Opinion issued August 31, 2010

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-01099-CV

IN RE MARY LYNN MABRAY, Relator

Original Proceeding on Petition for Writ of Mandamus

DISSENTING OPINION

The central issue in this case of first impression interpreting Texas's collaborative law statute, Section 6.603 of the Texas Family Code, is whether a "cooperative law agreement" that is not provided for by statute and whose provisions track and conflict with the provisions of the collaborative law statute and

the arbitration provision within it are valid and enforceable under Texas law or void as against public policy. The majority holds that both the "cooperative law agreement" and its arbitration clause are valid and enforceable. I would hold that neither is.

By petition for writ of mandamus, relator, Mary Lynn Mabray, challenges the trial court's October 30, 2009 order (1) ordering the parties to arbitration under the terms of the parties' "Cooperative Law Dispute Resolution Agreement" ("the Agreement") and (2) denying her motion to disqualify Brenda Keen, counsel for her ex-husband, Gary Allen Mabray, for failing to withdraw as counsel following the failure of settlement efforts under the cooperative law agreement.

Mary argues that the Agreement is "void and/or unenforceable" because (1) it fails to comply with Texas's collaborative law statute, including its provision that collaborative counsel withdraw if no settlement agreement is reached; (2) enforcement of the Agreement would violate public policy as reflected in the collaborative law statute because she would be required to participate in further litigation against counsel disqualified by statute; (3) the trial court clearly abused its discretion by requiring her to proceed to arbitration under an alternative dispute resolution agreement that fails to comply with Texas statutory law and is against public policy; and (4) even if formerly enforceable, the Agreement and the arbitration clause within it are no longer enforceable because Gary materially

breached the agreement and, in response, she revoked her consent to the agreement and terminated it. Gary opposes Mary's arguments and contends her petition for writ of mandamus is barred by laches.

I agree with the majority that Mary's petition is not barred by laches. I would hold, however, that both the "cooperative law agreement" and the arbitration provision within it are void and unenforceable as against the public policy of the State of Texas. Therefore, I would provisionally grant mandamus relief.

Background

After 35 years of marriage, Mary discovered her husband Gary's ongoing infidelity and sought a divorce. She retained Harry L. Tindall, who recommended that the parties engage in a process called "cooperative law" to settle the divorce. On February 12, 2008, Mary and Gary and their attorneys signed a four page document titled "Cooperative Law Dispute Resolution Agreement." The Agreement was not filed with the trial court.

The Agreement acknowledged the parties' "shared belief that it is in the best interests of the parties to avoid litigation." Thus, it stated that the parties agree to "effectively and honestly communicate with each other with the goal of efficiently and economically settling the terms of the dissolution of the marriage." The Agreement provided for the joint retention of experts, if needed, and it forbade formal discovery unless agreed upon, relying instead on the parties' agreement to

deal with each other in "good faith." It further provided,

> No formal discovery procedure will be used unless specifically agreed to in advance. The parties will be required to sign a sworn inventory and appraisement if requested by the other party.
>
> We acknowledge that, by using informal discovery, we are giving up certain investigative procedures and methods that would be available to us in the litigation process. We give up these measures with the specific understanding that the parties will make to each other a complete and accurate disclosure of all assets, income, debts, and other information necessary for us to reach a fair settlement. Participation in this process is based on the assumptions that we have acted in good faith and that the parties have provided complete and accurate information to the best of their ability.

Also included in the Agreement was an arbitration provision, which stated:

> The parties further agree that if this case has not been settled by negotiation and an Agreed Final Decree of Divorce has not been submitted to and signed by the Court before April 30, 2009 then this matter will be submitted to binding arbitration pursuant to the Joint Motion for Referral to Arbitration and Agreed Order of Referral to Arbitration attached hereto and made a part hereof.
>
> The parties agree to be bound by this agreement, the Texas Alternative Dispute Resolution Procedures Act (chapter 154 of the Texas Civil Practice and Remedies Code), the Texas General Arbitration Law (chapter 171 of the Texas Civil Practice and Remedies Code), Section 6.601, Texas Family Code, and the laws of the state of Texas.

The cooperative law process failed, and an agreed final decree of divorce was not submitted to the court by April 30, 2009. Neither party had requested a sworn inventory and appraisement.

On March 11, 2009, the parties jointly moved for referral to arbitration, and,

on March 18, 2009, the court entered the first Agreed Order for Referral to Arbitration, appointing an arbitrator and scheduling the arbitration for June 18, 2009. When the arbitrator realized that he had consulted with Mary regarding the divorce and thus could not serve as arbitrator, Gary filed an Opposed Motion to Appoint Substitute Arbitrator and For Entry of Order of Referral to Arbitration. The parties' agreed order appointing Donald R. Royall as substitute arbitrator was signed by the trial court on August 12, 2009, and the arbitration was scheduled for August 25 and 26, 2009.

In early August, Mary terminated her attorney-client relationship with Tindall and hired new counsel, Stephen Shoultz. Thereafter, Mary moved to disqualify Gary's counsel, Brenda Keen, on grounds that the Agreement was contrary to Texas public policy and therefore invalid. Specifically, Mary asserted that the Agreement sought to "contract around" Texas's collaborative law statute, section 6.603 of the Family Code. Because Brenda Keen would be unable to continue to represent Gary in litigation under a collaborative law agreement once the collaborative process had failed, Mary contended that, so too, Keen must be disqualified after the cooperative process failed. Mary also moved to revoke her consent to arbitration. She stated that Tindall had "forced" her to sign the Agreement while she was "emotionally distraught" over the divorce and under the influence of tranquilizers. She further contended that Gary "failed to truthfully and voluntarily disclose relevant

information, including complete and accurate disclosure of all assets." Gary moved to enforce the Agreement and to compel arbitration, arguing that the Texas collaborative law statute is inapplicable to the parties' cooperative law agreement.

The trial court heard all motions on September 17, 2009. At the hearing, Mary contended that Gary had breached the cooperative law agreement by concealing assets, but Gary's counsel asserted that the arbitrator, not the trial court, should determine whether he had breached the Agreement. Gary himself did not attend the hearing, despite having been subpoenaed to attend and bring financial documents.

The trial court verified that no notice of collaborative law proceedings had been filed with the court and no order had been signed by the trial court setting the dates for status reports,[1] as required by the collaborative law statute, section 6.603 of

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[1] The following colloquy between the court and Gary's counsel, Brenda Keen, occurred:

> [The Court]: So, the case is not filed as a Collaborative Law Agreement under the statute?
>
> [Ms. Keen]: It is not, Your Honor.
>
> [The Court]: And there's been no order signed by the Court that approves collaborative law procedures and schedules and so forth.
>
> [Ms. Keen]: No notice of collaborative law proceedings was filed, and the case had not been put on the collaborative track or no notices of updates, nothing. It is not a

the Family Code.[2] The court reasoned that it could not impose an "attorneys-have-to-withdraw provision" in a non-collaborative law case, stating,

> The Code certainly includes, encourages all forms of ADR; and if they want to enter into an agreement which, apparently, they both signed, and call it Cooperative Law Agreement and it has some mechanisms to try to resolve the case through ADR rather than coming to the Court, I don't think there's any assumption that they can't do that.

Mary's counsel argued that Mary had revoked her consent to arbitration, and therefore there was no valid agreement to arbitrate, and she also argued that the trial court was required to determine whether a valid agreement existed. He further argued that the cooperative law agreement operated as a collaborative law agreement but violated Texas law by not providing for the withdrawal of attorneys, as required by Texas's collaborative law statute. He stated, "There is no basis in Texas law to just substitute in the word cooperative for collaborative and then say the statute does not exist."

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collaborative case.

[The Court]: And after the signing of the agreement that includes the referral to arbitration, it wasn't handled as a collaborative law case subsequent to that time either?

[Ms. Keen]: No. It was always, it was always handled under the agreement, which is attached to my motion, to try to resolve it out of court by negotiation, and if we were unable to settle it by a date certain, we would go to submit all issues to binding arbitration.

[2] TEX. FAM. CODE ANN. § 6.603(f) (Vernon 2006).

Gary's counsel argued that breach of contract issues were a matter for the arbitrator to decide. She also argued that the agreement was not a collaborative law agreement under the Texas statute, that "[n]o notice of collaborative law proceeding was filed, and the case had not been put on the collaborative track or no notice of updates, nothing."

The trial court agreed with Gary's counsel and granted Gary's motion. On October 30, 2009, the court signed an order compelling arbitration, which provides, in part:

> This case was not resolved by agreement of the parties before April 30, 2009, and the parties are required to arbitrate their divorce action pursuant to the Cooperative Law Dispute Resolution Agreement signed by the parties on February 12, 2009. . . .
>
> It is ordered that Mary Lynn Mabray's Motion to Disqualify Brenda Keen is hereby denied.
>
> It is ordered that Mary Lynn Mabray's First Amended Motion to Revoke Consent to Arbitration and Request for Jury Trial is hereby denied.

The trial court signed findings of fact and conclusions of law on October 21, 2009.

On November 25, the court signed additional findings of fact and conclusions of law that state:

> 1. Brenda Keen is not required to withdraw as attorney for Gary Allen Mabray after the parties failed to reach a settlement under the Cooperative Law Dispute Resolution Agreement.

2. The Cooperative Law Dispute Resolution Agreement is not governed by Texas Family Code § 6.603.

3. The Cooperative Law Dispute Resolution Agreement does not violate Texas Public Policy.

4. Brenda Keen is not disqualified to represent Gary Allen Mabray.

On December 22, 2009, Mary petitioned for writ of mandamus.

Standard of Review

Mandamus relief is available only to correct a "clear abuse of discretion" when there is no adequate remedy by appeal. *Walker v. Packer*, 827 S.W.2d 833, 839–40 (Tex. 1992) (orig. proceeding). A clear abuse of discretion occurs when a trial court "reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." *Id.* at 839. The reviewing court may not substitute its judgment for that of the trial court when reviewing factual issues. *Id.* Even if the reviewing court would have decided the issue differently, it cannot disturb the trial court's decision unless the decision is shown to be arbitrary and unreasonable. *Id.* at 840. Appellate review of a trial court's determination of the legal principles controlling its ruling, however, is much less deferential. *Id.*; *In re Ching*, 32 S.W.3d 306, 310 (Tex. App.—Amarillo 2000, orig. proceeding). A trial court has no "discretion" in determining what the law is or in applying it to the facts. *Walker*, 827 S.W.2d at 840; *Ching*, 32 S.W.3d at 310. A clear failure of the trial court to

analyze or apply the law correctly constitutes an abuse of discretion that may result in the grant of an extraordinary writ. *Walker*, 827 S.W.2d at 840; *Ching*, 32 S.W.3d at 310.

Collaborative and Cooperative Law

Mary argues that (1) the parties Cooperative Law Dispute Resolution Agreement is void or unenforceable as against public policy because it fails to comply with Texas's collaborative law statute, including its provision that collaborative counsel withdraw if no settlement agreement is reached; (2) enforcement of the Agreement would violate public policy by requiring her to participate in further litigation against counsel disqualified by statute; and (3) the trial court clearly abused its discretion by requiring her to proceed to arbitration under an alternative dispute resolution agreement that fails to comply with Texas's collaborative law statute and is against public policy. Mary contends that "[u]sing a slightly different title for the ADR agreement does not avoid the protections of the statute." Gary responds to these three issues that the collaborative law statute is inapplicable to a cooperative law agreement.[3]

The central issue in the case is, thus, whether, in the absence of a duly promulgated cooperative law statute, the public policy of the State of Texas permits

[3] Mary also argues that, even if the Agreement was formerly enforceable, she terminated it after Gary breached it and it is no longer enforceable.

marriages to be dissolved pursuant to private "cooperative law" agreements, unauthorized by statute, whose provisions track and conflict with the provisions of Texas's collaborative law statute. I would hold, on the basis of Texas public policy regarding the dissolution of marriage as set out in Texas's statutes, the legislative history of the collaborative law statute, and Texas case law, that the parties' "cooperative law" agreement is an illegal contract whose enforcement is contrary to the public policy of the State of Texas. I would, therefore, hold the agreement void.

1. Collaborative Law and Cooperative Law Defined

I generally agree with and adopt the majority's statement of the distinction between collaborative law and cooperative law.

Essentially, collaborative law is a variety of alternative dispute resolution, most commonly used in the divorce context, that "provides for an advance agreement entered into by the parties and the lawyers in their individual capacities, under which the lawyers commit to terminate their representations in the event the settlement process is unsuccessful and the matter proceeds to litigation." Janet Martinez & Stephanie Smith, *An Analytic Framework for Dispute Systems Design*, 14 HARV. NEGOT. L. REV. 123, 166 (2009).

Texas provides by statute for the dissolution of a marriage in accordance with the collaborative law procedures set out in section 6.603 of the Family Code, which provides, in part:

(a) On a written agreement of the parties and their attorneys, a dissolution of marriage proceeding may be conducted under collaborative law procedures.

(b) Collaborative law is a procedure in which the parties and their counsel agree in writing to use their best efforts and make a good faith attempt to resolve their dissolution of marriage dispute on an agreed basis without resorting to judicial intervention except to have the court approve the settlement agreement, make the legal pronouncements, and sign the orders required by law to effectuate the agreement of the parties as the court determines appropriate. The parties' counsel may not serve as litigation counsel except to ask the court to approve the settlement agreement.

(c) A collaborative law agreement must include provisions for:

(1) full and candid exchange of information between the parties and their attorneys as necessary to make a proper evaluation of the case;

(2) suspending court intervention in the dispute while the parties are using collaborative law procedures;

(3) hiring experts, as jointly agreed, to be used in the procedure;

(4) withdrawal of all counsel involved in the collaborative law procedure if the collaborative law procedure does not result in settlement of the dispute; and

(5) other provisions as agreed to by the parties consistent with a good faith effort to collaboratively settle the matter.

(d) Notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule or law, a party is entitled to judgment on a collaborative law settlement agreement if the agreement:

(1) provides, in a prominently displayed statement that is boldfaced, capitalized, or underlined, that the agreement is not subject to revocation; and

(2) is signed by each party to the agreement and the attorney of each party.

(e) Subject to Subsection (g), a court that is notified 30 days before trial that the parties are using collaborative law procedures to attempt to settle a dispute may not, until a party notifies the court that the collaborative law procedures did not result in a settlement:

(1) set a hearing or trial in the case;

(2) impose discovery deadlines;

(3) require compliance with scheduling orders; or

(4) dismiss the case.

(f) The parties shall notify the court if the collaborative law procedures result in a settlement. If they do not, the parties shall file:

(1) a status report with the court not later than the 180th day after the date of the written agreement to use the procedures; and

(2) a status report on or before the first anniversary of the date of the written agreement to use the procedures, accompanied by a motion for continuance that the court shall grant if the status report indicates the desire of the parties to continue to use collaborative law procedures.

(g) If the collaborative law procedures do not result in a settlement on or before the second anniversary of the date that the suit was filed, the court may:

(1) set the suit for trial on the regular docket; or

(2) dismiss the suit without prejudice.

. . . .

TEX. FAM. CODE ANN. § 6.603 (Vernon 2006).

By contrast, cooperative law is essentially "a process which incorporates many of the hallmarks of Collaborative Law but does not require the lawyer to enter into a contract with the opposing party providing for the lawyer's disqualification." Martinez & Smith, 14 HARV. NEGOT. L. REV. at 166. Texas has no cooperative law statute.

2. Texas Public Policy

"It is the policy of [Texas] to encourage the peaceable resolution of disputes . . . and the early settlement of pending litigation through voluntary settlement procedures." TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (Vernon 2005). Texas public policy also strongly favors "preserving the freedom of contract." *Lawrence v. CDB Servs., Inc.*, 44 S.W.3d 544, 553 (Tex. 2001), *superseded by statute on other grounds*, TEX. LAB. CODE ANN. § 406.003(e), *as recognized in Storage & Processors, Inc. v. Reyes*, 134 S.W.3d 190 (Tex. 2004). However, "[t]he courts will not enforce a contract whose provisions are against public policy." *Sacks v. Dallas Gold & Silver Exch., Inc.*, 720 S.W.2d 177, 180 (Tex. App.—Dallas 1986, no writ); *accord Lawrence*, 44 S.W.3d at 555 (Baker, J., dissenting) (noting,

"On several occasions, we have held otherwise freely-entered contracts void because they were contrary to public policy" (citing, *e.g.*, *Juliette Fowler Homes, Inc. v. Welch Assocs., Inc.*, 793 S.W.2d 660, 663 (Tex. 1990))).

Texas expresses its public policy through its statutes. *Tex. Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240, 250 (Tex. 2002) (quoting *Lawrence*, 44 S.W.3d at 553). Therefore, "to determine whether a contract violates public policy, we consider the policies underlying any applicable statutes." *Jankowiak v. Allstate Property & Cas. Ins. Co.*, 201 S.W.3d 200, 210 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (quoting *Lawrence*, 44 S.W.3d at 555 (Baker, J., dissenting)).

Whether a contract violates public policy is a question of law the courts review de novo. *Id.* at 209. Generally, if a contract violates public policy it is void, not merely voidable. *Lawrence*, 44 S.W.3d at 555 (citing, *e.g.*, *Tom L. Scott, Inc. v. McIlhany*, 798 S.W.2d 556, 560 (Tex. 1990)). When a contract is void, neither party is bound thereby. *Ex parte Payne*, 598 S.W.2d 312, 317 (Tex. Civ. App.—Texarkana 1980, no writ), *overruled on other grounds, Huff v. Huff*, 648 S.W.2d 286 (Tex. 1983). Neither estoppel nor ratification will make a contract that violates public policy enforceable. *Lawrence*, 44 S.W.3d at 555–56 (Baker, J., dissenting) (citing *Richmond Printing v. Port of Houston Auth.*, 996 S.W.2d 220, 224 (Tex. App.—Houston [14th Dist] 1999, no pet.) and *Ex parte Payne*, 598 S.W.2d at 317). The appropriate test when considering whether a contract violates

public policy "is whether the tendency of the agreement is injurious to the public good, not whether its application in a particular case results in actual injury." *Hazelwood v. Mandrell Indus. Co.*, 596 S.W.2d 204, 206 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

3. Texas Public Policy Regarding Marriage: Section 1.101 of the Family Code

Texas has expressly set out its public policy with respect to marriage in the Family Code, Subchapter B, "Public Policy," section 1.101, "Every Marriage Presumed Valid," which states:

> In order to promote the public health and welfare and to provide the necessary records, this code specifies detailed rules to be followed in establishing the marriage relationship. However, in order to provide stability for those entering into the marriage relationship in good faith and to provide for an orderly determination of parentage and security for the children of the relationship, it is the policy of this state to preserve and uphold each marriage against claims of invalidity unless a strong reason exists for holding the marriage void or voidable. Therefore, *every 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 (Vernon 2006) (emphasis added). Chapter 6 expressly makes voidable marriages dissolved by collaborative law agreements made and performed in accordance with the procedures set out in Chapter 6, section 6.603 of the Family Code. Chapter 6 does not expressly make marriages voidable by "cooperative law" agreements. Therefore, a private "cooperative law"

agreement has no power to dissolve a marriage under Texas law. *See id.*; *see also Capellen v. Capellen*, 888 S.W.2d 539, 545–46 (Tex. App.—El Paso 1994, writ denied) (stating, in context of analyzing "open courts" claim, that suits for divorce and suits affecting parent-child relationship are not subject to such common law causes of action because they are statutorily created and regulated proceedings); *Ulloa v. Davila*, 860 S.W.2d 202, 203 (Tex. App.—San Antonio 1993, no writ) (stating that Texas law does not recognize common law divorce, and thus, marriage can be terminated only by death or court decree) (citing *Estate of Claveria v. Claveria*, 615 S.W.2d 164, 167 (Tex. 1981)). Under the plain language of section 1.101 of the Code, a marriage purportedly dissolved in accordance with a private "cooperative law agreement" remains presumptively valid under Texas law.

4. Texas Public Policy Regarding Collaborative Law: Section 6.603 of the Family Code

Unlike cooperative law agreements, collaborative law agreements are statutorily approved by Chapter 6 of the Texas Family Code as a method for dissolving a marriage under Texas law. The public policy regarding marriage set out in section 1.101 of the Family Code is echoed in the stated purpose of Texas's collaborative law statute as expressly set out both in the statute itself and in its legislative history. *See* TEX. FAM. CODE ANN. § 6.603(a), (b) (providing permission to conduct dissolution of marriage proceeding on written agreement of parties and

their attorneys and describing requirements of statutorily valid collaborative law proceeding in detail).

Texas's collaborative law statute originated in Texas's 77th Legislature as House Bill 1363, and it was enacted as new section 6.603 of the Texas Family Code, effective September 1, 2001. *See id.* § 6.603. The final House Bill Analysis, dated June 12, 2001, states, under the heading, "Background and Purpose":

> Currently, different types of alternative dispute resolution procedures are encouraged to bring about a peaceable solution instead of litigation. Collaborative law, a new dispute resolution method, is being used primarily in family law cases relating to the dissolution of a marriage and the parent-child relationship in which the costs of a court battle can be both personally and financially overwhelming. *The collaborative law process offers parties the option to negotiate in good faith for an out-of-court settlement. The process is entirely voluntary and participation may be terminated at any time. The parties agree to a full exchange of records and to jointly hire experts. If a settlement is not reached, the attorneys must withdraw and the parties then employ trial counsel. House Bill 1363 includes the collaborative law process among other dispute resolution methods encouraged in actions relating to the dissolution of a marriage or suits affecting the parent-child relationship.*

House Comm. on Civil Practices, Bill Analysis, Tex. H.B. 1363, 77th Leg., R.S. (2001) (emphasis added).

Under the heading "Analysis," the bill analysis states:

> House Bill 1363 amends the Family Code to provide that a collaborative law procedure (procedure) is a specified process, conducted under written agreement of the parties and their counsel, to reach a settlement agreement with minimal judicial intervention in a dissolution of marriage dispute or a suit affecting the parent-child

> relationship. *The bill sets forth provisions for what the agreement must include . . . .*

Id. (emphasis added). The analysis also states that, for the parties to be entitled to judgment on a collaborative law agreement, the agreement must "provide[] in a specified manner that [it] is not subject to revocation" and must be signed by each party and each party's attorney. *Id.* Finally, the analysis states that the bill requires notification to the court if the procedures result in a settlement, or the filing of a status report within a certain time period if they do not, and it states, "If the procedures do not result in a settlement on or before the second anniversary of the date that the suit was filed, the bill authorizes the court to set the suit for trial on the regular docket or dismiss the suit without prejudice." *Id.*

Section 6.603 of the Family Code restates the same purpose as the bill analysis:

> Collaborative law is a procedure in which the parties and their counsel agree in writing to use their best efforts and make a good faith attempt to resolve their dissolution of marriage dispute on an agreed basis without resorting to judicial intervention except to have the court approve the settlement agreement, make the legal pronouncements, and sign the orders required by law to effectuate the agreement of the parties as the court determines appropriate. The parties' counsel may not serve as litigation counsel except to ask the court to approve the settlement agreement.

TEX. FAM. CODE ANN. § 6.603(b). It then sets out the mandatory requirements of a collaborative law agreement:

> (1) full and candid exchange of information between the parties and their attorneys . . . ; (2) suspending court intervention . . . while the parties are using collaborative law procedures; (3) hiring experts, as jointly agreed . . . ; (4) withdrawal of all counsel involved in the collaborative law procedure if the . . . procedure does not result in settlement of the dispute; and (5) other provisions as agreed to by the parties consistent with a good faith effort to collaboratively settle the matter.

Id. § 6.603(c). Section 6.603 also contains notice requirements to the parties regarding the binding effect of any settlement reached and to the court regarding any settlement, the provision of a status report if the case is not settled within a year, and a provision that the court may set the case for trial on the regular docket or dismiss it without prejudice if it does not settle within two years. *Id*. § 6.603(d), (f).

5. Contravention of Texas's Collaborative Law Statute, Section 6.603, by the "Cooperative Law Dispute Resolution Agreement"

The "cooperative law agreement" entered by the parties in this case shows full cognizance of the statement of purpose and the safeguards expressly enumerated in Texas's collaborative law statute—section 6.603 of the Family Code—and in the Bill Analysis approving collaborative law as an alternative, statutorily approved, method for the dissolution of a marriage. Indeed, the Agreement's provisions track the provisions in the collaborative law statute and expressly *contravene* its protections while taking advantage of its benefits.

(a) Lack of notice to the trial court of "cooperative law agreement"

Section 6.603 requires that parties notify the trial court of any settlement

under collaborative law procedures, but it exempts collaborative law settlement agreements from filing with the court, which would otherwise be required for enforceability by Texas Rule of Civil Procedure 11, if certain conditions are met by the settlement agreement; and, in the absence of a settlement, the statute requires the parties to notify the trial court periodically of their progress through status reports. *See* TEX. R. CIV. P. 11 (providing that "no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record, or unless it be made in open court and entered of record"); TEX. FAM. CODE ANN. § 6.603(d) (exempting collaborative settlement agreements from compliance with Rule 11), 6.603(e) (limiting actions that trial court may take once notified by parties that they will use collaborative procedures), 6.603(f) (providing method for putting trial court on notice of parties' agreement to use collaborative law procedures and requiring parties to submit status reports).

The parties to the "cooperative law agreement" indicated their awareness of the provisions of section 6.603 and their purpose by tracking the statement of the background and purpose of section 6.603 as set out in the statute, by including in the Agreement a provision to negotiate in good faith for an out-of-court settlement, and by agreeing to fully exchange records and to jointly hire experts.

However, their "cooperative law agreement" was not filed with the court as a Rule 11 agreement, nor were status reports filed with the trial court. *See* TEX. R.

CIV. P. 11; TEX. FAMILY CODE ANN. § 6.603 (e), (f). Indeed, the parties emphasize that they intentionally failed to incorporate into the "cooperative law agreement" those provisions of the collaborative law statute that provided for notice to the trial court. Thus, the court was never put on notice of the nature of the Agreement or the progress of the parties' settlement negotiations until the parties sought binding arbitration under the Agreement.

I would hold, therefore, that the Agreement is unenforceable by virtue of the parties' failure to file their "cooperative law agreement" with the trial court as required by Rule 11 for the enforceability of all agreements "touching any suit pending" while they were negotiating a settlement for the dissolution of their marriage or, alternatively, by virtue of their intentional failure to file status reports, as required for compliance with the collaborative law statute.

(b) Failure to provide for voluntary withdrawal from the Agreement and referral to binding arbitration

Also, where the legislatively stated purpose of the collaborative law statute is that the process is "entirely voluntary and participation may be terminated at any time," House Comm. on Civil Practices, Bill Analysis, Tex. H.B. 1363, 77th Leg., R.S. (2001), the parties "cooperative law agreement" provides that "if this case has not been settled by negotiation and an Agreed Final Decree of Divorce has not been submitted to and signed by the Court before April 30, 2009 then this matter will be

submitted to binding arbitration pursuant to the Joint Motion for Referral to Arbitration and Agreed Order of Referral to Arbitration attached hereto and made a part hereof." The collaborative law statute, by contrast, provides for returning the case to the regular docket setting for trial or dismissal without prejudice if settlement is not reached in two years. TEX. FAM. CODE ANN. § 6.603(g).

Thus, while the "cooperative law agreement" grounded itself in Texas statutory authority permitting binding alternative dispute resolution procedures, it pointedly skirted and violated the safeguards in the collaborative law statute expressly designed to ensure the voluntariness of parties' participation in collaborative law negotiations and further providing for return to the court's docket or dismissal should the collaborative law process fail, violating both the letter and the spirit of section 6.603.

(c) Failure to provide for withdrawal of counsel on failure of the settlement negotiations

The parties likewise ignored the provisions of the collaborative law statute that state, "The parties' counsel may not serve as litigation counsel except to ask the court to approve the settlement agreement," and that mandate "withdrawal of all counsel involved in the collaborative law procedure if the . . . procedure does not result in settlement of the dispute." *Id.* § 6.603(b),(c)(4). Gary then took advantage of the Agreement's silence and proceeded to binding arbitration with the

same counsel he had used in the "cooperative law" negotiations, in plain contravention of sections 6.603(b) and (c),.

Thus, for this reason as well, I would hold that the parties' Agreement violates Texas's collaborative law statute and its public policy and is void.

6. Violation of Texas Public Policy Regarding the Dissolution of Marriage: Section 1.101 of the Texas Family Code

The collaborative law procedures set out in detail in section 6.603 of the Family Code carry forward the express public policy of the State of Texas regarding the dissolution of marriages stated in section 1.101 of the Family Code—that policy being that,

> in order to provide stability for those entering into the marriage relationship in good faith and to provide for an orderly determination of parentage and security for the children of the relationship, it is the policy of this state to preserve and uphold each marriage against claims of invalidity unless a strong reason exists for holding the marriage void or voidable

Id. § 1.101. Therefore, every marriage is presumed to be valid "unless expressly made voidable by Chapter 6 and annulled as provided by that chapter." *Id.* The parties' "cooperative law agreement" directly contravenes the policy set out in section 1.101 and the plain language of the statute by providing a private alternative to statutorily recognized means for dissolving marriages under Texas law.

The comparison between the "cooperative law agreement" in this case and Texas's collaborative law statute shows exactly why the statutory safeguards of

section 6.603 were meticulously put in place by the Texas Legislature for parties wishing to engage in collaborative settlement negotiations pertaining to the dissolution of a marriage. Assuming that Gary did not make the "full and candid exchange of information" that Mary Lynn contends he did not make, Mary Lynn now finds herself bound to an agreement to settle through binding arbitration, whereas under Texas's collaborative law statute she could withdraw from the collaborative law agreement at any time. She is bound to this without having received the notice of a "prominently displayed statement that is boldfaced, capitalized, or underlined, that the agreement is not subject to revocation" required for binding a party to a settlement agreement reached pursuant to section 6.603(d)(1). *Id.* § 6.603(d)(1). She is denied the protection of having the trial court put on notice of the "cooperative" negotiations with their full disclosure and joint naming of experts. And she is denied the protections of the provisions in the collaborative law statute that the parties notify the court in which the dissolution of marriage is pending if the collaborative law procedures result in settlement or file a status report if they do not. *Id*. § 6.603(f). She is also denied the right to have the suit set for trial by the trial court or dismissed without prejudice should the collaborative law procedures not result in a settlement on or before the second anniversary of the date the suit was filed. *Id*. § 6.603(g).

Finally, Mary is required to face Gary's counsel in the binding arbitration

provided for by the cooperative law agreement to which she is consigned, whereas, under the collaborative law statute and its statement of purpose, collaborative law counsel are expressly required to withdraw if the collaborative law procedure does not result in settlement of the dispute. *Id*. § 6.603(c)(4). Not only does the "cooperative law agreement" violate the collaborative law statute in each of the ways set out above, but also the overall picking and choosing among the provisions of the collaborative law statute shows the clear intent of the drafters of the Agreement to avoid the protections of law prescribed by section 6.603.

To count the parties' cooperative law agreement as valid and enforceable is thus to deny all meaning to section 1.101 of the Family Code, setting out the express public policy of Texas with regard to marriage. Indeed, to enforce such a private agreement is to permit a party who has not negotiated in good faith and who has failed to perform his obligations under the agreement, while benefitting from good faith participation in informal discovery and negotiation by the opposing party, to hold the party performing in good faith to binding arbitration while the violator continues to use the same counsel but exposes to the other party only that information he or she is required by arbitration procedures to share, flouting the provisions of the collaborative law statute, depriving the opposing party of its protections and of access to the courts, and potentially calling into question the compliance of the attorney who continues representation of a party in arbitration

after the failure of the "cooperative law" proceedings with the provisions of Rules 1.06 and 1.07 of the Texas Disciplinary Rules of Professional Conduct, governing conflicts of interest. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06, 1.07, *reprinted in* TEX. GOV'T. CODE ANN., tit. 2, subtit. G app. A (Vernon 2005).

Because Texas expresses its public policy through its statutes, and the Texas Legislature has expressly stated its policy regarding the dissolution of marriage in section 1.101 of the Family Code; because it has expressly permitted the dissolution of a marriage using collaborative law procedures in section 6.603 of the Code, setting out mandatory provisions for the protection of parties to such agreements; because the dissolution of marriage through "cooperative law agreements," such as the Agreement between the parties in this case, is not expressly provided for in Chapter 6; and because that Agreement systematically strips the protections of Chapter 6 from the parties to it, I would hold that the Cooperative Law Dispute Agreement in this case is injurious to the public good and that it is, therefore, void and unenforceable as against public policy.

Disqualification of Cooperative Law Counsel as Arbitration Counsel

Mary next argues that Keen, Gary's collaborative law attorney, must be disqualified from further participation in the dissolution of marriage proceedings because Keen's continued representation of Gary violates the Texas collaborative law statute and Texas public policy. I agree.

Courts are required to adhere to an exacting standard when considering motions to disqualify counsel in order to discourage the use of such motions as a dilatory trial tactic. *Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 656 (Tex. 1990); *In re Seven-O Corp.*, 289 S.W.3d 384, 388 (Tex. App.—Waco 2009, orig. proceeding). The burden is on the movant to establish with specificity a violation, in most cases a violation of one or more disciplinary rules. *See Spears*, 797 S.W.2d at 656. However, the disciplinary rules are only guidelines, not controlling standards for attorney disqualification. *In re Seven-O Corp*., 289 S.W. 3d at 388.

Here, Keen was Gary's "cooperative law" counsel and, in that capacity, received all of the information from Mary that she would have received had the parties proceeded properly under the applicable collaborative law statute, section 6.603 of the Family Code. The Legislature's analysis of the purpose of the statute expressly contemplates that, in a collaborative law setting, "The parties agree to a full exchange of records and to jointly hire experts. If a settlement is not reached, the attorneys must withdraw and the parties then employ trial counsel." House Comm. on Civil Practices, Bill Analysis, Tex. H.B. 1363, 77th Leg., R.S. (2001). The bill's analysis further states that the "collaborative law procedure (procedure) is a specified process, conducted under written agreement of the parties and their counsel, to reach a settlement agreement with minimal judicial intervention in a dissolution of marriage dispute or a suit affecting the parent-child relationship" and

that "[t]he bill sets forth provisions for what the agreement must include." *Id.* The express language of section 6.603 mandates, *inter alia*, "*full and candid exchange of information between the parties and their attorneys [and] withdrawal of all counsel involved in the collaborative law procedure if the . . . procedure does not result in settlement of the dispute . . . .*" TEX. FAM. CODE ANN. § 6.603(c) (emphasis added).

By continuing as Gary's counsel in binding arbitration proceedings, rather than withdrawing, Gary's counsel clearly contravenes the stated policy of the State of Texas regarding attorneys who participate in informal marriage dissolution negotiations. *See id.* § 6.603(b) (expressly prohibiting counsel who has participated in collaborative law procedure from "serv[ing] as litigation counsel except to ask the court to approve the settlement agreement"), 6.603(c) (requiring collaborative law agreements to include provision for "withdrawal of all counsel involved in the collaborative law procedure if the collaborative law procedure does not result in settlement of the dispute").

The reasons for this policy seem clear. The collaborative law statute and the parties' "cooperative law agreement" both expressly contemplate "the full and candid exchange of information between the parties and their attorneys." If parties abide by these statutory and contractual provisions, it is at least arguable that they will produce information to the opposing party that ordinarily would be protected by the attorney client privilege. If that same counsel continues to represent the same

client in arbitration proceedings, he will then have waived a privilege his client might otherwise be able to assert. If he has *not* made full and fair disclosure, he may well have violated the provisions of the "cooperative law" agreement. The different roles of the attorney representing parties in settlement negotiations based on "full and candid" disclosure of information and of the attorney representing his client in court set up the potential for a conflict of interest or waiver of the client's privilege. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06, 1.07.[4]

I recognize that it is not inevitable that representation of a client in "cooperative law" or collaborative law proceedings followed by representation of that same client in litigation, or, as here, in subsequent binding arbitration, would lead to the conflicts of interest contemplated by Rules 1.06 and 1.07 of the Rules of Disciplinary Conduct. However, it is reasonable to infer that it is precisely to avoid the potential for such conflicts of interest arising upon the failure of settlement negotiations between opposing parties in the informal full disclosure setting of collaborative law proceedings that Texas's collaborative law statute expressly

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4 Rule 1.06 is the general rule on attorney conflicts of interest. It provides that, within limitations, a lawyer shall not represent "opposing parties to the same litigation" or any person if representation of that person "involves a substantially related matter in which that person's interests are materially and directly adverse to the interest of another client" or "reasonably appears to be or become adversely limited by the lawyer's . . . responsibilities to another client or to a third person. . . ." TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(a), (b), *reprinted in* TEX. GOV'T. CODE ANN., tit. 2, subtit. G app. A (Vernon 2005).

Rule 1.07 addresses conflicts of interest when an attorney acts as an intermediary. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.07(a).

mandates that counsel in the collaborative law negotiations withdraw upon the failure of those negotiations.

I would hold that Keen is disqualified from representing Gary in on-going dissolution of marriage proceedings under the express public policy of the State of Texas.

Submission of Dispute to Arbitration under the Cooperative Law Agreement

Mary also argues that the trial court clearly abused its discretion by requiring her to proceed to arbitration under an alternative dispute resolution agreement that fails to comply with Texas statutory law and is against public policy.

A party attempting to compel arbitration must first establish that the dispute in question falls within the scope of a valid arbitration agreement. *J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 227 (Tex. 2003). If the other party resists arbitration, the court must determine whether a valid arbitration agreement exists. *Id*. If the court finds that the claim falls within the scope of a valid arbitration agreement, the court has no discretion but to compel arbitration. *Forest Oil Corp.*, 268 S.W.3d 51, 56 (Tex. 2008).

While defenses attacking the validity of a contract as a whole and not specifically aimed at the agreement to arbitrate are for the arbitrator rather than the court, the presumption favoring arbitration arises only after the party seeking to compel arbitration proves that a valid arbitration agreement exists. *In re Morgan*

Stanley & Co., 293 S.W.3d 182, 185 (Tex. 2009) (orig. proceeding). "[W]here the 'very existence of a contract' containing the relevant arbitration agreement is called into question, the . . . courts have authority and responsibility to decide the matter." *In re Morgan Stanley*, 293 S.W.3d at 187 (quoting *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 429 (5th Cir. 2004)). Any claim that necessarily calls the existence of an agreement to arbitrate into question is a question for the court. *Id.* at 190.

In determining whether a valid agreement to arbitrate exists, courts generally apply ordinary state-law principles that govern the formation of contracts. *In re D. Wilson Const. Co*, 196 S.W.3d 774, 781 (Tex. 2006); *J.M. Davidson*, 128 S.W.3d at 227–28; *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 1924 (1995). Under Texas law, as with any contract, agreements to arbitrate are valid unless grounds exist at law or in equity for revocation of the agreement. *In re Poly-America, L.P.*, 262 S.W.3d 337, 348 (Tex. 2008). "The burden of proving such a ground—such as fraud, unconscionability or voidness under public policy—falls on the party opposing the contract." *Id.* A trial court's determination regarding the validity of an arbitration agreement is a legal question subject to de novo review. *Forest Oil Corp.*, 268 S.W.3d at 55 & n.9; *J.M. Davidson*, 128 S.W.3d at 227.

Here, Chapter 6 of the Family Code provides that a court shall "refer a suit for

dissolution of marriage to arbitration" upon the "written agreement of the parties." TEX. FAM. CODE ANN. § 6.601 (Vernon 2006). The provision presumes, however, that the parties' agreement is a valid agreement to arbitrate under Texas law. The arbitration provision in the Agreement is clearly expressed to be the end result of the "cooperative law" process in the event the parties do not reach a settlement, rather than a separate agreement to arbitrate as provided for in Family Code section 6.601. *See id.* § 6.601.

By providing for binding arbitration *in advance* of collaborative settlement negotiations should those negotiations fail and by failing to permit voluntary withdrawal from the "cooperative law agreement," the Agreement directly contravenes intent of the Legislature that such proceedings shall be voluntary and withdrawal shall be permitted at any time. The final House Bill Analysis's statement of purpose expressly states, "The collaborative law process offers parties the option to negotiate in good faith for an out-of-court settlement. The process is entirely voluntary and participation may be terminated at any time." House Comm. on Civil Practices, Bill Analysis, Tex. H.B. 1363, 77th Leg., R.S. (2001).

The arbitration clause also contravenes subsection 6.603(f) of the collaborative law statute, which requires that in the event collaborative law procedures do not result in a settlement, "the parties shall file . . . a status report with the court not later than the 180th day after the date of the written agreement to use

the procedures . . . ." TEX. FAM. CODE ANN. § 6.603(f)(1). The clause also contravenes subsection 6.603(g), which requires that if the collaborative law procedures do not result in settlement by the second anniversary of the date suit was filed, the court may set the suit for trial on the regular docket or dismiss it. *Id.* § 6.603(g).

Finally, the collaborative law statute provides that the parties' counsel may not participate in litigation except to seek court approval of any settlement agreement and must withdraw if the proceedings fail. *Id.* § 6.603(b), (c)(4). Necessarily, counsel who have participated in informal collaborative settlement negotiations may not appear in court and request an order sending the parties to binding arbitration, much less binding arbitration in which the same counsel will continue to represent the parties following failure of the settlement negotiations.

The parties' "cooperative law agreement" intentionally avoids the provisions for court supervision of settlement negotiations and denies recourse to the courts to a party to the Agreement if the other party fails to participate in the negotiations in good faith, sending them to binding arbitration instead. In addition, the arbitration provision is intended to apply even if, as here, one of the parties continues to be represented by the same counsel who represented that party in the settlement negotiations, contravening the letter and intent of the public policy of Texas as stated in sections 1.101 and 6.603 of the Family Code.

Thus, even if I had not concluded that the entire Agreement was void, I would hold that the inclusion of an arbitration provision in the parties "cooperative law agreement" violates the letter and the spirit of sections 1.101 and 6.603 of the Family Code and that the provision is void an unenforceable as against the public policy of the State of Texas.[5] *See In re Poly-America*, 262 S.W.3d at 348 (holding that agreements to arbitrate are valid unless grounds exist at law or in equity for revocation, including "voidness under public policy").

Conclusion

For all the foregoing reasons, I cannot agree with the majority's conclusion that a private marriage dissolution contract not authorized by Chapter 6 of the Family Code is valid and enforceable, the necessary implication being that parties who do not wish to follow Texas's statutory provisions for dissolving a marriage do not have to do so, a holding that contradicts both the plain language and the intent of section 1.101 of the Family Code regarding the public policy of the State of Texas with respect to marriage. Nor do I agree with the notion that parties may inextricably intertwine valid procedures for voiding a marriage, such as arbitration clauses, into illegal marriage dissolution contracts, validating the illegal provisions

[5] Because I would hold that the arbitration agreement is void, I would also hold that Mary's fourth issue, contending that even if formerly enforceable, the arbitration agreement is no longer enforceable, is moot.

or avoiding their taint.

I would hold that the public policy of the State of Texas as expressed in sections 1.101, 6.601, and 6.603 of the Family Code clearly prohibits Texas state courts from recognizing as a valid method for dissolving a marriage a private agreement that Chapter 6 of the Family Code does not recognize as a means of making a marriage void, and that it prohibits intertwining statutorily valid and invalid procedures regarding the dissolution of marriage to avoid the protections of law.

I would hold that both the parties' Cooperative Law Dispute Resolution Agreement and the arbitration provisions integral to it are contrary to the public policy of the State and void. I would further hold that the trial court abused its discretion by enforcing the parties' Cooperative Dispute Resolution Agreement, by denying Mary's motions to disqualify Keen as counsel in the divorce proceedings, and by ordering Mary to arbitrate her claims as provided in the Agreement.

I would provisionally **grant** the petition for writ of mandamus. I would, therefore, remand the case to the trial court for further proceedings consistent with this opinion and with sections 1.101 and 6.603 of the Family Code.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Hanks, and Higley.
Justice Keyes, dissenting.