

The Enforceability of Mediated Settlement  
Agreements

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## NIGHTMARE ON MEDIATION STREET

You mediate a case where the Plaintiff is suing on a \$100,000.00 debt. Plaintiff is also asking for attorney's fees. During the course of the mediation, due to the expenses of litigation and the questionable solvency of the Defendant, Plaintiff agrees to accept a \$50,000.00 offer from the Defendant. The parties, the lawyers and the mediator stay late and draw up an absolutely air-tight settlement agreement whereby the Defendant agrees to pay \$50,000.00 within ten days. The lawyers and both parties sign the agreement. Everyone thanks the mediator and goes home.

The next morning you have receive a fax from the Defendant's attorney at 7:45 a.m..... "my client has changed his mind and withdraws his agreement to settle."

What happens next?

## STATUTES

### ADR STATUTE

Section 154.071 of the ADR statute states in part:

“(a) if the parties 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.

“(b) the Court in its discretion may incorporate the terms of the agreement in the Court’s final decree disposing of the case.”

### TEXAS RULES OF CIVIL PROCEDURE

Rule 11 states:

“Unless otherwise provided by these rules, no agreement between attorneys or parties touching on any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record...”

### TEXAS FAMILY CODE

Section 6.602 of the Texas Family Code states in part:

“(b) A mediated settlement agreement is binding on the parties if the agreement:

(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.

(c) If a mediated settlement agreement meets the requirements of this section, a party is entitled to judgment on the mediated settlement

agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.”

Section 153.0071 adds an additional element.

“(e-1) Notwithstanding Subsections (d) and (e), 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 circumstance impaired the party’s ability to make decisions; and
- (2) the agreement is not in the child’s best interest.”

### CASES

Section 154.071 of the ADR statute, Rule 11 and Section 153.0071 of the Family Code have been given rise to an interesting series of Texas cases.

The first Court to write on this issue was the Amarillo Court of Civil Appeals in 1993, in Matter of the Marriage of Ames, 860 S.W.2d 590, no writ history. The Court there cited Section 154.071(a) and stated that “a party who has reached a settlement agreement disposing of a dispute through alternative dispute resolution procedures may not unilaterally repudiate the agreement.” The Court, by implication, held that a Motion for Entry of Judgment in the trial court was the proper remedy. The Ames decision was later followed by the Texarkana Court of Civil Appeals in The Marriage of Banks, 887 S.W.2d 160, 1994, no writ history, and In the Marriage of Macintosh, 918 S.W.2d 87, Amarillo 1996, no writ history.

Subsequent appellate courts moved away from the reasoning expressed in the Ames case and refused to support the entry of a judgment, based on a repudiated settlement agreement reached at mediation. In Cadle Co. v. Castle, 913 S.W.2d 627 (Tex.Civ.App.—Dallas 1995, writ den.), the majority opinion disallowed a “Motion to Enforce Settlement Agreement.”

The Court, at page 632, held, “we do not believe the legislature intended Section 154.071(b) to be used to enter a judgment on the merits of a cause of action without a party having the right to be confronted by appropriate pleadings, have an opportunity to conduct discovery and assert defenses, or a chance to have a dispute determined by

a judge or jury.” The Court also pointed out that the ADR Statute gives the trial court “discretion.”

Justice James, in what I consider to be a well-reasoned dissent concluded that a trial court should be allowed to enforce a mediated settlement agreement (“MSA”) through a summary proceeding, i.e., a Motion to Enforce Settlement Agreement. Justice James reads Section 154.071(b) to mean that the legislature intended courts to be able to enforce a settlement agreement through a summary proceeding without filing a separate action. To conclude otherwise would take away the plain meaning and purpose of this section and undermine the policy of this state.

A subsequent series of appellate decisions sided with the majority in the Cadle case, thus setting the stage for the Texas Supreme Court.

In 1996, the Supreme Court finally resolved the conflict between the various courts of civil appeals in the case of Mantas v. the Fifth Court of Appeals, 925 S.W.2d 656 (Tex. 1996). The Supreme Court sided with Cadle in holding that the enforcement of a disputed settlement agreement, even if reached at court ordered mediation, must be determined in a breach of contract cause of action under normal rules of pleading and evidence.

Interestingly, the Mantas decision arose out of a MSA reached while the case was on appeal. The Court held that when the dispute over enforcement arises while the underlying action is on appeal, as in the Mantas case, the party seeking enforcement must file a separate lawsuit in District Court.

There remains some confusion as to exactly what procedures should be used if a MSA is reached while a trial court still has jurisdiction. This author’s opinion is that you need not file a new suit. You need only amend your existing pleadings, alleging a breach of the MSA and the Court will likely grant a summary judgment...if there is sufficient evidence of a binding contract.

Some of this confusion could be eliminated if the Texas Legislature would amend the ADR Statute to read more in line with the Family Code. The ADR Statute states that the agreement is enforceable “as any other written contract,” whereas the Family Code states that a settlement “is binding on the parties.” An article in the Texas Tech Law Review argues for such a reform. 28 Tex. Tech. L. Rev. 31 (1997).

In summary, the Courts have all agreed that Mediated Settlement Agreements are enforceable. The only issue is...how and where? The short, simple answer is as follows:

1. Presuit Mediation. If the settlement comes as a result of a pretrial mediation, the only remedy available is to file a lawsuit for breach of contract.
2. Mediation at District Court Level. If the settlement comes after suit is filed, but before the trial court loses jurisdiction (whether by dismissal or appeal), you can file with the trial court, a pleading basically asking that the Court enforce the MSA on breach of contract grounds, and you must be prepared to show that your MSA has the basic elements of a contract. See article by Professor L. Wayne Scott, 37 St. Mary's Law Journal 327 (2006)
3. Mediation on Appeal. If the case has been settled, like the Mantas decision, while on appeal, you will have to go back and start all over, filing a new breach of contract suit in the District Court.

### DISCUSSION POINTS

1. What role does the Mediator play in "preparing" the Mediated Settlement Agreement? (See Exhibit "A")
2. If one party to the MSA repudiates and the other seeks enforcement in the Courts, is the MSA admissible in that proceeding?
3. Can the Mediator be called as a witness in such enforcement proceeding?
4. In a divorce case, does the Court have the right to set aside a MSA if one of the parties was mistaken as to an important point of law?
5. In a divorce case, can a Court set aside a MSA if it is not in a child's best interest?
6. What is an "Agreed Judgment to securitize performance under a MSA"?
7. Should a Mediator ever agree to serve as an Arbitrator if the MSA unravels?

EXHIBIT "A"

NO. \_\_\_\_\_

VS.

§ IN THE DISTRICT COURT  
§  
§  
§ \_\_\_\_\_ JUDICIAL DISTRICT  
§  
§  
§ BEXAR COUNTY, TEXAS

MEDIATED SETTLEMENT AGREEMENT

The parties hereto agree that this lawsuit and all related claims and controversies between them are hereby settled in accordance with the following terms:

1. The parties acknowledge that bona fide disputes and controversies exist between them, and they desire to compromise and settle all claims and causes of action of any kind whatsoever which the parties may have arising out of the transaction or occurrence which is the subject of this litigation. It is further understood and agreed that this is a compromise of a disputed claim, and nothing contained herein shall be construed as an admission of liability.

2. Each signatory warrants and represents that:

- a. such person has authority to bind the party or parties for whom such person acts.
- b. the claims, suits, rights, and/or interests which are the subject matter hereto are owned by the party asserting same, have not been assigned, transferred or sold, and are free of any encumbrance.

3. The parties will execute and file an Agreed Order dismissing all claims in the above-styled and numbered case with prejudice. Each party will bear its own costs.

4. \_\_\_\_\_ agrees to pay \_\_\_\_\_  
the sum of \$ \_\_\_\_\_ on or before \_\_\_\_\_.

5. The parties further agree as follows:

\_\_\_\_\_  
\_\_\_\_\_



6. Except for the agreements set forth herein, the parties hereby release each other from all claims, counterclaims, demands, or suits, known or unknown, fixed or contingent, liquidated or unliquidated, whether or not asserted in the above case, as of this date, arising from or related to the events and transactions which are the subject matter of this cause. This mutual release runs to the benefit of all attorneys, agents, employees, officers, directors, shareholders, partners, heirs, assigns, and legal representatives of the parties hereto.

7. Counsel for \_\_\_\_\_ shall deliver drafts of any further documents to be executed in connection with this settlement to counsel for the other parties hereto within \_\_\_\_\_ days from the date hereof. The parties and their counsel agree to cooperate with each other in the drafting and execution of such additional documents as are reasonably requested or required to implement the provisions and spirit of this Settlement Agreement, but notwithstanding such additional documents the parties confirm that this is a written settlement agreement as contemplated by Section 154.071 of the Texas Civil Practice and Remedies Code.

8. This Settlement Agreement is made and performable in \_\_\_\_\_ County, Texas, and shall be construed in accordance with the laws of the State of Texas.

9. If one or more disputes arise with regard to the interpretation and/or performance of this Agreement or any of its provisions, including the form of further documents to be executed, the parties agree to further mediation in an attempt to resolve same with Thomas J. Smith, the Mediator, who facilitated this settlement.

10. Although the mediator has provided a basic outline of this Settlement Agreement to the parties' counsel as a courtesy to facilitate the final resolution of this dispute, the parties and their counsel have thoroughly reviewed such outline and have, where necessary, modified it to conform to the requirements of their agreement. All signatories to this Settlement Agreement hereby release the Mediator from any responsibility arising from the drafting of this Settlement Agreement, and by signing this Settlement Agreement acknowledge that they, or their attorneys, have been advised by the mediator in writing that this Settlement Agreement should be independently reviewed by counsel before executing the Agreement.

11. The parties represent and warrant that: (i) they have carefully reviewed this Settlement Agreement; (ii) they have consulted with their attorneys concerning this Settlement Agreement; (iii) any questions that they have pertaining to this Settlement Agreement have been answered and fully explained by their attorneys; (iv) their decision to execute this Settlement Agreement was not based on any statement or representation, either written or oral, made by any person or entity other than those statements contained in this Settlement Agreement, and specifically was not based on any statement or representation made by any opposing party or its counsel; (v) this Settlement Agreement constitutes the entire agreement and understanding between the parties; (vi) they have entered into this Settlement Agreement of their own free will; and (vii) all prior and contemporaneous agreements, understandings, representations and statements, whether written or oral, are merged herein.

12. In the event any party breaches this Mediated Settlement Agreement, the Agreement will be admissible in any Court proceedings seeking its enforcement and the parties specifically waive the confidentiality provisions of Section 154.053 of the Texas Civil Practice and Remedies Code as it relates to such proceeding.

13. This Agreement will be considered a Rule 11 Agreement when filed with the Court.

14. **THE PARTIES AGREE THAT THIS MEDIATION AGREEMENT IS BINDING ON ALL PARTIES AND IS NOT SUBJECT TO REVOCATION BY ANY PARTY.**

Agreed, this \_\_\_ day of \_\_\_\_\_, 2015.

**PLAINTIFF:**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**DEFENDANT:**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**APPROVED AS TO FORM:**

By: \_\_\_\_\_

State Bar No. \_\_\_\_\_

**ATTORNEYS FOR PLAINTIFF**

By: \_\_\_\_\_

State Bar No. \_\_\_\_\_

**ATTORNEYS FOR DEFENDANT**