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# **Settlements of Guardianship Disputes**

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She is co-author of West Publishing's Texas Probate Practice Guide and West Publishing's Texas Wills, Trusts and Estate Planning Practice Guide, and the Editor of the State Bar of Texas' Guardianship Manual (4<sup>th</sup> Ed).

Texas Monthly has been named Ms. Pacheco as one of the Top 100 Texas Super Lawyers and has repeatedly named her as one of the Top 50 Female Texas Super Lawyers, one of the Top 100 Houston Super Lawyers, and a Texas Super Lawyers,. In addition, she has been consistently named as one of The Best Lawyers in America in the practice areas of Trusts and Estates annually since 2006 and Litigation – Trusts & Estates since 2012. She was selected as Best Lawyers' Litigation - Trusts and Estates "Lawyer of the Year" for the Houston Region in 2014, 2017 and 2021.

In addition to serving as Chair of the Guardianship Manuel Committee, she served on the State Bar of Texas Legal Specialization Estate Planning and Probate Exam Commission from 2004-2010, including as its Chair her last term, and served on State Bar of Texas Pattern Jury Charge Oversight Committee for two terms. She has been active in various local and state legal organizations including: Houston Bar Association, Probate, Trust & Estates Section; Chair 2009-2010: CLE Committee; Judicial Polls Committee; 2008-2010: Houston Bar Foundation, Fellow (elected 2004); Houston Young Lawyers Association; Fellow: Texas Young Lawyers Association; Needs of Senior Citizens Committee; American Bar Association: Real Property, Probate and Trust Law and Litigation Sections; Member. She has been member for over 20 years of the Generation-X Estate Planning Forum.

She is a frequent author and speaker for various state and local professional organizations. In addition, she has served on numerous additional CLE planning committees and spoken at over 100 State Bar of Texas events. She has served as the course director for the State Bar of Texas' Advanced Fiduciary Litigation Course, Advanced Estate Planning Strategies Course, Advanced Estate Planning and Probate Course, Advanced Guardianship and Elder Law Course, Building Block of Wills, Trusts and Estate Planning Course, and Nuts and Bolts of Wills, Trusts and Estate Planning Course. In recognition of her contributions to the State Bar of Texas, she was awarded the 2011 Standing Ovation Award by the staff of TexBarCLE.

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## TABLE OF CONTENTS

<b>I.</b>	<b>SCOPE OF ARTICLE .....</b>	<b>1</b>
<b>II.</b>	<b>LEGAL BASIS FOR SETTLEMENT AGREEMENTS.....</b>	<b>1</b>
	A. Contract Law.....	1
	B. Rule 11 of the Texas Rules of Civil Procedure.....	2
	C. Texas Civil Practice and Remedies Code Section 154.071.....	3
	D. Texas Estates Code Sections 1055.151 and 1055.152 .....	4
<b>III.</b>	<b>PARTIES .....</b>	<b>5</b>
	A. Guardianship Lawsuits .....	5
	B. Related Estate Claims and Lawsuits .....	6
	C. Related Trust Claims and Lawsuits .....	7
	D. Related Declaratory Judgment Claims.....	7
<b>IV.</b>	<b>APPOINTMENT OF GUARDIAN .....</b>	<b>7</b>
	A. Initial Appointment.....	7
	B. Successor Appointments.....	8
	C. Successor if Noncompliance by Appointee .....	8
<b>V.</b>	<b>LEAST RESTRICTIVE ALTERNATIVES .....</b>	<b>8</b>
	A. Confirm Medical Least Restrictive Alternative .....	8
	B. Confirm Financial Least Restrictive Alternative .....	9
	C. Back-Up Plan if Least Restrictive Alternative Fails .....	10
	D. Prohibition on Future Transactions.....	10
<b>VI.</b>	<b>GRANTING RIGHTS TO OTHERS.....</b>	<b>10</b>
	A. Access and Visitation.....	10
	B. Medical Information .....	10
	C. Use of Care Manager .....	11
	D. Financial Information .....	12
<b>VII.</b>	<b>CONFIDENTIALITY AND RETURN OF INFORMATION OBTAINED THROUGH DISCOVERY .....</b>	<b>12</b>
	A. Limitations on Disclosures of Information Obtain in Litigation .....	12
	B. Requiring Return or Destruction of Confidential Information Produced in Litigation.....	13
	C. Other Considerations .....	14
<b>VIII.</b>	<b>TRYING TO PREVENT FUTURE CONTESTS &amp; INTERFERENCE BY SAME PARTIES .....</b>	<b>14</b>
	A. Prohibiting Future Will Contests .....	14
	B. Prohibiting Future Interference with Business Interests .....	15
<b>IX.</b>	<b>PREPLANNING THE FUNERAL .....</b>	<b>16</b>
<b>X.</b>	<b>PLANNING FOR FUTURE DISPUTES .....</b>	<b>17</b>
	A. Notice of Default and Time to Cure .....	17
	B. Mediation .....	17
	C. Waiver of Right to Jury Trial.....	17
	D. Arbitration.....	17
	E. Waiver of Right to Appeal.....	19
<b>XI.</b>	<b>AGREED MEANS FOR ENFORCEMENT .....</b>	<b>19</b>
	A. Breach of Contract.....	19

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B.	Enforcement By Judgment of Court .....	20
<b>XII.</b>	<b>RELEASES.....</b>	<b>21</b>
A.	Initial Considerations .....	21
B.	Covered Claims.....	21
C.	Covered Transactions .....	23
D.	Excluded Claims or Transactions .....	24
E.	Identify Released Parties and Nonparties .....	24
F.	Delaying Effective Date Of Release .....	27
<b>XIII.</b>	<b>REPRESENTATIONS, DISCLOSURES AND WAIVER PROVISIONS.....</b>	<b>28</b>
A.	Representations .....	28
B.	Disclosures.....	28
C.	Fraudulent Inducement Claims .....	30
D.	Disclaimers of Reliance .....	30
<b>XIV.</b>	<b>EFFECTUATING THE TERMS THROUGH DISMISSALS AND JUDGMENTS.....</b>	<b>31</b>
A.	Nonsuits & Dismissals.....	31
B.	Agreed Orders and Judgments .....	32
<b>XV.</b>	<b>SETTLEMENT CHECKLIST .....</b>	<b>32</b>

## I. SCOPE OF ARTICLE

The mediation and settlement of guardianship disputes is used on an increasing basis. So much so, the Texas Estates Code was amended to include specific provisions addressing mediation and related agreements. And courts routinely require mediation to occur prior to trial. And even if not court ordered, mediation of these matters provides a means to minimize the emotional and financial costs of this type of litigation, as settlement often (i) preserves the ward's property, (ii) avoids additional litigation costs, (iii) preserves family relationships, and (iv) acts as a bridge for communication. The unusual nature of a guardianship, however, results in the drafting of some unique provisions. And often includes additional claims such as fiduciary claims related to agents, executors and trustees and future challenges to documents.

Thus, effective settlements involve a number of considerations that range from who should be a party and in what capacities, to how to structure the settlement, how to effectuate its terms, when releases should be effective and to what acts, and how to mitigate future attempts to set them aside. This article addresses many of these fundamental considerations and provides suggestions to support an agreement's enforcement.

## II. LEGAL BASIS FOR SETTLEMENT AGREEMENTS

Settlement agreements are founded on both statutory and common law principles. Courts and parties often employ the fundamentals of contract law to establish, interpret and enforce settlement agreements. Rule 11 of the Texas Rules of Civil Procedure requires enforceable agreements between parties and their counsel in pending litigation. Section 154.071 of the Civil Practice and Remedies Code allows for the enforcement of agreements reached through mediation or settlement. Finally, sections 1055.151 and 1055.152 provide specific requirements applicable to mediation and settlement of guardianships. A discussion of each of these basic tenets follows.

### A. Contract Law

Compromise and settlement agreements are governed by the rules relating to the construction of contracts, including the intent of the parties and the offer and acceptance by the parties. See *Schlumberger Technology Corp. v. Swanson*, 959 S.W.2d 171, 178 (Tex. 1997); *Johnson v. J.M. Hubert Corp.*, 699 S.W.2d 879, 882 (Tex. App. – Amarillo 1985, writ ref'd n.r.e.) (contains release); *Stewart v. Mathes*, 528 S.W.2d 116, 118 (Tex. Civ. App. – Beaumont 1975, no writ); *TAG Resources v. Petroleum Well Services*, 791 S.W.2d 600, 605 (Tex. App. – Beaumont 1990, no writ).

A contract should generally define its essential terms “with sufficient detail to allow a court to determine the obligations of the parties.” *Montanaro v. Montanaro*, 946 S.W.2d 428, 430 (Tex. App. – Corpus Christi 1997, no writ) citing *T. O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992); see also *Gannon v. Baker*, 830 S.W.2d 706, 709 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1992, writ denied); *University Nat'l Bank v. Ernest & Whinney*, 773 S.W.2d 707, 710 (Tex. App. – San Antonio 1989, no writ).

Parties may, however, agree to certain contractual terms and leave other matters to be decided at a later time. See *Montanaro*, 946 S.W.2d at 430 citing *Scott v. Ingle Bros. Pacific*, 489 S.W.2d 554, 555 (Tex. 1972); *McCulley Fine Arts Gallery v. “X” Partners*, 860 S.W.2d 473, 477 (Tex. App.–El Paso 1993, no writ); *Magcobar North American, Inc. v. Grasso Oilfield Services, Inc.*, 736 S.W.2d 787, 795 (Tex. App.–Corpus Christi 1987, writ dismissed w.o.j.); *Frank B. Hall & Co. Inc. v. Buck*, 678 S.W.2d 612, 629 (Tex. App.–Houston [14<sup>th</sup> Dist.] 1984, writ ref'd n.r.e.), cert. denied, 472 U.S. 1009, 105 S.Ct. 2704, 86 L.Ed.2d 720.

It is only when an *essential* term of a contract is left open for future negotiations that no binding contract exists. See *T. O. Stanley Boot Co.*, 847 S.W.2d at 221; *Cap Rock Elec. Co-op, Inc. v. Texas Utilities Elec. Co.*, 874 S.W.2d 92, 99 (Tex. App. – El Paso 1994, no writ); *McCulley*, 860 S.W.2d at 477. Texas courts have

indicated that what constitutes an “essential term” will be decided on a case-by-case basis. *See Charco Properties Inc. v. Law, Snakard, Garibill, P.C.*, 985 S.W.2d 262 (Tex. App. – Fort Worth 1999, n.w.h.) (time of performance not essential term); *Reppert v. Beasley*, 943 S.W.2d 172, 174 (Tex. App. – San Antonio 1997, no writ) (how agreement to be enforced was essential term); *Montanaro*, 946 S.W.2d at 431 (settlement agreement contained essential terms even though terms of required promissory did not include interest rate); *Lerer v. Lerer*, 2002 WL 31656109 (Tex.App.— Dallas 2002, pet. denied)( appellate court held that none of “(1) a specific description of the real property to be sold; (2) the expiration of the listing agreement for the sale of the real property and the appointment of brokers; (3) who controls the property during the sales; (4) who controls the proceeds from the sales of the property; (5) the date of the valuation of the properties and the terms of any sale; (6) the failure of the current trustee of the Trust to agree to the terms of the [settlement agreement], (7) the deduction of taxes and costs from sale proceeds for LRC's operations; (8) the appointment of a guardian ad litem; (9) mandatory mediation with a specified mediator; (10) payment of attorney's fees in future disputes; and (11) the terms of the mutual release” were essential and, thus, have no effect on the enforceability of the settlement agreement.).

## **B. Rule 11 of the Texas Rules of Civil Procedure**

Rule 11 of the Texas Rules of Civil Procedure provides the requirements for enforcement of a settlement agreement relating to any pending lawsuit. Rule 11 is often included in settlement agreements to provide an additional basis for enforcement. Rule 11 provides as follows:

Unless otherwise provided in these rules, no agreement between attorneys or parties touching any suit pending will be *enforced* unless it is in writing, signed and filed with the papers as part of the record, or unless it is made in open court and entered into record.

TEX. R. CIV. PROC. 11 (emphasis added).

### 1. Writing Requirement

Rule 11 requires the agreement to be in writing to be enforced. This requirement has been relied upon by the Texas Supreme Court to deny enforcement of an oral settlement agreement after a lawsuit was filed. *See Kennedy v. Hyde*, 682 S.W.2d 525, 530 (Tex. 1984).

Rule 11 does not, however, prohibit oral settlement agreements made *prior* to the initiation of the litigation. *See Estate of Pollack v. McMurrey*, 858 S.W.2d 388, 393 (Tex. 1993); *Adams v. Petrade Int'l Inc.*, 754 S.W.2d 696, 714-15 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1988, writ denied). Oral agreements to settle before the initiation of a lawsuit are governed by contract law and Section 26.01 of the Texas Business & Commerce Code. *See Carter v. Allstate Ins. Co.*, 962 S.W.2d 268, 271 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1998, writ denied); *see also Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997) (Texas Supreme Court assumed oral statements about pre-lawsuit settlement agreement made without object confirmed existence of enforceable agreement during the lawsuit).

### 2. Pending Suit Requirement

Rule 11 is limited to “pending” lawsuits. *Estate of Pollack v. McMurrey*, 858 S.W.2d at 388. This includes lawsuits on appeal. *See Cunningham v. Zurick*, 352 S.W.3d 519 (Tex.App.—Fort Worth, 2011, pet denied).

### 3. Multiple Documents May Constitute Rule 11 Agreement

Note that an enforceable Rule 11 may arise from one document or a series of documents, such as letters between counsels of record. *See Padilla v. LaFrance*, 907 S.W.2d 454 (Tex. 1995). In *Padilla*, the plaintiff's counsel made a settlement demand in a letter to the defense counsel and requested the delivery of settlement documents and payment by a certain date. The defendant responded to the demand in a subsequent letter in which the defendant agreed to pay the demanded sum but inquired how a pending lien would be handled. Plaintiff's counsel responded with a third letter confirming the matter had been settled. Approximately one week after the demand date, the defendant then proceeded to issue settlement checks, along with a formal

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