ISSUES IN ADR

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STATE BAR OF TEXAS
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CHAPTER 6

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Member, The Collaborative Law Institute of Texas

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Member, Planning Committee, Family Law on the Front Lines (University of Texas 2001-2007)

Member, Planning Committee, The Ultimate Trial Notebook - Family Law (2000)

Member, Planning Committee, Fifth, Sixth, Ninth, Tenth, Eleventh and Thirteenth Annual Advanced Civil Appellate Practice Courses (1991-92, 1995-97, 1999)

Member, Editorial Board, APPELLATE ADVOCATE, State Bar Appellate Practice & Advocacy Section 1994-97

Member, Council, State Bar Appellate Practice & Advocacy Section 1995-1998

Member, Task Force on Staff Diversity, Texas Commission on Judicial Efficiency 1995-96

Chair, Civil Appellate Law Section, Travis County Bar Association November 1991-1993, 1995-1997

Member, Austin Bar Association Board of Directors November 1991-1993, 1995-1997, 2006-2007

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Member, Planning Committee, Primer for Handling Civil Appeals, Travis County Bar Association, Austin 1995, 1996

Staff Attorney, Hon. Jack Hightower, Justice The Supreme Court of Texas 1989-1995

EDUCATION

Baylor University School of Law J.D., *cum laude* 1980

University of Texas B.A. 1974

SELECTED LAW RELATED PUBLICATIONS & PRESENTATIONS

"Issues in ADR,"30th Marriage Dissolution Seminar, El Paso, Texas, May 2007.

"Marital Property Agreements: Still Crazy After All These Years," 32nd Annual Advanced Family Law Course, San Antonio, Texas, August 2006.

"Temporary Orders: Yes, It's Really a Trial - How to Get Prepared," 32nd Annual Advanced Family Law Course, San Antonio, Texas, August 2006.

"Should the Abuse of Discretion Standard in Child Custody Cases Be Re-Examined?," APPELLATE ADVOCATE, State Bar Appellate Practice & Advocacy Section Vol. XVIII, No. 5 (Summer 2006)

"Witness Preparation," Family Law on the Front Lines, Galveston, Texas, June 2006.

"The 10 Biggest Mistakes Physicians Make in a Divorce", THE BIGGEST LEGAL MISTAKES THAT PHYSICIANS MAKE AND HOW TO AVOID THEM (SEAK, Inc. 2005).

"Family Law Case Update," 20th Annual Texas Association of Domestic Relations Offices Conference, Austin 2004.

"Family Law in Probate Court," Travis County Family Law Section, Austin 2004.

"Appeals and Mandamus - How to Repair Your Case and Prevent the Need for Repairs (or What to Do When Your Case is in the Ditch)", 29th Annual Advanced Family Law Course, San Antonio, Texas, August 2003.

"Early Stage Companies," Family Advocate, Vol. 25, No. 3, American Bar Association Winter 2003.

Obtaining and Retaining the Benefit of the Bargain- Premarital and Martial Agreements," New Frontiers in Marital Property Law, San Antonio, Texas October 2002.

"Business Interests: Characterization as Separate or Community Interests,"Expert Witness Manual, Volume I, Chapter 2-9, State Bar of Texas August 2002.

"Contesting and Defending Premarital Agreements", 28th Annual Advanced Family Law Course, Dallas, Texas, August 2002.

"Termination and Adoption: It Ain't Over Till It's Over", 28th Annual Advanced Family Law Course, Dallas, Texas, August 2002.

"High Tech Evidence: How to Find It, Retrieve It and Get It In", 28th Annual Advanced Family Law Course, Dallas, Texas, August 2002.

"Early-Stage Company Valuation"American Institute of Certified Public Accountants/American Academy of Matrimonial Lawyers National Conference, Las Vegas, Nevada, May 2002.

"Summary Judgments and Declaratory Judgments in Divorce", Marriage Dissolution Seminar, Austin, Texas, May 2002.

"Termination and Adoption: It Ain't Over Till It's Over", Marriage Dissolution Seminar, Austin, Texas, May 2002.

"Child Support Collection: A Practical Guide to the Opportunities and Pitfalls in Enforcing and Defending Child Support Obligations," Family Law on the Front Lines, Galveston, Texas, April 2002.

"Valuation of Law Practice in Divorce," American Academy of Matrimonial Lawyers, Sanibel, Florida March 2002.

"Valuation, Characterization and Division of Unusual Assets", New Frontiers in Marital Property Law, Santa Fe, New Mexico, October 2001.

"Professional Partings: Valuing Medical/Legal Professional Practices", 27th Annual Advanced Family Law Course, San Antonio, Texas, August 2001.

"Valuing and Dividing the Community Business, Marriage Dissolution Seminar, Corpus Christi, Texas, May 2001.

"Interaction of Probate Court and Family Law," Family Law on the Front Lines, Galveston, Texas, April 2001.

"Bottom Line Appellate Issues," Ultimate Trial Notebook: Family Law, New Orleans, Louisiana, December 2000.

"Pretrial and Trial Strategies for the Complex Property Case", Santa Fe, New Mexico, October 2000.

"Representing the High Tech Entrepreneur: IPO's, Venture Capitalists and Beyond", 26th Annual Advanced Family Law Course, San Antonio, Texas, August 2000.

"Family Law Court v. Probate Court: What Every Family Lawyer Should Know", 26th Annual Advanced Family Law Course, San Antonio, Texas, August 2000.

"Bill of Review", 23rd Annual Marriage Dissolution Institute, Ft.Worth, Texas, May 2000

"Appellate Tips: Judges Panel", 23rd Annual Marriage Dissolution Institute, Ft.Worth, Texas, May 2000

"Fiduciary Duties of Spouses and Non-Physical Torts", International Academy of Matrimonial Lawyers, Palm Beach, Florida, March 2000.

Internal Procedures in the Texas Supreme Court Revisited: The Impact of the Petition for Review and Other Changes, 31 TEX. TECH L. REV. 63 (2000)

"Strategic Use of Law Beyond the Family Code", New Frontiers in Marital Property Law, San Diego, California, October 1999.

"Trends in Preservation of Error (At Trial, Charge, and Post Verdict)", 13th Annual Advanced Civil Appellate Practice Course, State Bar of Texas, Austin, Texas, October 1999.

"The Appellate Process-the Good, the Bad, and the Ugly", 25th Annual Advanced Family Law Course, Dallas, Texas, August 1999.

"Litigating Marital Agreements: "You can't always get what you want....",22nd Annual Marriage Dissolution Institute, San Antonio, Texas, May 1999.

“Fiduciary Duties of Spouses, Effective Use of the Remedy of the Constructive Trust, Recoveries for Violations of These Duties, and Issues Presented When Spouses are under Conflicting Fiduciary Duties,” New Frontiers in Marital Property Law, Sante Fe, New Mexico October 1998

“Appeal of the Coverage Suit,” Third Annual Insurance Law Institute (University of Texas School of Law, October 1998) (panelist/speaker and co-author);

“The New Appellate Rules -- At Last!” Eleventh Annual Advanced Civil Appellate Practice Course, Dallas September 1997 (speaker and author);

GUIDE TO THE NEW RULES OF APPELLATE PROCEDURE (State Bar of Texas 1997) (contributing author);

Motion Practice in the Texas Supreme Court, 59 TEX. B. J. 846 (October 1996)

“Factual and Legal Sufficiency in the Texas Supreme Court,” Tenth Annual Advanced Civil Appellate Practice Course, Austin 1996 (co-author)

"Inside the Texas Supreme Court," Ninth Annual Advanced Civil Appellate Practice Course, San Antonio 1995 (moderator and author)

Internal Procedures in the Texas Supreme Court, 26 TEX. TECH L. REV. 935 (1995)

"Internal Procedures and Motion Practice in the Supreme Court," Seventh Annual Advanced Civil Appellate Practice Course, Austin 1993 (speaker and author)

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Martindale-Hubbell - "AV" rating
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Member, Planning Committee, Family Law on the Front Lines (University of Texas 2005, 2006, and 2007)

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Checklist Committee of the State Bar Family Law Section

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EDUCATION

Whittier College School of Law J.D. 1992

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SELECTED LAW RELATED PUBLICATIONS & PRESENTATIONS

"Proving Economic Contribution and Reimbursement Claims,"30th Marriage Dissolution Seminar, El Paso, Texas, May 2007.

"Issues in ADR,"30th Marriage Dissolution Seminar, El Paso, Texas, May 2007.

"Marital Property Agreements: Still Crazy After All These Years," 32nd Annual Advanced Family Law Course, San Antonio, Texas, August 2006.

"Temporary Orders: Yes, It's Really a Trial - How to Get Prepared," 32nd Annual Advanced Family Law Course, San Antonio, Texas, August 2006.

"Tips for Keeping the Presentation of Your Case Straightforward," Family Law on the Front Lines, Galveston, June 2006.

"Practical Tips for Proving Tracing, Economic Contribution and Reimbursement," Austin Bar Association Bench Bar Conference, April 2006.

"Factors and Issues Judges Use in a SAPCR Case," 29th Marriage Dissolution Institute, Austin, April 2006.

"Property Issues and Closing the Case,"Annual Divorce Basics Seminar, Austin, December 2005.

"Business Evaluation in Small Estates," Family Law on the Front Lines, Galveston, Texas, June 2005.

"Judges' Panel," Family Law on the Front Lines, Galveston, Texas, June 2005 (moderator).

"Across the Divide: Trial Techniques for Family Lawyers," Austin Bar Association Bench Bar Conference 2005

"The 10 Biggest Mistakes Physicians Make in a Divorce", THE BIGGEST LEGAL MISTAKES THAT PHYSICIANS MAKE AND HOW TO AVOID THEM (SEAK, Inc. 2005).

"Responding to a Grievance," Travis County Bar Association Family Law Section Luncheon, Austin, Texas, September 2003.

"Children Inside Wedlock/Outside Wedlock," 16th Annual Marriage Dissolution Institute Houston, Texas, May 2003.

"I've got a Divorce in My Guardianship Case!" Guardianship and Advanced Elder Law Course Dallas, Texas, March 2003.

"Family Limited Partnership Basics," State Bar Section Report: Family Law, Volume 2000-2, Spring 2000.

"Summary of the 1999 Amendments to the Texas Family Code," Legal Assistant U, San Antonio, Texas, September 1999.

"Playing By the Rules: Recent Changes in the Rules of Evidence and Discovery," 1998 Winning Techniques in Family Law Litigation.

"Discovery Objections: The Good, the Bad and the Frivolous," 24th Annual Advanced Family Law Course, Dallas, Texas, August 1998.

"Analysis of the Law and Key Issues and Procedures in the Divorce Process," 1998 Texas Family Law Practice for Paralegals.

“Avoiding a Grievance, or When that Fails, Practical Tips for Responding,”1998 Travis County Bar Association Family Law Seminar.

“Ethical Considerations When Leaving a Law Firm,” 1993 Travis County Bar Association Moving Up or Moving Out Seminar.

“Ethics in Litigation: A Hitchhiker's Guide,” 1993 University of Houston Law Foundation Advanced Civil Litigation Course.

Table of Contents

ISSUES IN ADR

I. INTRODUCTION

Agreements appurtenant to the trial of a family law case come in varied forms, arising from varied authorities, which apply to varied circumstances. Texas Rule of Civil Procedure 11 governs agreements, admissions, and concessions which can limit or exclude issues to be tried in a judicial proceeding. The Texas Civil Practice & Remedies Code, at Title 7, Alternate Methods of Dispute, § 154.071, establishes the effect and enforceability of written settlement agreements. Texas Family Code § 7.006 promotes amicable settlement of disputes in cases of divorce or annulment, while Texas Family Code § 153.007 provides for the amicable settlement of disputes regarding conservatorship and possession of a child, including modification of the agreement and variations from the standard possession order. The section governing divorce or annulment provides that the terms are binding on the trial court if the terms are found to be just and right, if not, the trial court may request that the spouses submit a revised agreement or may set the cause for a contested hearing. Similarly, in cases of conservatorship or possession, the court must render an order in accordance with the agreement if the court finds the order to be in the child's best interest, if not, the trial court may render any order for the conservatorship and possession of the child. Mediated Settlement Agreements in divorce are governed by Texas Family Code § 6.602 and in parent-child relationships by Texas Family Code § 153.0071.

II. RULE 11

Unless otherwise provided in the Texas Rules of Civil Procedure, no agreement between attorneys or parties touching any suit pending is enforceable unless it is in writing, signed and filed with the papers as part of the record, or unless is made in open court and entered of record. TEX. R. CIV. P. 11.

A. Requisites of Stipulations

1. Agreement.

A stipulation, or agreement between the parties, in order to suffice under Rule 11, must be "an agreement, admission, or concession made in a judicial proceeding by the parties or their attorneys," and limits or excludes the issues that can be tried. *Rosenboom Machine & Tool, Inc. v. Machala*, 995 S.W.2d 817, 821 (Tex. App.-Houston [1st Dist.] 1999, pet. denied) (quoting *Hanson v. Academy Corp.*, 961 S.W.2d 329, 335-36 (Tex. App.– Houston [1st Dist.] 1997, writ denied)). Thus, a stipulation "obviates the need for proof on [the] litigable issue." *Id.*

2. Writing.

The Rule requires that agreements, stipulating to certain facts, "between attorneys or parties concerning a pending suit to be in writing, signed and filed in the record of the cause" to be enforceable. *London Mkt. Cos. v. Schattman*, 811 S.W.2d 550, 552 (Tex. 1991). Rule 11 exists because verbal agreements of counsel respecting the disposition of cases are likely to be misconstrued and forgotten and to lead to misunderstandings and controversies, *Padilla v. LaFrance*, 907 S.W.2d 454, 460 (Tex. 1995); *Kosowska v. Kahn*, 929 S.W.2d 505, 507 (Tex. App.– San Antonio 1996, writ denied). For example, a settlement agreement dictated during a deposition that was transcribed, filed, and signed by the court reporter, but not by the parties or attorneys, was found not enforceable as a Rule 11 agreement. *Tindall v. Bishop, Peterson and Sharp*, 961 S.W.2d 248, 251 (Tex. App.-Houston [1st Dist.] 1997, no writ). The court specifically found that the agreement was neither "(1) in writing, signed and filed with the papers as part of the record, nor was it (2) made in open court and entered of record." *Id.* Conversely, another court held that an agreement between the parties and counsel that was dictated to the court reporter was enforceable as a Rule 11 agreement. *Kosowska v. Kahn*, 929 S.W.2d 505, 507-08 (Tex. App.-San Antonio 1996, writ denied). Thus, if this type of situation presents itself, it is strongly suggested that the complete agreement, containing all salient terms, be read verbatim to the court reporter. All parties and counsel should then acknowledge the stipulation so dictated as the agreement, and that all parties intend to be bound by it. Then, as soon as possible after the deposition, a written Rule 11 agreement, memorializing the agreement, should be prepared and signed by each party. Alternatively, immediately secure a transcript of the agreement from the court reporter and attach a Rule 11 cover sheet for signature purposes. When signed by all parties, promptly file the document with the court.

The landmark case relevant to the requirement of written stipulations is *Kennedy v. Hyde*, 682 S.W.2d 525 (Tex. 1984). This multi part suit involved a stock sale, and all of the parties, except Kennedy, signed a Rule 11 agreement in regard to their respective claims. The settling parties then amended their pleadings and alleged that Kennedy, who refused to sign the Rule 11

agreement, had orally agreed to the settlement. *Id.* at 526. In response, the trial court severed the causes and proceeded with a jury trial on the issue of enforcement of Kennedy's alleged oral contract to settle. The Texas Supreme Court reversed, holding that once it was determined that Kennedy had not signed the Rule 11 agreement, the lower courts had erred by permitting a trial on the enforceability of the alleged oral agreement to settle. The Court specifically rejected the Court of Appeals statement that "the purpose of Rule 11 is to authorize rendition of agreed judgments." *Id.* at 528. The Court stated that, if the case proceeded to trial, it should have been on the original issue, and not on the issue of whether Kennedy orally had agreed to the Rule 11 agreement. In conclusion, the Supreme Court stated, "[t]he oral agreement was disputed and unenforceable at the moment its existence was denied in the pleadings; Rule 11 prohibits further inquiry." *Id.* at 531. *See also Banda v. Garcia*, 955 S.W.2d 270, 272 (Tex. 1997) (relating to pre-suit oral agreements).

3. Open Court.

When made in open court, the Rule is satisfied if the terms of the agreement are dictated before a certified reporter, and the record reflects who was present, the settlement terms, and the parties' acknowledgment of the settlement. *Cantu v. Moore*, 90 S.W.3d 821,824 (Tex. App.-San Antonio 2002, pet. denied). Be mindful, however, that the overall purpose of Rule 11 is "to avoid disputes over the existence or terms of an oral agreement between counsel." *London Mkt. Cos.*, 811 S.W.2d at 552 (citing *Kennedy*, 682 S.W.2d at 526-27). "To have a binding, open-court stipulation, the parties must dictate into the record all material terms of the agreement and their assent thereto." *Herschbach v. City of Corpus Christi*, 883 S.W.2d 720, 734 (Tex. App.-Corpus Christi 1994, writ denied). The "made in open court" option in the Rule has been construed to provide an alternative way to establish an agreement between the parties when it is not practical to have a written agreement prepared. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 677 (Tex. 1979).

In *Enber v. First State Bank of Smithville*, the parties had drafted an assignment and agreed to it beforehand, but neither side presented it to the court or filed at a hearing. 27 S.W.3d 287, 295-96 (Tex. App.-Austin 2000, pet. denied). The bank argued that, since the parties' lawyers agreed to the settlement in open court, they thereby entered the settlement of record. *Id.* at 296. The court of appeals held that the record of the hearing in question failed to establish as a matter of law that the parties entered into an oral Rule 11 agreement. *Id*. In so doing, however, it noted that "to allow a written statement to be 'supplemented' by the parties or their attorneys' subsequent in-court oral statements lead to the very mischief that the rule seeks to prevent." *Id.*

4. Material Terms.

To be enforceable, all the terms of a settlement agreement need not be contained in the judgment. *Compania Financiara Libano v. Simmons,* 53 S.W.3d 365,368 (Tex. 2001). Rather, a settlement agreement is enforceable as a contract even though its terms are not incorporated in the judgment. *Id.* But the Rule does require that the agreement must be complete "as to every material detail" and must contain "all the essential elements of the agreement so that the contract can be ascertained from the writing, without resort to oral testimony." *CherCo Props. v. Law, Snakard & Gambill, P.C.*, 985 S.W.2d 262, 265 (Tex. App. - Fort Worth 1999, no pet.). A stipulation must be clear enough so that enforcement of the agreed terms can be accurately reflected in a judgment. A trial court has no power to supply terms, provisions, or details not previously agreed to by the parties. *Tinney v. Willingham*, 897 S.W.2d 543, 545 (Tex. App.-Fort Worth 1995, no writ). If a judgment does not conform to the settlement agreement, it will be rendered unenforceable. *Nuno v. Pulido*, 946 S.W.2d 448,451 (Tex. App.-Corpus Christi 1997, no writ).

It is particularly important in family law matters to reduce any stipulations to writing, even if it is scratched out on a notepad. The stipulation should include all aspects of the agreement, including a listing of the obligations of each party. The attorney may omit the parent-child issues (i.e., support, possession and access, rights and duties), all property issues, and financial obligations of both parties; but the attorney must remember that any omitted issue remains contested.

B. Uses for stipulations

Stipulations are useful tools that can be used for many purposes. They can be utilized to narrow complex issues, alleviate the need to call witnesses, and resolve the entire lawsuit. But if not properly implemented, another lawsuit inevitably follows. There is a fundamental different between an agreement concerning a law suit and a suit concerning an agreement. The remedy for a failed stipulated agreement is a suit for breach of contract. In that situation, not only is the suit in regard to

family matters not resolved, but a whole new suit must be initiated to enforce the attempted agreement. This generates more fees and expenses for the parties, and escalates the hard feelings and mistrust among all those involved. It is therefore imperative that the applicable rules be followed and statutes read carefully for strict compliance.

Stipulations pursuant to Rule 11 refer only to agreements in regard to facts; legal conclusions cannot be stipulated. A stipulation of a legal conclusion is not binding on a court or the parties. *Cartwright v. Mbank Corpus Christi, N.A.*, 865 S.W.2d 546, 549 (Tex. App.-Corpus Christi 1993, writ denied). For example, in *Caprock Investment Corp. v. Federal Deposit Insurance Co.*, the court noted that the question of whether Caprock was the proper plaintiff was a question of law, so the stipulation could not be determinative. 17 S.W.3d 707, 713 (Tex. App.¬Eastland 2000, pet. denied).

C. Clear and Unambiguous

Further, a stipulation that is ambiguous or unclear should be disregarded by the court. *Am. Nat'l Petroleum Co. v. Transcontinental Gas Pipe Line Corp.,* 798 S.W.2d 274, 281 (Tex. 1990); *Rosenboom Mach. & Tool, Inc. v. Machala*, 995 S.W.2d 817, 821 (Tex. App.-Houston [1st Dist.] 1999, pet. denied). To construe a stipulation, a court must "determine the intent of the parties from the language used in the entire agreement, examining the surrounding circumstances, including the state of the pleadings, the allegations made therein, and the attitude of the parties with respect to the issue. *Am. Nat'l Petroleum Co.*, 798 S.W.2d at 281; *Rosenboom*, 995 S.W.2d at 821. But a stipulation should not be given greater effect than the parties intended, nor should it be construed as an admission of fact intended to be controverted. *Am. Nat'l Petroleum Co.*, 798 S.W.2d at 281; *Rosenboom*, 995 S.W.2d at 822.

D. Filing with the Court

Rule 11 does not require a writing to be filed in the trial court before the other party withdraws their consent; the filing requirement is satisfied so long as the agreement is filed before enforcement is sought. *Padilla v. LaFrance*, 907 S.W.2d 454, 461 (Tex. 1995). *Padilla* involved a dispute about whether a series of letters between the parties' representatives were enforceable as a written settlement agreement under Rule 11 even though the plaintiffs withdrew their consent before the papers were filed with the court and before judgment was rendered on the agreement. *Id.* at 455. The Supreme Court noted that "[a]lthough Rule 11 requires the writings to be filed in the court record, it does not say *when* it must be filed." *Id.* at 461. To require that the papers be filed before consent is withdrawn would not further the purpose of the rule – to avoid disputes over the terms of oral settlement agreements. *Id*. The purpose of the rule is to put the agreement before the judge so that he could determine its importance and proceed with the orderly progression of the suit. *Id.* The Court held that "[t]his purpose is satisfied so long as the agreement is filed before it is sought to be enforced. *Id*.

Although the law appears to be clear in regard to the timing of filing a Rule 11 agreement, the better practice is to file the agreement as soon as it is signed. It is also advisable to provide a signature blank for the judge to sign evidencing the court's approval. This practice will remove any doubt of the agreement's validity and enforceability.

E. Approval by the Court

A settlement agreement upon which an eventual judgment will be based when entered into the record is subject to withdrawal by either party until judgment is rendered by the court. In other words, party may revoke consent to a settlement agreement at any time before judgment is rendered. *San Antonio Rest. Corp. v. Leal*, 892 S. W.2d 855, 857 (Tex. 1995). In *San Antonio Restaurant Corp*., after the settlement agreement was read into the record, the defendants attempted to withdraw consent based on newly discovered evidence. The trial court refused to consider the new evidence and signed the judgment based on the previously entered settlement agreement. The court of appeals affirmed, but the Texas Supreme Court reversed, holding that because there was no clear language in the record of the trial court's intention to render judgment when the agreement was read into the record, the settlement agreement was subject to revocation. *Id.* at 858. The Court noted that the operative language of the trial court was "...once this judgment is signed and I approve it,...it's full, final and complete...I'll approve the settlement." *Id*. The Supreme Court held that this language was not sufficient to express a clear intent to render judgment in the case. Therefore, the agreement could still be revoked and judgment could not be rendered based on the agreement.

In a similar case, the parties filed a stipulation resolving their divorce case. *Keim v. Anderson*, 943 S.W.2d 938 (Tex. App.-El Paso 1997, no writ). After reviewing the agreement, the trial court pronounced, "I will grant the divorce as of this time on June 30, 1995." *Id.* at 942. There was no mention in the stipulation in regard to the resolution of any outstanding temporary orders, or

prior award of attorney's fees granted to wife's attorney as discovery sanctions. Later that same day, the wife's prior attorney filed an intervention for attorney's fees previously awarded as a discovery sanction. *Id.* at 940. At the entry hearing the, court found that the Rule 11 agreement entered into the record did not seek to withdraw or vacate by the stipulation the prior order award of interim attorney's fees therefore they should be included in the decree. *Id.* at 941. In remanding the case, the appellate court held that the trial court could consider the intervention, filed after rendition, only if it had set aside the prior judgment. *Id.* at 945. The trial court had no authority to modify the agreement. *Id.*

In an injunction suit, the parties announced to the Court that they had reached a settlement. *Samples Exterminators v. Samples*, 640 S.W.2d 873, 874 (Tex. 1982). Based on this announcement, the Court stated on the record that "all of you did agree in open Court to this settlement, the Court approves the settlement...and orders all parties to sign any and all papers necessary to carry out this agreement and...the agreement that was...dictated into the record." *Id.* at 874. The day after the stipulation, the defendant revoked consent to the agreement. The Supreme Court held that the revocation was too late because the court's statement on the record constituted a rendition of judgment. *Id.* at 875.

1. Modification of a Rule 11 Agreement.

In *In re Nolder*, a court of appeals modified a provision of a Rule 11 settlement agreement that awarded the wife 55% of the husband's stock options when the husband failed to disclose that he had already exercised the options and sold the stock. 48 S.W.3d 432, 434-35 (Tex. App.-Texarkana 2001, no. pet.). The court held that because it was impossible for the trial court to enforce the terms of the agreement, it was entitled to modify the agreement and render a judgment that awarded the wife 55% of the cash value of the in-kind options. *Id.*

2. Actions of an Associate Judge.

An associate judge has only limited authority to render and sign a final judgment. The associate judge may only sign a judgment that is "agreed to in writing as to both form and substance by all parties" or they may sign "a final default judgment." TEX. FAM. CODE § 201.007(a)(14)(A),(B). But it must be a final order from the associate judge in order to be enforceable. *See In re Lausch*, 177 S.W.3d 144, 151 (Tex. App.-Houston [1st Dist.] 2005, no pet.) (holding that an associate judge's oral pronouncements from the bench, combined with a handwritten report do not constitute a final order of enforcement)). In *Stein v. Stein*, the parties entered into a settlement agreement that was initialed but not signed by an associate judge. 868 S.W.2d 902, 903 (Tex. App.-Houston [1st Dist.] 1994, no writ). Before the referring court could sign the settlement, one of the parties revoked consent to the agreement. *Id.* The court of appeals determined that the associate judge never generated a *signed* report and therefore the provisions of former section 54.010 of the Government Code did not apply. *Stein*, 868 S.W.2d at 904. The court of appeals further held no rendition of judgment occurred until the referring court signed the settlement agreement, and because this came after one of the parties had revoked consent, the judgment was void. *Id.*

This rule comports with the previous discussion that judgment cannot be entered on a Rule 11 agreement when one side as withdrawn consent.

An associate judge entering an agreement into the record can likewise constitute entering a Rule 11 agreement into the record. For example, in *Clanin v. Clanin*, the appeals court upheld a Rule 11 agreement that had been entered by an associate judge. 918 S.W.2d 673 (Tex. App.-Fort Worth 1996, no writ). The parties in *Clanin* entered into a Rule 11 agreement that was filed in court with the associate judge. *Id.* at 675. Three months later, the referring court signed a final order on the matter. *Id.* Afterwards, one of the parties attempted to repudiate the agreement, which the trial court denied. *Id.* On appeal, the court found that "the statement of facts clearly shows that the parties and attorneys announced in open court they had reached an agreement and that the agreement was dictated into the record in the form of sworn testimony of the parties. Further, the handwritten statement styled 'Rule 11 Agreement,' announcing their agreement and that the terms of the agreement had been entered of record, was signed by the parties and attorneys and filed with the papers as part of the record. Clearly, there was sufficient evidence for the court to conclude the existence of a valid Rule 11 agreement." *Clanin*, 918 S.W.2d at 677.

It is important, however, to note the distinction between *Stein* and *Clanin*. In *Stein*, it was held that one party repudiated before final rendition of judgment, so no valid judgment could be entered based on the agreement. On the other hand, the party in *Clanin* attempted to repudiate only **after** a final judgment had been rendered. Therefore the agreement was upheld. *See also Sohocki v. Sohocki*, 897 S.W.2d 422 (Tex. App.-Corpus Christi 1995, no writ) (holding that entering

decree based on Rule 11 agreement improper when wife had revoked consent before the special master made his recommendation to the trial court and trial court adopted the recommendation).

F. Motion to Enforce a Rule 11 Versus a Motion to Enter Judgment

A trial court is not authorized and cannot render a judgment on a Rule 11 stipulation if it is repudiated before rendition of judgment. *Davis v. Wickham*, 917 S.W.2d 414, 417 (Tex. App.-Houston [1st Dist.] 1996, no writ). In *Davis*, the parties had reached a settlement that was reduced to a Rule 11 agreement and signed by all parties. Prior to rendition of judgment, the husband repudiated the agreement based on newly discovered evidence. The wife's attorney filed a motion to enter final judgment based upon the agreement between the parties. *Id.* at 417. The trial court granted the motion and entered judgment. The Court of Appeals reversed, holding that because the husband revoked the agreement, the court was without power to enter a binding final judgment. It held further that the sole issue before the trial court was whether to enter, or not to enter, the agreement as a final judgment. The issue of whether the Rule 11 agreement should or should not be enforced was not before the court. Citing *Padilla*, the court opined that, before the trial court could have considered the enforcement issue, the wife would have to have proper pleadings on file, and would have to introduce proper proof. *Id.* at 417. *Padilla* is the leading Supreme Court case to provide guidance, and provides a warning not to "confuse the requirements for an agreed judgment with those for an enforceable settlement agreement." *Padilla*, 907 S. W.2d at 461. The Court explained:

> Although a court cannot render a valid agreed judgment absent consent at the time it is rendered, this does not preclude the court, after proper notice and hearing, from enforcing a settlement agreement complying with Rule 11 even though one side no longer consents to the settlement. The judgment in the latter case is not an agreed judgment, but rather is a judgment enforcing a binding contract.

Id.

In *CherCo Prop., Inc. v. Law, Snakard, & Gambill, P.C.*, 985 S.W.2d 262 (Tex. App.-Fort Worth 1999, no pet.), the parties reached an agreement in a malpractice case. Plaintiffs refused to approve the formal agreed settlement and withdrew consent because the agreement did not include a time for performance. Defendants filed a motion to enforce the agreement, together with a motion for summary judgment in support of their contention, which the trial court granted. In upholding the trial court's ruling, the appellate court stated that "although withdrawal of CherCo's consent to the agreement may have been fatal to an agreed judgment, it has no effect on Law's motion to enforce the settlement as a contract," and "under the facts of this case, a time for performance is not a material term, and thus its omission does not render the parties' settlement agreement unenforceable." *Id.* at 266.

G. Judicial Admission from Stipulation

Once a clear and unambiguous stipulation is made as to specific facts issued pursuant to Rule 11, that stipulation becomes a judicial admission and is conclusive on all parties, which estops the complaining party from further disputing the stipulated facts. *Shepherd v. Ledford*, 962 S. W.2d 28, 34 (Tex. 1998). A judicial admission is a formal waiver of proof usually found in pleadings or the stipulations of the parties. *Hennigan v. I.P. Petroleum Co.*, 858 S.W.2d 371, 372 (Tex. 1993). A true judicial admission is conclusive on the party making the admission and not only relieves the opposing party from making proof of the fact admitted, but also bars the admitting party from disputing that the admission made. *Id.*; *Gevinson v. Manhattan Const. Co. of Okla.*, 449 S.W.2d 458, 467 (Tex. 1969). In contrast, a Rule 11 stipulation is sometimes a contractual agreement, which must include the following--express or implied: an offer, acceptance, and consideration. At other times, it is a mere concession or admission made by one or both parties to save time and expense, requiring none of the usual contractual elements. *Discovery Operating, Inc. v. Baskin*, 855 S.W.2d 884, 887 (Tex. App.-El Paso 1993, orig. proceeding). The actual stipulation filed with the court or dictated into the record which meets the requirements of Rule 11 is controlling, not the erroneous recitation by the trial court of the agreement. *Herschbach v. City of Corpus Christi*, 883 S.W.2d 720, 734 (Tex. App.-Corpus Christi 1994, writ denied); *Tinney v. Willingham*, 897 S.W.2d 543, 544 (Tex. App.-Fort Worth 1995, no writ).

H. Applicable only to Pending Lawsuits

A stipulation is only valid if it is entered in a pending lawsuit. A compromise and settlement of a claim prior to the filing of a suit does not fall within the ambit of Rule 11. *See, e.g., Estate of*

Pollack v. McMurrey, 858 S.W.2d 388, 393 (Tex. 1993). There is a difference between an agreement concerning a pending lawsuit, which falls under Rule 11, and a lawsuit concerning an agreement, which is merely a suit on a contract. *Id.* This distinction is illustrated in *Banda v. Garcia*, 955 S.W.2d 270 (Tex. 1997). Although *Banda* does not address Rule 11 directly, it does shed light on the enforceability of oral pre-suit agreements.

In *Banda*, Garcia's attorney made an offer to settle with Banda's attorney prior to suit being filed. The offer was evidenced by a letter that set out the offer and stated that, if the offer was not accepted by a certain deadline, then the offer would be withdrawn. *Id.* at 271. The deadline passed, and Garcia withdrew the offer and filed suit to enforce the agreement. *Id.* The trial court found that an oral agreement existed, but the court of appeal reversed, stating the unsworn testimony of the attorney was not enough to support a finding of an enforceable settlement agreement. *Id.* The Supreme Court reversed the court of appeals, holding that the attorney's comments were some evidence of an enforceable pre-suit settlement agreement. *Id.* at 272. Thus, Rule 11 requires settlement agreements in a pending lawsuit to be in writing, but is silent on the issue of settlement offers. TEX. R. CIV. P. 11; *Trinity Univ. Ins. Co. v. Bleeker*, 944 S.W.2d 672, 675 (Tex. App.-Corpus Christ 1997), *rev'd in part on other grounds*, 966 S.W.2d 489 (Tex. 1998). *See also Carter v. Allstate Ins.*, 962 S.W.2d 268, 271 (Tex. App.-Houston [1st Dist.] 1998, pet denied) (holding that a pre-suit oral settlement agreement between an insurer and a claimant against its insured is not rendered unenforceable by Rule 11); *Recio v. Recio*, 666 S.W.2d 645 (Tex. App.-Corpus Christi 1984, no writ) (holding that Rule 11 did not bar ex-wife's suit because the alleged agreement was not made as an incident to the suit, but rather as a defense to it, so Rule 11 had no application in that instance).

III. SETTLEMENT AGREEMENTS UNDER FAMILY CODE SECTIONS 7.006 AND 153.007

To promote amicable settlement of disputes in a suit for divorce or annulment, spouses may enter into a written agreement concerning the division of the property and the liabilities of the spouses and maintenance of either spouse. *Engineer v. Engineer*, 187 S.W.3d 625, 626 (Tex. App.-Houston [14th Dist.] 2006, no pet.); TEX. FAM. CODE § 7.006(a). The agreement may be revised or repudiated at any time before rendition of the divorce or annulment unless the agreement is binding under another rule of law. TEX. FAM. CODE § 7.006(a). But remember, it is still enforceable under contract law. Thus, a written settlement agreement can be enforceable even though one party withdraws consent before judgment is rendered on the agreement. *See, e.g., Michael Mantas, M.D. v. The Fifth Court of Appeals*, 925 S.W.2d 656, 658 (Tex. 1996); *Padilla v. LaFrance*, 907 S.W.2d 454, 461 (Tex. 1995).

If the trial court finds that the terms of the agreement are just and right, those terms are binding on the court. *Engineer*, 187 S.W.3d at 626; TEX. FAM. CODE § 7.006(b). If the trial court approves the agreement, the court may set forth the agreement in full, or incorporate the documents by reference in the final decree. *Engineer*, 187 S.W.3d at 626; TEX. FAM. CODE § 7.006(b). But if the trial court finds that the terms of the agreement are not just and right, it may either request that the spouses submit a revised agreement or set the case for a contested hearing. TEX. FAM. CODE § 7.006(c). A trial court is not bound to accept the parties' agreement. *In re McFarland*, 176 S.W.3d 650, 659 (Tex. App.-Texarkana 2005, no pet.). So a trial court has only two options when it finds that the term are not just and right: it can request the parties to revise the agreement or set a hearing on the matter. There is no discretion to do otherwise; it cannot change an agreement before entering it. If an appellate court determines that a decree contains terms and provisions that were never agreed upon by the parties, it must reverse the judgment and remand the case. *Engineer*, 187 S.W.3d at 626.

In *Engineer*, appellant complained that the trial court omitted certain provisions of the settlement agreement in the final decree. *Id.* at 625. In its findings, the trial court stated that there was no trial on the merits, nor were there independent findings concerning the property division. *Id.* at 626. The trial court's conclusions stated that the decree incorporated the agreement as modified and clarified by arbitration, and further modified by the court. In reversing the case, the appellate court conceded that certain provisions in the agreement were ambiguous, noting that the Family Code does not authorize a trial court to modify an agreement before incorporating it into the decree. *Id.* The case was remanded back to the trial court for further proceedings.

Section 153.007 is almost a mirror image of section 7.006, but deals with child conservatorship and possession. Texas Family Code section 153.007 encourages parties to settle their disputes amicably and allows parties to enter into agreements to modify orders concerning possession of their children. TEX. FAM. CODE § 153.007(a); *Wyatt v. Wyatt*, 104 S.W.3d 337, 339 (Tex. App.-Dallas

2003, no pet.). Such an agreement must be in writing or be made part of the record in open court. *Id.*; *Skidmore v. Glenn*, 781 S.W.2d 672, 674-75 (Tex. App.-Dallas 1989, no writ). If the trial court finds the agreement is in the children's best interest, then the court is to render an order in accordance with the agreement. TEX. FAM. CODE § 153.007(b); *Wyatt*, 104 S.W.3d at 339.

An important distinction between section 153.007 and section 7.006 is that, under Texas Family Code section 153.007, an agreement regarding child support is not enforceable as a contract. TEX. FAM. CODE § 153.007(c); *In re T.J.K.*, 62 S.W.3d 830 832-33 (Tex. App.-Texarkana 2001, no pet.). As such, child support agreements are construed differently than property settlement agreements, which are construed under the law of contracts. *Hill v. Hill*, 819 S.W.2d 570, 572 (Tex. App.-Dallas 1991, writ denied). But the parties can contract apart from section 153.007, and a contract made as part of divorce judgment under section 153.007 is, in absence of fraud, accident or mistake, enforceable and not subject to alteration, modification or cancellation merely because conditions or circumstances have changed, notwithstanding custody or support provisions of divorce decree might be subject to modification because of changed circumstances. *Kolb v. Kolb*, 479 S.W.2d 81 (Tex. App.-Dallas 1972, no writ). If the court finds the agreed parenting plan is not in the child's best interest, the court may request the parties to submit a revised parenting plan or the court may render an order for the conservatorship and possession of the child. TEX. FAM. CODE § l53.007(d).

IV. SETTLEMENT AGREEMENTS UNDER TEXAS CIVIL PRACTICE & REMEDIES CODE SECTION 154.071

If the parties in a suit reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract. TEX. CIV. PRAC. & REM. CODE § 154.071. In *Compania Financiara Libano, S.A. v. Simmons*, the underlying lawsuit claimed a fraudulent transfer of property interests. 53 S.W.3d 365, 366 (Tex. 2001). The parties subsequently entered into an agreed settlement, which was filed as a Rule 11 and signed by the court; however, the judgment did not refer to all the provisions of the agreement, and it also contained a "Mother Hubbard" clause. *Id.* Compania Financiara Libano filed a timely motion to modify the judgment but it was never ruled upon and was overruled by operation of law. *Id.* Later, Compania Financiara Libano filed suit against Simmons to compel performance of the agreement, claiming breach of contract, fraud, tortuous interference and specific performance. *Id.*

The trial court granted Compania Financiara Libano's summary judgment and ordered Simmons to specifically comply and pay attorney fees. *Id.* The court of appeals reversed, holding that the action was an impermissible collateral attack, and that the agreement had been merged into the agreed judgment based on the Mother Hubbard clause. *Id.* The Supreme Court reversed, holding that nothing in the settlement agreement stated that all the terms were intended to be in the judgment. *Id.* at 367. The statute set out that the agreement may be enforced as a contract. *Id.* The Court concluded that all settlement terms are not required to be incorporated into a judgment to be enforceable. *Id.*

V. SETTLEMENT AGREEMENT V. MEDIATED SETTLEMENT AGREEMENT

When does an agreement fall under the provisions of section 7.006 and when does an agreement fall within the more restrictive provisions of sections 6.602 or l53.007l? For example, in *Lee v. Lee*, the parties met and negotiated an agreement to settle their divorce case. 158 S.W.3d 612 (Tex. App.-Fort Worth 2005, no pet.). Except for the first page, which was prepared by the husband's attorney, the entire document was prepared by the husband. *Id.* at 612. The agreement was titled "Binding Settlement Agreement" and contained following statement on the first page: "PURSUANT TO SECTION 6.602 OF THE TEXAS FAMILY CODE, THIS AGREEMENT IN [SIC] NOT SUBJECT TO REVOCATION." *Id.* Both parties signed the agreement. *Id.* Before rendition of the divorce and the property division, however, the husband attempted to revoke his consent. *Id.* But the trial court refused and found the agreement between the parties to be a valid settlement agreement and not revocable under section 6.602 of the Family Code. *Id.* at 612-13.

On review, the appellate court noted that the ordinary meaning of the word "mediation" was "[a] method of nonbinding dispute resolution involving a neutral third party who tries to help the disputing parties reach a mutually agreeable solution." *Id.* at 613. The court of appeals reversed, holding that "[b]ecause there was no third party present at the settlement conference between [the parties], there was no mediated settlement agreement." *Id.* at 614. In doing so, the court reasoned that "[g]iven that section 7.006(a) of the Texas Family Code, which has been in force for many years, already allows divorcing parties to enter into written agreements without requiring mediation concerning the division

of the community assets and liabilities as well as spousal maintenance," and "decline[d] to carve a common-law exception into section 6.602(b) that allows an unmediated settlement agreement to morph into a mediated settlement agreement based on mere form." *Id.* at 613-14. The document in dispute was then held to be "an agreement under section 7.006(a)," which can be "revised or repudiated before the divorce is rendered unless the agreement is binding under another rule of law." *Id.* at 614. The effect of the ruling was to require that a separate suit be filed for a breach of contract claim to enforce the signed agreement.

Perhaps in response to *Lee v. Lee*, in 2005, the Legislature added section 6.604 to the family code. Section 6.604 was effective September 1, 2005. Section 6.604 provides:

> (a) The parties to a suit for dissolution of a marriage may agree to one or more informal settlement conferences and may agree that the settlement conferences may be conducted with or without the presence of the parties' attorneys, if any.
>
> (b) A written settlement agreement reached at an informal settlement conference is binding on the parties if the agreement:
>
> (1) provides, in a prominently displayed statement that is in boldfaced type or in 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.
>
> (c) If a written settlement agreement meets the requirements of Subsection (b), a party is entitled to judgment on the settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.
>
> (d) If the court finds that the terms of the written informal settlement agreement are just and right, those terms are binding on the court. If the court approves the agreement, the court may set forth the agreement in full or incorporate the agreement by reference in the final decree.
>
> (e) If the court finds that the terms of the written informal settlement agreement are not just and right, the court may request the parties to submit a revised agreement or set the case for a contested hearing.

Section 6.604 essentially permits parties to enter into a written informal settlement agreement without attorneys and the informal settlement agreement is binding on the parties if it complies with the requirements of an enforceable mediated settlement agreement. However, informal settlement agreements under section 6.604 are subject to review by the trial court. For example, the terms of the informal settlement agreement are binding on the trial court if the trial court finds that the terms of the written informal settlement agreement are just and right. But if the trial court finds that the terms of the written informal settlement agreement are not just and right, the terms of the informal settlement agreement are not binding on the trial court and the trial court may request the parties to submit a revised agreement or set the case for a contested hearing.

VI. 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).

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.).

A. 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 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.*

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 121. *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).

B. Cannot Withdraw Consent.

In *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 407. 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 407.

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. Reiser*, 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 pointed out that subsection (d) does provide a trial court with the discretion to modify a proposed order in the event that the court determines it is not in the child's best interest, but nowhere does it require the court to do so. *Id.* at 360.The court also held that nothing in the common law creates such a duty. *Id.*

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. *Beyers v. Roberts*, 199 S.W.3d 354, 360-361 (Tex. App.-Houston [1st Dist.] 2006, pet. denied); *In re T.B.H.-H.*, 188 S.W.3d 312, 314 (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.* 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). *Beyers* 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)).

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.

D. Deviation or Modification

Modifications to settlement agreements are typically grounds for reversal only if they add terms, significantly alter the original terms or undermine the intent of the parties. *Beyers v. Roberts*, 199 S. W .3d 354, 362 (Tex. App.-Houston [1st Dist.) 2006, pet. denied); *See In the Matter of the Marriage of Ames*, 860 S.W.2d 590, 592-93 (Tex. App.-Amarillo 1993, no writ) (holding that the trial court erred when it added terms that "differed significantly").

Beyers dealt, in part, with an argument that the settlement agreement specified that a child would attend Emmanuel Lutheran School starting in January 2004, while the court's order provided that the child would attend his current school through that year, and then attend Emmanuel Lutheran the next school year. *Beyers*, 199 S.W.3d at 361-362. Appellant argued that, when it was discovered that the child could not enter Emmanuel Lutheran until the next school year because the school was full and could not enroll more students, the settlement agreement should have been rescinded for mutual mistake. *Id.* at 362. The court noted that, when mutual mistake is alleged, the party who claims relief must show what the parties' true agreement was and that the instrument does not show that agreement because of the mutual mistake. *Id.*. The court found such attempt was made, but did point out that it was clearly the parties' intent that the child would enroll in school at Emmanuel Lutheran as soon as possible. *Id.*. Because the court's order correctly reflected the parties' intent, the court held that the trial court did not err when it failed to rescind the entire agreement. *Id.* at 363.

The court may abuse its discretion if it deviates from the terms of the mediated settlement agreement in the judgment. In *Garcia-Udall v. Udall*, temporary orders awarded 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.*

The appellant in *In re J.A.W.-N.* contended that the terms of the mediated agreement were not compatible with the court's order, and were so vague, contradictory, ambiguous, and inherently incomplete that it could not be enforced by judgment. 94 S.W.3d 119, 121 (Tex. App.-Corpus Christi 2002, no pet.). Appellant further argued that the agreement was incomplete because it did not address unresolved disputes. *Id.* at 122. In rejecting all these arguments, the court noted that the appellant never complained that the provisions were incorrect. *Id.* The court further held that, "if there were any issues related to conservatorship, support, or possession of and access to his child that need to be revisited, appellant's remedy would be further modification or clarification of his rights, incident to the trial court's continuing jurisdiction, not a finding of trial court error on appeal." *Id.* (citing TEX. FAM. CODE § 156.101.

E. 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 166 (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 by one party to an agreement can support rescission or repudiation by the other party. *Boyd v. Boyd*, 67 S.W.3d 398 (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 Lifestyles, Inc., 977 S.W.2d 662, 670 (Tex. App.-Fort Worth 1998, pet. denied). 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 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). 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 (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 agreement 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 underlying 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. Rendition

Generally, a judgment is rendered when the decision is officially announced orally in open court, by memorandum filed with the clerk, or otherwise announced publicly. *Garza v. Tex. Alcoholic Beverage Comm'n*, 89 S.W.3d 1, 6 (Tex. 2002); *Comet Aluminum Co. v. Dibrell*, 450 S.W.2d 56, 58 (Tex. 1970); *Knox v. Long*, 257 S.W.2d 289, 292 (1953), *overruled in part on other grounds*, *Jackson v. Hernandez*, 285 S.W.2d 184 (1955); *Coleman v. Zapp*, 151 S.W. 1040, 1041 (Tex. 1912). The entry of a written judgment is merely a ministerial act that reflects the court's action. *Cook v. Cook*, 888

S.W.2d 130 (Tex. App.-Corpus Christi 1994, no writ). A party can revoke his consent to settle a case at any time before the judgment is rendered. *Samples Exterminators v. Samples*, 640 S.W.2d 873, 874-75 (Tex. 1982). A judgment rendered after a party revokes his consent is void. *Id.* at 875.

When does the actual rendition occur? In *In re Joyner*, the trial court announced "your divorce is granted." 196 S.W.3d 883, 885 (Tex. App.-Texarkana 2006, pet. denied). Was this pronouncement the rendition of the final judgment? Is such an oral rendition effective? In *Joyner*, the parties signed a mediated settlement agreement that addressed most of their property and provided for the conservatorship and support of their minor son. *Id.* at 885-886. The parties attended a "final hearing" to address the few remaining property issues they had not been able to resolve in mediation. *Id.* at 886. The next day, the husband purchased a lottery ticket, which won over two million dollars. *Id.* Almost a year later, the wife filed a motion for a final trial setting, claiming that the divorce had never been finalized. *Id.* At that time, the trial court signed a "Final Decree of Divorce," which set out that the divorce had been judicially pronounced at the earlier hearing. *Id.* The wife appealed claiming that the divorce was final at the later hearing. *Id.* The court of appeals disagreed.

The appeals court observed that a judgment can be rendered either orally or in writing. *Id.*. (citing *James v. Hubbard*, 21 S.W.3d 558, 561 (Tex. App.-San Antonio, 2000, no pet)). If rendered by oral pronouncement, the entry of the written judgment is merely a ministerial act. *Keim v. Anderson*, 943 S.W.2d 938, 942 (Tex. App.-El Paso 1997, no pet.). But in order to be an official judgment, the oral pronouncement must indicate intent to render a full, final and complete judgment when it is recited. *S & A Rest. Corp. v. Leal*, 892 S.W.2d 855, 858 (Tex. 1995). It cannot allude to a future act that will decide the issues before the court. *Woods v. Woods*, 167 S.W.3d 932,933 (Tex. App.-Amarillo 2005, no pet.).

In this case, the *Joyner* court found that the intent of the trial court to render judgment was "undeniably there." *Id.* at 887. The court of appeals found that the trial court's statement was "made in open court while officiating as the presiding judge after all the evidence had been presented and in the presence of all parties and attorneys." *Id.* The trial judge expressly stated: "*your divorce is granted*" in the midst of other statements indicating present intent. *Id.* He also referred to the wife as "former wife." *Id.* The court of appeals found the judge's statement to indicate a "clear, present intent" that the judge was going to "rule immediately" and then did so. *Id.* at 888.

I. Mediation Notebook

Frequently we 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 doesn't 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 as well as 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.

We suggest the preparation of a mediation notebook with "form" Decree language that can be edited and revised as necessary for each particular mediation. We 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. We don't particularly like some of the Family Law Practice Manual forms and frequently insist that our forms be utilized. The Appendix contains an example of a check list and some of our "form" Decree language which you might find helpful including geographical restriction, life insurance, contractual alimony, sale of property, health insurance provisions, mediation of disputes, income tax provisions, and miscellaneous provisions.

VII. AGREEMENTS IN COLLABORATIVE LAW CASES

In the context of a collaborative case, many commitments and agreements are made throughout the entire case regarding various temporary and long-term issues. When lawyers first began practicing collaborative law, they discovered that clients sometimes are uncomfortable agreeing to "final issues" in a piecemeal fashion. Lawyers also learned that "agreements" were reached and then one client would change his or her mind later. How binding are the agreements reached in the collaborative process? The answer is: as binding as the spouses and the lawyers desire. The means of obtaining the answer is: talk about it!

A. Participation Agreement Authorizes Binding Agreements

The lawyer Participation Agreement includes a section titled "Agreements." In that section, all participants agree that any partial or final agreement, if in writing and signed by both parties and their collaborative lawyers, may be filed with the court as a settlement agreement "...in accordance with Texas Family Code § 6.603 and/or § 153.0072 and/or Rule 11, Texas Rules of Civil Procedure. Such an agreement is retroactive to the date of the written agreement and may be made the basis of a court order."

B. Collaborative Statutes Authorize Binding Agreements

Texas law permits collaborative participants to enter into binding agreements as follows:

> Notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule or law, a party is entitled to judgment on a collaborative law settlement agreement if the agreement: (1) provides, in a prominently displayed statement that is boldfaced, capitalized, or underlined, that the agreement is not subject to revocation; and (2) is signed by each party to the agreement and the attorney of each party.

TEX. FAM. CODE § 6.603(d), §153.0072(d). These provisions allow collaborative participants the same finality with a collaborative settlement agreement as has been permitted to those who have a mediated settlement agreement. (*See* TEX. FAM. CODE § 6.602(b)).

C. Other Relevant Statutes

1. Texas Rule of Civil Procedure 11

Rule 11 states in relevant part that no agreement between lawyers or parties will be enforced unless it is in writing, signed, and filed with the court. In some collaborative cases, the parties agree on a significant issue or issues, and one or both parties want the agreement to be binding. In those instances, the lawyers and parties sign an agreement separate from the Minutes and file the agreement with the Court in order to comply with Rule 11.

In joint meetings many agreements are reached – some small and some large. The typical Minutes of a joint meeting summarize the agreements reached. At the next scheduled joint meeting, the parties and lawyers review the Minutes from the previous meeting, and if accurate, sign the Minutes indicating their approval and agreement. The Minutes are not typically filed with the Court but could the Minutes be filed? Arguably the Minutes could be filed with the Court as a Rule 11 Agreement. At this time, few, if any, lawyers are filing the Minutes as a Rule 11 Agreement but that does not mean the Minutes cannot be filed. An open question is whether the Minutes later could be filed, becoming binding and enforceable, if the parties opted out of collaborative to pursue a litigated divorce. The Participation Agreement suggests an affirmative answer. In the "Legal Process" section of the Participation Agreement, everyone agrees that "[a]ll written agreements shall remain effective until modified by agreement or court order." This provision is found in the "termination of the collaborative process" section.

In collaborative joint meetings, lawyers are careful to ask the participants whether they are entering into an agreement by which they wish to be bound. In most cases, clients seem more comfortable with agreements being conditioned on all other issues being resolved in an acceptable way.

2. Texas Family Code § 6.604

Section 6.604 "Informal Settlement Conference" became effective September 1, 2005. This statute states that parties to a dissolution of marriage suit may enter into binding written settlement agreements even if the settlement conference is "informal" and no lawyers are present. Collaborative lawyers should make their clients aware of this statute if, for no other reason, to ensure that no one inadvertently enters into a binding agreement.

D. Discuss Agreements

The lawyer Participation Agreement and collaborative statutes authorize binding, enforceable agreements in a collaborative case. Collaborative participants desire a final, binding agreement which provides resolution of all issues and closure. Controversy arises most often in the context of interim agreements reached along the way to final resolution. These interim agreements sometimes create confusion when one party believed a particular agreement was binding and the other believed it was merely an expression of intent or conditioned upon some other event. Collaborative lawyers must talk to their clients and ask questions to determine whether agreements are intended to be binding or conditional. Lawyers then must draft Minutes consistent with the intent of the parties –

expressing agreements as "conditional" or "binding." As long as everyone discusses the pros and cons and ramifications of entering into a binding settlement agreement, the collaborative participants are free to do so – on one issue or all issues.

APPENDIX

MEDIATION CHECK LIST

1. Custody and Access

A. Parties

_____ Current address and telephone number

_____ Employer's address and telephone number

_____ Social Security numbers of all parties and children

_____ Driver's license number of all parties and children

_____ Maiden name

_____ Place of birth of all parties

_____ Date and location where the parties were married

B. Custody

_____ Sole Managing Conservator

_____ Joint Managing Conservator

_____ Grandparent access

2. Privileges and Duties

_____ Physical possession and domicile

_____ Geographical restriction

_____ Consent to medical, dental, and surgical treatment involving invasive procedures

_____ Consent to psychiatric, and psychological treatment

_____ Right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child

_____ Right to consent to marriage and to enlistment in the armed forces of the United States

_____ Right to the services and earnings of the child

_____ Except when a guardian of the children's estate or a guardian or attorney ad litem has been appointed for the child, the right to act as an agent of the child in relation to the child's estate if the child's action is required by a state, the United States, or a foreign government

_____ Right to receive and give receipt for periodic payments for the support of the child

3. Visitation

_____ Mutual agreement

_____ Standard Possession Order

_____ Expanded Standard Possession Order

_____ Geographic restriction

_____ Other

_____ Telephone visitation

_____ Surrender by Mom

_____ Surrender by Dad

_____ Other terms of surrender (who is driving when and where)

_____ Personal Effects

_____ Designation of competent adult

_____ Inability to exercise

_____ Means of Travel

_____ Right of First Refusal

4. Support

_____ Monthly payments

_____ Employer's Order to Withhold

_____ Life insurance

_____ Obligation of Estate

5. Health Insurance

_____ Premiums

_____ Uninsured medical expenses

_____ Medical expenses – no insurance coverage

_____ Current or overdue medical bills

6. Property

_____ Real property

_____ Household furnishings

_____ Clothing and personal effects

_____ Cash in bank accounts

_____ Employee benefits and retirement

_____ Military retirement

_____ Union benefits

_____ Insurance

_____ Vehicles

_____ Boats

_____ Stocks and Bonds

_____ Stock Options

_____ Business interests

_____ Cash

_____ Debts

_____ Home mortgage

_____ Property taxes

_____ Vehicle or Boat lien

_____ Credit cards

_____ Business debts

_____ Current income taxes

_____ Past years' income taxes

_____ Specified debts

_____ Confirmation of separate property

_____ Reimbursement

_____ Economic Contribution

7. Miscellaneous

_____ Release of claims

_____ Indemnification

_____ Waiver of ERISA entitlement

_____ Time and place to exchange property and execute documents

_____ Mediation provision

_____ Contractual alimony

_____ Attorney's fees

_____ Tax refund

_____ Partition of income taxes

_____ Preparation of taxes

_____ Mortgage interest deduction

_____ Property tax deduction

_____ Dependent exemption

_____ COBRA coverage

_____ Name change

_____ Preparation of documents

Geographical Area for Primary Residence

The Court finds that, in accordance with Section 153.001 of the Texas Family Code, it is the public policy of Texas to assure that children will have frequent and continuing contact with parents who have shown the ability to act in the best interest of the children, to provide a safe, stable, and nonviolent environment for the children, and to encourage parents to share in the rights and duties of raising their children after the parents have separated or dissolved their marriage. The parties have agreed and IT IS ORDERED that the domicile of the children shall be _____. The parties shall not remove the children from _____, Texas for the purpose of changing the domicile of the children until modified by further order of the court of continuing jurisdiction or by written agreement signed by the parties and filed with the court.

Mediation of Future Disputes

IT IS ORDERED that before any party files suit for modification of the terms and conditions of conservatorship, possession, or support of the children, except in an emergency, that party shall attempt to mediate in good faith the controversy as provided in chapter 153 of the Texas Family Code. This requirement does not apply to actions brought to enforce this Final Decree of Divorce or to enforce any subsequent modifications of this decree. IT IS FURTHER ORDERED that the party wishing to modify the terms and conditions of conservatorship, possession, or support of the children shall give written notice to the other party of a desire to mediate the controversy. If the other party does not agree to attend mediation or fails to attend a scheduled mediation of the controversy within thirty days after receiving such written notice, the party desiring modification shall be released from the obligation to mediate and shall be free to file suit for modification.

Health Insurance

IT IS FURTHER ORDERED AND DECREED that as additional child support, HUSBAND shall provide health insurance for the children as follows:

It is the intent and purpose of this Decree that HUSBAND shall, at all times, provide and pay for health insurance for the children. IT IS THEREFORE ORDERED and DECREED that, as additional child support, HUSBAND shall provide health insurance for the parties' children equivalent to the coverage which is in effect at the time of the divorce through HUSBAND's employer.

"Health insurance" means insurance coverage that provides basic health care services, including usual physician services, office visits, hospitalization, and laboratory, X-ray, and emergency services and may be provided through a health maintenance organization or other private or public organization.

"Through employment" means through the party's employment or membership in a union, trade association, or other organization.

IT IS FURTHER ORDERED AND DECREED that within 10 days after this Decree of Divorce is signed, HUSBAND shall furnish to WIFE a true and correct copy of the health insurance policy or certificate and a schedule of benefits covering the children. HUSBAND is further ORDERED to provide WIFE with an Insurance Card evidencing medical/health/hospitalization benefits coverage for the children, immediately upon HUSBAND' receipt of such card from his insurer. IT IS FURTHER ORDERED AND DECREED that HUSBAND shall furnish to WIFE a true and correct copy of any renewals or changes (including conversions) of the insurance policy within ten (10) days after the issuance of the renewal or change.

IT IS ORDERED AND DECREED that HUSBAND shall provide to WIFE and to the _____ County District Clerk's Office the following information not later than the thirtieth (30th) day after the date the notice of the rendition of the Agreed Decree of Divorce is received by HUSBAND:

(1) The social security number of HUSBAND;

(2) The name and address of HUSBAND's employer;

(3) Whether the employee is self-insured or has health insurance available;

(4) Proof that insurance has been provided for the children; and

(5) The name of the health insurance carrier, the number of the policy, a copy of the policy and schedule of benefits, a health insurance membership card, claim forms, and any other information necessary to submit a claim, or, if the employer is self-insured, a copy of the schedule of benefits, a membership card, claim forms, and any other information necessary to submit a claim.

HUSBAND is ORDERED to furnish WIFE and the _____ County District Clerk's Office with any additional information regarding health insurance coverage that becomes available to him on or before the fifteenth (15th) day after the date the information is received.

WIFE is ORDERED to promptly notify HUSBAND in writing of any potential claim which may be covered by said health insurance and to submit to HUSBAND any and all forms, receipts, bills, and statements or completed claim forms that may be required by the insurance company reflecting the medical and health care expenses WIFE incurs on behalf of the children within (10) ten days of receiving them. HUSBAND is ORDERED to forward to the insurance carrier no later than ten (10) working days after receipt of said notice, all necessary claim forms and/or other documents, properly executed by HUSBAND, which are required for the prompt filing of said claims.

HUSBAND is designated as Constructive Trustee to receive any insurance payments.

In the event HUSBAND receives payments or reimbursements by check, money order or other negotiable instrument from his insurer for medical, hospital, other health care, and/or mental health care expenses actually paid by WIFE, on behalf of the minor children, HUSBAND shall forward to WIFE her share of such payments or reimbursements, together with any explanation of benefits received from the insurer at his/her then current address, within ten (10) working days of his receipt of said negotiable instrument. IT IS AGREED AND ORDERED that HUSBAND may only retain that share of the reimbursement directly referable to expenses he has fully and timely paid out-of-pocket.

Each party is ORDERED to cooperate with the other party in any other respect to facilitate collection or payment of all claims covered by said major health insurance.

Uninsured Medical Expenses

IT IS ORDERED AND DECREED that, for so long as child support is due under the terms of this Order, WIFE and HUSBAND shall each pay as child support fifty percent (50%) of all health care expenses

not paid by insurance that are incurred on behalf of the parties' children. This obligation includes, without limitation, any copayments for office visits or prescription drugs, the yearly deductible, if any, medical care, surgical, prescription drug and medications, psychiatric, psychological, counseling, dental, orthodontic and ophthalmological charges including prescription eyewear. This provision shall not be interpreted to include payment for travel to and from the health-care provider, or non-prescription medications, which shall be the sole responsibility of the parent incurring the expense.

The decision to incur health care expenses shall be made by WIFE. Reasonableness of the charges shall be presumed upon presentation of the bill. Disallowance of the bill by a health insurer shall not excuse the obligation of the parties to make their respective shares of the payment.

WIFE shall submit to HUSBAND copies of all statements and bills for such uninsured health care expenses incurred on behalf of the minor children, within ten days after she receives them. IT IS ORDERED that, within ten days after receipt of the statements and bills HUSBAND shall pay to WIFE one-half (½) of the uninsured expenses either by paying the health care provider directly or by reimbursing WIFE for his portion of any advance payments made by her for such expenses over and above the insured portion of the expense.

HUSBAND shall submit to WIFE copies of all statements and bills for such uninsured health care expenses incurred on behalf of the minor children, within ten days after he receives them. IT IS ORDERED that, within ten days after receipt of the statements and bills WIFE shall pay to HUSBAND one-half (½) of the uninsured expenses either by paying the health care provider directly or by reimbursing HUSBAND for her portion of any advance payments made by him for such expenses over and above the insured portion of the expense.

Each conservator is ORDERED AND DECREED to inform the other conservator within 24 hours of any medical condition of the parties' children requiring surgical intervention and/or hospitalization.

WARNING

ANY OBLIGOR WHO FAILS TO PROVIDE HEALTH INSURANCE AS ORDERED IS LIABLE FOR ANY NECESSARY MEDICAL EXPENSES OF THE CHILDREN, WITHOUT REGARD TO WHETHER THE EXPENSES WOULD HAVE BEEN PAID BY HEALTH INSURANCE HAD IT BEEN PROVIDED AND THE COST

OF HEALTH INSURANCE PREMIUMS OR CONTRIBUTIONS, IF ANY, PAID ON BEHALF OF THE CHILD.

NOTICE

FAILURE TO OBEY A COURT ORDER FOR CHILD SUPPORT OR FOR POSSESSION OF OR ACCESS TO A CHILD MAY RESULT IN FURTHER LITIGATION TO ENFORCE THE ORDER, INCLUDING CONTEMPT OF COURT. A FINDING OF CONTEMPT MAY BE PUNISHED BY CONFINEMENT IN JAIL FOR UP TO SIX MONTHS, A FINE OF UP TO $500 FOR EACH VIOLATION, AND A MONEY JUDGMENT FOR PAYMENT OF ATTORNEY'S FEES AND COURT COSTS.

FAILURE OF A PARTY TO MAKE A CHILD SUPPORT PAYMENT TO THE PLACE AND IN THE MANNER REQUIRED BY A COURT ORDER MAY RESULT IN THE PARTY NOT RECEIVING CREDIT FOR MAKING THE PAYMENT.

FAILURE OF A PARTY TO PAY CHILD SUPPORT DOES NOT JUSTIFY DENYING THAT PARTY COURT ORDERED POSSESSION OF OR ACCESS TO A CHILD. REFUSAL BY A PARTY TO ALLOW POSSESSION OF OR ACCESS TO A CHILD DOES NOT JUSTIFY FAILURE TO PAY COURT ORDERED CHILD SUPPORT TO THAT PARTY.

EACH PERSON WHO IS A PARTY TO THIS ORDER IS ORDERED TO NOTIFY EACH OTHER PARTY, THE COURT, AND THE STATE CASE REGISTRY OF ANY CHANGE IN THE PARTY'S CURRENT RESIDENCE ADDRESS, MAILING ADDRESS, HOME TELEPHONE NUMBER, NAME OF EMPLOYER, ADDRESS OF EMPLOYMENT, DRIVER'S LICENSE NUMBER, AND WORK TELEPHONE NUMBER. THE PARTY IS ORDERED TO GIVE NOTICE OF AN INTENDED CHANGE IN ANY OF THE REQUIRED INFORMATION TO EACH OTHER PARTY, THE COURT, AND THE STATE CASE REGISTRY ON OR BEFORE THE 60TH DAY BEFORE THE INTENDED CHANGE. IF THE PARTY DOES NOT KNOW OR COULD NOT HAVE KNOWN OF THE CHANGE IN SUFFICIENT TIME TO PROVIDE THE 60-DAY NOTICE, THE PARTY IS ORDERED TO GIVE NOTICE OF THE CHANGE ON OR BEFORE THE FIFTH DAY AFTER THE DATE THAT THE PARTY KNOWS OF THE CHANGE.

THE DUTY TO FURNISH THIS INFORMATION TO EACH OTHER PARTY, THE COURT, AND THE STATE CASE REGISTRY CONTINUES AS LONG AS ANY PERSON, BY VIRTUE OF THIS ORDER, IS UNDER AN OBLIGATION TO PAY CHILD SUPPORT OR IS ENTITLED TO POSSESSION OF OR ACCESS TO A CHILD.

NOTICE SHALL BE GIVEN TO THE OTHER PARTY BY DELIVERING A COPY OF THE NOTICE TO THE PARTY BY REGISTERED OR CERTIFIED MAIL, RETURN RECEIPT REQUESTED. NOTICE SHALL BE GIVEN TO THE COURT BY DELIVERING A COPY OF THE NOTICE EITHER IN PERSON TO THE CLERK OF THE COURT OR BY REGISTERED OR CERTIFIED MAIL, RETURN RECEIPT REQUESTED, ADDRESSED TO THE CLERK.

FAILURE BY A PARTY TO OBEY THE ORDER OF THIS COURT TO PROVIDE EACH OTHER PARTY, THE COURT, AND THE STATE CASE REGISTRY WITH THE CHANGE IN THE REQUIRED INFORMATION MAY RESULT IN FURTHER LITIGATION TO ENFORCE THE ORDER, INCLUDING CONTEMPT OF COURT. A FINDING OF CONTEMPT MAY BE PUNISHED BY CONFINEMENT IN JAIL FOR UP TO SIX MONTHS, A FINE OF UP TO $500 FOR EACH VIOLATION, AND A MONEY JUDGMENT FOR PAYMENT OF ATTORNEY'S FEES AND COURT COSTS.

NOTICE TO ANY PEACE OFFICER OF THE STATE OF TEXAS:

YOU MAY USE REASONABLE EFFORTS TO ENFORCE THE TERMS OF CHILD CUSTODY SPECIFIED IN THIS ORDER. A PEACE OFFICER WHO RELIES ON THE TERMS OF A COURT ORDER AND THE OFFICER'S AGENCY ARE ENTITLED TO THE APPLICABLE IMMUNITY AGAINST ANY CLAIM, CIVIL OR OTHERWISE, REGARDING THE OFFICER'S GOOD FAITH ACTS PERFORMED IN THE SCOPE OF THE OFFICER'S DUTIES IN ENFORCING THE TERMS OF THE ORDER THAT RELATE TO CHILD CUSTODY. ANY PERSON WHO KNOWINGLY PRESENTS FOR ENFORCEMENT AN ORDER THAT IS INVALID OR NO LONGER IN EFFECT COMMITS AN OFFENSE THAT MAY BE PUNISHABLE BY CONFINEMENT IN JAIL FOR AS LONG AS TWO YEARS AND A FINE OF AS MUCH AS $10,000.00

Notices of Change of Residence

Each party is ORDERED AND DECREED to keep the other party, the court, and the state case registry fully and promptly informed of his or her current address, mailing address, home telephone number, name of employer, address of employment, driver's license number, and work telephone number and of the address of the children's school or day-care center.

IT IS ORDERED that a party who intends to change his or her place of residence shall give written notice to each other party, the court and the state case registry of an intended change in the party's current residence address, mailing address, home telephone number, name of employer, address of employment, driver's license number, and work telephone number. The party must give written notice by registered or certified mail of an intended change in the required information to each other party, the court, and the state case registry on or before the 60th day before the change is made. If the party does not know or could not have known of the change in sufficient time to provide 60-day notice, the party shall provide the written notice of the change on or before the fifth day after the date that the party knew of the change.

Life Insurance

IT IS ORDERED AND DECREED that to secure all obligations of HUSBAND for child support of the children, HUSBAND is ORDERED to obtain and maintain in full force and effect life insurance insuring the life of HUSBAND in the initial face amount of $_____. At HUSBAND's option, IT IS ORDERED that HUSBAND may fulfill this life insurance obligation with existing life insurance policies owned by HUSBAND so long as said policies will fully pay all of HUSBAND's child support obligations in the event of his death. IT IS ORDERED AND DECREED that said life insurance policy or policies shall be used in the event of the death of HUSBAND toward payment of the obligations imposed on HUSBAND for child support, as set forth in this Agreed Decree of Divorce.

IT IS ORDERED AND DECREED that HUSBAND shall maintain said insurance policy or policies in full force and effect so long as HUSBAND has any obligations for child support, as set forth in this Agreed Decree of Divorce. IT IS ORDERED that HUSBAND shall not borrow against, hypothecate, pledge, assign, or otherwise alienate or encumber the insurance, nor surrender it to obtain cash value.

IT IS ORDERED AND DECREED that HUSBAND shall immediately designate WIFE as Trustee for the minor children, as primary beneficiary of said life insurance policy or policies, and such beneficiary designation shall not be altered or revoked so long as HUSBAND has an obligation to pay child support for the minor children pursuant to this Agreed Decree of Divorce.

IT IS ORDERED AND DECREED that WIFE as Trustee for the children, shall receive insurance proceeds from such policy or policies in an amount sufficient fully to fund HUSBAND's obligations for child support which come due after HUSBAND's death

IT IS ORDERED AND DECREED that at the time of HUSBAND's death, an amount of the proceeds from said policy or policies as calculated in the preceding paragraph shall be paid to WIFE in one lump sum.

IT IS ORDERED that within thirty (30) days of the date of this Agreed Decree of Divorce is signed by the Judge, and on or before _____ 1st of each subsequent year, HUSBAND is ORDERED to deliver

to WIFE satisfactory proof that the insurance is in full force and effect, the irrevocable beneficiary designation (or, if applicable, the collateral assignment has been made by him, and that the insurer has received notice of the restrictions placed on HUSBAND's ownership of the policy by the terms of this Agreed Decree of Divorce.

IT IS ORDERED AND DECREED that the aforesaid life insurance proceeds shall pass to the beneficiary (or, if applicable, the collateral assignee) free of estate, inheritance and successor taxes and any other liabilities of HUSBAND.

Contractual Alimony

It is the mutual desire of the parties to provide a continuing measure of support for WIFE after divorce. These support payments undertaken by HUSBAND are intended to qualify as contractual alimony as that term is defined in the Internal Revenue Code of 1986 ("the Code"), as amended, and are intended to be included in the gross income of WIFE and deducted by HUSBAND under the provision of the Code. All provisions of this article will be interpreted in a manner consistent with that intention.

This alimony obligation undertaken by HUSBAND is contractual in nature and is not an obligation imposed by order or decree of the Court.

HUSBAND agrees to pay WIFE the sum of $_____, in _____ equal installments of $_____ each. The first installment of $_____ shall be due and payable on _____ 1, 200_, and a like payment shall be due and payable on the same day of each month thereafter, for _____ months.

The alimony will continue as set forth above but will terminate at the death of WIFE, the death of HUSBAND or the remarriage of WIFE. The alimony will also terminate if WIFE cohabits with another person in a permanent place of abode on a continuing, conjugal basis. The alimony will also terminate after the _____th payment, providing all payments provided herein have been made.

There is no liability for HUSBAND to make any payments for any period after the death of WIFE, and there is no liability for HUSBAND to make any payment in cash or property as a substitute for such payments after the death of WIFE.

If HUSBAND dies before fulfilling the alimony obligations of this article, the alimony obligations remaining at the time of his death shall not terminate but will be fully binding on HUSBAND's estate. The remaining alimony obligation may be discharged by life insurance payable to WIFE equal to the sum of the then-remaining alimony payments under this article.

All alimony payments, except as provided otherwise, will be made by personal check, money order, or cashier's check payable to WIFE and will be payable to WIFE at her residence located at _____, at the time of each payment obligation.

Payments will be timely made if deposited in the U.S. mail on or before the date provided for the payment under this article and if delivered to WIFE not more than five (5) days later.

HUSBAND agrees that time is of the essence in the payment of the periodic alimony payments. If default is made by HUSBAND in the prompt payment of any periodic amounts due under the terms of this agreement and such default continues for a period of more than fifteen (15) days, the entire remaining alimony obligation of HUSBAND, at the option of WIFE, shall then be accelerated and shall become immediately due and payable, together with an amount sufficient to reimburse WIFE for any additional tax and/or penalty resulting to WIFE as a result of such default by HUSBAND.

Pursuant to section 71 of the Code, all the alimony payments made under this article shall be includable as income in WIFE's income tax returns beginning in calendar year 200_. In addition, such payments shall be deductible on HUSBAND's income tax returns pursuant to section 215 of the Code, beginning in the same calendar year.

All payments made under this article are taxable to WIFE and includable in her gross income, and WIFE agrees to report them in her federal income tax return and to pay all taxes due thereon. WIFE agrees to furnish written assurance signed by her and by any tax return preparer that payments made pursuant to this article have been included as income in her federal income tax return for the applicable year. The written assurance will be given at the time the federal income tax return is filed.

HUSBAND shall be entitled to deduct all payments from his federal income tax return.

If WIFE fails or refuses to include the alimony payments in her gross income, HUSBAND's obligation to make payments will be suspended until all the amounts have been included in WIFE’s gross income, at which time the payments will be resumed and HUSBAND will immediately pay any amounts held in suspense.

If a final determination is made by the Internal Revenue Service or by a Court of competent jurisdiction that the payments under this article are not deductible as alimony for any reason, then the payments due under this article will be reduced by the additional tax actually paid by HUSBAND in connection with the obligation to be calculated from the date the deduction is disallowed by the I.R.S.

Neither the agreement to pay alimony nor the right to receive alimony under this article is assignable or transferrable.

Sale of Property

The Court finds that the parties have owned the house and property located at _____, Texas, hereinafter called the "the Property", as community property.

IT IS ORDERED AND DECREED that the parties shall continue to own the Property as tenants-in-common with undivided interests. IT IS ORDERED AND DECREED that WIFE shall own as her sole and separate property an undivided _____ percent (__%) interest in and to the Property, and HUSBAND herein conveys and assigns to WIFE all is his right, title and interest in and to said _____ percent (__%) undivided interest in and to the Property. IT IS ORDERED AND DECREED that HUSBAND shall own as his sole and separate property an undivided _____ percent (__%) interest in and to the Property, and WIFE herein conveys and assigns to HUSBAND all of her right, title and interest in and to said _____ percent (__%) undivided interest in and to the Property.

IT IS ORDERED AND DECREED that WIFE and HUSBAND shall list the Property for sale with a licensed Real Estate Agent not later than five (5) days following the date the decree is signed by the Court and they shall continue to list the Property on the market for sale with such licensed Real Estate Agent until the sale of the Property is closed. IT IS AGREED AND ORDERED that the parties shall follow the recommendations of the agent/broker regarding the beginning listing price for the Property, the timing and amount of reduction of listing price for the Property and the final sales price and terms of the sale of the Property. IT IS FURTHER ORDERED that HUSBAND pay the expense of any repairs to the property recommended by the agent/broker to market the Property and that HUSBAND shall be reimbursed for these expenses prior to the division of the net proceeds of the sale of the property. IT IS FURTHER ORDERED that HUSBAND pay the mortgage payments and other utility expenses deemed necessary to market the Property, and that HUSBAND shall be entitled to claim the property tax, mortgage interest and other deductions for the Property on his federal income tax return for 2005.

Upon closure of sale of the Property, IT IS ORDERED AND DECREED that the gross proceeds from sale shall be disbursed in the following manner in the following order of priority:

1. All outstanding loan and/or mortgage balances shall be paid in full.
2. All Real Estate Agent commissions fees and all closing costs shall be paid in full.
3. The expense of any repairs to the property recommended by the agent/broker to market the Property and paid by HUSBAND
4. _____ percent (__%) of the proceeds shall be paid to WIFE.
5. _____ percent (__%) of the proceeds shall be paid to HUSBAND.

IT IS ORDERED that the parties shall instruct the person or entity closing the sale of the Property to disburse the proceeds as hereinabove provided.

The Court finds that WIFE and HUSBAND represent that the only outstanding indebtedness secured by the Property is the loan owing to _____.

Prior Tax Years Through 2006

IT IS FURTHER ORDERED AND DECREED that WIFE and HUSBAND shall be equally responsible for all federal income tax liabilities of the parties from the date of marriage through December 31, 2006, and each party will pay timely one-half of all deficiencies, assessments, penalties or interest due thereon and shall hold the other party harmless therefrom.

IT IS AGREED AND ORDERED that HUSBAND shall pay and shall hold WIFE and her property harmless for all additional tax, penalty, and/or interest which resulted or may result from HUSBAND's omission of taxable income or claim of erroneous deductions from the date of marriage through December 31, 2006. IT IS AGREED AND ORDERED that WIFE shall pay and shall hold HUSBAND and his property harmless for all additional tax, penalty, and/or interest which resulted or may result from WIFE's omission of taxable income or claim of erroneous deductions from the date of marriage through December 31, 2006.

Income Tax Refunds Through 2006

IT IS FURTHER ORDERED AND DECREED that if a refund is made for overpayment of taxes later assessed for 2006 or any prior year during the parties' marriage, each party will be entitled to one-half of the refund, and the party receiving the refund check is designated as constructive trustee for the benefit of the other party, to the extent of one-half of the total amount of the refund, and will pay to the other party one-half of the total amount of the refund check within five days of receipt of the refund check.

Federal Income Taxes for 2007

IT IS AGREED AND ORDERED that each party shall file a separate individual federal income tax return for tax year 2007. IT IS FURTHER AGREED AND ORDERED that WIFE shall report on her 2007 federal income tax return all income personally earned by WIFE in 2007 and all income attributable to WIFE's separate property, and shall claim and report on her 2007 federal income tax return all income tax withheld from WIFE's personal earnings, all prepayments paid by WIFE, and all deductions and credits attributable to WIFE or to her separate property in 2007, including all real estate deductions related to the _____ property.

IT IS AGREED AND ORDERED that HUSBAND shall report on his 2007 federal income tax return all income personally earned by HUSBAND in 2007 and all income attributable to HUSBAND's separate property, and shall claim and report on his 2007 federal income tax return all income tax withheld from HUSBAND's personal earnings, all prepayments paid by HUSBAND, and all deductions and credits attributable to HUSBAND or to his separate property in 2007, including all real estate deductions related to the _____ property.

IT IS AGREED AND ORDERED that WIFE shall pay and shall hold HUSBAND and his property harmless for all taxes shown to be due and payable on WIFE's 2007 federal income tax return prepared as set out hereinabove. IT IS FURTHER AGREED AND ORDERED that HUSBAND shall pay and shall hold WIFE and her property harmless for all taxes shown to be due and payable on HUSBAND's 2007 federal income tax return prepared as set out hereinabove. IT IS AGREED AND ORDERED that any federal income tax refund shown to be due and payable to WIFE on her 2007 federal income tax return shall be the property of WIFE, and any tax refund shown to be due and payable to HUSBAND on his 2007 federal income tax return shall be the property of HUSBAND.

IT IS AGREED AND ORDERED that, to the extent necessary to effect this division of tax liability for community income realized in 2007, this Decree of Divorce shall serve as a partition of community income, setting aside to WIFE as her separate property all income earned by WIFE from January 1, 2007, until

the date the divorce is granted, and setting aside to HUSBAND as his separate property all income earned by HUSBAND from January 1, 2007, until the date the divorce is granted. IT IS AGREED that this partition is made under the provisions of the Texas Constitution, Article XVI, Section 3, as amended November 25, 1980, which provides that:

> "Spouses may by written instrument from time to time partition between themselves all or any part of their property then existing or to be acquired or exchange between themselves the community interest of the other spouse in other community property then existing or to be acquired, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property and estate of such spouse";

and in accordance with the Texas Family Code, Chapter 4 (1999).

Information To Be Furnished

Each party will furnish such information to the other party as is requested to prepare federal income tax returns for each party for the year in which the divorce decree is entered, and in no event will such information be exchanged later than March 1 of the year following the year in which the divorce decree is entered. IT IS FURTHER ORDERED AND DECREED that each party shall furnish to the other party all financial records relating to acquisition dates, basis, and recapture information concerning property in which the community has had an interest.

Each party will pay for the preparation of his or her own tax return for the year in which the divorce decree is entered.

Preservation of Records

IT IS FURTHER ORDERED AND DECREED that each party will keep and preserve for a period of six (6) years from the date of divorce all financial records relating to the community estate, and each party will allow the other party access to these records in the event of tax audits.

Notification

Any party who receives correspondence or notices of communication from the Internal Revenue Service is to forward such correspondence or notices of communication to the other party within three days after its receipt at the current residence address of the other party.

Definitions

As used in this section, the term "income" attributable to a party, includes (1) personal earnings; (2) revenue from increase of and mutations of separate property; and (3) the revenues from all property subject to his or her sole management, control and disposition. The term "tax liability" includes all penalties and interest related to the tax in question as well as all accounting, legal and other expenses incurred by the determination or redetermination of the tax, penalties and interest. The term "prepayments" includes all taxes withheld from wages during, and all estimated tax payments made for, the period in question.

Dependency Exemption

_____IT IS ORDERED and DECREED that HUSBAND shall have the right to claim the dependency exemption for _____ for the purpose of federal income taxes for 200_, and have the right to claim the dependency exemption for _____ for the purpose of federal income taxes for 200_ and all subsequent years. IT IS FURTHER ORDERED and DECREED that WIFE shall sign and deliver to HUSBAND IRS Form 8332, "Release of Claim to Exemption for Child of Divorced or Separated Parents," for _____ no later than 5:00 p.m. on the date that the Decree of Divorce is signed by the Court.

_____IT IS ORDERED and DECREED that WIFE shall have the right to claim the dependency exemption for _____ for the purpose of federal income taxes for 200_ ,and have the right to claim the dependency exemption for _____ for the purpose of federal income taxes for 200_ and all subsequent years. IT IS FURTHER ORDERED and DECREED that HUSBAND shall sign and deliver to WIFE IRS Form 8332, "Release of Claim to Exemption for Child of Divorced or Separated Parents," for _____ no later than 5:00 p.m. on the date that the Decree of Divorce is signed by the Court.

Miscellaneous Provisions

Attorneys' Fees

To effect an equitable division of the estate of the parties and as part of the division, and for services rendered in connection with conservatorship and support of the children, each party shall be responsible for his or her own attorney's fees incurred as a result of legal representation in this case.

Attorneys' Fees And Expenses For Enforcement

IT IS ORDERED AND DECREED that reasonable attorneys' fees and expenses of a party incurred in successfully prosecuting or defending a suit to enforce any provision of this decree against the other party or the other party's estate shall be recoverable by the successful party in such action.

Division of Assets and Liabilities Not Provided For In Decree

IT IS ORDERED AND DECREED that all community property not listed in this decree, which community property is later determined to be in the possession of or under the control of Petitioner or Respondent, shall be divided by the agreement of the parties and if the parties cannot agree, then by the Court in a division that is considered just and right, pursuant to Tex. Fam. Code Section 9.203, as amended, effective April 17, 1997. IT IS FURTHER ORDERED AND DECREED that the party in possession or control of such property is designated as constructive trustee of the property for the benefit of the other party.

IT IS ORDERED AND DECREED that, as a part of the division of the estate of the parties, any community liability not expressly assumed by a party under this decree will be paid by the party incurring the liability, including attorney's fees, and said party is hereby ORDERED to pay said liability and to indemnify and hold harmless the other party.

Release of All Claims

IT IS ORDERED AND DECREED that each party hereby releases the other from all claims, liabilities, debts, obligations, actions, and causes of action of every kind that have been incurred relating to or arising from the marriage between the parties, including any premarital or postmarital property agreements; provided,

however, that neither party is relieved or discharged from any obligation set forth in this decree or under any instrument or document executed pursuant to this decree.

IT IS FURTHER ORDERED AND DECREED that each party hereby surrenders any claims for reimbursement and claims for economic contributions his or her separate property estate may have against the community estate of the parties, or the separate property estate of the other, or the community estate may have against either party's separate estate.

Disclosure of Assets And Debts

The Court finds that the parties have represented 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 in this Decree of Divorce.

Indemnification

The Court finds that each party represents and warrants to the other that he or she has not incurred any debt, obligation, or other liability, other than those described in this decree, on which the other party is or may be liable. IT IS THEREFORE ORDERED AND DECREED that if any claim, action, or proceeding is hereafter initiated seeking to hold the other party liable for any liability or obligation assumed by a party under this decree or for any other debt, obligation, liability, act, or omission of the party, that party is ORDERED, at his or her sole expense, to defend the other party against any such claim or demand, whether or not well-founded, and will indemnify and hold harmless the other party from all damages resulting therefrom. Damages, as used herein, will include any loss, cost, expense, penalty, and other damages, including, without limitation, counsel fees and other costs and expenses reasonably incurred in investigating or in attempting to avoid same or oppose the imposition thereof or in enforcing this indemnity. The indemnifying party is ORDERED to reimburse the indemnified party on demand for any payment made by the indemnified party at any time after the entry of the divorce decree to satisfy any judgment of any court of competent jurisdiction or pursuant to a bona fide compromise or settlement of claims, demands or actions for any damages to which the foregoing indemnity relates. Each party is further ORDERED to give the other party prompt written notice

of any litigation threatened or instituted against either party that might constitute the basis of a claim for indemnity under this decree.

Right To Live Separately and Free from Interference

IT IS ORDERED AND DECREED that each party will live separately and apart from the other for the rest of his or her life at any place or places that he or she may select. IT IS FURTHER ORDERED that neither party will molest, harass, annoy, injure, threaten, or interfere with the other party in any manner whatsoever. IT IS FURTHER ORDERED that each party may carry on and engage in any employment, profession, business, or other activity as he or she may deem advisable for his or her sole use and benefit. IT IS FURTHER ORDERED that neither party will interfere with the use, ownership, enjoyment, or disposition of any property now owned or hereafter acquired by the other.

Litigation

The Court finds that the parties have declared that there are no actions, suits, or proceedings pending or threatened against either party or the community estate or affecting any community properties or rights, at law or in equity or before any federal, state, municipal, or other government agency or instrumentality, domestic or foreign, and neither party is aware of any facts that might result in any action, suit or proceeding.

Waiver of ERISA Entitlement

The Court finds and IT IS ORDERED AND DECREED that each party, by his or her signature below, hereby knowingly and voluntarily waives any and all right that he or she may have or may acquire in the future, to be named a beneficiary of any plan that may qualify under the Employment Retirement Income Security Act (ERISA) and/or other qualified or non-qualified plan in the name of, or as a result of, the employment of the other party.

Waiver of Rights to Other Party's Estate

IT IS ORDERED AND DECREED that each party will renounce and waive any and all rights:

(a) to inherit any part of the estate of the other party;

(b) to receive property from the estate of the other party by bequest or devise, except under a will or codicil executed after the effective date of this decree;

(c) to act as a personal representative of the estate of the other party on intestacy, unless nominated by another party legally entitled to so act;

(d) to act as a personal representative under the will of the other party, unless so nominated by a will or codicil executed after the effective date of this decree;

(e) to receive the proceeds from any life insurance policy on the life of the other party or from any retirement plan, or individual retirement account, unless redesignated after the effective date of this decree; and

(f) to be named a beneficiary of any plan that may qualify under the Employee Retirement Income Security Act (ERISA) and/or other qualified or non qualified plan in the name of, or as a result of, the employment of the other party.

Successors And Assigns

IT IS ORDERED AND DECREED that this decree, except as otherwise expressly provided herein, will be binding on, and will inure to the benefit of, the respective legatees, devisees, heirs, executors, administrators, assigns, and successors in interest of the parties.

Execution Of Documents

IT IS ORDERED AND DECREED that each party will on demand execute and deliver to the other party any and all other deeds, deeds of trust, bills of sale, assignments, consents to change of beneficiaries of insurance policies, tax returns, and other documents, and will do or cause to be done any other acts and things as may be necessary or desirable to effect the provisions and purposes of this decree. If either party fails on demand to comply with this provision, that party is ORDERED to pay all reasonable and necessary attorney's fees incurred as a result of that failure.

Entire Agreement

The Court finds this decree supersedes any and all other agreements, either oral or in writing, between the parties relating to the rights and liabilities arising out of their marriage, and this decree contains the entire agreement of the parties.

Partial Invalidity

IT IS ORDERED AND DECREED that if any provision of this decree is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions will nevertheless continue in full force and effect without being impaired or invalidated in any way.

Waiver of Breach

IT IS ORDERED AND DECREED that the waiver by one party of any breach of this decree by the other party will not be deemed a waiver of any other provision of this decree.

Notices

IT IS ORDERED AND DECREED that any notice to be given under this decree by either party to the other shall be in writing and may be effected by registered or certified mail, return receipt requested, unless specified otherwise herein. Notice to HUSBAND will be sufficient if made or addressed to the following:

HUSBAND
_____
_____

and to WIFE if made and addressed to the following:

WIFE
_____
_____

Each party may change the address for notice to him or her by giving written notice of that change to the other in accordance with the provisions of this paragraph.

Change of Name

IT IS ORDERED that WIFE's name is changed to _____.

Court Costs

All costs of court expended in this cause having been paid let no execution issue.

Resolution of Temporary Orders

IT IS FURTHER ORDERED AND DECREED that, except as provided for herein, Petitioner and Respondent are discharged from all further liabilities and obligations imposed by the Temporary Orders of this Court.

Discharge from Discovery Retention Requirement

IT IS ORDERED AND DECREED that the parties and their respective attorneys are discharged from the requirement of keeping and storing the documents produced in this case in accordance with Rule 191.4(d) of the Texas Rules of Civil Procedure.

Clarifying Orders

Without affecting the finality of this Decree of Divorce, this Court expressly reserves the right to make orders necessary to clarify and enforce this decree.

Relief Not Granted

IT IS ORDERED AND DECREED that all relief requested in this cause and not expressly granted is denied.