ALTERNATIVE RESOLUTIONS

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ALTERNATIVE DISPUTE RESOLUTION SECTION

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CHAIR'S CORNER
By Donald R. Philbin, Jr., Chair, ADR Section

Mediation Training Improves Litigation Outcomes
Annual ADR Section CLE:
January 23, 2015 in Austin

Trial lawyers with mediation training make the right call on whether to accept the last offer or proceed to trial more often than those without it. In fact, plaintiff's attorneys reduced their error rate with mediation training by 12% and defendant's attorneys reduced theirs by 4%.

Palo Alto decision analyst Randall Kiser has been studying jury verdicts against the last offers and demands for a decade. His study of California attorneys, Jonathan D. Glater, Study Finds Settling Is Better That Going to Trial (Aug. 7, 2008), made the front page of The New York Times. He has since broadened the research to other states.

Kiser's findings have been widely discussed and critiqued, but the methodology was straightforward: if the verdict fell below the defendant's last offer, it was an error not to take that offer even if the plaintiff was awarded something. Same for the defendant: they erred if the verdict exceeded the plaintiff's last demand.

Kiser also measured the cost of error. It's one thing for a plaintiff to technically miss the last offer, it's another to miss is it by a large margin. So the cost of error was simply the magnitude of the error in dollars.

Plaintiffs were technically wrong (60% error rate) more often that defendants (25%). But defendant's cost of error was much higher when they were wrong: $1,403,654 v. $73,400.

		Trial Lawyers Overall	With Mediation Training	Improvement
Plaintiff	Error Rate	60.0%	48.5%	12%
	Cost of Error	$73,400	$68,400	$5,000
Defendant	Error Rate	25.0%	21.5%	4%
	Cost of Error	$1,403,654	$889,200	$514,454

Interestingly, trial lawyers who also had mediation training were found to have both lower error rates and cost of error. Kiser controlled for a number of factors not knowing which would affect these numbers. He measured whether law school or firm, years of practice, and other variables reduced errors. But the only variable that materially reduced error rates and the cost of those errors turned out to be whether the advocates been trained in mediation.

Overall, trial attorneys with mediation training made fewer errors and they cost less. Plaintiff's attorneys with mediation training made 12% fewer errors and they cost $5,000 less. Defendant's attorneys made 4% fewer errors and they cost $514,454 less.

Inside This Issue:

A number of factors could have contributed to these findings and my space is limited. It does seem to make a good case for mediation training across practice areas – even for those who do not act as neutrals.

ADR Section Annual CLE in Austin on January 23, 2015

CLE Course Director and Council Member John DeGroote and TexasBarCLE have planned a great course for January 23, 2015 in Austin. It mixes legal and ethical updates with strategic advice for 6.5 CLE and 2.0 ethics hours.

"Mediation Dos and Don'ts" will help advocates and neutrals maximize value in the 99+% of cases that won't – because for whatever reason they just don't – go to trial and help advocates make the call as to which ones should be tried unless the offers improve.

"Early Case Mediation and Other Ways Mediators Can Add Value" will explore the push to mediate cases earlier in the process. The latest case "Update on Mediated Settlement Agreements" will help neutrals and advocates tack down those deals. And a lively discussion of "Mediation in the Internet Age" will spice up our lunch.

There are also case and ethical updates for arbitration. "Does Arbitration Have to be Litigated?" will bring us up to the minute on arbitration case law. "Mediation and Arbitration in Elder Law and Guardianship Law" will give specific updates in that area. Kim Kovach will wrap it up with a fun-filled look at "Ethical Issues in Mediation and Arbitration" to cap off your ethics requirement.

Great Return on Investment

The ADR Section consists not only of neutrals, but of lawyers in a wide variety of practice areas. Many members are trial lawyers. Others are business lawyers and general counsel looking for insights into how to maximize value in their cases.

Membership provides insightful content through this newsletter edited by Professor Tasha Willis, CLE programs, roundtables, and our mobile-friendly website that puts arbitration rules, articles, and other resources at your fingertips.

Professor Gene Roberts writes case updates for the Section blog. There are more than two dozen posts already and soon you'll be able to receive new posts delivered to your email box as they are published.

If there are ways the ADR Section can better enrich your practice, please let me or any of the Council members listed on the back of this newsletter know.

Best,
Don

SUBMISSION DATES FOR UPCOMING ISSUES OF
ALTERNATIVE RESOLUTIONS

Issue	Submission Date	Publication Date
Winter	December 15, 2014	January 15, 2015
Spring	March 15, 2015	April 15, 2015
Summer	June 15, 2015	July 15, 2015
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ETHICAL PUZZLER

By Suzanne M. Duvall*
Summer 2014

This column addresses hypothetical problems that mediators may face. If you would like to propose an ethical puzzler for future issues, please send it to Suzanne M. Duvall, 4080 Stanford Avenue, Dallas, Texas 75225, or fax it to214-368-7528.

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Once every year-or-so, the Ethical Puzzler asks leading ADR providers to submit the most interesting and puzzling ethical dilemmas that they have faced in their practice and how they solved (or failed to solve) those dilemmas. This is that time of year. Enjoy....

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Lionel Schooler, (Houston): This issue's puzzler hypothetical comes from the world of arbitration.

An individual (Ms. X) and her former employer were directed to arbitrate her claims concerning her treatment by the Employer during the time of her employment. The arbitration agreement called for the Federal Rules of Evidence and Civil Procedure to apply. The law firm representing the Employer assigned an equity partner and a new partner to the case, and they were involved in handling the matter from the date the Employee brought to the Employer's attention (through its HR Hotline) her concerns about her treatment.

These two attorneys conducted an internal investigation and apparently issued to the Employer a report on its results. The Employer later terminated Ms. X's employment, and she pursued her claim of wrongful treatment through appropriate administrative and judicial channels. The Employer was represented by its HR Director in the arbitration, and by the two attorneys who had conducted the investigation.

At the arbitration hearing, Ms. X as Claimant was called to testify. She had testified to notes she made periodically during the course of her employment, and many of these notes were offered into evidence, including some cryptic references to a meeting among the Employee and the two company attorneys during the internal investigation. During cross-examination by the younger of the two Respondent attorneys, he raised with the Claimant the subject of statements made by her during the internal investigation, statements which the Employer characterized during the arbitration proceeding as damaging admissions.

On the subject of the "damaging admissions," the cross-examination went something like this ("A" is the Attorney conducting the cross-examination, and "C" is the "Claimant"):

A: Ms. X, did you ever indicate that the following (a statement which would constitute an admission under the Federal Rules of Evidence by Ms. X) was true?

C: No, I did not.

A: Well, do you remember when my colleague sitting here and I came to meet with
you in a conference room at the company's offices?

C: Yes, I remember that.

A: Okay, then, Ms. X. Were you aware at the time that my colleague and I were there meeting with you as part of an investigation we were conducting into your complaint?

C: Yes, I think I knew that at the time.

A: And do you remember that my colleague and I arranged the meeting with you at the request of the company because you had submitted a complaint over the company HR Hotline about how you were being treated in the workplace?

C: I remember calling the Hotline and making the complaint, and I assumed that you were meeting with me to follow up about that, but I don't remem-

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ber details of the meeting.

A: Well, do you remember making that statement (the damaging admission) to me during our meeting?

C: No, I'm sorry. According to my notes, the meeting you are talking about took place so long ago that I cannot remember much of what was discussed.
A: Oh, so you have notes of the meeting?

C: Well, I have some notes here that indicate the date and time we met, and who was present, and why we were having the meeting, but I don't have any notes about the specifics of what we discussed.

A: Well, I took notes at that meeting, Ms. X, did you know that?

C: Now that you mention it, I vaguely recall that you were writing down some notes while we were talking, but I never got to see the notes.

A: Well, Ms. X, would it surprise you to know that during that meeting you said the following to me: [at which point the attorney began to read, or synopsize, from a legal pad concerning one of the "damaging admissions" by Ms. X].

At this point, the arbitrator interrupted the attorney:

Arbit: Mr. A, I notice you appear to be reading from a legal pad of notes in front of you, and it appears you are about to read these verbatim. From the introduction to your question, it appears that these are your notes that you are reading, and that these notes result directly from your attendance at the meeting with Ms. X and your colleague, who is here today, who were apparently the only persons in the room at the time. It also appears to me that you are about to use your notes in an effort either to refresh the memory of the witness or to try to impeach the witness on a substantive matter related directly to the merits of her claim.

A: That's right, Your Honor.

Arbit: I am not a judge, but thanks for the compliment. "Mr. Arbitrator" will do.

A: I don't see why there is a problem, Mr. Arbitrator. I believe this witness is not being forthcoming with you, and I think I am entitled to demonstrate that.

Arbit: Well, I certainly do not want to tell you how to try your case. That is your decision. However, I believe that your line of questioning, if you continue it, will necessitate me to take certain action here which will have the effect of interfering with the progress of this hearing, and which could also affect your client's right to counsel of its choosing.

A: I am not following you, Mr. Arbitrator. [It was apparent by his expression that the Employer's HR Director was also mystified by this turn of events].

Arbit: Well, why don't we do this? Why don't we take a five minute break? During that time, you and your colleague and your client can go out in the hall and discuss the situation to decide how you would like to proceed. At that point, there was a break in the proceeding. About ten minutes later, the Employer's counsel and its representative returned to the hearing room, at which time, the younger attorney announced as follows:

Anyway, I believe you are heading down a path of examination here that is problematic. [When this comment was made, the older attorney's facial expression revealed that a "light" had just illuminated inside his head, as though he had begun to appreciate the dimensions of the problem. The younger attorney still did not appreciate the significance of the situation.]

A: Mr. Arbitrator, we have decided to move on to another topic.

William E. (Will) Hartsfield (Dallas): In a wage and hour employee lawsuit, the employer counterclaimed for the breach of a noncompete. Both attorneys believed that the noncompete was enforceable as written, both believed that the employee had breached, both believed that damages could be recovered and both believed that attorneys' fees can be recovered under a breach of contract theory relying on CPRC Section 38.001. Neither was aware that Business & Commerce Code Section 15.52 preempted other remedies available for breach of a noncompete and limited the employer to remedies provided by that Section. Neither was aware that Business & Commerce Code Section 15.51 limited remedies for a too broad noncompete and allowed an employee to recover his attorneys' fees if the employer sought to enforce a noncompete covenant broader than needed.

In the joint session, the employer's attorney emphasized, at length, the employee's risks on the noncompete counterclaim and that the employer's damages, especially its attorneys' fees, far exceeded the damages for the employee's claim, including his claims for attorneys' fees.

In private sessions with the employee and his attorney, none of the problems with the employer's counterclaim are raised.

In private sessions with the employer and its attorney, only the issues of enforceability of the noncompete and recovery of the employer's attorneys' fees are raised. The attorney remains adamant that his client can succeed on this counterclaim. The risk that the employee may recover his attorneys' fees if the employer seeks to enforce a too broad covenant is not raised.

At one point, the employer's attorney asks for another joint session to convey another settlement proposal directly to the employee.

(1) Does the mediator allow it?

Answer: Yes. While the employer's attorney may now know that the counterclaim is weak and while the employer's attorney may seek to emphasis the risks of the counterclaim when he conveys the settlement proposal, the employee selected his attorney and the over emphasis on the counter claim may prompt the employee's attorney to think that the employer's attorney "doth protest too much."

(2) Does the mediator ever raise the risk of the employee recovering his attorneys' fees if the employer seeks to enforce a too broad covenant?

Answer: Not overtly. The employer selected its attorney and raising the topic would allow the employer to "fix" a problem and reduce his risk. Just raising the issue of enforceability and recovery of the employers' attorney fees may prompt the attorney to find this risk.

Michael P. O'Reilly, (Corpus Christi): I have been a practicing Human Being for 71 years. I have been a Texas lawyer for 46 years. I have been a certified Family law Specialist for 35 years and I have been a Family Law Mediator for 20 years. Of late, I have become more and more aware of a recurring transaction in some mediations which creates a bit of a conflict between my two chosen professions (litigator-mediator).

The transaction occurs when I am conducting a mediation in which there is a large disparity between the talent and knowledge of the two lawyers in the two caucus rooms.

When I started out, no lawyer practiced Family Law. Everyone did something else and a divorce was just a fill in the blank transaction that lawyers did as an accommodation for their existing clients or friends. There was no Family Code until 1974 and the original only covered two Titles. The original annotated Family Code was little more than a pamphlet of 15 or 20 pages. Today, the annotated Family Code covers six titles and is over 1200 pages. The practice of Family Law has become a complicated and technical trap for the unwary.

In the practice of Family Law, what you don't know can hurt your client.

The situation that I describe above can happen in many different ways, but for illustrating the point, I have chosen the example of qualified retirement plans. Most retirement plans, such as an IRA or a 401(k) are reported by the plan administrator as having a dollar value. However, tax has not been paid on that amount. When you withdraw the money, you must report it as income and pay tax at regular income tax rates.

For example, if you are in a 20% effective tax bracket, when you withdraw $1,000.00 from your qualified retirement plan and pay your taxes on it, you only have $800.00 left in your pocket. In other words, that $1,000.00 in your 401(k) is not really worth $1,000.00.

It no longer surprises me, but it continues to frustrate me, to see how many times lawyers show up at a Family Law mediation and do not understand about tax affecting qualified plans. (Or any other technical area of the law)

And now for my ethical/moral dilemma.

The knowledgeable lawyer sends a settle proposal that "My client will keep the one million dollar savings account and your client can have the one million dollar IRA." (Over simplified, but not by much) The unaware lawyer says to his client "That sounds fair. I recommend that you do it."

Silent screams in my brain, followed by the following conversation with myself.

"I am the mediator in this room–I am not the lawyer."

"My loyalty is to the resolution of this case –not to either side."

"As the mediator, I do not give legal advice to either side."

"A mediator's function is that of a facilitator and catalyst and not a decision maker or fact finder."

"A mediator should be impartial."

"A mediator may not assist either party against the other."

"A mediator must preserve the confidences of the parties (and tactical plans of the attorneys)"

"A mediator may not substitute his or her judgment for the judgment of the parties."

And then, after I have had this little talk with myself, if both rooms are agreeable, I ink the deal. Maybe one of the lawyers did not do their job adequately, but I believe that I did mine.

Conclusion – Arbitration, employment law, family law – three distinct areas of ADR practice; each with its own ethical conundrum and each with its own "conversation with oneself" as to the "right" ethical decision. But wait, there's more! Our cup runneth over. In the next issue, three additional leading ADR providers will share their ethical dilemmas and resolutions, each of which will be as thorny and thought-provoking as those presented in this issue.

Suzanne M. Duvall is an attorney-mediator in Dallas with over 800 hours of basic and advanced training in mediation, arbitration, and negotiation. She has mediated over 2,500 cases to resolution and serves as a faculty member, lecturer and trainer for numerous dispute resolution and educational organizations in Texas and nationwide. A former Chair of the ADR Section of the State Bar of Texas, Suzanne has received numerous awards for her mediation skills and service including the Frank G. Evans Award for outstanding leadership in the field of dispute resolution, the Steve Brutsche Award for Professional Excellence in Dispute Resolution, the Suzanne Adams Award for Outstanding Commitment and Dedication to the Mediation Profession, and the Association of Attorney Mediators Pro Bono Service Award. She has also been selected "Super Lawyer" 2003 -2014 by Thomson Reuters and the publishers of Texas Monthly and has been named to Texas Best Lawyers 2009 – 2015 and Best Lawyers in America 2015. She holds the highest designation given by the Texas Mediator Credentialing Association; that of TMCA Distinguished Mediator.

DEAL, OR NO DEAL???
MEDIATED SETTLEMENT AGREEMENTS

By JoAl Cannon Sheridan

I. INTRODUCTION

The paper below was part of a larger paper written and presented at the 2014 State Bar of Texas Advanced Family Law Conference entitled "Settlement Agreements, Rule 11 Agreements, Informal Settlement Agreements and Mediated Settlement Agreements. The original paper attempted to enighten the bar about the pitfalls awaiting those who try to navigate their way from an executed settlement agreement to a signed, written order. This paper was edited to concentrate on the portion of the paper most relevant to this ADR newsletter.

IV. MEDIATED SETTLEMENT AGREEMENTS

A written mediated settlement agreement in a suit affecting the parent-child relationship is enforceable notwithstanding Rule 11. See Tex. Fam. Code § 153.0071 (d), (e). A written mediated settlement agreement in a suit for divorce is enforceable in the same manner. See Tex. Fam. Code § 6.602(b). Under these provisions, a mediated settlement agreement is binding in a suit if it:

(1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation; (2) is signed by each party to the agreement; and (3) is signed by the party's attorney, if any, who is present at the time the agreement is signed.

Id. §§ 6.602(b); 153.0071 (d) (emphasis added). If a mediated settlement agreement meets these requirements, a party is entitled to judgment on the mediated agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law. Id. §§ 6.602(c)); 153.0071(e). Notwithstanding the preceding subsections, a court may decline to enter a judgment on a mediated settlement agreement under section 153.0071 if the court finds that (1) a party to the agreement was a victim of family violence, and that circumstance impaired the party's ability to make decisions; and (2) the agreement is not in the child's best interest. Id. § 153.0071(e-1) (emphasis added).

The exception to the binding nature of mediated settlement agreements was upheld via split decision by the Texas Supreme Court in the recent case of In re Stephanie Lee, 411 S.W.3d 445 (Tex 2013). In the Lee case, Father of the child the subject of the suit brought a modification action against Mother, alleging that Mother had placed the child in danger by allowing Mother's husband, a registered sex offender, to have contact with the child. The parties attended mediation and executed a MSA providing that Father would have the exclusive right to determine the primary residence of the child and Mother's husband would be enjoined from coming within 5 miles of the child. Father appeared before the trial court to present the MSA for approval and judgment and informed the Court at the time that Mother's husband was a registered sex offender and that Mother had allowed her husband to sleep naked with the child in the bed. Based on the testimony of Father, the trial court refused to enter judgment on the MSA, finding that the entry was not in the best interest of the child. Mother petitioned the Court of Appeals for a writ of mandamus but the Court of Appeals upheld the trial court's judgment again based on the best interest test. Mother then petitioned the Texas Supreme Court for a writ of mandamus.

In its 5-4 decision, the Texas Supreme Court held that a trial court cannot decline to enter judgment on a validly executed MSA based solely on an inquiry into whether the MSA was in the child's best interest. In so holding, the Court found that parents are in a position to know what is in the best interest of their children and that successful mediation of child-custody disputes, conducted within statutory parameters, furthers a child's best interest by putting a halt to a potentially lengthy and destructive custody litigation. The Court further noted that the rules of statutory construction require that the more specific and more recently enacted provision of Section 153.0071 prevails over the more general provision of Section 153.002 of the Texas Family Code.

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Thus, part of the take-away of Lee is that Sections 6.602(b) and 153.0071(d) are virtually identical and are construed the same way. See, e.g., In re Joyner, 196 S.W.3d 883 (Tex. App.- Texarkana 2006, pet. denied); Beyers v. Roberts, 199 S.W.3d 354 (Tex. App.¬Houston [1st Dist.] 2006, pet. denied); In re Calderon, 96 S.W.3d 711 (Tex. App.-Tyler 2003, orig. proceeding); Boyd v. Boyd, 67 S.W.3d 398 (Tex. App.-Fort Worth 2002, no pet.). Both have very limited exceptions upon which the court can refuse to render judgment on the MSA, and must make specific findings in accordance with the intent of those statutes to do so.

Strict Compliance

At the outset, it is important to reiterate that, under sections 6.602 and 153.0071, the statutory language clearly set out that, if the terms of either section 6.602(b) or 153.0071(d) are complied with, a party is entitled to judgment on the mediated settlement agreement. Clearly, this means that there is no requirement for a separate suit to enforce the agreement, and that it cannot be repudiated to prevent judgment on the matter. See Beyers v. Roberts, 199 S.W.3d 354, 358 (Tex. App.-Houston [1st Dist.] 2006, pet. denied). Additionally, "[a] fundamental principle of statutory construction is that a more specific statute controls over a more general one." Id. at 359. (citing Horizons/CMS Healthcare Corp. v. Auld, 34 S.W.3d 887, 901 (Tex. 2000)). Thus, sections 6.602 and 153.0071 of the Family Code will control over any over general provision in regard to settlement agreements. See Id. (holding that section 153.0071(d) controls over section 153.133, which deals with agreed parental plan that create joint managing conservatorships); Garcia-Udall v. Udall, 141 S.W.3d 323, 331 (Tex. App.-Dallas 2004, no pet.) (holding that section 153.0071 controls over 153.007, because section 153.0071 deals specifically with mediated settlement agreements, while section 153.007 deals generally with agreements for joint managing conservatorships).

A mediated settlement agreement must meet all of the requirements of the Family Code in order to bind the parties. See Tex. Fam. Code § 153.0071(d), (e); Beyers v. Roberts, 199 S.W.3d 354 (Tex. App.-Houston [1st Dist.] 2006, pet. denied). In Vickery v. American Youth Camps, Inc., the Texas Supreme Court held that a final judgment founded upon a mediated settlement agreement must be in strict and literal compliance with the agreement. 532 S.W.2d 292, 292 (Tex. 1976).

In Spinks v. Spinks, the parties reached an agreement through court-ordered mediation. 939 S.W.2d 229, 229 (Tex. App.-Houston [1st Dist.] 1997, no writ). The agreement was signed by the parties, their attorneys, and the mediator. Id. The agreement provided for custody, property division, child support, alimony and insurance. Id. It also contained a statement that the parties stipulated and agreed that the agreement was not subject to revocation. Id. The appellant repudiated the agreement while testifying at trial, but the trial court rendered a decree based on the mediated settlement. Id. Appellant appealed, and because the stipulation by the parties that the agreement was not revocable was not underlined, which was the statutory requirement at the time, the case was reversed and remanded. Id. See Streety v. Hue Thi, 2010 WL 2278617 at *4 (Tex. App. – Dallas 2010, no pet.)(The mediated settlement agreement contains no language indicating the agreement is not subject to revocation. In addition, it does not contain any language from which one could infer that further disputes on the agreement are foreclosed).

In In re A.H, the appellant argued that a mediated settlement agreement was not in strict compliance because the statement, "This is a binding and IRREVOCABLE agreement" that was located in paragraph eight of the agreement was insufficient to meet the statutory requirements. 114 S.W.3d 750, 752¬53 (Tex. App.-Dallas 2003, no pet.). The court dismissed this argument, however, because in addition to the language above, the bottom of pages two and three also contained that following statement: "THE PARTIES AGREE THAT THIS SETTLEMENT AGREEMENT IS BINDING AND NOT SUBJECT TO REVOCATION. THIS AGREEMENT MEETS THE REQUIREMENTS OF SECTION 153.0071 OF THE TEXAS FAMILY CODE." Id. at 753. The court held that this statement clearly complied with statutory requirements regardless of the statement made in the body of the agreement. Id.

Apparently, it also does not matter whether the court orders the parties to mediation or the parties attend at their own initiative. See In re J.A. W.-N., 94 S.W.3d 119 (Tex. App.-Corpus Christi 2002, no pet.). In J.A. W.-N., the parties agreed to meet with a mediator to discuss their concerns regarding an agreed order in a SAPCR proceeding. Id. at 120. Following the meeting, they signed a "Mediated Settlement Agreement" that modified the terms of support and possession of and access to the child. Id. The agreement was signed by the parties, their attorneys, was initialed on each page, and recited the required language from

the Family Code section 153.0071. Id. Later, appellant repudiated the agreement, but at a hearing held after that, the trial court signed a written order on the agreement. Id. On appeal, appellant argued that the agreement was not a statutory mediation agreement because the court did not refer the parties to the mediation as set out in section 153.0071(c). Id. The appellate court rejected that argument, holding that nothing in that section requires a written request or written order of referral based in either the parties' or the court's own motion in order for parties to mediate their differences and execute a mediated settlement agreement. Id. at 121. The court stated that there was no authority for such a proposition and to hold so "would have a chilling effect on the mediation process." Id. In overruling appellant's point, the court noted that "the plain language...of the agreement indicated that the parties intended their agreement to be final." Id.

Likewise, it does not matter if the dispute is in regard to a suit or a post-suit dispute. In re J.A.W.-N. involved a dispute about terms and conditions of a pre-existing order. 94 S.W.3d at 119 (Tex. App.-Corpus Christi 2002, no pet.). To address these concerns, the parties agreed to meditation. Id. at 120. The result was an agreement that was signed by the parties, attorneys, and the mediator. Id. When appellant refused to sign an agreed order based on the mediated agreement, appellee filed a motion for judgment, which the trial court granted and signed a written order on the agreement. Id. On appeal, appellant complained that section 153.0071 applies to suits only and did not apply to post-suit disputes. As support for this argument, he pointed to the language of section 153.0071(c), which states that "the court may refer a suit affecting a parent-child relationship to mediation." Id. at 123. The court stated that, as the parties had "agreed to mediation without court intervention" and also "came within the statute by satisfying the elements of section 153.0071(d)," the section applied to the case and the appel1ate court affirmed the judgment of the trial court. Id. at 123. See also Kilroy v. Kilroy, 137 S.W.3d 780, 789 (Tex. App.-Houston [1st Dist.] 2004, no pet.) (holding that because the parties' Rule 11 agreement did not require that they petition the trial court before initiating arbitration proceedings, there was no requirement under section 153.0071(c) or any other rule to do so).

Cannot Withdraw Consent

In the case of In re Circone, it was argued that the appel1ant should be able to withdraw consent after the requirements of the Family Code had been met. 122 S.W.3d 403, 404 (Tex. App.-Texarkana 2003, no pet.). Appellant contended that the trial court erred in its application of the alternative dispute resolution procedures of the Family Code. Id. at 405. To support that position, appellant argued that the court erred when it refused to permit him to introduce evidence about the actions or inaction of the attorney ad litem who represented the children. Id. at 406. But the court pointed out that the Code provides for this within the context of a binding arbitration proceeding under section 153.0071(b) of the Family Code, and the Circone case dealt with mediation under section 153.0071 (c)-(e). As the requirements under that provision were met, the court held that "the trial court had no authority to go behind the signed agreement of the parties, which explicitly... stated in underlined capital letters that agreement was not subject to revocation." Id. at 406.

In making this determination, the court noted that the language of the statute at that time differed from that which existed at the time of another case that was frequently cited and had analyzed the statute, Davis v. Wickham, 917 S.W.2d 414, 416 (Tex. App.-Houston (14th Dist.] 1996, no writ). The Davis court held in that case that, if the parties reach a settlement through alternative resolution procedures and execute a written agreement pursuant to Rule 11 disposing of the dispute, the agreement is enforceable in the same manner as any other written contracts. Id. at 406 n.4. The Texarkana Court noted that it had since been recognized that the Davis case did not address mediation agreements that meet the requirements of either section 6.602 or 153.0071 of the Family Code and so provided no guidance for those provisions. Id. (citing Cayan v. Cayan, 38 S.W.3d 161 (Tex. App.-Houston [14th Dist] 2000, pet. denied)). The Court pointed out that two other courts had reviewed the current statute and applied it as written. The Corpus Christi court held that a trial court is required to enter judgment on a mediated settlement agreement even if the mediation is not under the direction of the court. In re J.A.W.-N., 94 S.W.3d 119, 121 (Tex. App.-Corpus Christi 2002, no pet.). Likewise, the Eastland court analyzed a similar case and held that, in a mediated settlement agreement context under the statute, even if one party did withdraw consent, the trial court was required to enter judgment on the agreement. Alvarez v. Rei-

ser, 958 S.W.2d 232, 233-34 (Tex. App.¬Eastland 1997, pet. denied).

C. Best Interest of the Child.

A best interest hearing is not required before entering an order pursuant to a mediated settlement agreement. Beyers v. Roberts, 199 S.W.3d 354 (Tex. App.-Houston [1st Dist.] 2006, pet. denied). In Beyers, the appellant contended that the Family Code and the common law created a duty on the trial court to conduct an evidentiary hearing to determine whether the parents' custody agreements were in the child's best interest in every case. Id. at 359. The court noted that "[n]othing in the statute requires that a trial court conduct a best interest hearing before entering an order pursuant to a mediated settlement agreement. Subsection (e) of section 153.0071 states that a party is entitled to judgment on a mediated settlement agreement so long as it satisfies the requirements of subsection (d)." Id. (citing Tex. Fam. Code. § 153.0071(e). The court also held that nothing in the common law creates such a duty. Id. at 360.

Further, several courts have held that a trial court does not err in failing to conduct a best interest hearing when the parties waived their right to challenge best interest in a binding arbitration agreement. In re T.B.H.-H., 188 S.W.3d 312, 315 (Tex. App.-Waco 2006, no pet.); In the Interest of C.A.K., 155 S.W.3d 554, 560 (Tex. App.-San Antonio 2004, pet. denied). The court in C.A.K. also held that allowing parties to contract away their right to challenge best interest did not violate public policy given that alternate policy of encouraging "peaceful resolution of disputes, particularly those involving the parent-child relationship, including mediation of issues involving conservatorship, possession and child support." In the Interest of C.A.K., 155 S.W.3d at 560. In this manner, the court rejected the argument that trial courts have an independent duty to hold a best interest hearing. Id.

As set forth above, the Texas Supreme Court has recently held and reinforced the position that a best interest finding is not required to be entitled to judgment on an MSA that meets the requirements of TFC 153.0071 (d). In fact, even if the trial court determines that entry of judgment on the MSA in a SAPCR is not in the child's best interest, to do so is reversible error, because best interest alone does not meet the exceptions to entry of judgment set forth in TFC 153.0071 (e-1), requiring a finding that a party to the agreement was a victim of family violence which circumstance impeded the parties ability to make decisions, and the MSA is not in the child's best interest.

In Lee, Father of the child the subject of the suit brought a modification action against Mother, alleging that Mother had placed the child in danger by allowing Mother's husband, a registered sex offender, to have contact with the child. The parties attended mediation and executed a MSA providing that Father would have the exclusive right to determine the primary residence of the child and Mother's husband would be enjoined from coming within 5 miles of the child. Father appeared before the trial court to present the MSA for approval and judgment and informed the Court at the time that Mother's husband was a registered sex offender and that Mother had allowed her husband to sleep naked with the child in the bed. Based on the testimony of Father, the trial court refused to enter judgment on the MSA, finding that the entry was not in the best interest of the child. Mother petitioned the Court of Appeals for a writ of mandamus but the Court of Appeals upheld the trial court's judgment again based on the best interest test. Mother then petitioned the Texas Supreme Court for a writ of mandamus.

In its 5-4 decision, the Texas Supreme Court held that a trial court cannot decline to enter judgment on a validly executed MSA based solely on an inquiry into whether the MSA was in the child's best interest. In so holding, the Court found that parents are in a position to know what is in the best interest of their children and that successful mediation of child-custody disputes, conducted within statutory parameters, furthers a child's best interest by putting a halt to a potentially lengthy and destructive custody litigation. The Court further noted that the rules of statutory construction require that the more specific and more recently enacted provision of Section 153.0071 prevails over the more general provision of Section 153.002 of the Texas Family Code. As the trial court declined entry of the judgment solely on best interest (and did not find the family violence exception existed as required by the statute), the trial court abused its discretion in refusing to enter judgment on the MSA.

It is not unusual for courts to order parents to mediate controversies before setting any hearing or initiating discovery in a suit for modification of the terms of an order or decree except in an emergency.

However, In the Interest of K.L.D., 2012 WL 2127464 (Tex. App. - Tyler 2012, no pet.), the appellate court held that the trial court abused its discretion when it ordered the parties to mediate before setting any hearing or discovery in a suit for modification of the terms and conditions of conservatorship, possession or support. Id. at *8.

In 2005, the legislature added subsection (e-l)(2) to section 153.0071 of the statute, which provides that "[n]otwithstanding Subsections (d) and (e), a court may decline to enter a judgment on a mediated settlement agreement if the court finds that...the agreement is not in the child's best interest." Tex. Fam. Code § 153.0071 (e-1)(2). The Beyers case stated that this provision expressly allows a trial court to conduct a best hearing only at its own discretion. 199 S.W.3d at 361. The court noted that "the agreement is 'subject to the Court's approval,' but not 'subject to the court determining the agreement is in the children's best interest.'" Id. at 361. The court concluded that "[i]f parties were free to repudiate their agreements, disputes would not be finally resolved and traditional litigation would recur...but if a voluntary agreement that disposes of the dispute is reached, the parties should be required to honor the agreement." Id. at 361. (quoting In the Matter of the Marriage of Ames, 860 S.W.2d 590, 592 (Tex. App.-Amarillo 1993, no writ). However, this holding is specifically abrogated and overruled by In re Stephanie Lee.

It is important to note that section 153.0071 (e-1) actually provides that "a court may decline to enter a judgment on a mediated settlement agreement if the court finds that: (1) a party to the agreement was a victim of family violence, and that circumstances impaired the party's ability to make decisions; and (2) the agreement is not in the child's best interest. Tex. Fam. Code § 153.0071 (e-1) (emphasis added). Thus, a court may not decline to enter a judgment on a mediated settlement agreement if the court finds only that the agreement is not in the child's best interest. As stated previously, this has been confirmed by the Lee case.

The holding in the Lee case is not without controversy, and because there were dissents and concurrences written, there was barely a majority to support the opinion. While agreeing with the majority decision that trial courts should refrain from performing a broad best interest inquiry into every MSA, the dissent argued that a trial court should be allowed to ensure that the child's safety and welfare are protected by refusing to enter judgment on an MSA that places the child in danger. The dissent further contended that the Court cannot ignore the fundamental best interest consideration required by section 153.002 and the overarching public policies set forth in section 153.001 to ensure the safety and welfare of children‖ when analyzing Section 153.0071 and its application to a particular case at hand. The dissent further noted that the fundamental public policies established by Sections 153.001 and 153.002 of the Texas Family Code are not only rendered meaningless by the majority's decision, but ―yield an absurd result– preventing a trial court from protecting a child's safety and welfare simply because the parties executed an irrevocable MSA.

Thus, it appears that there is still an unresolved issue regarding a court's discretion in refusing to enter judgment on an MSA in a SAPCR if the court is concerned about the safety of a child. Following the decision in Lee, the distinction between a best interest inquiry and whether the MSA endangers the child is of paramount importance and remains unresolved by the courts. Significantly, the majority decision in Lee noted that the dissent was particularly concerned that the Court's holding would inevitably require a trial court to overlook evidence of child endangerment. However, the Court declined to decide this case in the context of child endangerment because the only basis for the trial court's refusal to enter judgment on the MSA was best interest (and not endangerment or some other safety issue). In her concurrence, Justice Guzman notes that while insufficient evidence existed of child endangerment in the Lee case, a trial court does not abuse its discretion by refusing to enter judgment on a MSA that could endanger the safety and welfare of a child. Of note, neither Justice Guzman in her concurrence nor the dissent define child endangerment or specify what elements would be necessary to prove endangerment and whether a party would be required to specifically plead endangerment to be entitled to a finding of the same. Although the makeup of the Texas Supreme Court has changed since the Lee decision, it is apparent that the majority at that time would only allow a narrow inquiry into whether entering judgment on an MSA would endanger the safety and welfare of a child.

D. Deviation or Modification

As a general rule, a court has no authority to alter, change, amend, or modify the material terms to

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which the parties have already agreed by inserting additional terms into the Court's order enforcing the agreement. Vickrey v. American Youth Camps, Inc., 532 S.W.2d 292 (Tex. 1976); In Matter of Marriage of Ames, 860 S.W.2d 590, 594 (Tex.App.--Amarillo 1993, no writ); McLendon v. McLendon, 847 S.W.2d 601, 610 (Tex.App.--Dallas 1992, writ denied).

For example, in Garcia-Udall v. Udall, temporary orders gave one parent the exclusive right to consent to "invasive medical, dental, or surgical treatment." 141 S.W.3d 323, 327 (Tex. App.—Dallas 2004, no pet.). The parties subsequently executed a Section 153.0071 mediated settlement agreement that incorporated the temporary orders into the divorce decree, and also provided that one parent would have the final decision "in the event parties cannot agree on medical, dental or surgical treatment involving invasive procedures." Id. at 327-28. The appellant argued the provision in the mediated settlement agreement changed the decision on invasive treatment from appellee's exclusive right to a joint right of the parties, with appellee having the authority to make the decision if they cannot agree. Id. at 328. Recognizing that an unambiguous contract must be interpreted as a matter of law, and ambiguity does not arise merely because the parties advance differing interpretations, the court of appeals held that the adjectives "medical, dental or surgical" modified the same noun, "treatment" and the phrase "involving invasive procedures" modified the noun "treatment" and was not limited to surgical treatment. Id. The court of appeals reversed the trial court and modified the agreement to make the decree conform to the mediated agreement. Id. at 329. The court observed that "[t]he fact that the trial court interpreted the mediated settlement differently is irrelevant because the trial court has no discretion to misapply the law." Id.

However, it should be noted that there is one notable exception to the general rule that a court has no power to supply additional terms: a court does have the power and duty to supply additional terms when the additional terms are needed to effectuate the parties' agreement and the additional terms do not alter, change, amend, or modify the material terms to which the parties have already agreed. Beyers v. Roberts, 199 S.W.3d 354, 362 (Tex.App.--Houston [1st Dist.] 2006, no pet.); Haynes v. Haynes, 180 S.W.3d 927, 930 (Tex.App.-Dallas 2006, no pet.); In re Kasschau, 11 S.W.3d 305, 311 (Tex.App.--Houston [14th Dist.] 1999, orig. proceeding); McLendon, 847 S.W.2d at 606.

In Beyers, husband and wife entered into a mediated settlement agreement which provided, among other things, that the child would attend a certain private school. Beyers, 199 S.W.3d at 357. After the mediation, husband moved to rescind the agreement because the private school the parties agreed upon could not accept the parties' child by mid-semester transfer. Id. The trial court refused to rescind the agreement, and entered a modification order which required the child to remain in its current school. Id. On appeal, husband argued that the trial court exceeded its authority by entering a final order which included terms to which the parties never agreed. The court of appeals rejected husband's argument holding that the additional terms were only a slight modification and were needed to effectuate the intent of the parties' agreement. Id. at 362-63.

Similarly, in Haynes, husband and wife entered into a mediated settlement agreement. Haynes, 180 S.W.2d 928. Attached to the agreement was a single page spreadsheet with "Haynes v. Haynes Property Division" handwritten at the top of the page. This spreadsheet listed several assets, their net value, and contained two columns dividing the value between Husband and Wife. The total property division was approximately sixty percent to Wife and forty percent to Husband. Attached to the property division was a single sheet handwritten division of liabilities between Husband and Wife. The main settlement agreement provided that its terms would be incorporated in a final decree of divorce following the forms published in the Texas Family Law Practice Manual and prepared by Wife's attorney. Wife's attorney prepared an agreed final divorce decree containing detailed procedures for the exercise and division of the stock options and making Husband constructive trustee for the options awarded to Wife. At a hearing on Wife's motion to enter the decree, Husband objected to the procedures relating to the options because they imposed additional duties, liabilities, and burdens on him. The trial court took the case under advisement and later signed the proposed decree with some modifications.

On appeal, husband argued that he never agreed to the specific terms of the decree regarding the stock options such as the constructive trust, the terms relating to the exercise of the options by Wife, and the tax issues involved with exercise of the options. Husband argued that the trial court erred in entering the divorce decree because the trial court had no authority to enter a judgment that varied from the terms of the mediated settlement agreement. See Haynes,

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180 S.W.3d at 929. The court of appeals rejected husband's argument on the grounds that the additional terms did not materially alter the parties' agreement. Instead, the additional terms were necessary to effectuate the intent of the parties' agreement. Id. at 930. The court of appeals stated that to be an enforceable agreement:

The law does not require the parties to dictate and agree to all of the provisions to be contained in all of the documents necessary to effectuate the purposes of the agreement; it only requires the parties to reach an agreement as to all material terms of the agreement and prevents the trial court from supplying additional terms to which the parties have not agreed.

Terms necessary to effectuate and implement the parties' agreement do not affect the agreed substantive division of property and may be left to future articulation by the parties or consideration by the trial court.

* * * * * *

A trial court has no power to supply terms not previously agreed to by the parties; however, the parties here agreed to the material terms of their property division and nothing in the divorce decree varies from that agreement. The divorce decree's provisions implementing and effectuating the agreed division of the options do not vary the terms of the mediated settlement agreement; rather, they carry those terms into effect. Thus, the trial court did not supply terms to which the parties had not agreed.

Id. at 930 (citation omitted).

In summary, a court has no authority to alter, change, amend, or modify the material terms to which the parties have already agreed by inserting additional terms into the Court's order enforcing the agreement. However, a court does have the power and the duty to interpret the parties' agreement and to enter an order which effectuates the true intent of that Agreement.

Fraud, Failure to Disclose

"If a party fails to exercise diligence in investigating facts or law or otherwise enters into a section 6.602 agreement unadvisedly, he will not be rewarded for doing so with a reprieve from the agreement." Cayan v. Cayan, 38 S.W.3d 161, 167 (Tex. App.-Houston [14th Dist.] 2000, pet. denied). In Cayan, the husband and wife attended mediation and entered into a Rule 11 agreement and mediated settlement agreement. Id. at 163. Both parties and their attorneys signed the agreement and it was approved by the court. Id. The wife filed a motion for the court to sign and enter a final decree based on the agreement. Id. On the day the motion was set, the husband filed a motion to revoke the agreement alleging mistake and misrepresentation. Id. He claimed that he relied on the representations of the wife's CPA in regard to his retirement benefits. Id. The trial court entered the decree and the husband appealed, claiming that the wife could only enforce the agreement via a contract claim. Id. The court of appeals stated that, "[t]he plain meaning of section 6.602 could hardly be more clear," that it is an agreement that is "binding, i.e., irrevocable, and a party to one is entitled to judgment based on the agreement." It further reasoned that "the purpose of alternative dispute measures is to keep parties out of the courtroom. When a mediated settlement agreement is not summarily enforceable, the trial court is then faced with litigating the merits of not only the original action, but also the enforceability of the settlement agreement, thereby generating more, not less, litigation." Id. at 165-66 (citations omitted). In conclusion, that court noted that, if a party was wrongfully induced to sign a mediated settlement agreement that falls under section 6.602, they have the same recourse as one who discovered the same thing after the judgment was entered as a party who signed an agreement that did not fall under the statute. Id. at 167.

A material misrepresentation by one party to an agreement can support rescission or repudiation by the other party. Boyd v. Boyd, 67 S.W.3d 398, 404-405 (Tex. App.-Fort Worth 2002, no pet.). A failure to disclose material information by one contracting party can lead to the rescission of an otherwise enforceable settlement agreement under what is essentially fraudulent inducement. Id. Boyd involved undisclosed retirement accounts, stock options, and an earned, unpaid bonus. After the parties entered into a mediated settlement agreement, the wife repudiated the agreement, contending that the husband failed to make proper disclosures. The trial court denied enforcement of the agreement because it failed to include substantial assets of the parties. The appellate court agreed, stating that a duty to speak exists when "the parties to a mediated settlement agreement have represented to one another that they have each disclosed the marital property known to them." Id. at 405. “[W]hen one voluntarily discloses information, he has a duty to disclose the whole truth rather than making a partial disclosure that conveys a false impression.” Id. (quoting World Help v. Leisure Life-

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styles, Inc., 977 S.W.2d 662, 670 (Tex. App.-Fort Worth 1998, pet. denied). In addition, the mediated settlement agreement included a full disclosure provision which stated: "Each party represents that they have made a fair and reasonable disclosure to the other of the property and financial obligations known to them." Id at 404. The court further held that "inserting a catchall provision" like "[a]ny undisclosed property is specifically awarded in equal shares to the parties" into a mediated settlement agreement "while at the same time intentionally withholding information about substantial marital assets will not save the mediated settlement agreement from being held unenforceable." Id.

F. Illegal/Void Provisions

It is possible that a settlement agreement can be found unenforceable, even though it meets the requirements of sections 6.602(c) or 153.0071(d). Contracts, including mediated settlement agreements, can be found void if the agreement results in fraud, or if its provisions are illegal, although contracts are generally voided for illegality only when performance requires fraud or a violation of criminal law. Beyers, 199 S.W.3d at 358 (citing In re Kasschau, 11 S.W.3d 305, 314 (Tex. App.-Houston (14th Dist.] 1999, orig. proceeding)).

In Kasschau, a mandamus action was brought by the husband in regard to the trial court's refusal to enter judgment based upon a mediated settlement agreement that complied with the Family Code. The appellate court denied the mandamus on multiple grounds, even though it was undisputed that all the provisions of the code had been complied with. The appellate court noted that, because the mediated settlement had certain contingencies, the court had discretion to review the agreement before entering the judgment. The court reasoned that, although the trial court had approved the settlement agreement, it had never rendered judgment on it. More importantly, the court found that particular provisions of the agreement were illegal and violated public policy. On this ground, the entire agreement was found to be void. In the agreement, the husband had agreed to turn over certain telephone recordings he had made of the wife, without her consent, with third parties. This would constitute an illegal act. The settlement also provided that these recordings would be destroyed. The trial court found, and was upheld on appeal, that these actions were illegal since it contemplated the destruction of evidence related to a possible criminal proceeding, and refused to enter judgment on the entire agreement.

Settlement agreements are subject to review for duress, coercion, or other dishonest actions. Boyd, 67 S.W.3d at 403. See Sudan v. Sudan, 199 S.W.3d 291 (Tex. 2006) (the Supreme Court found that there was no evidence of economic duress to justify rescinding an amendment to a settlement agreement). The Supreme Court "characterized duress as the result of threats which render persons incapable of exercising their free agency and which destroy the power to withhold consent." The Court further stated that "[t]he compulsion must be actual and imminent, and not merely feigned or imagined." Id. at 292 (citations omitted). A settlement agreement will not be invalidated, however, if the duress or coercion emanates from a disinterested third party. King v. Bishop, 879 S.W.2d 222, 224 (Tex. App.-Houston [14th Dist.] 1994, no writ).

G. Limitations on Settlement Agreements

Parties cannot contract around the mandatory venue requirements in the Family Code. See In re Calderon, 96 S.W.3d 711 (Tex. App.-Tyler 2003, orig. proceeding). In Calderon, the parties entered into a mediated settlement agreement. Id. at 714. The agreement provided that jurisdiction would remain in Smith County for three years. Id. at 715. The court approved the agreement and incorporated its terms into its order. Id. Seventeen months later, the wife filed a motion to transfer venue to Bexar County and sought modification of the trial court's order. Id. The husband contended that transfer would not be proper because the agreement expressly stated that jurisdiction would remain in Smith County for three years. Id. The trial court denied the motion to transfer and the wife filed a petition for writ of mandamus asking the appellate court to order the trial court to transfer the proceedings to Bexar County. Id. Citing Cassidy v. Fuller, 568 S.W.2d 845, 847 (Tex. 1978), the court of appeals first noted that the language of the venue statute in the Family Code was mandatory in a SAPCR suit. Thus, a trial court has no discretion but to transfer the proceeding if the child has resided in another county for six months or more, and there was no dispute in this case that this requirement was satisfied. Id. at 716. The court based its decision, in part, on Leonard v. Paxson, 654 S.W.2d 440 (Tex. 1983). The Leonard court held that despite an agreement to the contrary, a trial court has a mandatory duty to transfer such a

proceeding. Leonard, 654 S.W.2d at 441. It noted that "the fixing of venue by contract, except in such instances as permitted by Article 1995, § 5 [inapplicable here] is invalid and cannot be the subject of private contract." Id. The Calderon court "found no indication in section l53.0071(e) or any other Family Code provision that the legislature, by adopting a policy favoring alternative dispute resolution, intended to abrogate its longstanding policy...that matters affecting the parent-child relationship be heard in the county where the child resides." Id. at 719 (citing Leonard, 654 S.W.2d at 442). The Calderon court then held that "any attempt to supplant the mandatory transfer provision applicable in a SAPCR is void." Calderon, 96 S.W.3d at 719. The court further held that the mediated settlement provision did not constitute a waiver of venue because "a settlement agreement attempting to change venue contrary to the statutory law of the state cannot constitute a waiver of venue. Id. at 720 (citing Johnson v. U.S. Indust., Inc., 469 S.W.2d 652, 654 (Tex. Civ. App.-Eastland 1971, no writ)). If the provision were allowed to contravene the statutory scheme, it would "defeat the legislature's intent that matters affecting the parent-child relationship be heard in the county where the child resides." Id. (citing Leonard, 654 S.W.2d at 442).

A court may also deny a motion to enforce a mediated settlement agreement if the agreement does not include substantial community assets. Boyd v. Boyd, 67 S.W.3d 398 (Tex. App.-Fort Worth 2002, no pet.). In Boyd, the husband failed to disclose retirement accounts, stock options, and an earned, unpaid bonus in a mediated settlement agreement. Id. at 401. The husband moved to enforce the mediated settlement agreement based on sections 6.602 and 153.0071 of the family code. Id. The trial court held a hearing on the husband's motion and entered an order denying the motion. Id. The court concluded that the mediated settlement agreement was unenforceable and had to be set aside so the court could make a fair and just division of the marital property and enter enforceable orders for the protection and best interest of the couple's child. Id. The trial court denied enforcement of the agreement because it did not include substantial community assets. Id. On appeal, the appellant argued that the trial court had no discretion to deny his motion to enforce an agreement because it complied with statutory requirements. Id. at 401. The Fort Worth Court of Appeals disagreed, and held that the phrase "notwithstanding Rule 11 [...] or another rule of law" does not require a trial court to enforce a mediated settlement merely because it complies with statutory requirements. Id. at 403.

The court reasoned that the appellant's argument, if taken to its logical end, could require "enforcement of an agreement that was illegal or that was procured by fraud or duress, coercion, or other dishonest means," which would be "an absurd result" and not one intended by the legislature. Id. Adopting a less restrictive interpretation, the court held that the quoted phrase means "the requirements of Rule 11 and common law that ordinarily apply to the enforcement of settlement agreements do not apply to mediated settlement agreements," if the agreements meet statutory requirements. Id.

If the trial court enters a judgment based on a mediated settlement agreement, and the trial court did not have jurisdiction to do so, then that portion of the agreed judgment is void. Seligman-Harris v. Hargis, 186 S.W.3d 582, 586-87 (Tex. App.-Dallas 2006, no pet.). In that case, appellant filed suit in Texas although the entire family lived in Germany. Id. at 584. The parties entered into a mediated settlement agreement regarding custody, visitation, child support and division of property. Id. at 585. The parties agreed to have the decree registered in Germany. Id. Based on the agreement, the trial court entered an agreed final decree. Id. On appeal, the appellant contended that under the UCCJEA, the trial court did not have jurisdiction to include in its decree provisions regarding child custody because Texas was not the "home state" of the children. Id. The court initially noted that, although the mother agreed to the trial court's jurisdiction, subject-matter jurisdiction cannot be conferred by consent, waiver, or estoppel. Id. (citing Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 76 (Tex. 2000)). The court then reiterated that section 152.201(a) of the UCCJEA is the exclusive jurisdictional basis for making a child custody determination by a Texas court and the trial court could not acquire jurisdiction based on those statutory provisions. Id. at 585-86. It then concluded that under the plain terms of the UCCJEA, a Texas court lacked subject matter jurisdiction over child custody issues in this case. As such, those provisions pertaining to child custody issues were void. Id. at 586-87. The court also noted that the entire agreement would be void "if the contract is entire and indivisible." Id. at 587 (citing In re Kasschau, 11 S.W.3d 305, 311 (Tex. App.-Houston [14th Dist.] 1999, orig. proceeding). But the court found that, in this instance, "the effect the trial court's lack of jurisdiction over the child custody has on the un-

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derlying settlement agreement is an issue that has not been presented to the trial court" because the Father was unable to raise them. Id. Therefore, the court of appeals reversed the provisions of the decree that dealt with the division of property and child support and remanded the case back for further development. Id. The child custody claims were dismissed for want of jurisdiction. Id.

H. Death of a Party

What happens if a party to a mediated settlement agreement dies before judgment is rendered and the order is signed? In Spiegel v. KLRU Endowment Fund, 228 S.W.3d 237 (Tex. App. – Austin 2007, pet. denied), husband filed for divorce and subsequently husband and wife attended mediation and signed a mediated settlement agreement. Id. at 239. The mediated settlement agreement included the required statutory language. Id. at 240. For more than two years after the mediated settlement agreement was signed, husband unsuccessfully used various legal maneuvers attempting to rescind the agreement. Wife died on the day before the hearing to enter the final divorce decree was to occur. Id. at 239. The independent executor of wife's estate filed a declaratory judgment action concerning the enforceability of the mediated settlement agreement. Id. The trial court held that the mediated settlement agreement was enforceable. Id. at 239.

On appeal, husband argued that although he and wife intended to make a mediated settlement agreement pursuant to section 6.602 of the Family Code, the agreement was unenforceable because wife's death precluded any possibility that the agreement could be incorporated into a final divorce decree as intended by the parties. Id. at 241. The court of appeals held that the mediated settlement agreement was enforceable based upon the plain language of the statute and the public policy underlying it as well as the parties' intent as expressed in the language of the agreement. Id.

The court noted that section 6.602 allows spouses to enter into settlement agreements that are immediately binding and do not require the approval of the court. Id. Furthermore, by providing that when an agreement meets the requirements of section 6.602, the agreement is binding and a party is entitled to judgment on it, the court recognized that the statute shows the legislature's intention that the agreement be binding even in the absence of a judgment incorporating it. Id. at 242. The court also relied on the plain language of the agreement which indicated that the parties intended that the agreement be immediately effective. Id.

A recent and interesting case on this issue, which also includes the broad powers of a power of attorney is the Fannette case out of the Waco Court of Appeals. In the Matter of the Marriage of Fannette, 2013 Tex. App. LEXIS 8558 (Tex. App. – Waco July 11, 2013) (mem. opinion) (Cause No. 10-12-0141-CV). The facts are as follows: After 65 years of marriage, H filed for divorce. Two months later H's health declined and he was hospitalized. H executed a power of attorney in favor of his brother (B). Despite the circumstances the court ordered mediation. W attended with her counsel. B attended on H's behalf with H's attorney. An MSA was signed. The next day both lawyers appeared in court and stipulated to all facts necessary to support the divorce and approval of the MSA. Neither party appeared. The court rendered a divorce, made a docket entry substantiating rendition and announced in response to H's counsel that H was divorced. Three days later H died. W hired a new attorney who filed a suggestion of death. B initiated a probate proceeding seeking appointment as executor of H's estate. B hired H's divorce counsel as his counsel who then filed a motion to enter a decree. Two months after H's death, W filed a counter petition, joining B and his son and asserting claims of fraud, duress, self-dealing, conversion, mistake, and other claims, all in an effort to challenge the MSA she signed. W also filed a motion to show authority claiming that H's counsel had no right to seek entry because his attorney client relationship ended when H died. Evidentiary hearings were conducted on these motions, were denied and the court signed a final decree and severed W's claims against B and his son. W appealed. Regarding the motion to show authority the COA determined that the parties' marriage was not terminated by death but instead by divorce as the trial court had rendered a divorce 3 days before H died. As such, entry of the decree was only a ministerial act and further, because property rights were involved, H's attorney was authorized to take actions to finalize the property issues in the divorce proceeding. The COA found that W's challenge to the MSA were untimely and that she permitted the court to render judgment on the MSA without objection. Further the COA found that evidence regarding fraud and duress in the mediation process was disputed and the court was permitted to disbelieve the W's allegations. Regarding the severance, W claimed that the facts surrounding the claims against B and his son were interwoven with those relating to

the MSA and severance was improper. First the COA notes that W's claims against third parties were filed two months after the divorce was rendered and thus were too late to impact the divorce proceedings. Further the COA notes that W filed no motion for leave to file the late pleading. Finally, and most interesting, the COA notes that there is no authority allowing a party to a divorce action to join independent claims against third-parties within the divorce where only H and W are parties, citing the Supreme Court decision in Twyman, 855 SW2 619, which holds that a divorce plaintiff may join any and all claims (both legal and equitable) against the opposing party, noting the absence of any authority to join third parties. The COA referenced the trial court's conclusion that B and his son had been improperly joined. Judgment affirmed. Dissenting notes (not a separate opinion) are included which question the procedural short circuit of allowing H's counsel to proceed to finalize the divorce without waiting for the probate court to formally appoint an executor. Further the dissenting notes question the finding that joinder was improper because the W's claims against B and his son involved their transactions regarding ownership of marital property. COMMENT: As part of her pleadings, W alleged a conspiracy and her allegations involved actions between H, B and his son in getting H to change his will and H signing a gift deed for marital property to B's son. If H was alleged to be a participant in the conspiracy then joinder of this claim and the other conspirators should have been proper. I believe the holding of improper joinder should be limited to cases where third party claims are wholly unrelated to the divorce or property.

Another recent case on upholding an MSA and reaffirming that the court does not have to approve the agreement or find that it is just or right for the party to be entitled to judgment is the case of Campbell v. Campbell, 2014 Tex. App. LEXIS 5268 (Tex. App. – Fort Worth May 15, 2014) (mem. opinion) (Cause No. 02-12-00313-CV). In Campbell, H and W executed a MSA. Although the opinion does not detail the events occurring thereafter, one can surmise that W refused to cooperate in the subsequent entry of a final decree and thus H filed a motion to enter the decree and attached the MSA as an exhibit to his motion. W did not appear for the entry hearing but her attorney did and her attorney signed and approved the final decree as to form. W appealed and raised two issues. First W complained that the trial court erred in failing to make a record at the entry hearing. The COA determined that W waived error if any because there was nothing in the record to establish that her counsel asked for one. As to her second issue, W complained that the trial court had no basis for determining within the final decree that the division of property was just and right because the MSA itself was not admitted into evidence at the entry hearing. W did not challenge any aspect of the division and did not claim that the decree contradicted the MSA. The COA notes that TFC 6.602 establishes a party's right to judgment if the MSA meets all statutory requirements and that the trial court is not required to determine if the MSA division is just and right. As such, the COA determined that although the trial court's finding was not supported by any evidence, this did not require reversal because the finding was not required to support the judgment. The COA simply modified the Final Decree to exclude the finding and affirmed the decree as modified.

Drafting Considerations

1. Include Statutory Language

It is obvious, but make sure that the mediated settlement includes the required statutory language. I include this language in my mediated settlement agreements:

THIS AGREEMENT IS NOT
SUBJECT TO REVOCATION.

Pursuant to Sections 153.0071 and/or 6.602 of the Texas Family Code, this Mediated Settlement Agreement is not subject to revocation and is signed by both parties and their attorneys, who were present at the time that their respective clients signed this Mediated Settlement Agreement. The parties and their attorneys recognize that this provision means that either party is entitled to judgment on this Mediated Settlement Agreement as a matter of law.

2. Include "Partition" Language

Even though Spiegel v. KLRU Endowment Fund held that mediated settlement agreements are immediately binding and do not require the approval of the court, I want "partition" language included in the mediated settlement agreement. The following are a couple of examples:

Partition. The parties agree that this Mediated Settlement Agreement constitutes a partition pursuant

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to Section 4.102 of the Texas Family Code, and will survive the death or disability of either party.

Partition. The parties agree that pursuant to Section 4.102 of the Texas Family Code, this Mediated Settlement Agreement constitutes a partition to each party all of the property awarded to the party herein and any and all interests, income or debts acquired after March 1, 2013, and will survive the death or disability of either party.

3. Include a Full Disclosure Provision

After Boyd v. Boyd, 67 S.W.3d 398 (Tex. App.-Fort Worth 2002, no pet.), every mediated settlement agreement should include a full disclosure provision. The provision in Boyd stated: "Each party represents that they have made a fair and reasonable disclosure to the other of the property and financial obligations known to them." Id. at 404. Another example of a full disclosure provision provides: "Each party represents that they have made a full and complete disclosure of all assets and debts of the community and separate estates and that such disclosure is a material part of the consideration for the agreements set out herein."

4. Be Very Cautious When Including a Residuary Clause

Practitioners need to be very cautious when including a residuary clause in a mediated settlement agreement because there can be significant unintended consequences.

There are two general types of residuary clauses used in mediated settlement agreements. One category is the "possession and/or control residuary clause, generally treated as the more narrow of the two types. The other general category, referred to as the broadly worded clauses, uses language intended to cover a wider range of property. Marriage of Smith, 115 S.W.3d 126, 133 (Tex. App. – Texarkana 2003, pet. denied).

Possession And/or Control Residuary Clauses

In Soto v. Soto, 936 S.W.2d 338 (Tex. App. – El Paso 1996, no pet.), the divorce decree stated that wife was awarded "All property in [wife's] possession" and that husband was awarded "All real and personal property in [husband's] possession." Id. at 339-340. Several years later, wife filed suit to partition property alleged not divided upon divorce. Id. at 340. The trial court ruled that at the time of the entry of divorce, husband had actual control, access and possession of all real properties. Id. at 340, 342. On appeal, wife argued that because her name was listed on the deeds to the properties, the court of appeals should determine that she was in legal, as opposed to actual, possession of the properties. Id. at 342. In other words, because she had legal possession of the parcels of real estate, the trial court was precluded as a matter of law from finding that husband had possession and control of the properties. Id. The court of appeals rejected wife's legal possession argument stating that "'Possession' as used in the context of divorce decrees, means the physical control of the property, or the power of immediate enjoyment and disposition of property." Id. at 343.

In Marriage of Malacara, 223 S.W.3d 600 (Tex. App. – Amarillo 2007, no pet.), husband and wife executed a settlement agreement in which they agreed that husband "shall own, possess, and enjoy, free from any claim of [wife], the property listed in Schedule 2 of this agreement...." The property described in Schedule 2 consisted of "[a]ll personal property in [his] possession." Id. at 602. Husband's retirement benefits were not expressly mentioned in the agreement. Id. at 601. Once husband retired and began receiving benefits, wife filed suit to partition the community portion of the retirement benefits. Id. at 601. The trial court determined that the retirement benefits were not divided in the settlement agreement or the divorce decree and awarded wife a portion. Id. at 601-602. The court of appeals rejected husband's argument that the retirement benefits were in his possession. The court explained that settlement clauses encompassing property within the possession of a spouse do not affect intangible property, that is, property not subject to physical control or immediate enjoyment or disposition. The court further explained that choses-in-action or contract rights are such property, as is a right to retirement benefits. Id. at 602.

Broadly Worded Residuary Clauses

In Marriage of Smith, 115 S.W.3d 126, 133 (Tex. App. – Texarkana 2003, pet. denied), husband and wife entered into a partition agreement. Paragraph 12 stated:

The parties agree that, except as provided herein, each party shall own, have, and enjoy, independently

of any claim or right of the other party, all property of every kind, nature, and description, wheresoever situated, which is now owned or held by him or her, or which may hereafter belong or come to belong to him or her, with full power to him or her to dispose of the same as fully and effectively in all aspects and for all purposes, as if he or she were unmarried.

Id. at 129. The partition agreement made no specific reference to the disposition of husband's GOSI retirement benefits. Id. A few years later, husband began receiving payments from his GOSI retirement benefits. Id. at 129. Years later, wife filed for divorce. The trial court concluded that the partition agreement did not cover the GOSI retirement benefits and awarded a portion to wife. Id. at 129-130.

The court of appeals noted that the residuary clause was a broadly worded residuary clause. The court further noted that language of the clause clearly indicates that the parties intended that it cover all other property not specifically divided by the agreement regardless of possession or control. Id. at 134. Because the agreement does not specifically allocate the GOSI retirement benefits to either husband or wife, the court concluded that the residuary clause governed the disposition of the funds. That being so, the funds, having "come to belong" to husband, still belong to husband independent of any claim or right of wife. Id. at 134. See Buys v. Buys, 924 S.W.2d 369, 371-372 (Tex. 1996).

In Pearson v. Fillingim, 332 S.W.3d 361 (Tex. 2011), husband's parents conveyed four deeds for mineral rights to him during the marriage. Husband and wife subsequently divorced. The divorce decree stated that "the estate of the parties be divided as follows" and divides property in the community estate into two schedules, one for husband and one for wife. The decree did not specifically mention the mineral rights that originally belonged to husband's parents in the division, but it did include residuary clauses in each schedule awarding both parties a "one-half interest in all other property or assets not otherwise disposed of or divided herein." Id. at 362. Years later, after husband discovered that wife was receiving royalties, he filed a petition to clarify the divorce decree and a declaratory judgment action concerning his separate property mineral interests. The trial court determined that the deeds were gifts from husband's parents and his separate property, and that the divorce decree did not partition the separate property of the parties. Id.

The Texas Supreme Court first addressed husband's claim that the mineral rights were his separate property and could not be awarded to wife. The Court noted that even if husband's separate property claim is valid, section 3.003(a) of the Family Code states that "[p]roperty possessed by either spouse during or on dissolution of marriage is presumed to be community property." Parties claiming certain property as their separate property have the burden of rebutting the presumption of community property. Husband did not attend the final divorce hearing or offer proof that the deeds were his separate property. As a result, the deeds must be characterized as community property even if the characterization is mistaken. Id. at 363. The Court next addressed the residuary clause. The divorce decree did not specifically divide the mineral deeds, but the schedules included residuary clauses that awarded each party "[a] one-half interest in all other property or assets not otherwise disposed of or divided herein." The Court explained that such residuary clauses, as opposed to the more limited clauses that divide only the property "in possession" of the former spouses, have been held to effectively divide property not explicitly mentioned in the decree. Id. The Court concluded that because husband did not provide any evidence that the deeds were separate property, the deeds were encompassed in the "estate of the parties" and were divided by the divorce decree's residuary clauses. Id. at 364.

5. Arbitration Provisions

A mediator may also serve as an arbitrator if the parties consent. In re Provine, 312 S.W.3d 824, 829 (Tex. App.– Houston [1st Dist.] 2009, no pet.). See In re Cartwright, 104 S.W.3d 706, 714 (Tex.App.-Houston [1st Dist.] 2003, orig. proceeding) (noting mediator should not act as arbitrator in the same or a related dispute without the express consent of the parties).

In Milner v. Milner, 361 S.W.3d 615 (Tex. 2012), the parties signed a mediated settlement agreement. Subsequently, a dispute developed regarding the meaning of the terms of the mediated settlement agreement. Specifically, whether it provided that the Husband would assign his partnership interest to Wife or that the Wife would assume the Husband's status as a limited partner. Id. at 617-618. After a hearing, the trial court signed a decree which provided for the assignment of the partnership interest to the Wife. Id. at 618.

The Texas Supreme Court determined that the language in the mediated settlement agreement regarding the partnership interest was ambiguous and that the intent of the parties was a question of fact. Id. at 622. The Court recognized that the mediated settlement agreement provided that the parties were to return to the mediator in the event of a dispute regarding the language in the Agreed Final Decree or other documents necessary to effectuate the agreement's terms. The mediated settlement agreement further provided that the mediator would arbitrate the dispute and make a final decision on the disputed matter. The Court held that this provision would appear to apply to ambiguities in the mediated settlement agreement itself, making the mediator, rather than the trial court, the appropriate authority to resolve the fact issue. Id.

The arbitrator usually decides disputes regarding drafting, the interpretation or performance of the mediated settlement agreement or any of its provisions as well as disputes regarding the form of the Decree.

I would usually want the following language in the mediated settlement agreement regarding what the arbitrator will decide and how the arbitrator will decide the disputes:

If any dispute arises with regard to the interpretation or performance of this Mediated Settlement Agreement or any of its provisions, including the necessity and form of closing documents, the parties agree to try to resolve the dispute by telephone conference with _____, the mediator who facilitated this settlement. If the parties are unable to agree, the parties agree that _____ shall serve as the sole arbitrator of disputes regarding the interpretation or performance of this Mediated Settlement Agreement or any of its provisions. In addition, the parties agree that _____shall serve as the sole arbitrator of disputes concerning the form of the Decree. The parties agree that, at the sole discretion of the arbitrator, the arbitration of disputes may be by written submissions without a hearing. The parties agree that the arbitration shall be binding arbitration.

There are several critical concepts to include in the arbitration provision: (1) the mediator will serve as the sole arbitrator of disputes; (2) at the sole discretion of the arbitrator, the arbitration may be by written submissions without a hearing; and (3) the arbitration shall be binding.
A good example of the necessity for specificity is the case of Diggs. 2013 Tex. App. LEXIS 8500 (Tex. App. – Houston [14th Dist.] July 11, 2013) (mem. opinion) (Cause No. 14-11-0854-CV). In Diggs, H filed for divorce. Several months before trial W's counsel was allowed to withdraw and new counsel was designated who agreed that the parties should participate in mediation. H's attorney suggested mediator RW and W's attorney suggested mediator JS, although in a letter to H's counsel, W's counsel also agreed to attend mediation with RW. In this letter, W's counsel mentioned that she had previously contacted RW about a possible business evaluation but he was never retained for this purpose and that neither RW nor W's counsel believed any conflict of interest existed. W filed a motion asking that H pay for all mediation fees and at this hearing it was affirmed again that RW would mediate. W was present and raised no objection. Issues regarding property were resolved in an MSA signed by all parties and their counsel. Issues of conservatorship were tried to a jury. Thereafter W refused to sign an AID prepared in accordance with the MSA and told the court she would like to revoke the MSA. The trial court ruled that she could not and approved the MSA. A decree was prepared which incorporated the MSA as the property division. Further the decree required W to execute various transfer documents regarding several businesses (known as the "Affiliated Companies") to H. W refused to sign the decree which the trial court eventually entered. W hired new counsel and filed a MNT, asserting for the first time that RW, the mediator, was not qualified based on a conflict of interest (asserting that her prior lawyer imparted confidential information to RW when inquiring about his possible role as a business evaluator in the divorce). W further claimed that the decree improperly modified the MSA by expressly awarding H a specified business entity along with "Affiliated Companies" which "affiliated companies" W claimed were not specifically defined in the MSA. The court held a non-evidentiary hearing on the MNT and denied it. After the court ruled W's counsel asked to make an offer of proof on W's lack of consent to use RW as a mediator. The court denied the request, however W filed no formal bill of exception thereafter. W appealed. The COA found that W waived her right to challenge the qualifications of the mediator based on an alleged conflict of interest by (1) her counsel' express agreement to mediate with RW; (2) W's failure to speak up in opposition to RW when she had the opportunity; and (3) W's attendance at mediation with RW and her eventual signature on the MSA. The COA noted that W was only ordered to participate in mediation, not to settle. W's waiver (and her failure to file a bill of

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exception) likewise made any error in refusing to allow an offer of proof at the MNT hearing moot. W further asserted that the trial court erred in approving the MSA despite never having seen it or reviewing it. The COA noted that the court is not required to determine whether a property settlement contained in an MSA is "just and right". Further the MSA contained language which also expressly characterized it as a partition and exchange agreement under TFC 4.102, which likewise requires no judicial approval. Although the MSA was ultimately filed as an exhibit to a pleading in the trial court before the MNT was heard, nothing required the MSA to be filed or admitted as a prerequisite to approval and rendition on that agreement. Regarding whether the decree exceeded the scope of the MSA the COA found that the MSA property schedule (taken directly from H's I&A and proposed division) failed to include an additional exhibit from H's I&A which detailed the names of the "Affiliated Companies" and that what was intended by use of the phrase "Affiliated Companies" was a fact issue to be decided. As such the trial court erred in including the division of these companies in the decree without making such a determination. Further, because the MSA required the parties to submit drafting and interpretation issues to RW in binding arbitration, the trial court could not have made this decision. Because the COA overruled W's claims that RW was an unqualified arbitrator, the COA set aside the division of property, remanded the division back to RW for binding arbitration to determine the intent and meaning of "Affiliated Companies".

Another recent case on arbitration provisions is the Spradley case, 2014 Tex. App. LEXIS 3244 (Tex. App. – Austin March 26, 2014) (mem. opinion) (Cause No. 03-13-00745-CV). In the midst of a divorce, H and W, pro se, executed a MSA which claimed to comply with TFC 6.602 and stated it was effective immediately as a contract. The MSA further expressly operated as a partition of the community estate. The MSA contemplated that the parties would thereafter finalize their divorce and obtain a final judgment in accordance with the MSA. Before this could happen, W amended her pleadings and filed a declaratory judgment action challenging the validity and enforceability of the MSA claiming H had induced her into the MSA by fraud and duress. H sought to compel arbitration relying on two separate provisions within the MSA. One recognized that the MSA was merely an outline of the settlement and the parties' understood the final order would contain additional provisions to implement the general agreement. This provision required arbitration of drafting disputes. The second provision stated that "if any other dispute arises with regard to the interpretation or performance of [the MSA] or any of its provisions" then these will be handled by binding arbitration with the mediator. The trial court denied H's motion to compel arbitration and further denied H's motion to enter judgment on the MSA. The trial court also denied MSJ claims by W on her declaratory judgment action finding that genuine issues of material fact exist regarding the statutory and contractual defenses to enforcement of the MSA. H filed an interlocutory appeal. The COA found that the MSA was conclusive proof of the parties' agreement to arbitrate. The only question that remained was whether W's claims challenging the MSA fell within the scope of the arbitration agreements. The COA found that the first arbitration agreement should be read to include only drafting disputes as to the final judgment, however, the second provision, much broader in scope, contemplated both mediation, and if no settlement, then arbitration of "any other disputes" regarding interpretation or performance. The COA considered whether W's challenge to the validity and enforceability of the MSA could be considered a dispute regarding interpretation or performance, concluding that W's efforts to avoid the MSA contemplated a dispute regarding the parties' respective performance of the MSA and thus her disputes fell within the scope of the second arbitration provision. Once H met his burden, W could then assert a defense to enforcement of the arbitration agreement but W admits that she did not do so. The COA reversed the trial court's order denying arbitration and remanded to the trial court with instructions to abate further proceedings pending ADR per the parties' MSA.

J. Mediation Notebook

Frequently I encounter difficulties "converting" the mediated settlement agreement into a Final Decree of Divorce which results in increased expenses for the client (or the lawyer if the client does not pay the extra expense) and delay in getting the case wrapped up and finished. There are several ways to remedy this problem. First, have a Decree prepared and revise it as the mediation progresses and have the parties sign a mediated settlement agreement incorporating the Decree. Second, have "form" Decree language prepared so that it can be revised or marked up and attached to the mediated settlement agreement. As a result, there is less conflict over the drafting and language in the Decree.

I suggest the preparation of a mediation notebook with "form" Decree language that can be edited and revised as necessary for each particular mediation. I also suggest that you include other items such as a checklist to make sure that everything has been covered, the airline regulations regarding unaccompanied minors which is available on the Family Law Section website, the child support guidelines, and IRS form 8332.

VII. CONCLUSION

If there is any take-away from the ideas, concepts, statutes and cases discussed in this paper, it should be that "The Devil is absolutely in the details." I do not believe you can be too careful when drafting agreements, whether as informal as a Rule 11 or as formal (not to mention binding) as an MSA. While we all get rushed or tired during negotiations and with our busy schedules, there is no substitute for being meticulous and careful. The more specifics you can place in an agreement, the more enforceable it will be—there is a reason that divorce decrees are no longer simply 2-5 pages long! Taking care in drafting will not only save your clients money time, it will save you sleepless nights as well. Happy drafting!

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ENCOURAGE COLLEAGUES TO JOIN ADR SECTION

This is a personal challenge to all members of the ADR Section. Think of a colleague or associate who has shown interest in mediation or ADR and invite him or her to join the ADR Section of the State Bar of Texas. Photocopy the membership application below and mail or fax it to someone you believe will benefit from involvement in the ADR Section. He or she will appreciate your personal note and thoughtfulness.

BENEFITS OF MEMBERSHIP

✓ **Section Newsletter, *Alternative Resolutions*** is published several times each year. Regular features include discussions of ethical dilemmas in ADR, mediation
and arbitration law updates, ADR book reviews, and a calendar of upcoming ADR events and trainings around the State.

✓ **Valuable information** on the latest developments in ADR is provided to both ADR practitioners and those who represent clients in mediation and arbitration processes.

✓ **Continuing Legal Education** is provided at affordable basic, intermediate, and advanced levels through announced conferences, interactive seminars.

✓ **Truly interdisciplinary** in nature, the ADR Section is the only Section of the State Bar of Texas with non-attorney members.

✓ **Many benefits** are provided for the low cost of only $25.00 per year!

STATE BAR OF TEXAS
ALTERNATIVE DISPUTE RESOLUTION SECTION
MEMBERSHIP APPLICATION

MAIL APPLICATION TO:
State Bar of Texas
ADR Section
P.O. Box 12487
Capitol Station
Austin, Texas 78711

I am enclosing $25.00 for membership in the **Alternative Dispute Resolution Section** of the State Bar of Texas from June 2013 to June 2014. The membership includes subscription to *Alternative Resolutions,* the Section's Newsletter. (If you are paying your section dues at the same time you pay your other fees as a member of the State Bar of Texas, you need **not** return this form.) Please make check payable to: ADR Section, State Bar of Texas.

Name_____

Public Member _____ **Attorney**_____

Bar Card Number _____

Address_____

City_____ **State**_____ **Zip**_____

Business Telephone_____ **Fax**_____ **Cell**_____

E-Mail Address:_____

2014-2015 Section Committee Choice_____

_____

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ALTERNATIVE RESOLUTIONS
PUBLICATION POLICIES

Requirements for Articles

1. *Alternative Resolutions* is published quarterly. The deadlines for the submission of articles are March 15, June 15, September 15 , and December 15. Publication is one month later.
2. The article should address some aspect of negotiation, mediation, arbitration, another alternative dispute resolution procedure, conflict transformation, or conflict management. Promotional pieces are not appropriate for the newsletter.
3. The length of the article is flexible. Articles of 1,500-3,500 words are recommended, but shorter and longer articles are acceptable. Lengthy articles may be serialized upon an author's approval.
4. Names, dates, quotations, and citations should be double-checked for accuracy.
5. Citations may appear in the text of an article, as footnotes, or as end notes. Present editorial policy is to limit citations, and to place them in the text of articles. "Bluebook" form for citations is appropriate, but not essential. A short bibliography of leading sources may be appended to an article.
6. The preferred software format for articles is Microsoft Word, but WordPerfect is also acceptable.
7. Check your mailing information, and change as appropriate.
8. The author should provide a brief professional biography and a photo (in jpeg format).
9. The article may have been published previously, provided that the author has the right to submit the article to Alternative Resolutions for publication.

Selection of Article

1. The editor reserves the right to accept or reject articles for publication.

2. If the editor decides not to publish an article, materials received will not be returned.

Preparation for Publishing

1. The editor reserves the right, without consulting the author, to edit articles for spelling, grammar, punctuation, proper citation, and format.
2 Any changes that affect the content, intent, or point of view of an article will be made only with the author's approval.

Future Publishing Right

Authors reserve all their rights with respect to their articles in the newsletter, except that the Alternative Dispute Resolution Section ("ADR Section") of the State Bar of Texas ("SBOT") reserves the right to publish the articles in the newsletter, on the ADR Section's website, and in any SBOT publication.

ALTERNATIVE RESOLUTIONS
POLICY FOR LISTING OF TRAINING PROGRAMS

It is the policy of the ADR Section to post on its website and in its Alternative Resolution Newsletter, website, e-mail or other addresses or links to any ADR training that meets the following criteria:

1. That any training provider for which a website address or link is provided, display a statement on its website in the place where the training is described, and which the training provider must keep updated and current, that includes the following:

   a. That the provider of the training has or has not applied to the State Bar of Texas for MCLE credit approval for ____hours of training, and that the application, if made, has been granted for ____hours or denied by the State Bar, or is pending approval by the State Bar. The State Bar of Texas website address is www.texasbar.com, and the Texas Bar may be contacted at (800)204-2222.

   b. That the training does or does not meet The Texas Mediation Trainers Roundtable training standards that are applicable to the training. The Texas Mediation Trainers Roundtable website is www.TMTR.ORG. The Roundtable may be contacted by contacting Cindy Bloodsworth at cebworth@co.jefferson.tx.us and Laura Otey at lotey@austin.rr.com.

   c. That the training does or does not meet the Texas Mediator Credentialing Association training requirements that are applicable to the training. The Texas Mediator Credentialing Association website is www.TXMCA.org. The Association may be contacted by contacting any one of the TXMCA Roster of Representatives listed under the "Contact Us" link on the TXMCA website.

2. That any training provider for which an e-mail or other link or address is provided at the ADR Section website, include in any response by the training provider to any inquiry to the provider's link or address concerning its ADR training a statement containing the information provided in paragraphs 1a, 1b, and 1c above.

The foregoing statement does not apply to any ADR training that has been approved by the State Bar of Texas for MCLE credit and listed at the State Bar's Website.

All e-mail or other addresses or links to ADR trainings are provided by the ADR training provider. The ADR Section has not reviewed and does not recommend or approve any of the linked trainings. The ADR Section does not certify or in any way represent that an ADR training for which a link is provided meets the standards or criteria represented by the ADR training provider. Those persons who use or rely of the standards, criteria, quality and qualifications represented by a training provider should confirm and verfy what is being represented. The ADR Section is only providing the links to ADR training in an effort to provide information to ADR Section members and the public."

SAMPLE TRAINING LISTING:

40-Hour Mediation Training, Austin, Texas, July 17-21, 2012, Mediate With Us, Inc.,. Contact Information: 555-555-5555, bigtxmediator@mediation.com, www.mediationintx.com

ALTERNATIVE DISPUTE RESOLUTION SECTION

http://www.texasadr.org

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