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Resolving Guardianship Disputes[1]

Sarah Patel Pacheco

Author contact information:
Sarah Patel Pacheco
Crain, Caton & James, P.C.
Houston, TX
spacheco@craincaton.com
713-658-2323

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SARAH PATEL PACHECO
Crain, Caton & James, P.C.
1401 McKinney, 17th Floor
Houston, Texas 77010
spacheco@craincaton.com
(713) 658-2323

Sarah Patel Pacheco is a shareholder with the law firm of Crain, Caton & James, P.C., in Houston, Texas, where she generally limits her practice to litigation, administration and tax issues relating to estate, trust, guardianship and related fiduciary appointments. She was first elected of Crain, Caton & James, P.C.'s President in 2008 and currently serves in that capacity. She received her Doctor of Jurisprudence in May 1993 from Southern Methodist University, School of Law, Dallas, Texas, and received her undergraduate degree in accounting in May of 1990 from the University of Texas at Arlington.

She is a co-author of two of the West Publishing's Practice Guides: Probate and Wills, Trusts and Estate Planning and the editor of the Second and Third Editions of the State Bar of Texas' Guardianship Manual.

She has been Board Certified in Estate Planning and Probate Law by the Texas Board of Legal Specialization since 1998. In 2004, she was appointed to serve on State Bar of Texas Legal Specialization Estate Planning and Probate Exam Commission. And, she served as its chair between 2008 and 2010. In 2011, she was appointed to the State Bar of Texas Pattern Jury Charge Oversight Committee and continues to serve.

She has served as the course director for the State Bar of Texas 2015 Annual Fiduciary Litigation Course, 2013 Annual Advanced Estate Planning Strategies Course, 2011 Advanced Guardianship and Elder Law Course, 2006 Advanced Estate Planning and Probate Course, 2011 and 2003 Building Block of Wills, Trusts and Estate Planning Courses, and 2005 Nuts and Bolts of Wills, Trusts and Estate Planning Course. In addition, she has served on numerous additional CLE planning committees. She is a frequent author and speaker for various state and local professional organizations. In 2011, She was awarded the Standing Ovation Award by the staff of TexBarCLE.

She remains active in various local and state legal organizations including: Houston Bar Association, serving as the Probate, Trust & Estates Section's Chair from 2009 to 2010. She was elected as a fellow in the Houston Bar Foundation, Fellow in 2004 and in the Houston Young Lawyers Association in 2000. She has also served on the HBACLE Committee; serving as a Co-Chair 2008-2009, Institutes Subcommittee Co-Chair 2006-2007, and member 2005-2007, 2011: Judicial Polls Committee; 2008-2010: Co-Chair of Elder Law Committee (1998-2003): Texas Young Lawyers Association; Needs of Senior Citizens Committee (1999-2003): Generation-X Estate Planning Forum; Member (1999-present): Women Attorneys in Tax and Probate; Vice President, Programs (2000-2001), C.L.E. Officer (1999-2000), Disabilities & Elder Law Attorneys; Member, American Bar Association: Real Property, Probate and Trust Law and Litigation Sections; Member (1993-present).

She has been repeatedly selected as a Texas Super Lawyer and a Texas Rising Star by Texas Monthly, as a Top Lawyer in Houston, as one of the Best Lawyers Under 40 by H Texas Magazine, and as a Top Lawyer in Houston by Houston Magazine. She has also been selected as One of the Top 50 Female Texas Super Lawyers and One as the Top 100 Houston Super Lawyers by Texas Monthly Magazine. She has also been named as one of The Best Lawyers in America in the practice areas of Trusts and Estates annually since 2006 and Litigation – Trusts & Estates annually since 2012.

She was featured in Profiles in Professionalism by The Houston Lawyer Magazine in December of 2013 and was named the Best Lawyers' 2014 Lawyer of the Year in the area of Litigation - Trusts and Estates for the Houston region.

TABLE OF CONTENTS

I. GENERAL OVERVIEW

Alternative dispute resolution ("ADR") is not a single method for settlement as many people believe but, rather, it includes several techniques including negotiation, mediation, arbitration, case evaluation techniques, and private judging. Although the methods vary, all include a neutral third party who provides assistance and facilitates settlement. This outline provides an overview of the process, the law applicable to entering into binding agreements, possible strategies and considerations when actually negotiating and drafting the agreement.

II. REASONS TO MEDIATE

Numerous reasons exist to mediate pending litigation. In contested guardianships, however, mediation can be an especially beneficial vehicle. It tends to minimize both the financial and emotional costs of this type of litigation, an invaluable tool. The most common benefits include:

A. Preserving The Proposed Ward's Rights

Attorney ad litems of individuals with marginal capacity should be cognizant of the fact that their client, the proposed ward, faces possible disaster in the courtroom. Under such circumstances, mediation may be a useful vehicle for preserving their client's rights in a dignified manner. Remember, until the proposed ward is adjudicated incapacitated, he or she is presumed to have capacity. Thus, an agreement may be reached allowing the proposed ward to establish a management trust to manage his or her assets, potentially, avoiding a guardianship of at least the estate. *See* discussion *infra.* Ad litems may also be able to reach an agreement allowing them to continue utilizing a power of attorney – an action that may otherwise be questioned.

B. Avoiding The Cost Of Litigation

Litigating guardianships can cost tens of thousands if not hundreds of thousands of dollars. Since both the successful and unsuccessful parties may seek the payment of their fees from the proposed ward's estate, this can be a devastating cost, affecting the resources available to the proposed ward and, thus, the value of his or her estate at death.

C. Preserving Family Relationships

The only disputed issue in most contested guardianships is who should serve as guardian. A lifetime of resentment between children may be the root of the contest. Mediation may be a means to avoid completely severing the family relationship and to reduce the stress on the proposed ward as each side postures to obtain his preference to serve.

D. Bridge For Communications

Unfortunately, a "rambo" litigator, or counsel's or the parties inability to communicate effectively because of their dislike for each other, may be an impediment to informal settlement discussions. In these cases, mediation may provide the necessary intermediary allowing meaningful settlement discussions.

E. Texas Law Favors Settlement Agreements

Courts have consistently held that encouraging settlement and compromise is in the public interest. *See Bass v. Phoenix Seadrill/78, Ltd.*, 749, F.2d 1154, 1164 (5th Cir. 1985); *Knutson v. Morton Foods, Inc.,* 603 S.W.2d 805, 808 (Tex. 1980); *Gilliam v. Alford*, 69 Tex. 267, 6 S.W. 757, 759 (Tex. 1887); *see also* TEX. CIV. PRAC. & REM. CODE § 154.002 (policy of state of Texas to encourage resolution of disputes and "early settlement of pending litigation through voluntary settlement procedures").

The Texas Supreme Court and a number of appellate courts have expressly confirmed that they continue to favor and support settlement agreements in matters involving estates and trusts. *See Shepherd v. Ledford*, 962 S.W.2d 28 (Tex. 1998*); In Re Estate of Hodges,* 725 S.W.2d 265, 267 (Tex. App.–Amarillo 1986, writ ref'd n.r.e.); *Estate of Morris*, 577 S.W.2d 748, 755-56 (Tex. Civ. App.–Amarillo, 1979, writ ref'd n.r.e.). And recent amendments to the Texas Estates Code indicate this preference extends to guardianships. *See* TEX. ESTATES CODE § 1055.151.

III. GETTING TO MEDIATION

The most common form of ADR used in guardianship proceedings is mediation. Mediation is a facilitated negotiation process. The term "mediation" is derived from the Latin term "mediare" which means to be in the middle. A mediator is a neutral third party who does not force a settlement but, rather, facilitates communication between the parties, assists the parties by focusing on the real issues and generates options for settlement. Kimberlee K. Kovach, ADR - DOES IT WORK? SOUTH TEXAS COLLEGE OF LAW, Advanced Civil Litigation Institute (1989). The Texas Lawyer's Creed requires attorneys to advise their clients of the availability of alternative ways to resolve disputes, such as mediation.

Mediation may be voluntary or court-ordered. In a voluntary mediation, the litigants and their attorneys simply choose the mediator and date, and attend. In some cases, one party applies to the court to order the case to mediation and appoint a mediator. Section 152.003, et seq., of the Texas Civil Practice and Remedies Code provides authority for referring a case to alternative dispute resolution. In particular, Section 152.001 provides that:

> A judge of a district court, county court, statutory county court, probate court, or justice of the peace court in a county in which an alternative dispute resolution system has been established may, on motion of a party, refer a case to the system. Referral under this section does not prejudice the case.

TEX. CIV. PRAC. & REM. CODE § 152.003.

Any party may object to the referral of a case to mediation. If the court determines there is a reasonable basis for the objection, it may not refer the dispute. *See* TEX. CIV. PRAC. & REM. CODE § 154.022.

If the parties agree to mediate voluntarily, they should execute a Rule 11 Agreement or an Agreement to Mediate. These agreements should confirm the date, place, time, cost, and the name of the mediator. They should also confirm who will be present and, who may attend as their representative with authority to enter into settlement, if they are unable to attend.

Once the mediation is scheduled, the mediator generally will send each party a confirmation and request for information. Unless requested in a specific form, most attorneys submit general information about the parties and a brief summary of (i) agreed and disputed facts, (ii) disputed issues of law, and (iii) any prior settlement offers.

Before incurring the time and expenses to prepare and attend mediation, it is important to verify that all parties necessary to achieve settlement will be present. For example, if a party is unable to attend and plans to send a representative, i.e., under a power of attorney, the power of attorney should be presented to the other parties prior to the mediation to avoid issues of invalid authority at the mediation.

Finally, one should prepare their opening statement so the other side will have an overview of their cases in a non-threatening manner, informing them of what to expect if settlement is not reached. Mediators often instruct the parties to only listen to the other sides opening statement, and to ignore their own.

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Also available as part of the eCourse
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