NUMBER 13-22-00449-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

PENNIE M. DELIGANS, **Appellant,**

v.

BILLY R. DELIGANS JR., **Appellee.**

ON APPEAL FROM THE COUNTY COURT AT LAW NO. 3 OF MONTGOMERY COUNTY, TEXAS

MEMORANDUM OPINION

Before Justices Longoria, Silva, and Peña
Memorandum Opinion by Justice Longoria

In this divorce case, appellant Pennie M. Deligans appeals the trial court's order holding that Louisiana law applies to the validity and enforceability of the parties' purported premarital agreement (PMA), as well as the trial court's denial of her request for certain questions and instructions to be included in the jury charge. We affirm.

I. BACKGROUND

Pennie and appellee Billy R. Deligans Jr. were married on December 15, 1990, in the state of Louisiana. At issue in this case is a PMA that the parties purportedly signed on December 12, 1990, pursuant to the provisions of the Louisiana Civil Code. *See* LA. CIV. CODE ANN. arts. 2325, 2328, 2329 (1990). The PMA altered the parties' community property rights regarding certain property acquired before and during their marriage:

> MATRIMONAL AGREEMENT
>
> BEFORE ME, William S. Bordelon, Notary Public, and in the presence of the two undersigned competent witnesses, on the day and date hereinafter written:
>
> PERSONALLY CAME AND APPEARED:
>
> Billy R. Deligans, Jr., a single man of the full age of majority and domiciled in Terrebonne Parish, Louisiana, being married but once, and then to Jennifer Mahler·Deligans, who died on the 10th day of February, 1981, and;
>
> Pennie Jo Maricelli, a single woman of the full age of majority and domiciled in Terrebonne Parish, Louisiana;
>
> who, in anticipation of their marriage to each other on December 15, 1990 and pursuant to the provisions of the Louisiana Civil Code, Articles 2325 et seq do hereby modify the legal regime of community property henceforth to exist between them as hereinafter set forth.
>
> The parties hereto modify the legal regime of community property to provide that only the salary of Billy R. Deligans, Jr. which is derived from Deligans Valves, Inc., shall be community property. All other revenues generated by the efforts of Billy R. Deligans, Jr. from any source whatsoever,·shall remain his separate property. This includes, but is not limited to, all draws, bonuses or commissions paid to Billy R. Deligans, Jr., as well as salaries paid to Billy R. Deligans, Jr. from companies other than Deligans Valves, Inc.
>
> Billy R. Deligans, Jr. reserves unto himself the exclusive control and management of his separate estate. The said Billy R. Deligans, Jr. reserves

> unto himself, as his separate property, the natural and civil fruits of his entire separate estate, minerals produced from or attributable to his separate property, and bonuses, delay rentals, royalties and shut-in payments arising from mineral leases on his separate property.
>
> All debts incurred by Billy R. Deligans, Jr. on account of his separate estate shall remain the separate debts and obligations of Billy R. Deligans, Jr. The said Billy R. Deligans, Jr. shall hold the community of acquets and gains which shall henceforth exist between he and Pennie Jo Maricelli and the separate estate of Pennie Jo Maricelli free and harmless from his separate debts and shall indemnify the community of acquets and gains and/or the separate estate of Pennie Jo Maricelli, as the case may be, in the event either or both are called upon to satisfy the separate debts of Billy R. Deligans, Jr. To the fullest extent allowed by law, the parties hereto waive and renounce the right to have the separate debts and obligations of Billy R. Deligans, Jr. satisfied out of the community of acquets and gains which shall exist between the parties.
>
> All revenues generated by the efforts of Pennie Jo Maricelli shall be the separate property of Pennie Jo Maricelli.
>
> Pennie Jo Maricelli reserves unto herself the exclusive management and control of her separate estate. The said Pennie Jo Maricelli reserves unto herself as her separate property the natural and civil fruits of her separate estate.
>
> As to matters not otherwise provided for hereinabove, the parties subject themselves to the regime of community property imposed by the Louisiana Civil Code and ancillaries thereto.

On March 14, 2019, Pennie filed her original petition for divorce in Montgomery County Court at Law No. 3, asserting among other things, that she was a domiciliary of Texas and resident of Montgomery County. On March 21, 2019, Billy filed his original answer and an original counterpetition for divorce requesting the trial court to enforce the parties' PMA. The parties thereafter filed amended petitions and counterpetitions.

In her first amended answer to Billy's first amended counterpetition, Pennie asserted as a defense to enforcement of the parties' PMA "under Texas law" that (1) she

did not sign the PMA; (2) the PMA was not signed voluntarily; (3) the PMA was invalid because she did not waive financial disclosure before signing it and was not provided and did not have reasonable disclosure of the property or financial obligations of Billy; and (4) the PMA was procured by fraud by Billy and his attorney. In addition, Pennie asserted the following "specific and affirmative defense to the enforcement of the [PMA] under Louisiana law": (1) fraud in the inducement; (2) constructive fraud; (3) mutual mistake; (4) "[w]aiver of disclosure of assets and debts"; (5) duress; (6) contract unconscionability; (7) "Violates Public Policy"; and (8) "[Pennie] did not sign the [PMA] voluntarily"; and (9) breach of fiduciary duty.

On January 30, 2020, the parties filed a "Joint Motion to Bifurcate," which requested that the trial court have a separate trial on the issue of the validity, interpretation, and enforceability of the PMA. *See* TEX. R. CIV. P. 174(b) ("The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.").

On February 3, 2020, Billy filed his "Motion for Court to Apply Louisiana Law to Validity and Enforceability of [PMA]," which requested that the trial court hold a hearing and conduct a "significant relationship test in accordance with Restatement (Second) of Conflict of Law [§] 188" to resolve a conflict of law issue he claimed existed with regards to the PMA. In his motion, Billy asserted, among other things, that the PMA contained legal terms and doctrines "peculiar" to Louisiana, that it was prepared by an attorney licensed to practice law in Louisiana, that it was signed by the parties in Louisiana, and

that "the property subject of the [PMA] all existed in Louisiana . . . at the time the [PMA] was signed and several larger assets still in existence continue to be located in Louisiana, including a residence . . . ." Billy admitted that the PMA did not contain an express choice of law clause dictating that Louisiana law apply to disputes arising out of the PMA. However, he concluded that Louisiana was the state with the most significant relationship to the PMA and that Louisiana law should apply to the validity and enforceability of the PMA.

On February 13, 2020, the trial court signed and entered its "Order on Joint Motion to Bifurcate," which granted the parties' request for separate trials for the validity and enforceability of the parties' PMA and the determination of the parties' divorce, characterization of property, division of property, and confirmation of separate property.

On March 6, 2020, Billy filed his "Motion to Take Judicial Notice" with exhibits requesting the trial court to take judicial notice of various Louisiana statutes and court decisions.

On April 1, 2020, Pennie filed her "[]Response in Opposition to Motion to Apply Louisiana Law," arguing that the "enforceability standards in TEX. FAM. CODE [ANN.] § 4.006 prevail" absent a contractual choice of law provision in a PMA, and that an analysis under "Restatement § 188" was inappropriate because Billy had failed to show a conflict between Texas and Louisiana law.

On June 4, 2020, Billy filed his "First Amended Motion for Court to Apply Louisiana Law to Validity and Enforceability of [PMA]." On June 5, 2020, Billy filed his "Brief in Support of Application of Louisiana Law to [PMA]" and "First Supplemental Motion to Take

Judicial Notice." On June 8, 2020, Pennie filed her "[]Supplemental Response in Opposition to Motion to Apply Louisiana Law." That same day, the trial court held a hearing on Billy's "First Amended Motion for Court to Apply Louisiana Law . . . ," and heard arguments and evidence from the parties. Another hearing on the motion took place on July 28, 2020. The parties filed additional trial briefs on the choice of law issue in August, 2020.

On November 19, 2020, the trial court signed its "Order on Motion to Take Judicial Notice," by which the trial court took judicial notice of various Louisiana statutes and court decisions. On the same day, the trial court also signed its "Order on First Amended Motion for Court to Apply Louisiana Law to Validity and Enforceability of [PMA]," which stated

> On June 8, 2020 and July 28, 2020 the Court considered Respondent/Counterpet[i]tioner, [Billy's], *First Amended Motion for Court to Apply Louisiana Law to Validity and Enforceability of* [*PMA*]. After reviewing the evidence, hearing argument of counsel, and reviewing the briefs and reply briefs, the Court finds that the December 12, 1990 [PMA] does not contain an express choice of law provision. The Court finds that Texas does not have an explicit choice of law directive on resolving issues of validity, enforceability, and construction of this particular [PMA]. The Court finds that, after application of the Restatement (Second) of Conflict of Laws §§ 6 and 188, Louisiana is the state with the most significant relationship to the [PMA] at issue and further finds that Louisiana law applies to both the question of validity and enforceability of the [PMA], as well as to issues of the construction of the [PMA].
>
> IT IS THEREFORE ORDERED that the law of the state of Louisiana will apply in all instances in this case to resolve issues related to the validity, enforceability, and/or construction of the December 12, 1990 [PMA].

A jury was selected on April 14, 2021, for the parties' trial regarding the validity and enforceability of the purported PMA. The parties presented various witnesses and evidence over four days. On April 21, 2021, after hearing closing arguments from the

parties, the jury answered "no" to the sole question: "Did Pennie M. Deligans prove by clear and convincing evidence that she did not sign the December 12, 1990 [PMA]?" On June 28, 2021, the trial court entered its "Order with Regard to Validity of December 12, 1990 [PMA]," which accepted and adopted the jury's verdict, and further ordered that "the December 12, 1990 [PMA] is valid and enforceable."

On December 31, 2021, the trial court entered its "Agreed Order of Referral to Arbitration." After arbitration was conducted, Billy filed his "Motion for Confirmation of Final Binding Arbitration Award" on April 27, 2022 requesting the trial court to confirm a "March 7, 2022 Amended Final Arbitration Award" and an accompanying "property division spreadsheet" attached to the motion. On May 5, 2022, the trial court entered its "Final Divorce Decree," which confirmed the arbitration award issued "on March 7, 2022, partially revised on April 26, 2022," and an arbitration award issued on May 4, 2022.

On May 27, 2022, Pennie filed her "Motion to Vacate Judgment or, [i]n the Alternative, Motion to Modify, Correct, or Reform Judgment or, in the Alternative, Motion for New trial." Pennie's motion alleged that the final divorce decree contained substantive errors which made it inconsistent with the arbitration award issued on March 7, 2022. On June 30, 2022, Billy filed his ". . . Motion to Compel Arbitration," which asserted that Pennie's "Motion to Vacate Judgment . . ." filed on May 27, 2022, should be submitted to arbitration. On July 26, 2022, an arbitration hearing was held. On the same day, an arbitration award was issued and subsequently filed into the case on July 29, 2022. On August 3, 2022, the trial court entered its "Final Decree of Divorce Nunc Pro Tunc" which confirmed all previous arbitration awards, including the July 26, 2022 arbitration award.

This appeal ensued.

II. CHOICE OF LAW

By two issues, Pennie challenges the trial court's order holding that Louisiana law applies to the validity and enforceability of the parties' purported PMA. In her first issue, Pennie asserts that the Texas Family Code contains a choice of law directive that requires application of Texas law, and therefore "renders the entire property distribution [of the divorce decree] improper and requiring remand."[1] In her second issue, as an alternative to her first, Pennie asserts that even if the Texas Family Code contains no choice of law directive, the trial court erred by concluding that Louisiana had the most significant relationship to the PMA and the parties. We address these issues together.

A. Standard of Review & Applicable Law

Determining which state's law governs an issue is a question of law we review *de novo*. *See Hughes Wood Prods., Inc. v. Wagner*, 18 S.W.3d 202, 204 (Tex. 2000). But determining the state contacts to be considered by the court in making this legal determination involves a factual inquiry. *See id.*

We begin our review by determining whether the particular substantive law is subject to a clear choice of law determination by the Texas Legislature. *See Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 443 (Tex. 2007). If the legislature is silent on the choice of law for the particular issue, Texas law can apply if we determine it does not conflict with the laws of the other interested jurisdictions. *See id.*; *see also Compaq Comput. Corp. v. Lapray*, 135 S.W.3d 657, 672 (Tex. 2004). If we determine the laws

[1] We note that Pennie does not assert a direct challenge to the trial court's division and distribution of the community property estate that is within its "Final Decree of Divorce Nunc Pro Tunc."

differ, we then decide the appropriate law to apply by using the Restatement (Second) of Conflicts of Law with respect to the particular substantive issue to be resolved. *See Wagner*, 18 S.W.3d at 205; *see also Engine Components, Inc. v. A.E.R.O. Aviation Co., Inc.*, No. 04–10–00812–CV, 2012 WL 666648, at *2 (Tex. App.—San Antonio Feb. 29, 2012, pet. denied) (mem. op.). Specifically, we apply the most significant relationship guidelines of § 6(2) and any other specific Restatement sections applicable to the substantive law at issue. *See Daccach*, 217 S.W.3d at 443.

B. Discussion

1. Choice of Law Directive

The trial court's "Order on First Amended Motion for Court to Apply Louisiana Law to Validity and Enforceability of [PMA]" found, among other things, that "the December 12, 1990 [PMA] does not contain an express choice of law provision." The parties do not challenge this finding. However, the trial court's order also found that "Texas does not have an explicit choice of law directive on resolving issues of validity, enforceability, and construction of" the parties' PMA. Pennie challenges this finding as erroneous in her first issue and asserts that the validity and enforceability of the parties' PMA is subject to § 1.103 of the Texas Family Code, which she claims is a clear choice of law directive. *See Daccach*, 217 S.W.3d at 443. Billy argues that § 1.103 affects "only the ['marriage relationship' itself, specifically whether the marriage would be considered valid under Texas law" and that "[§] 1.103 does not include a specific directive that Texas law be applied to 'contracts' executed elsewhere when issues surrounding those contracts arise in a Texas divorce proceeding."

"[E]very marriage entered into in this state is presumed to be valid unless expressly made void by Chapter 6 or unless expressly made voidable by Chapter 6 and annulled as provided by that chapter." TEX. FAM. CODE ANN. § 1.101. Section 1.103 provides that "The law of this state applies to persons married elsewhere who are domiciled in this state." *Id.* § 1.103. Section 1.103 applies the presumption of validity of a marriage to persons who were married outside the state of Texas but who are domiciled in Texas. *See Fuentes v. Zaragoza*, 555 S.W.3d 141, 153 (Tex. App.—Houston [1st. Dist.], 2018, no pet.) (citing TEX. FAM. CODE ANN. § 1.103) (holding that the presumption of validity applied to persons who were married outside the state of Texas, like the parties who were citizens of Mexico and had married in New Mexico but were domiciled in Texas at the time of suit).

If § 1.103 is a choice of law directive at all, it is only with respect to which state governs the rights and duties flowing from a litigant's marriage or divorce. *See Broussard v. Arnel*, 596 S.W.3d 911, 918 (Tex. App.—Houston [1st. Dist] 2019, no pet.) (noting that "every Texas case that has cited to [§] 1.103 has done so in the context of determining which state's law to apply to the litigant's marriage or divorce," and that "[w]e do not consider [§] 1.103 to be applicable beyond determining which state's law governs the rights and duties flowing from a litigant's marriage or divorce . . . ."); *see also Cutler v. Cutler*, No. 04-15-00693-CV, 2016 WL 4444418, *2 (Tex. App.—San Antonio 2016, no pet.) (rejecting argument that § 1.103 directs the application of Texas law in determining whether the parties have been "married elsewhere" regardless of whether the parties had any relationship to Texas at the time of the purported marriage). Otherwise, § 1.103 is

silent regarding whether Texas law governs the validity and enforceability of a PMA originating from a different state. Moreover, the Texas Family Code allows parties to a PMA to set out which state's laws govern the construction of a PMA but does not statutorily direct the application of Texas law regarding the validity and enforceability of an out-of-state PMA containing no choice of law provision addressing that issue. *See* TEX. FAM. CODE ANN. § 4.001–.010.

We have found no case law holding that § 1.103 is a choice of law directive for the *particular substantive issue* involved in this case—the validity and enforceability of the parties' out-of-state PMA, and we decline to do so here. *See Daccach*, 217 S.W.3d at 443. Pennie acknowledges in her brief that her claim is "an issue of first impression for Texas appellate courts" and has provided case citations she maintains support her claim. However, we do not find that the cases cited by Pennie support her assertion. *See id.* at 464 (Jefferson, J., concurring);[2] *Broussard*, 596 S.W.3d at 918;[3] *In re Marriage of J.B. &*

[2] Pennie cites to Justice Jefferson's concurring opinion in *Daccach* where he stated, "Some statutes clearly contain an explicit [']directive . . . on choice of law.['] *See*, *e.g.*, . . . TEX. FAM. CODE ANN. § 1.103". *Citizens Ins. Co. of Am. v. Daccach*, 217 S.W.3d 430, 464 (Tex. 2007) (Jefferson, J., concurring). However, *Daccach* involved a choice of law issue regarding class certification requirements for a "worldwide class" in a suit involving the sale of securities from Texas to nonresidents and the Texas Securities Act. *See id.* at 435–446. Nothing in Justice Jefferson's concurring opinion indicates that § 1.103 directs courts to apply Texas law to the validity and enforceability of an out-of-state PMA. *See id*. at 464 (Jefferson, J. concurring).

[3] In *Broussard*, the appellant argued that Texas law did not apply to the determination of the validity of a Missouri marriage because there was no evidence that a party to that marriage was domiciled in Texas. *See Broussard v. Arnel*, 596 S.W.3d 911, 918 (Tex. App.—Houston [1st. Dist] 2019, no pet.) (citing TEX. FAM. CODE ANN. § 1.103). In addressing this issue, the First Court of Appeals in Houston stated

> [W]e note that every Texas case that has cited to [§] 1.103 has done so in the context of determining which state's law to apply to the litigant's marriage or divorce. We do not consider [§] 1.103 to be applicable beyond determining which state's law governs the rights and duties flowing from a litigant's marriage or divorce; it does not govern the determination whether an out-of-state marriage or divorce affects a Texas court's jurisdiction.

Broussard, 596 S.W.3d at 918.

H.B., 326 S.W.3d 654, 668–69 (Tex. App.—Dallas, 2010 pet. dism'd).[4] We conclude that § 1.103 of the Texas Family Code is not a choice of law directive with respect to the validity and enforceability of a litigant's PMA, and the trial court did not err in making that finding. *See Daccach*, 217 S.W.3d at 443. Accordingly, we overrule Pennie's first issue.

2. Most Significant Relationship

In her second issue, Pennie alternatively argues that the trial court erred by holding that Louisiana had the most significant relationship to the PMA and the parties.

a. Conflict

We only undertake a choice of law analysis if a conflict of law exists that affects the outcome of an issue. *Toyoto Motor Co. v. Cook*, 581 S.W.3d 278, 283 (Tex. App.—Beaumont 2019, no pet.); *see also Lapray*, 135 S.W.3d at 672. Billy argues that the Texas and Louisiana laws conflict regarding the validity and enforceability of premarital agreements. Pennie does not expressly assert that the states' laws conflict in her brief,

[4] The Fifth Court of the Appeals in Dallas in *In re Marriage of J.B. and H.B.* addressed an issue challenging a trial court's order holding that it had subject-matter jurisdiction over a divorce arising from a same-sex marriage that occurred in Massachusetts. 326 S.W.3d 654, 668–69 (Tex. App.—Dallas, 2010 pet. dism'd). The appellant had asserted that Texas courts had "long employed the comity-based 'place-of-celebration rule' to determine whether a foreign marriage is valid for purposes of hearing a divorce," and that the Court should "continue to apply that rule." *Id.* at 667–68; *see also Hawsey v. La. Dep't of Soc. Servs.*, 934 S.W.2d 723, 726 (Tex. App.—Houston [1st Dist.] 1996, writ denied) ("Comity is a principle under which the courts of one state give effect to the laws of another state or extend immunity to a sister sovereign not as a rule of law, but rather out of deference or respect."). In discussing cases regarding the comity-based "place-of-celebration-rule," the Court noted that the rule "seems contrary to the family code's general choice-of-law provision: 'The law of this state applies to persons married elsewhere who are domiciled in this state.'" *In re Marriage of J.B. and H.B.*, 326 S.W.3d at 668–69 (citing TEX. FAM. CODE ANN. § 1.103). The Court concluded that Texas had "repudiated the place-of-celebration rule with respect to same-sex unions on public-policy grounds." *Id.* The Court did not discuss whether § 1.103 is a choice of law directive with respect to the validity and enforceability of out-of-state (non-Texas) PMAs. We note that *In re Marriage of J.B. and H.B.* was decided before the U.S. Supreme Court's decision in *Obergefell v. Hodges*, which held that the Fourteenth Amendment requires a State to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-State. 576 U.S. 644, 651-81 (2015).

but does argue that "disregard[ing] the Texas enforcement procedures regarding premarital agreements in favor of Louisiana law would be repugnant to Texas public policy."

Under Texas law, a premarital agreement is not enforceable if the party against whom enforcement is requested proves that:

> (1) the party did not sign the agreement voluntarily; or
>
> (2) the agreement was unconscionable when it was signed and, before signing the agreement, that party:
>
> (A) was not provided a fair and reasonable disclosure of the property or financial obligations of the other party;
>
> (B) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the other party beyond the disclosure provided; and
>
> (C) did not have, or reasonably could not have had, adequate knowledge of the property or financial obligations of the other party.

See TEX. FAM. CODE ANN. § 4.006(a)(1)–(2). In addition, the remedies and defenses of § 4.006 "are the exclusive remedies or defenses, including common law remedies or defenses." *See id.* § 4.006(c). We note that "voluntarily" and "unconscionable" are terms not defined in the statute. *See id.* § 4.001–.0010.

Premarital agreements in Louisiana are considered contracts and "shall be made by authentic act or by an act under private signature duly acknowledged by the spouses." LA. CIV. CODE ANN. arts. 2328–2329. An authentic act is a writing executed before a notary public or other officer authorized to perform that function, in the presence of two witnesses, and signed by each party who executed it, by each witness, and by each

notary public before whom it was executed. LA. CIV. CODE ANN. art. 1833.

Unlike the Texas Family Code, the Louisiana Civil Code does not provide a specific statutory provision governing when a premarital agreement is unenforceable. *See* TEX. FAM. CODE ANN. § 4.006. Instead, "[t]he rules applicable to the validity of premarital agreements . . . are the same as for other contracts, namely, the [Louisiana]Civil Code articles dealing with capacity, consent, error, fraud, and duress." *McAlpine v. McAlpine*, 679 So.2d 85, 93 (La. 1996).

Under Louisiana law, in order to execute a valid contract, four elements are required: (1) the capacity to contract; (2) mutual consent; (3) a certain object; and (4) a lawful cause. *See Brady v. Pirner*, 261 So.3d 867, 875 (La. Ct. App. 2018) (first citing *Fairbanks v. Tulane Univ.*, 731 So.2d 983, 986 (La. Ct. App. 1999); then citing LA. CIV. CODE ANN. arts. 1918, 1927, 1966, and 1971).

Article 1918 provides that "[a]ll persons have capacity to contract, except unemancipated minors, interdicts, and persons deprived of reason at the time of contracting."[5] LA. CIV. CODE ANN. art. 1918. "A contract made by a person without legal capacity is relatively null and may be rescinded only at the request of that person or his legal representative." *See id*. art. 1919. Furthermore, "[a] noninterdicted person, who was deprived of reason at the time of contracting, may obtain rescission of an onerous contract

[5] "Interdicts" refer to persons who are civilly committed by a court pursuant to the Louisiana Civil Code's interdiction process. *See* LA. CIV. CODE ANN. art. 389 ("A court may order the full interdiction of a natural person of the age of majority, or an emancipated minor, who due to an infirmity, is unable consistently to make reasoned decisions regarding the care of his person and property, or to communicate those decisions, and whose interests cannot be protected by less restrictive means."); LA. CIV. CODE ANN. art. 390 (permitting the limited interdiction of a person under substantially the same conditions as LA. CIV. CODE ANN. art. 389).

upon the ground of incapacity only upon showing that the other party knew or should have known that person's incapacity." *See id.* art. 1925. In addition, Article 2031 provides that "[a] contract is relatively null when it violates a rule intended for the protection of private parties, as when a party lacked capacity or did not give free consent at the time the contract was made." *Id.* art. 2031.

"Consent may be vitiated by error, fraud, or duress." *See id.* art. 1948. "Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party." *Id.* art. 1949; *see also id.* art. 1950 ("Error may concern a cause when it bears on the nature of the contract, or the thing that is the contractual object or a substantial quality of that thing, or the person or the qualities of the other party, or the law, or any other circumstance that the parties regarded, or should in good faith have regarded, as a cause of the obligation."). "Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other." *Id.* art. 1953. "Fraud may also result from silence or inaction." *Id.* "Consent is vitiated when it has been obtained by duress of such a nature as to cause a reasonable fear of unjust and considerable injury to a party's person, property, or reputation." *Id.* art. 1959. "Age, health, disposition, and other personal circumstances of a party must be taken into account in determining reasonableness of the fear." *Id.*

While there are some similarities in how each state governs the validity and enforceability of PMAs, we cannot say that the differences could not affect the outcome of that issue. *See Cook*, 581 S.W.3d at 283. Accordingly, we conclude that a conflict of

law exists between Texas and Louisiana.

b. Restatement Factors

As noted above, we determine the appropriate law to apply when there is a conflict of laws by using the Restatement (Second) Conflict of Law in the context of the subject matter of the particular substantive issue to be resolved. *See Wagner*, 18 S.W.3d at 205. We use the most significant relationship guidelines of § 6(2) and any other specific Restatement sections applicable to the substantive law at issue. *See Daccach*, 217 S.W.3d at 443. Section 6 of the Restatement (Second) outlines the general choice of law factors courts should consider, including:

> (a) the needs of the interstate and international systems,
>
> (b) the relevant policies of the forum,
>
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
>
> (d) the protection of justified expectations,
>
> (e) the basic policies underlying the particular field of law,
>
> (f) certainty, predictability and uniformity of result, and
>
> (g) ease in determination and application of the law to be applied.

Torrington Co. v. Stutzman, 46 S.W.3d 829, 848 (Tex. 2000) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2)).

At issue in this case is which state's law applies to the validity and enforceability of an out-of-state PMA containing no choice of law provision. Section 188 of the Restatement applies to choice of law issues relating to contracts that contain no express

choice of law provision by the parties.[6] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188. Under § 188, "[t]he rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6." *Id.* § 188(1). Section 188 also contains factual matters to be considered when determining the law applicable to an issue in the absence of an effective choice of law by the parties, which the Restatement refers to as contacts, and they include: "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicil[e], residence, nationality, place of incorporation and place of business of the parties." *Id.* § 188(2). "These contacts are evaluated in accordance with their relative importance to the particular issue." *See id*.

> In this case, the trial court's order held, in relevant part, the following:
>
> > The Court finds that, after application of the Restatement (Second) of Conflict of Laws §§ 6 and 188, Louisiana is the state with the most significant relationship to the [PMA] at issue and further finds that Louisiana law applies to both the question of validity and enforceability of the [PMA], as well as to issues of the construction of the [PMA].
> >
> > IT IS THEREFORE ORDERED that the law of the state of Louisiana will apply in all instances in this case to resolve issues related to the validity, enforceability, and/or construction of the December 12, 1990 [PMA].

The order also states that the trial court considered Billy's "First Amended Motion for Court to Apply Louisiana Law to Validity and Enforceability of [PMA]" on June 8, 2020 and July 28, 2020, evidence presented by the parties, argument of counsel, and the

[6] The parties agree that § 188 is appropriate as applicable to the issue in this case.

parties' briefs and reply briefs.

The appellate record indicates that the trial court did not issue findings of fact regarding the evidence it considered in making its decision, nor did the parties request the trial court to issue any. The trial court's docket sheet notes that a hearing took place on June 8, 2020, and that the "parties and attorneys appeared for choice of law hearing," and that "evidence [was]presented." However, Pennie did not designate the June 8, 2020 hearing to be included as part of the reporter's record, and no such transcript of that hearing is before us. *See* TEX. R. APP. P. 34.6(b) ("At or before the time for perfecting the appeal, the appellant must request in writing that the official reporter prepare the reporter's record. The request must designate the exhibits to be included. A request to the court reporter . . . must also designate the portions of the proceedings to be included."). The record also does not include a reporter's record volume containing any exhibits that may have been admitted at the hearing on June 8, 2020. As far as the order's reference to a July 28, 2020 hearing, Pennie also did not designate a July 28, 2020 hearing to be included as part of the reporter's record, and the trial court's docket sheet does not indicate that a hearing on such date took place.

When discussing the evidence of the Texas and Louisiana contacts relevant to § 188 in her brief, Pennie cites to testimony that occurred subsequent to the trial court's November 19, 2020 order at issue in this case.[7] We cannot consider this testimony because it was not before the trial court at the time it entered its November 19, 2020 order. *See Iraan-Sheffield Indep. Sch. Dist. v. Kinder Morgan Prod. Co. LLC*, 657 S.W.3d

[7] Pennie cites to testimony from April 15, 2021, which was elicited during the jury trial regarding the validity and enforceability of the parties' purported PMA.

525, 529 (Tex. App.—El Paso 2022, pet. ref'd) ("An appellate court may only consider the record as it appeared before the trial court at the time the court made the decision in question."). Pennie also cites to an "expert report" that was attached to a trial brief she filed on August 21, 2020. This report contains various factual assertions which refer to deposition testimony. However, the referred-to deposition testimony was not filed or attached as an exhibit to Pennie's trial brief or the "expert report" itself, and is otherwise not found in the appellate record. On appeal, we may consider only the evidence contained in the record. *See Sabine Offshore Serv., Inc. v. City of Port Arthur*, 595 S.W.2d 840, 841 (Tex. 1979) (per curiam); *see also Iraan-Sheffield Indep. Sch. Dist.*, 657 S.W.3d at 529; *AAA Navi Corp. v. Parrot-Ice Drink Prod. of Am., Ltd.*, 119 S.W.3d 401, 403 (Tex. App.—Tyler 2003, no pet.) ("[A]n appellate court can consider only the record as filed and cannot consider documents not included in the record and not considered by the trial court.").

The appellant has the burden to bring forward an appellate record showing reversible error. *Christiansen v. Prezelski*, 782 S.W.2d 842, 843 (Tex. 1990) (per curiam); *Sareen v. Sareen*, 350 S.W.3d 314, 317 (Tex. App.—San Antonio 2011, no pet.); *see also Magellan Terminal Holdings, L.P. v. Vargas*, No. 13-19-00354-CV, 2021 WL 79351, at *3 (Tex. App.—Corpus Christi–Edinburg Jan. 7, 2021, no pet.) (mem. op.). It is not possible to review all the evidence presented to the trial court or analyze the relevance or importance of that evidence with respect to the § 188 contacts without a complete reporter's record. *See Sareen*, 350 S.W.3d at 317. (addressing an evidentiary insufficiency claim and holding that "without a complete reporter's record, it is impossible

to review all the evidence presented to the trier of fact or apply the appropriate sufficiency standards"). Therefore, if an appellant files a partial reporter's record, a presumption arises that the missing portions of the reporter's record support the trial court's judgment. *See Bennett v. Cochran*, 96 S.W.3d 227, 228–30 (Tex. 2002) (per curiam) (explaining we must presume the omitted items support the trial court's judgment); *Haut v. Green Cafe Mgmt*., Inc., 376 S.W.3d 171, 179 (Tex. App.—Houston [14th Dist.] 2012, no pet.) ("[I]f the appellant entirely fails to file a statement of points or issues, he is not entitled to the presumption that the record is complete for appellate review purposes, and, instead, an appellate court presumes that the material missing from the reporter's record supports the trial court's judgment." (citing *Bennett*, 96 S.W.3d at 229–30)); *see also Bulthuis v. Avila*, No. 13-13-00717-CV, 2015 WL 9487472, at *2 (Tex. App.—Corpus Christi–Edinburg Dec. 29, 2015, pet. denied) (mem. op.) (determining that an appellant is not entitled to the presumption that the record is complete for appellate review purposes if that appellant does not file a statement of points or issues and that we must presume that anything missing from the appellate record supports the judgment). An appellant can avoid this presumption by complying with Texas Rule of Appellate Procedure 34.6(c), requiring the inclusion in the appellant's request for a partial reporter's record "a statement of the points or issues to be presented on appeal[.]" TEX. R. APP. P. 34.6(c)(1). Once done, we are required to presume that the partial record constitutes the entire record with respect to the issues raised on appeal. *Id*. R. 34.6(c)(4).

Pennie, as the appellant, needed to provide this Court with proof that the trial court erred in reaching its conclusion after conducting its § 6 and § 188 analysis. *See*

RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 188; *see also Daccach*, 217 S.W.3d at 443; *Wagner*, 18 S.W.3d at 204 (addressing a choice of law issue in the summary judgment context and holding that "a movant for summary judgment seeking to have the law of another state applied must satisfy its burden of proof with respect to fact questions necessary to the choice of law decision"). Pennie has not filed a complete reporter's record because, although a hearing was held on Billy's "First Amended Motion for Court to Apply Louisiana Law to Validity and Enforceability of [PMA]" on June 8, 2020, and evidence was purportedly admitted at the hearing, she has not provided a copy of that record for our review or even mentioned it. Pennie also did not request a partial reporter's record with a statement of the points to be argued as per Rule 34.6(c)'s requirements for filing a partial reporter's record. *See* TEX. R. APP. P. 34.6(c).

Because Pennie challenges the trial court's finding that, "after application of the Restatement (Second) of Conflict of Laws §§ 6 and 188, Louisiana is the state with the most significant relationship to the [PMA] at issue . . ." and we lack the reporter's record of the hearing on that issue, we must presume that the omitted portions of the reporter's record support the trial court's choice of law determination as appropriate. *See Bennett*, 96 S.W.3d at 229 ("There is no question that, had [the appellant] completely failed to submit his statement of points or issues, Rule 34.6 would require the appellate court to affirm the trial court's judgment."); *Haut*, 376 S.W.3d at 179; *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 188; *Daccach*, 217 S.W.3d at 443; *Wagner*, 18 S.W.3d at 204. Pennie's assertion that the trial court erred in its choice of law determination is therefore insufficient on the record before us. Presuming, as we must,

that the missing portions of the record support the trial court's order, we overrule Pennie's second issue. *See Bennett*, 96 S.W.3d at 229; *Haut*, 376 S.W.3d at 180 (presuming "that the omitted portions of the record are relevant and support the trial court's judgment" on issues in which evidentiary review is required because the appellant "failed to follow the requirements for Rule 34.6"); *see also Avila*, 2015 WL 9487472, at *2.

III. JURY QUESTIONS AND INSTRUCTIONS

In her third issue, Pennie complains that the trial court erred by not submitting her requested jury questions and instructions.

A. Standard of Review & Applicable Law

We review a trial court's submission of questions to a jury under an abuse-of-discretion standard. *Moss v. Waste Mgmt. of Tex.*, 305 S.W.3d 76, 81 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). Similarly, we also review a trial court's decision to submit or refuse a particular instruction under an abuse of discretion standard of review. *Thota v. Young*, 366 S.W.3d 678, 687 (Tex. 2012) (citing *In re V.L.K.*, 24 S.W.3d 338, 341 (Tex. 2000)). A trial court abuses its discretion if it acts arbitrarily or unreasonably, or without reference to guiding rules or principles. *Moss*, 305 S.W.3d at 81.

Ordinarily, a trial court has broad discretion in submitting questions to a jury. *In re D.R.*, 177 S.W.3d 574, 581 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). However, this discretion is subject to the requirement that the questions submitted fairly place the disputed issues before the jury. *Id.* Texas Rule of Civil Procedure 278 states that a trial court "shall submit the questions, instructions[,] and definitions in the form provided by Rule 277 [that] are raised by the written pleadings and the evidence." TEX. R. CIV. P. 278;

see also id. R. 277 (trial court must "submit such instructions and definitions as shall be proper to enable the jury to render a verdict"). Rule 278 thus "provides a substantive, non-discretionary directive to trial courts requiring them to submit requested questions to the jury if the pleadings and any evidence support them." *Elbaor v. Smith*, 845 S.W.2d 240, 243 (Tex. 1992).

In determining whether a trial court erred in refusing to submit a requested question, we "view the evidence as if the trial court had instructed a verdict against the party seeking the submission." *Cunningham v. Haroona*, 382 S.W.3d 492, 506–07 (Tex. App.—Fort Worth 2012, pet. denied). That is, we consider the evidence in the light most favorable to the party whose question was refused. *Id.* at 507. Generally, if the evidence on a controlling and controverted issue amounts to more than a scintilla or if there is conflicting probative evidence in the record, a trial court is obligated to submit a question to the jury. *Id.* at 506–07.

The trial court also has considerable discretion to determine proper jury instructions, and "[i]f an instruction might aid the jury in answering the issues presented to them, or if there is any support in the evidence for an instruction, the instruction is proper." *Thota*, 366 S.W.3d at 687 (quoting *La.-Pac. Corp. v. Knighten*, 976 S.W.2d 674, 676 (Tex. 1998) (per curiam)). "An instruction is proper if it (1) assists the jury, (2) accurately states the law, and (3) finds support in the pleadings and evidence." *Id.* (quoting *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 855–56 (Tex. 2009)).

If we conclude that the trial court erred by refusing to submit requested questions

and instructions to the jury, we may not reverse the judgment unless we also conclude that the error was harmful. *See Transcon. Ins. Co. v. Crump*, 330 S.W.3d 211, 225 (Tex. 2010). Charge error is harmful if it "probably caused the rendition of an improper judgment" or "probably prevented the appellant from properly presenting the case" on appeal. *See* TEX. R. APP. P. 44.1(a). "Charge error is generally considered harmful if it relates to a contested, critical issue." *Thota*, 366 S.W.3d at 687 (quoting *Hawley*, 284 S.W.3d at 856). In determining harm, we must examine the entire record. *See Gunn v. McCoy*, 554 S.W.3d 645, 676 (Tex. 2018).

B. Discussion

At the jury trial regarding the validity and enforceability of the purported PMA at issue, the parties presented witnesses and evidence, which we summarize in relevant part below.

Pennie testified that Billy was "trying to claim all community property in a prenup that [she] never signed." She stated that on December 11, 1990, she and Billy went to lunch at "La Casa," a local restaurant, and each had one drink. After lunch, Billy took her to meet his friend Billy Bordelon, an attorney, at Bordelon's office in downtown Houma, Louisiana. At some point, Bordelon gave Pennie a piece of paper, and asked her to sign it. Pennie noticed it was a PMA, got upset, and refused to sign it. According to Pennie, Billy had not talked to her about a PMA or terms of a PMA prior to December 11, 1990, and Bordelon provided no advice to her regarding the PMA "other than the fact he said it was a good agreement." Pennie testified that Billy was surprised and not happy due to her refusal to sign the PMA. Afterwards, Billy dropped Pennie off at her mother's house

in the afternoon, and Billy left on his own. Pennie stated that she told her family about what happened and told them that she was going to call off the wedding.

Later that night, Pennie and her friend Gwyn Hensley met up with friends at La Casa. Pennie testified she was intoxicated and told her friends she was intending to call off the wedding. According to Pennie, Billy arrived at La Casa at some point, and she went to the bathroom upon his arrival. After she returned from the bathroom, Billy talked to her for a few minutes and handed her a drink. Pennie took a "gulp of the drink," and then her friend Hensley grabbed the drink from her and said, "Let's go," and they left. Pennie testified that she and Hensley went to Hensley's house and Pennie became sick. Pennie specifically stated that she was dizzy, "just wanted to throw up," and "just felt awful." Pennie stated that at the time, she thought that the cause of her sickness was the alcohol she drank, and that she did not recall anything else that night. Pennie stated that she later had a conversation with Hensley about the events of December 11, 1990, and then talked to Billy and told him: "Are you crazy[?] . . . What did you put in my drink and why would you do something like that to me?" According to Pennie, Billy apologized and stated he put something in her drink "to take the edge off, because [she] was upset."

Pennie stated that she woke up at 6:00 a.m. the next day, December 12, 1990, and Hensley brought her to her mother's house. Pennie said she canceled an 8:30 a.m. hair appointment and 11:00 a.m. bridal photo shoot because she was in "no shape" to get those things done. A joint statement from Wayne and Marie Vauquelin, photographers for the parties' wedding, was admitted into evidence and indicated that on December 12, 1990, Pennie did not show for a pre bridal photo appointment because she was sick.

Pennie testified that there were segments of that day that were blacked out from her memory and that she had no recollection of going anywhere with Billy on December 12, 1990. When asked what recollection she had about what had occurred on December 12, 1990, Pennie replied,

> December the 12th, 1990. I remember feeling really bad and I remember being at my mom's house and my family was in and I remember that I had missed some appointments and my—one of my girlfriends was with me that day and I didn't—I stayed there all day until my friend picked me up at night because my—I didn't have a place to sleep because all my family was in there. So I was sleeping with my friend at her house, and I had been there for a while with her.

Pennie further stated that she had periods of "blacking out" and no memory up until her wedding day on December 15, 1990. Pennie testified that she threatened not to marry Billy on December 13, 14, and 15. However, Pennie stated that on her wedding day, Billy provided her with a stock certificate in an effort to get her to marry him. This stock certificate was admitted into evidence and purported to give Pennie over two hundred shares in Billy's company, Deligan's Valves Incorporated. Pennie testified that Billy told his mother to take the stock certificate and file it, and that Pennie had not seen the certificate again until after Pennie's mother died in October 2020. According to Pennie, the transfer of stock played a role in her decision to marry Billy.

Pennie testified that she first learned of the PMA involved in this case in 2017. Pennie testified that Billy had gotten ill and asked her to contact Bordelon's office for his will. Pennie stated that Bordelon did not release Billy's will to her but did provide her with the purported PMA and a purported will for her. According to Pennie, she had never talked to Bordelon or Billy about a will, and that she had never had a will. Pennie stated that the

signature on the will and the PMA was not her own. In addition, Pennie testified that Billy had forged her signature in several documents in the past, including a land contract and tax returns.

Darlene Watkins, Pennie's friend, testified that on December 12, 1990, she went to Pennie's mother's house at 8:00 a.m. and observed that Pennie was very angry and "looked like she was drunk." According to Watkins, Billy showed up to the house and she overheard him say to Pennie that "she is not going to have to sign a prenup." Watkins testified that she was with Pennie until about 6:00 p.m., and that Pennie did not go anywhere. When asked if Pennie appeared drunk the entire day, Watkin's replied

> Yeah. She—she just—she just wasn't herself, sir. So, I mean, Pennie's just a happy-go-person [sic] and being that it was close to her wedding day, she was just—she wasn't herself. She was angry for something; and, you know, that's what I was seeing, her all upset. And when I heard what I heard, I knew that's what it was.

Watkins also observed that Pennie appeared "medicated" and "just didn't look like herself" on her wedding day, December 15, 1990. According to Watkins, Pennie stumbled while walking down a staircase and "was ready to collapse and her father had to pick her up." Watkins also stated that Pennie was "very fragile" and "shaking" when attempting to sign the marriage certificate, and that she observed Billy take the pen "and he just signed both of their names."

Hensley testified that on December 11, 1990, she and Pennie drank some margaritas at La Casa. Hensley stated that when Pennie went to the bathroom, she saw Billy take a capsule out of his shirt pocket, open it, and pour its contents into Pennie's drink, and stirred it with his finger. Hensley testified that she asked Billy what he put in

Pennie's drink and that Billy "told me it was none of my f[***]ing business" in response. Hensley stated that Billy handed Pennie the drink after she returned from the bathroom, and Pennie took a "big gulp" of the drink. According to Hensley, she then grabbed the drink from Pennie, told Pennie that Billy put something in it, and Pennie and Hensley left to Hensley's apartment. Hensley stated that Pennie was sick all the way home, and that she had to keep stopping the car so Pennie could throw up. According to Hensley, Pennie was sick all night long, and they stayed up all night. Hensley also stated that Pennie was not a "big drinker" and that Pennie had consumed alcohol at higher levels that night than what Hensley had previously observed.

Hensley also testified that she dropped off Pennie at Pennie's mother's house at 8:00 a.m. the next day. Hensley stated that she had tried to communicate to Pennie that day about Billy putting something in her drink, but Pennie did not "seem to register" what she was saying. Hensley stated that Pennie's friend showed up at Pennie's mother's house, and that Billy arrived a short time after. Hensley stated she overheard Billy tell Pennie that "he still loved her, still wanted to marry her and that she didn't have to sign the prenup." Hensley stated that she then left and drove to her own parent's house, and that she didn't see Pennie until later that day.

Billy admitted to previously forging Pennie's signature in a document relating to a "land swap" but denied forging her signature on the PMA. Billy also stated that he never put anything in Pennie's drink on December 11, 1990. Billy explained that he desired having a PMA prior to marrying Pennie because they had gotten married fast and they did not really know each other well. Billy also stated that he wanted to protect his assets

"because from the time I was 27 till [sic] I was 40, I was working 15, 18 hours a day building my company." Billy also stated that he had communicated to Pennie about his desire to get a PMA. Billy testified that he and Pennie met with Bordelon "about 3.5 weeks" before December 12, 1990, and that Bordelon had read Pennie the agreement at that initial meeting. According to Billy, Bordelon instructed both of them that "if we had questions about the prenup to contact him at any time and he told Pennie, he suggested that she get her an attorney to read it." Billy further testified that Bordelon had stated that "If Pennie's attorney and Pennie didn't understand any of the—the language in it, which he had already explained to both of us, that he would visit with Pennie and her attorney and explain . . . everything." Billy testified that his impression after the meeting was that Pennie was "going to go speak to someone—an attorney, friends, family—and talk about it." According to Billy, Pennie called him at some point and said she would sign the PMA. Billy further testified that Pennie came with him to Bordelon's office on December 12, 1990 at "11 o'clock probably." Billy stated that Bordelon was present, as well as putative witnesses Debbie Naquin and Kristin Dyson, and that they all signed the PMA that day. Billy stated that he was under no impression that Pennie was intoxicated that morning.

Billy also testified that Pennie had spent the night at his home on December 11, 12, and 13. Billy stated that he never gave Pennie shares in his company, and that the first time he saw the certificate of shares was upon the divorce proceedings. Billy further stated that if Pennie was actually transferred 250 shares, he would have had only thirty percent ownership of his company. Billy also testified that Pennie had told him many times over a "30-year-period" that "if [he] loved her, [he] would tear the prenup up."

Bordelon testified that he was "100 percent" certain that Pennie's signature on the PMA was not forged, because he had "never executed a [PMA] or a will without all the witnesses in the room at the same time and all the people executing the document there." Bordelon's assistant, Naquin, testified that she typed the PMA and witnessed it. Naquin also recalled that she had signed it, that Billy and Pennie came to Bordelon's office, that the PMA was read aloud, and that Billy and Pennie signed it. Naquin further testified that she would not have put her signature on the PMA had either Billy or Pennie not been there to put their signatures on it. When asked whether she had ever been a witness to a legal document where she thought one of the parties was not in their right mind, Naquin replied, "No."

Kenneth Crawford, a forensic document examiner, testified that he had analyzed the stock certificate that was purportedly issued to Pennie by Billy to determine if it was fabricated in any manner. Crawford concluded that the questioned stock certificate was fabricated, that it was a "photo[-]reproduction" of an original stock certificate. In other words, the questioned stock certificate was merely a copy of an original stock certificate that had been manipulated. Crawford testified that "as a paper reproduction, someone physically removed portions of the questioned certificate and someone added handwriting [in the] secretary[] signature and typing in the certificate number and the number of shares."

On April 20, 2021, the trial court submitted its proposed jury charge to the parties, which included two questions.[8] Pennie objected to various aspects and instructions

[8] We note that the trial court's proposed jury charge that was presented to the parties during the charge conference is not found in the appellate record.

pertaining to "Question Two," which purportedly dealt with the issue of capacity and contained an instruction regarding drunkenness.[9] Among other things, Pennie objected to "the inclusion of [the phrase ']by convincing evidence[']] because it should be a preponderance of the evidence" and argued that it was a "heightened burden of convincing evidence that's not supported in this case by Louisiana law or the facts." Pennie also objected to the proposed instruction regarding "drunkenness" on the basis that it constituted an improper comment on the weight of the evidence and contained an improper evidentiary standard. The trial court overruled all of Pennie's objections. Pennie also requested that the charge include questions and instructions regarding capacity, fraud, and duress. All of Pennie's requests for inclusion were filed in the form of a written request. The trial court denied all of Pennie's proposed written questions and instructions. Billy objected to inclusion of "Question Two" entirely pursuant to Louisiana Civil Code Article 2032 regarding the statute of limitations, which was denied by the trial court.

The charge conference resumed the next day on April 21, 2021. Billy argued that "Question Two" be removed entirely based on a lack of evidence to support its inclusion within the charge. The trial court agreed with Billy and removed "Question Two" and its accompanying instructions. The trial court then read the charge to the jury. "Question One," the sole question contained in the final charge submitted to the jury, provided as follows: "Did Pennie M. Deligans prove by clear and convincing evidence that she did not sign the December 12, 1990 [PMA]?" After deliberations, the jury answered "no" to "Question One."

[9] The reporter's record for April 20 and 21, 2021 indicates that neither the trial court nor the parties dictated the express wording of the contents of "Question Two" or its related instructions.

In her brief, Pennie argues that the trial court erred when it refused to include questions and instructions regarding fraud, duress, and capacity within the jury charge. According to Pennie, she was entitled to each of these questions and instructions based on the evidence before the court. Specifically, Pennie points out that the evidence presented at trial demonstrated that Pennie did not learn of the signed PMA until 2017, and that Billy had a history of forging her signature on other documents during their marriage. Pennie also argues that "an eye-witness testified that she observed Billy surreptitiously put something in Pennie's drink, resulting in Pennie being incapacitated for several days." Billy concedes that Pennie's pleadings asserted defenses under Louisiana law, specifically including fraud, duress, and lack of capacity. *See* TEX. R. CIV. P. 278 ("The court shall submit the questions, instructions[,] and definitions in the form provided by Rule 277, which are raised by the written pleadings and the evidence."). However, Billy argues that there is no evidence in the record supporting the inclusion of each of Pennie's requested questions and instructions. We address each of Pennie's requested questions and instructions as separate sub-issues.

1. Fraud

Pennie submitted a written request for a question regarding fraud, which read, "[W]as Pennie Deligans' execution of the [PMA] secured by fraud?" Pennie also submitted a written request for an accompanying instruction regarding fraud, which read, "Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction." We find that this requested instruction tracks the

Louisiana Civil Code's provision defining fraud. *See* LA. CIV. CODE ANN. art. 1953; *see also McAlpine*, 679 So.2d at 93 ("The rules applicable to the validity of premarital agreements . . . are the same as for other contracts, namely, the [Louisiana]Civil Code articles dealing with capacity, consent, error, fraud, and duress."); LA. CIV. CODE ANN. art. 1948 ("Consent may be vitiated by error, fraud, or duress.").

In her brief, Pennie does not cite to evidence in the record that demonstrates fraud within the meaning of the statute and in relation to the signed PMA. *See* TEX. R. CIV. P. 278. While Pennie testified that she refused to sign the PMA at Bordelon's office on December 11, 1990, Pennie also testified regarding December 12, 1990, the day the purported PMA was executed. Specifically, Pennie testified that her hair and photo appointments were canceled that day, that there were segments of that day that were blacked out from her memory, and that she had no recollection of going anywhere with Billy that day. Furthermore, Watkins testified that she was with Pennie until about 6 p.m. on December 12, 1990, and that Pennie did not go anywhere. In contrast, Billy testified that he and Pennie signed the PMA around 11 a.m. at Bordelon's office on December 12, 1990.

We have found no evidence in the record establishing that, in securing the execution of the signed PMA on December 12, 1990, Billy made a misrepresentation or a suppression of the truth with the intention to obtain unjust advantage for himself or to cause a loss or inconvenience for Pennie. *See id.* Accordingly, we hold that the trial court did not err in refusing Pennie's requested question and instruction regarding fraud. We overrule this sub-issue.

2. Duress

Pennie also submitted a written request for a question regarding duress, which read, "Was Pennie Deligans' execution of the [PMA] secured by duress?" Pennie submitted a request for an accompanying instruction regarding duress, which read, "Duress occurs where consent has been obtained by a reasonable fear of unjust and considerable injury to a party's person, property, or reputation. Age, health, disposition, and other personal circumstances of a party must be taken into account in determining reasonableness of the fear." We find that this requested instruction tracks the Louisiana Civil Code's provision for duress. *See* LA. CIV. CODE ANN. art. 1959; *see also* LA. CIV. CODE ANN. art. 1948; *McAlpine*, 679 So.2d at 93. However, Pennie has not demonstrated in her brief—and we have not found—any evidence in the record establishing that Pennie's purported consent in entering the PMA was obtained by a "reasonable fear of unjust and considerable injury" to Pennie's person, property, or reputation. *See id.* Accordingly, we hold that the trial court did not err in refusing Pennie's requested question and instruction regarding duress. We overrule this sub-issue.

3. Capacity

a. Pennie's written request

Pennie submitted a written request for a question regarding capacity, which read "Did Pennie M. Deligans lack capacity to enter into the [PMA] on December 12, 1990?" Pennie did not submit an accompanying instruction or definition relating to her question regarding capacity.

Louisiana Civil Code Article 1918 provides: "All persons have capacity to contract,

except . . . persons deprived of reason at the time of contracting." LA. CIV. CODE ANN. art. 1918. *See also* LA. CIV. CODE ANN. art. 1919 ("A contract made by a person without legal capacity is relatively null and may be rescinded only at the request of that person or his legal representative."); LA. CIV. CODE ANN. art. 1925 ("A noninterdicted person, who was deprived of reason at the time of contracting, may obtain rescission of an onerous contract upon the ground of incapacity only upon showing that the other party knew or should have known that person's incapacity."); LA. CIV. CODE ANN. art. 2031 ("A contract is relatively null when it violates a rule intended for the protection of private parties, as when a party lacked capacity . . . ."). The parties agree that intoxication can support a question regarding whether a person is "deprived of reason at the time of contracting." *See id*. § 1918; *see also Emerson v. Shirley*, 175 So. 909, 913 (La. 1937) (interpreting former Louisiana Civil Code Article 1789, and holding that "it is now generally recognized that one who is so completely intoxicated that he has lost his reason is as incapable of making a valid contract, as long as he is in that condition, as if he were insane"). The purported PMA was signed on December 12, 1990. The parties disagree as to whether the evidence raised a question that Pennie was deprived of reason at the time of contracting.

The failure of the trial court to submit a jury question is not grounds for reversal unless the party submitting it has requested it in "substantially correct wording." TEX. R. CIV. P. 278. A question tendered in substantially correct wording must be correct "in substance and in the main" and "not affirmatively incorrect." *Placencio v. Allied Indus. Int'l, Inc.*, 724 S.W.2d 20, 21 (Tex. 1987); *Rivera v. Herndon Marine Prods., Inc.*, 895 S.W.2d 430, 433 (Tex. App.—Corpus Christi–Edinburg 1995, writ denied). A request is

affirmatively incorrect if it assumes material controverted facts. *Collins v. Beste*, 840 S.W.2d 788, 791 (Tex. App.—Fort Worth 1992, writ denied) (citing *Placencio*, 724 S.W.2d at 21). Similarly, a request is not substantially correct if it contains a term that requires a definition but the party fails to tender the definition. *Select Ins. Co. v. Boucher*, 561 S.W.2d 474, 479 (Tex. 1978); *Watson v. Brazos Elec. Power Co-op., Inc.*, 918 S.W.2d 639, 645 (Tex. App.—Waco 1996, writ denied) ("If a question contains a legal term, *i.e.*, nuisance, and no definition of the legal term is offered, then the requested question does not provide guidance to the jury that would enable it to reach a proper verdict."). Further, a request is not substantially correct if it is too vague. *See Perez v. Weingarten Realty Inv'rs*, 881 S.W.2d 490, 493 (Tex. App.—San Antonio 1994, writ denied) ("Jury issues which are too vague are not substantially correct."); *see also Coleson v. Lovette*, No. 02-99-00366-CV, 2001 WL 1289491, at *5 (Tex. App.—Fort Worth Oct. 4, 2001, no pet.) (not designated for publication) (concluding proposed question and instruction was too vague to be considered substantially correct because it did not explain when the statute of limitations began to run).

Here, Pennie's written requested question contains a legal term—capacity. As noted above, Louisiana Civil Code Article 1918 provides that "[a]ll persons have capacity to contract, except . . . persons deprived of reason at the time of contracting." LA. CIV. CODE ANN. art. 1918. Furthermore, a person who is not interdicted but lacked capacity to contract when she entered into a contract can only have a contract rescinded because she lacked capacity by "showing that the other party knew or should have known that

person's incapacity."[10] *See id*. art. 1925. By failing to submit accompanying instructions regarding capacity pursuant to Articles 1918 and 1925, Pennie proposed jury question failed to provide guidance to the jury that would enable it to reach a proper verdict.[11] *See Boucher*, 561 S.W.2d at 479; *Watson*, 918 S.W.2d at 645. Pennie's written question is also too vague to be considered substantially correct because it does not explain, specify, or reflect that a person lacks capacity when they are deprived of reasoning *at the time of contracting*. *See* LA. CIV. CODE ANN. art. 1918; *see also Perez*, 881 S.W.2d at 493; *Coleson*, 2001 WL 1289491, at *5.

Assuming without deciding that a question of capacity was raised by the evidence, we overrule this sub-issue because Pennie's written requested question was not in substantially correct wording. Given the defects in Pennie's proposed written question regarding capacity, we cannot conclude that Pennie requested the question in substantially correct wording or that the trial court abused its discretion in refusing to submit it in the charge. The trial court's failure to submit Pennie's proposed written question is therefore not grounds for reversal. *See Boucher*, 561 S.W.2d at 479; *Watson*, 918 S.W.2d at 645; *Perez*, 881 S.W.2d at 493; *Coleson*, 2001 WL 1289491, at *5; TEX. R. CIV. P. 278.

[10] None of the pleadings or evidence demonstrates that Pennie, at the time of contracting, was an interdicted person. *See* LA. CIV. CODE ANN. arts. 389–390.

[11] We observe that the written jury charge contains no instructions or definitions related to the lack of capacity to contract as provided by Louisiana Civil Code Articles 1918, 1919, 1925, or 2031. *See* LA. CIV. CODE ANN. arts. 1918, 1919, 1925, 2031. The record indicates that Pennie did not object to the lack of such instructions or definitions within the jury charge.

b. "Question Two"

Pennie also complains in her brief that "the trial court removed a question regarding Pennie's capacity to enter into the [PMA] due to intoxication over Pennie's objection."

The charge conference commenced on April 20, 2021. The transcript for April 20, 2021 indicates that the trial court submitted a proposed jury charge to the parties and conducted a hearing about it that day. The parties lodged various objections to "Question Two," which were all denied by the trial court. As discussed *infra*, upon reviewing the statements between the parties and the trial court regarding "Question Two," it is apparent that "Question Two" involved a question regarding capacity and included an instruction regarding "drunkeness." However, the trial court's proposed jury charge, as submitted to the parties on April 20, 2021, is not contained in the appellate record. In addition, neither the parties nor the trial court dictated the content of "Question Two" or its accompanying instructions on the record.

The record indicates the charge conference continued on April 21, 2021. The transcript of April 21, 2021 demonstrates that Billy raised an objection to the inclusion of "Question Two" in its entirety based on a lack of evidence that Pennie was "drunk" at the time of signing the agreement. In response, Pennie argued that the record contained evidence that Pennie was "very ill and out of sorts," that "she had . . . been drugged and that she was intoxicated," and that she was "out of it" the entire day of December 12. After hearing extensive arguments, the trial court orally granted Billy's objection and removed "Question Two" and its related instructions. Pennie did not raise an objection as to the

omission of "Question Two." Though Pennie submitted her own question regarding capacity as discussed infra, nothing in the record indicates that Pennie requested a second capacity question in writing corresponding to the the trial court's proposed version of "Question Two."[12]

A party objecting to a charge "must point out distinctly the objectionable matter and the grounds of the objection." TEX. R. CIV. P. 274; *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 43 (Tex. 2007). Any complaint as to a question on account of any defect, omission, or fault in pleading is waived unless specifically included in the objections. TEX. R. CIV. P. 274. Under Rule 278, we will not reverse a judgment for failure to submit a question "unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the question is one relied upon by the opposing party." *Id.* R. 278. One basic test determines whether a party has preserved error in the jury charge: "whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling." *Thota*, 366 S.W.3d at 689 (quoting *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992) (op. on motion for reh'g)); *see Ledesma*, 242 S.W.3d at 43 (same).

In this case, Pennie has not preserved her issue for "Question Two" because she failed to specifically object to the charge's omission of "Question Two" and obtain a ruling. *See* TEX. R. CIV. P. 274; *Thota*, 366 S.W.3d at 689; *Ledesma*, 242 S.W.3d at 43.[13]

[12] We note that Pennie raised several objections to various aspects to "Question Two" on April 20, 2021 that she now seems to disregard in this sub-issue.

[13] Even had Pennie objected to the omission of "Question Two" and obtained a ruling, Pennie also failed to submit a written request for "Question Two" and its accompanying instructions as required by

Accordingly, we overrule this sub-issue.

IV. CONCLUSION

The trial court's judgment is affirmed.

NORA L. LONGORIA
Justice

Delivered and filed on the
18th day of April, 2024.

Texas Rule of Civil Procedure 278. *See* TEX. R. CIV. P. 278 ("Failure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the question is one relied upon by the opposing party.").

Under Louisiana law, "[a] contract made by a person without legal capacity is relatively null and may be rescinded only at the request of that person or his legal representative." LA. CIV. CODE ANN. art. 1919. As the party challenging capacity, it was Pennie's burden to prove her claim. *See Herbert & Lula Marie Fusilier Revocable Living Tr. v. EnLink NGL Pipeline, LP*, 220 So. 3d 904, 908 (La. Ct. App. 2017), ("The party challenging capacity must prove his claim by clear and convincing evidence.") (citing *Florida v. Stokes*, 944 So.2d 598 (La. Ct. App. 2004)). Because Pennie was the petitioner at trial and not the opposing party, any objection she could have made to the omission of "Question Two" would not have been sufficient to preserve error under Texas Rule of Civil Procedure 278. *See Sears, Roebuck & Co. v. Abell*, 157 S.W.3d 886, 891 (Tex. App.—El Paso 2005, pet. denied) (recognizing Rule 278's limited exception to requirement for tender of a requested question).