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BEST PRACTICES

Does a Partition Agreement Present a Justiciable Controversy?

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In Texas, where property accrued during marriage is presumptively community property, couples have the right to engage in contracts prior to marriage to change the character of their property. Moreover, spouses may partition or exchange their community property after marriage and/or convert their separate property to community property.

The recent case of In Re: Cynthia Banigan creates issues as to how attorneys engage in best practices with their clients regarding partition

and exchange agreements. In Banigan, the Fifth Circuit Court of Appeals ruled in January, 2023 that a 2015 declaratory judgment "establishing that the parties' partition of community property agreement is valid and enforceable" should be set aside as void.

Pursuant to Chapter 4 of the Texas Family Code, parties must enter into a written agreement to change the nature of their property. Each individual should retain independent counsel. Each party to such an agreement should make complete disclosure of their respective assets and debts to the other or sign a written waiver absolving the other party of making complete disclosure prior to entering such a contract. Each party must make decisions as to how to partition and/or characterize future income earned during marriage, as well as to income generated from their respective separate estates.

Through the years, many family lawyers have recommended taking additional steps to assure the sanctity of a partition agreement, including initiating a declaratory judgment action to seek a ruling that the agreement is valid, binding and enforceable.

In October 2015, Michael and Cynthia Banigan entered into a Partition or Exchange Agreement (PEA), seeking to divide their community property, and further to characterize the divided community assets as separate property. They also agreed to submit any controversies regarding the document to binding arbitration in the event of a divorce "as the sole and exclusive remedial proceeding." In the PEA's arbitration provision, each party waived the right to a trial and agreed that the arbitrator would be "designated as a special master under the Texas Rules of Civil Procedure."

Pursuant to Tx.Fam. Code § 4.105, a partition agreement is not enforceable if:

- A party did not sign the document voluntarily
- The agreement was unconscionable when signed
- A party was denied reasonable disclosure of the other party's assets and debts
- Neither party signed a waiver of disclosure prior to executed the Partition Agreement

Concurrent with executing their PEA, the Banigans each signed waivers of disclosure, pursuant to TxFam Code Section 4.102. Each party stipulated that they had been provided a fair and reasonable accounting from the other party as to financial commitments, that they individually lacked the desire to be provided with a complete accounting of the metes and bounds of the other party's estate, and that they voluntarily, and under no duress, waived the right to any additional investigation as to each other's holdings.

The same day that the documents were executed, Michael Banigan filed a petition for declaratory judgment pursuant to the Uniform Declaratory Judgment Act, in which he sought to establish the validity of the partition agreement. The case was assigned to the 417th District Court of Collin County. Cynthia filed a responsive pleading, in which she did not take issue with any of the allegations in the petition and consented to the entry of orders that declared the validity of the partition agreement.

The Hon. Benjamin Smith, sitting on assignment for the Hon. Cynthia Wheless, heard the application for declaratory judgment. Michael testified that he was of sound mind when he executed the waiver and the PEA, that he and Cynthia voluntarily signed the documents under no duress nor compunction to do so, that he made as thorough of disclosure

of his assets and debts as possible and that he waived complete disclosure of the metes and bounds of Cynthia's estate. Cynthia's testimony was that her responses would be the same as her husband's. Judge Smith granted the declaratory judgment, finding that the PEA was enforceable.

In early 2021, Michael initiated a divorce action in the 468th Judicial District Court. In May, 2021, Cynthia filed a counter-petition for divorce, which in pertinent part challenged the validity of the PEA, on the basis that she had not signed the PEA voluntarily, and that the PEA was unconscionable. The following month, Michael sought to have the case referred to arbitration. Three months after Michael's initial motion for referral to arbitration, he filed a supplemental motion seeking abatement of the case pending referral to arbitration.

Cynthia countered with a brief in which she contended that pursuant to Tx.Fam. Code 6.6015, the court should first grant her request for a trial regarding whether the arbitration provision in the PEA was enforceable, before forcing her to comply with that provision. Later, the trial court held a hearing on the motion requesting that the case be referred to arbitration. Cynthia again argued that she was first entitled to a ruling as to the validity and enforceability of the PEA before mandating that the parties engage in arbitration. Michael countered that TFC Section 6.6015 is inapplicable to court orders and agreements that had been previously approved by the court. The trial court signed an order granting Michael's motion to refer the case to arbitration pursuant to the terms of the PEA.

The following month, Cynthia initiated a bill of review in the 429th Judicial District Court. She sought to set aside the declaratory judgment on several grounds, arguing that the partition agreement was signed involuntarily and that there was no existing justiciable claim or controversy when the trial court granted the declaratory judgment. Michael sought to have the bill of review referred to arbitration. In October, the Judge Cynthia Wheless entered an order compelling arbitration, mandating arbitration of all issues.

Cynthia sought *mandamus* relief from the Fifth Circuit Court of Appeals. She sought to declare the declaratory judgment void, and to order that the trial court erred by referring the case to arbitration. Michael argued that Cynthia's right to an appeal prevented her from seeking *mandamus*, that the declaratory judgment was not void, but instead evidenced an enforceable contract, that the trial court properly ruled that the declaratory judgment is *res judicata* as to Cynthia's attempts to avoid the terms of the PEA and that the trial court property denied Cynthia's claim that Michael waived his right to arbitration by initiating a declaratory judgment proceeding.

Regarding the standard of review in a *mandamus*, the relator is to demonstrate that the trial court clearly abused its discretion, and further that the relator has no adequate remedy on appeal.

If there is no justiciable controversy, the trial court lacks subject matter jurisdiction. Moreover, the item in controversy must be real, not theoretical. In this case, the appellate court notes that the allegations and evidence presented as part of the declaratory judgment proceeding fail to show that there is a pending cause of action between the parties, nor

that the parties' have such different views of the PEA that the trial court could perceive that a cause of action was imminent.

The Fifth Circuit notes that the circumstances of the underlying case are unique, in that Judge Smith was sitting by assignment for Judge Wheless and is no longer taking an active role in the case. The appellate court notes that it would typically abate the *mandamus* proceeding to allow the successor judge reconsider the ruling. However, as the appellate court concluded that the declaratory judgment is void, "there is no decision for Judge Wheless to reconsider and abatement is unnecessary." Therefore, an order of *mandamus* is granted, and the declaratory judgment is vacated as void.

As to the referral of the bill of review to arbitration, Cynthia received the very relief she sought in regard to the bill of review in her case as to the declaratory judgment, and relief as to the bill of review is rendered moot.

Over the past few decades, Texas family lawyers have engaged in a legal fiction: Let's tie a bow around the package of a partition and exchange agreement by seeking to have the agreement made the subject of a declaratory judgment action. The Fifth Circuit appears to blow that concept out of the water. Lawyers: *caveat emptor*.

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