm>. The BLS recommends that scriveners (I) define the payment that will escalate (e.g., child support or alimony), (ii) precisely identify the CPI index to be used; (iii) specify the starting period from which increase will be determined, (iv) state the frequency of adjustments; (v) determine the formula to use; and (vi) provide a contingency if the chosen index is altered by the BLS. The formula is: subtract the new CPI from the base CPI, then divide this difference by the base CPI to determine the change, and convert that to a percentage.

26. Floors/Ceilings. Sometimes a future obligation will require performance based on future events. It is possible to put outside parameters on the extremes, by using "floors" or a "ceilings." Fox, p. 102. For example, an alimony obligation may be subject to adjustment based on fluctuations in the payer's income. The

fluctuation could be subject to a floor and ceiling. A ceiling might be used with, for example, a parent's obligation to pay college expenses for a child, which would set an upper limit on what could be spent in one year, or over a four year period.

27. Income (Defined). If the contract requires a future payment conditioned on future income, defining "income" is very important. An easily verifiable measure of income is Line 22 of the IRS Form 1040, which sets out "total income." However, this concept of income includes some items that most people would want to exclude from a family law income calculation, like capital gain income (which is taxed as income but which is not income under state law), IRA distributions, and social security benefits. You could break down the components of income you want by specifying different lines of the Form 1040: line 7 is "Wages, salaries, tips, etc."; lines 8a and 8b set out dividend income; lines 9a and 9b set out dividend income; line 13 contains capital gains income; line 17 is rental real estate, royalties, partnerships, S corporations, trusts, etc.; line 18 is farm income. You could provide for "earned income," but should probably give a definition for the term, like: "a spouse's compensation for personal services rendered, such as wages, salaries, professional fees, commissions, and bonuses. Earned income does not include income which constitutes a return on capital, such as dividends, interest, rents on real estate, or capital gains."

28. Interest on Delayed Payments. Delayed payments should bear interest to account for the time value of money. A three-to-four percent interest rate just keeps pace with inflation. If the rate is to be set based on what the principal could be invested at, a passbook rate, a U.S. government bond rate, or a quality corporate bond rate could be selected. That rate will not reflect an adequate recognition of the risk of default for most situations. If the rate is set at what it would cost the payer to borrow the principal sum to be paid, you would use the prime rate, or prime plus one percent. The nature of the collateral for the debt affects the risk which affects the interest rate. Most family law interest rates do not adequately account for the risk of non-payment.

When payments are to be made over time, the payee will want to receive interest on the obligation, to reflect the time value of money and to offset the loss of purchasing power due to inflation. Interest can be simple or compounded, and whether interest is to be simple or compounded should be explicitly stated. There are some tax practitioners who believe that, in connection with the settlement of a divorce, the parties can agree to front-end load or back-end load the interest payments. If interest payments are back-end loaded and included in a "balloon" payment at the end of the period, the payee will not have to pay income tax on the payments until the end of the payment stream. This may help to reach a settlement number that nets the payee enough money to maintain a desired level of expenditure longer into the future. Consult a tax advisor before you try this.

29. Align Adjustments to Pertinent Date. If adjustments are to be made for periodic payments, the scrivener should see that adequate data will exist to make the adjustment when the time comes. Annual adjustments based on income are easy to make based on tax returns, but personal tax returns are done on a calendar year basis, and frequently are not completed until April 15 of the following year, or later. Inflation related adjustments can be done at the end of any month, because the government publishes data on a monthly basis, with a time lag.

30. Waiver of Jury Trial. The Texas Supreme Court has upheld the right of contracting parties to waive the right to a jury in the event of a later dispute under the contract. *In re Prudential Ins. Co. of America*, 148 S.W.3d 124, 131 (Tex. 2004).

31. Arbitration Clauses. If arbitration is desired, the first decision is what future disputes will be arbitrated. "The parties agree to submit any disputes arising from this agreement to final and binding arbitration under the Arbitration Rules of

the American Arbitration Association." Or, "All disputes arising out of or in connection with this agreement shall be finally settled under the Rules of Arbitration of the American Arbitration Association by one or more arbitrators appointed in accordance with the said Rules." Or, "Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be decided by arbitration in accordance with the Rules for Arbitration of JAMS." Or, "The parties agree to binding arbitration to resolve all post-divorce issues relating to the parties' relationships to their minor child, except with regard to appointment as managing conservator or possessory conservator, the right to designate the child's primary residence, and whether the right to designate primary residence will be confined to a geographic area." In describing what disputes will be subject to arbitration, remember that some courts have recognized a presumption in favor of arbitration when deciding how broad the arbitration clause is.

In *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 106 S.C. 1415 (U.S. 1986), the Supreme Court said that "it has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" This view was echoed in *Williams Industries, Inc. v. Earth Development Systems Corp.*, 110 S.W.3d 131, 137 (Tex. App.--Houston [1 Dist.] 2003, no pet.): "Because of the strong policy favoring arbitration, '[a]n order to arbitrate should not be denied unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.' . . . Thus, '[a]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration'" [citations omitted].

Particular care should be taken about the arbitration language inserted in the mediated or informal settlement agreement. If the parties' intention is for the mediator or other private third party to arbitrate only drafting disputes, the clause should say so, and might even go further and recite that the arbitration agreement does not extend beyond the court's signing the final decree. An open ended arbitration agreement in the mediated settlement agreement might cause someone to think that the mediator is to arbitrate disputes that arise even after the decree is signed. Also, disagreements about substantive terms of the agreement can masquerade as drafting disputes. Care should be taken not to over-empower an arbitrator.

Other matters that merit express treatment in an arbitration provision are:

• Whether the arbitration ruling will be binding or non-binding • Waivers of right to jury, right to trial court review, right of appeal • Scope of issues to be submitted • Location of arbitration sessions • Who will pay what expenses incurred in arbitration, including arbitrator's fee, court reporter's fee, rental for the courtroom, travel expenses copying, telephone expenses, and the like • Selection of arbitrator • Procedure–will the Texas Rules of Civil Procedure apply, especially summary judgments? • Interim relief–will the arbitrator be able to grant interim relief? Can the parties go to court for that? • Availability of formal discovery procedures and production of documents • Scheduling arbitration sessions • Confidentiality of process and result • Pleadings or "position statements" • Formality of proceeding–will arbitration sessions be like hearings or like meetings? • Will a court reporter make a record? • Will the Texas Rules of Evidence apply? Can affidavits be used? Experts' reports instead of live testimony? • What standards–will the substantive state law be applied, or will a fairness standard apply, or something else? • Limits on power–what are the limits on the arbitrator's authority? What issues are beyond the scope of arbitration? • Arbitrator's Report–when it is due? What will it include? • In which court will the request to confirm the

arbitrator's award be filed? • Duration of arbitration clause: only the current round of litigation or also future litigation? • Appeal–is there appeal to an appellate court? What will the standard of review be (abuse of discretion, substantial evidence, sufficiency of the evidence or just the review contemplated in the Arbitration Act)? See also the TFLPM form family law arbitration agreement (Form 15-36) and family law arbitration rules (Form 15-37).

The U.S. Supreme Court recently ruled that the parties to an arbitration agreement under the Federal Arbitration Act cannot contract to alter the scope of appellate review of arbitration awards that is provided in the Act. *Hall Street Assocs., LLC v. Mattel, Inc.*, --- U.S. ----, 128 S.C. 1396 (Mar. 25, 2008). What about agreements under the Texas Arbitration Act? • Enforcement–will enforcement issues be presented to the arbitrator or the court? What enforcement remedies can the arbitrator use? • Duration of arbitration clause: only the current round of litigation or also future litigation?

32. Signatures. While all form contracts contain sample signature blocks, it is important to be sure that the signature blocks you are using fit your circumstance. Fox, p. 135. This is a little tricky when an entity is a party to the contract. Sometimes execution will take place at different places and times, and the signatures will be sent by fax or scanned and sent by email, to be assembled by someone and attached to an original of the contract. This situation could lead to later claims of a lack of authority to attach the signature to the draft of the contract in question. In such a situation, it is better to send a copy of the contract with all signatures attached, and to obtain confirmation from all signing parties that the signature is attached to the right version of the contract. These confirmations should be kept in the same place as the original of the contract, so that it can be located in the event of a dispute.

33. Notarization. Most contracts do not have to be notarized. Notarization is generally required only to file the contract with a government office, like the county clerk's office. Fox, p. 158. A notary public's acknowledgment of a signature is prima facie evidence of the execution of the document. *Mack Financial Corp. v. Decker*, 461 S.W.2d 228, 230 (Tex. Civ. App.--Dallas 1970, no writ).

34. Originals. Keeping possession of the original of a contract is ordinarily not especially important. Fox, p. 156. Under Tex. R. Evid. 1003, a duplicate is admissible to the same extent as an original, unless an issue of authenticity is raised and under the circumstances admitting the copy would be unfair. A contract can provide that a copy may be used to prove the original. The original of a document is required for filing with the county clerk's office. Many lawyers have multiple originals of the contract executed, so that each party and his/her lawyer can have a signed original. If there is only one original, the scrivener may wish to recite in the agreement who will retain possession of the original.

35. Corporate Consent. If one of the contracting parties is a business entity, care should be taken to be sure that the person executing the contract on behalf of the entity has proper authority, supported by resolution of the directors or partners, etc.

36. Releases. If you are settling a dispute, you will want to include releases of liability between the parties. In *McMillen v. Klingensmith*, 467 S.W.2d 193, 196 (Tex. 1971), the Supreme Court held that a release fully discharges only those tortfeasors that it names or otherwise specifically identifies. In *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420, 422 (Tex. 1984), the Supreme Court said that a "tortfeasor can claim the protection of a release only if the release refers to him by name or with such descriptive particularity that his identity or his connection with the tortious event is not in doubt," and that Texas courts "narrowly construe general, categorical release clauses." "When a release refers to a related document, that document should be considered when reviewing a release." *Schomburg v. TRW Vehicle Safety Systems, Inc.*, 242 S.W.3d 911, 913 (Tex. App.--Dallas 2008, pet. denied). The

TFLPM form agreement incident to divorce (Form 17-6), para. 7.2, contains a global release of claims.

37. Indemnification. Fox suggests that in some contracts it is appropriate to have a global indemnification clause saying that the contracting party making representations or warranties will indemnify and hold harmless the other contracting party from all losses arising from breach of representations or warranties. Fox, p. 240. The types of things to be indemnified can be spelled out, including attorneys' fees and other litigation expenses, and can include losses or expenses that would not ordinarily be included in damages for breach of contract. An indemnification obligation can be subject to "baskets" or caps. *Id.* As to baskets, see Section IV.A.5 above.

V. EXAMPLES OF DRAFTING DISPUTES.

A. SELLING THE HOUSE. The parties agree that the house will be sold and the net proceeds from sale will be split 50-50.

Problems:

1. When will the house be put on the market? At what price?
2. What happens if a counter-offer is received for less than the asking price?
3. What if the buyer wants the sellers to seller-finance part of the purchase price through a second lien?
4. If no offers are received, who decides when to lower the asking price, and to what level?
5. How are net proceeds calculated?
6. Who makes the mortgage payment until the house is sold? Will s/he be reimbursed out of proceeds from sale?

Here's how the TFLPM form Collaborative Law Settlement Agreement (Form 12-11) handles a house sale:

"Collaborative Law Settlement Agreement

* * *

3. Real Estate

1. [Wife/Husband] will own the property commonly known as [address], [city], Texas, and will pay the remaining balance of the mortgage.

2. The property commonly known as [address], [city], Texas, will be listed for sale with a real estate agent who is active in the area where the property is located. It will be sold for a price and on terms that are mutually agreeable to the parties. Until the closing of the sale-

a. [Wife/Husband] will have the exclusive use and possession of the property and will pay all utilities and keep the property maintained and in good repair;

b. [Wife/Husband] will pay the mortgage payments as they come due; and

c. [Wife/Husband] will pay the insurance premiums and ad valorem taxes as they come due.

On the sale, the net sales proceeds will be divided [percent] percent to Wife and [percent] percent to Husband. If, after [number] days after the divorce, the parties are unable to agree on a sales price or terms, then either party may apply to the Court for the appointment of a receiver to take possession of the property and sell it and, after the receiver's fee, to distribute the remaining proceeds in the proportions specified above."

B. WAIVER OF REIMBURSEMENT. The case of *Moroch v. Collins*, 174 S.W.3d 849, 858 (Tex. App.--Dallas 2005, pet. denied), involved a postnuptial waiver of reimbursement claims:

> In issues one and two, Thomas contends the trial court erred in considering Christy's economic contribution claims for the down payment and mortgage payment and for the first phase of renovation expenses because those claims were precluded by the subsequent (1987) postnuptial agreement. First, Thomas argues that Christy waived her claim for economic contribution in paragraph 3.03 of the 1987 postnuptial agreement. That paragraph, entitled "Waiver by Wife," provides:
>
> > Wife waives and releases any right of reimbursement that she might presently or in the future have or claim on behalf of her separate estate or the community estate against the separate estate of Husband.
>
> Paragraph 3.03 plainly waives Christy's claim for reimbursement against Thomas's separate estate. Here, however, Christy asserted a claim for economic contribution against the community estate, not Thomas's separate estate. The plain language of paragraph 3.03 does not apply to waive and release this claim.

C. A COMPLICATED ALIMONY CALCULATION. Husband agrees to pay Wife three annual payments of alimony, based on the amount by which his annual income exceeds $500,000 ("excess income"):

- the 1st payment, due one year after the divorce will equal one-half of his excess income;
- the 2nd payment, due two years after the divorce, will equal one-third of his excess income;
- the 3rd payment, due three years after the divorce, will equal one-fourth of his excess income.

Problems:

1. Potential for alimony recapture if it turns out that the alimony is front-end-loaded.
2. Unless the parties divorce on December 31, there is a phasing problem, because annual income is normally calculated on a calendar basis, while the payments are due on the anniversary of the divorce decree.
3. What happens if Husband sells the ranch he received in the divorce for a capital gain of $200,000? Is that capital gain included in "excess income"?
4. What happens if Husband receives a bonus from employment on January 10th the year after the divorce? Is all of the bonus included in the first year's income calculation, even though it is partially attributable to work done before the divorce? How do you handle the bonus on January 4th of the fourth year after divorce, part of which is attributable to work done during the third year after divorce?

D. ESTIMATE OR FLOOR? In *Coker v. Coker*, 650 S.W.2d 391, 392-94 (Tex. 1983), the Supreme Court had to resolve a dispute over clauses in an agreement incident to divorce. The agreement said:

> 5. Wife shall receive as her sole and separate property, free and clear of any claim, right or title of husband, the following described property: one 1969 Buick automobile, serial no. 4443792127816, all household goods and personal possessions now in the wife's possession or located at her place of residence, (except that the husband shall receive one bedroom suite now located in Crowell, Texas), and one Texas Stadium bond, free of all indebtedness, along with the season ticket sold in connection therewith. The wife shall further have as her sole and separate property, free and clear of all claim, right or title asserted by husband, that certain right, commission or account receivable heretofore earned by husband during his employment with the firm of Majors & Majors in connection with the sale of the "Jinkens ranch

> property in Tarrant County, Texas," such future commission or account receivable being in the approximate sum of $25,000.00.
>
> * * *
>
> 8. Husband represents and warrants to the wife that, to the best of his knowledge, approximately $25,000.00 remains due and owing to him as his portion of commissions earned in connection with the sale of the "Jinkens property in Tarrant County, Texas," and he hereby guarantees to wife that she will receive the said sum of $25,000.00, from Majors & Majors, or from any other payor of such commissions receivable. Such commission is payable to her as payments are made by purchasers to sellers, and will normally be received by her through the office of Majors & Majors. In the event, for any reason she fails to receive such installments of commission exactly as husband would have prior to his assignment of his rights thereto to wife, husband agrees to pay to wife in Dallas County, Texas all such sums of money, which she has failed to receive, up to the guaranteed sum of $25,000.00. (emphasis added).

The parties thereby agreed that Mac would keep his rights to the monthly commissions earned on leases he had negotiated and Frances would be assigned the commission earned by Mac from the sale of the "Jinkens ranch property in Tarrant County." Prior to the divorce, Mac had participated in the sale of the Jinkens ranch whereby he would receive 40% of the sales commission payable by the seller to Majors & Majors over a seven year period contingent on the annual payments being made by the purchaser. In 1976, however, the purchaser defaulted and according to the terms of the sales contract, the seller was not required to continue payments of the commission. Therefore, Mac's rights in the commission were terminated.

* * *

The court of appeals determined that Mac had absolutely guaranteed the payment of $25,000 to Frances. Although the court of appeals recognized that the liability of a guarantor is generally measured by the liability of the principal, it held that paragraph 8 of the settlement agreement created a broader obligation than the commission sales agreement. This interpretation conflicts with paragraph 5 of the agreement and the language used in the divorce decree.

According to the rules of construction, paragraph 8 must be considered along with paragraph 5 and the underlying circumstances to ascertain the true intention of the parties. *See City of Pinehurst*, 432 S.W.2d at 518, 519. The court of appeals failed to fully consider paragraph 5 of the agreement which clearly states that Mac only assigned that "certain right, commission or account receivable heretofore earned by husband." Also, the language of the divorce decree supports an interpretation only assigning Mac's interest in the commission.

* * *

When the language in paragraph 8 is considered alone and particularly the last sentence thereof, the meaning is unclear. The provision could be construed as a guarantee by Mac that Frances would receive $25,000 or merely a promise that he would not interfere with the payments made by Majors & Majors to her after they received the commission from the seller. If we construe the agreement as a contract of guaranty, any uncertainty must be resolved in favor of Mac as guarantor. Even if we conclude the rules of guaranty do not apply, we could not say with certainty that Mac promised to pay Frances

> $25,000 regardless of the payment of the commission. Such an interpretation would render the provisions in the divorce decree and paragraph 5 relating to the assignment of the commission surplusage. Courts must favor an interpretation that affords some consequence to each part of the instrument so that none of the provisions will be rendered meaningless.

E. ACCOUNT LANGUAGE. Consider this language from a hypothetical mediated settlement agreement:

> 5. Wife is awarded the following:
>
> (1) $20,000 out of UBS account no. 1234 (the balance being awarded to Husband)
> (2) Account no. 5432 at Blanco Bank, (September 1 balance of $25,000)
> (3) Wachovia account no. 13579, (September 1 value of $500,000), together with all increases and decreases thereon

Between the date of the Mediated Settlement Agreement and the date of divorce, the securities in the Wachovia account declined in value by $50,000. A disagreement arises, because Wife says she's entitled to $500,000 from Para 5(3). Husband said that the risk of loss was on Wife. What's the answer?