



Summary Judgments In Family Law Cases

By Lynne Liberato and Kate David

Before she got married, your divorce client inherited \$100,000. During the marriage, she swept into a separate account all dividends, interest, and income earned on the money. Despite these efforts, her husband claims that the entire inheritance is community property.

In a premarital agreement, your client and his wife agreed that the property acquired during the marriage would be the separate property of the party who earned it or whose property produced the income. Now, his wife contends that the agreement is unenforceable.

Your client inherited a house that had been the property of a married couple who divorced. The couple's divorce decree did not contain express language disposing of the house. Your client plans to sell the home, so you have filed a suit for declaratory judgment to clear title.

Your client was divorced 20 years ago. The divorce decree did not apportion his military retirement pay and did not have a residuary clause. Now, his ex-wife has sued to partition his military retirement pay.

These are examples of issues that may be resolved through summary judgment disposition. Although most family law cases are fact driven, summary judgment can be an effective way to partially or fully resolve some family law matters. This article offers guidance on when to move for summary judgment in a family law case.¹

Summary Judgment Standards

Regardless of the area of law, there are two types of summary judgments: traditional and no evidence. Understanding the distinction is key to presenting an effective summary judgment — or opposing one. To prevail on a traditional motion

for summary judgment, the movant must establish that no material fact exists and that his or her claim or affirmative defense is established as a matter of law.² To prevail on a no-evidence summary judgment motion, a movant must allege that there is no evidence of an essential element of the adverse party's claim.³

Traditional Summary Judgment

A party with the burden of proof may move for summary judgment by proving as a matter of law entitlement to judgment by establishing each element of his or her own claim or affirmative defense as a matter of law.⁴ Therefore, almost all traditional summary judgments must be

supported by competent summary judgment evidence.⁵ Once the movant has established his or her right to summary judgment as a matter of law, the burden shifts to the non-movant to present evidence that raises a genuine issue of material fact thereby precluding summary judgment.⁶

No-evidence Summary Judgment

A no-evidence summary judgment is essentially a pretrial directed verdict.⁷ The party without the burden of proof moves for summary judgment by alleging that the non-movant has no evidence of a claim (or affirmative defense) on which he or she has the burden of proof.⁸ To successfully oppose a no-evidence summary judgment, the non-movant must respond with more than a scintilla of evidence to raise a genuine issue of material fact.⁹

These standards apply to specific family law issues as follows.

Enforceability of premarital and marital property agreements

The enforceability of premarital and marital property agreements¹⁰ may be determined by summary judgment disposition.¹¹ If you seek to enforce the agreement, you may move for summary judgment relying only on the agreement itself.¹² The agreement itself is sufficient evidence on which to move for summary judgment because, under Family Code Section 5.46, there is a rebuttable presumption that the agreement is enforceable.¹³ The party challenging the



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agreement as unenforceable has the burden to prove the agreement is unenforceable. Once you move for summary judgment, the burden shifts to your opponent to come forward with enough evidence to raise a fact issue on whether the agreement is unenforceable.¹⁴

If your opponent is relying on an involuntary execution defense, you may consider filing a no-evidence motion for summary judgment.¹⁵ To defeat summary judgment, your opponent must present enough evidence to raise a fact issue concerning whether the agreement was entered into voluntarily.¹⁶

Whether the agreement was unconscionable when it was signed is a matter of law to be decided by the court.¹⁷ The Houston 14th Court of Appeals noted that an early determination of unconscionability is a better practice than waiting for submission of the case to a jury.¹⁸ Summary judgment may be one way for the trial court to make this determination early in the proceedings.

Interpretation of divorce decrees

To resolve a dispute over property, you may file a motion for summary judgment asking the court to interpret a divorce decree to resolve a dispute over property. If the divorce decree, when read as a whole, is unambiguous concerning the property's disposition, the court may grant a summary judgment to effectuate the order in light of the literal language used.¹⁹ Thus, even when a divorce decree does not contain express language disposing of a certain piece of property (such as the house your client inherited in the hypothetical), the court may still grant a summary judgment if the decree indicates the divorce court's decision to award the property solely to one spouse.²⁰

You can also use summary judgment to dispose of disputes that are barred by an agreement incident to divorce that a party would not re-open the divorce and that had been incorporated into your client's divorce decree.²¹

Interpretation or application of law

A motion for summary judgment is also appropriate when the resolution of a question involving the interpretation or application of law will resolve a family law issue. The courts have determined the following through summary judgment disposition:

- A court cannot divide military benefits as community property in a former spouse's partition suit if the final divorce decree, issued before June 25, 1981, does not divide the benefits or reserve jurisdiction to divide those benefits.²²
- An employer may not be held liable for failing to prevent two employees from engaging in extramarital relations.²³
- An employer does not have a duty to voluntarily disclose the existence

and nature of an employee's benefits to the employee's spouse.²⁴

- The United States may not be ordered to pay a former spouse directly her portion of her ex-spouse's military retirement benefits based on sovereign immunity.²⁵
- An agreement concerning the support of a non-disabled child over 18 is not enforceable when the agreed order incorporating the agreement does not expressly provide that the agreement's terms are enforceable as contract terms.²⁶

Res judicata/collateral estoppel

Another situation that may call for summary judgment disposition is if your client's family law issue has previously been litigated either in Texas or in another state. Res judicata and collateral estop-



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pel precepts also apply in family law cases.²⁷ For example, in *Mossler v. Shields*,²⁸ a woman was estopped from bringing an action seeking to establish the existence of a common-law marriage because a divorce action, making the same claim, had been dismissed with prejudice by another Texas court. Likewise, summary judgment has been used to dispose of an action that was already litigated to final judgment in another state.²⁹ In *Purcell v. Bellinger*, the Texas Supreme Court affirmed a summary judgment barring a paternity action in Texas after the issue had been litigated to final judgment in New York.³⁰

Characterization of property

Property possessed by either spouse is presumed to be community property.³¹ However, traditional summary judgment

may be used in some instances to establish the separate nature of such property. Partial summary judgment is available if you can present uncontroverted evidence that your client owned the property before the marriage, without interruption, throughout the marriage.³² Partial summary judgment may also be appropriate if you can present uncontroverted evidence that a bank account is your client's separate property and that the interest earned on the account (which is community property) was not commingled with the account.³³

Existence of the marital relationship

An informal ("common law") marriage claim may also be disposed of by summary judgment. A party that alleges an informal marriage must prove that: (1) the parties agreed to be married, (2)

after the agreement, they lived together as husband and wife, and (3) they represented to others in Texas that they were married.³⁴ Also, both parties must possess the legal capacity to marry.³⁵ The informal marriage can be challenged by summary judgment either by the movant disproving one of the elements or by filing a no-evidence motion claiming that the non-movant has no evidence to support one or more of the elements. For example, summary judgment has been used to dismiss a divorce action where one of the parties to the alleged informal marriage was under the age of 18 and there was no evidence that the legal requirements for written or judicial consent under the Family Code were met.³⁶

Notes

1. See generally Judge David Hittner & Lynne Liberato, *Summary Judgments in Texas*, 47 S. Tex. L. Rev. 409 (2006).
2. Tex. R. Civ. P. 166a(c); *M.D. Anderson Hosp. & Tumor Inst. v. Willich*, 28 S.W.3d 22, 23 (Tex. 2000) (per curiam); *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 222 (Tex. 1999).
3. Tex. R. Civ. P. 166a(i); *Southwestern Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002).
4. *Willich*, 28 S.W.3d at 23; *Steel*, 997 S.W.2d at 222.
5. *Wyatt v. Mealy*, 704 S.W.2d 63, 64 (Tex. App.—Corpus Christi 1985, no writ).
6. *City of Houston v. Clear Creek Basin Auth*, 589 S.W.2d 671, 678-79 (Tex. 1979).
7. *Sheshunoff v. Sheshunoff*, 172 S.W.3d 686, 691 (Tex. App.—Austin 2005, no pet.).
8. See Tex. R. Civ. P. 166a(i); *Southwestern Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002).
9. *Id.*
10. Family Code Section 4.105 sets out the exclusive remedies available to prevent enforcement of a marital property agreement. The statute addressing the enforcement of premarital agreements is identical to the statute addressing marital property agreements and thus the analysis for both types of agreements is the same. Tex. Fam. Code § 4.006 & § 4.105.
11. See *Beck v. Beck*, 814 S.W.2d 745 (Tex. 1991) (holding premarital agreements constitutional).
12. *Grossman v. Grossman*, 799 S.W.2d 511 (Tex. App.—Corpus Christi 1990, no pet.).
13. Tex. Fam. Code § 5.46.
14. *Id.* at 513 citing Tex. Fam. Code § 5.46.
15. *Sheshunoff v. Sheshunoff*, 172 S.W.3d 686 (Tex. App.—Austin 2005, no pet.).

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16. *Id.*
17. Tex. Fam. Code § 4.006(b) & § 4.105(b).
18. *Blonstein v. Blonstein*, 831 S.W.2d 468, 472 (Tex. App.—Houston [14th Dist.] 1992, writ denied).
19. *Wilde v. Murchie*, 949 S.W.2d 331 (Tex. 1997) (per curiam), citing *Acosta v. Acosta*, 836 S.W.2d 652, 654 (Tex. App.—El Paso 1992 writ denied) and *Lohse v. Cheatham*, 705 S.W.2d 721, 726 (Tex. App.—San Antonio 1986, writ dismissed).
20. *Wilde*, 949 S.W.2d at 333.
21. *Smith v. Ferguson*, 160 S.W.3d 115 (Tex. App.—Dallas 2005, pet. denied) (Claim barred by release provision in an agreement incident to divorce (AID) that the husband would not “reopen” the divorce case or AID.).
22. *Hawlen v. McDougall*, 22 S.W.3d 343 (Tex. 2000).
23. *Helena Laboratories Corp. v. Snyder*, 886 S.W.2d 767 (Tex. 1994).
24. *Medenco, Inc. v. Myklebust*, 615 S.W.2d 187 (Tex. 1981).
25. *United States v. Stelter*, 567 S.W.2d 797 (Tex. 1978) (The Supreme Court reversed and re-
- dered the trial court’s summary judgment that had allowed garnishment of husband’s military benefits and dismissed the proceedings).
26. *Elfeldt v. Elfeldt*, 730 S.W.2d 657 (Tex. 1987).
27. *Smith v. Ferguson*, 160 S.W.3d at 123-24 (applying fraud four-year statute of limitations); *Nelson v. Williams*, 135 S.W.3d 202, 206 (Tex. App. — Waco 2004, pet. denied) citing *Baxter v. Ruddle*, 794 S.W.2d 761 (Tex. 1990) (Res judicata applies to a final divorce decree to the same extent that it applies to any other final judgment.).
28. 818 S.W.2d 752 (Tex. 1991).
29. *See, e.g., Purcell v. Bellinger*, 940 S.W.2d 599 (Tex. 1997).
30. *Id.*
31. Tex. Fam. Code § 3.003(b).
32. *Dawson-Austin v. Austin*, 920 S.W.2d 776, 788 (Tex. App. — Dallas 1996), *rev’d on other grounds*, 968 S.W.2d 319 (Tex. 1998) (entire value of corporation was husband’s separate property because the shares were issued before marriage and he never divested himself of any shares or acquired additional shares during the marriage).
33. *Pace v. Pace*, 160 S.W.3d 706 (Tex. App. — Dallas 2005, pet. denied).
34. Tex. Fam. Code § 2.401(a)(2).
35. *Kingery v. Hintz*, 124 S.W.3d 875, 877 (Tex. App. — Houston [14th Dist.] 2003, no pet.) citing *Villegas v. Griffin Indus.*, 975 S.W.2d 745, 749-50 (Tex. App. — Corpus Christi 1998, pet. denied).
36. *Id.* at 878.

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