

MEDIATION STRATEGIES AND CONSIDERATIONS

Written and Presented by:

W. CAMERON McCULLOCH, JR., *Houston*
Kean Miller

Presented by:

JOYCE W. MOORE, *San Antonio*
Langley & Banack

R. SHAUN RAINEY, *Midland*
Cotton Bledsoe Tighe & Dawson

Co-author:

CHARLOTTE NALL, *Houston*
Kean Miller, LLP

State Bar of Texas
47TH ANNUAL
ADVANCED ESTATE PLANNING & PROBATE
June 7-9, 2023
Dallas

CHAPTER 14

TABLE OF CONTENTS

- I. THE TIMING OF THE MEDIATION MAY BE CRITICAL 1
- II. IT'S ALL IN THE PREPARATION 1
 - A. Prepare yourself..... 1
 - 1. Be familiar with the pertinent facts and law..... 1
 - 2. Address any tax issues..... 1
 - 3. Make sure all pleadings, discovery responses, and inventories are updated..... 1
 - B. Prepare the Client 1
 - 1. Put yourself in the client’s shoes..... 1
 - 2. Fully advise the client..... 2
 - C. Prepare the Mediator 2
 - 1. Select your mediator wisely..... 2
 - 2. A clear and concise mediation memorandum is key..... 2
 - 3. Be ready with an offer..... 2
 - D. General Preparation Tips 2
 - 1. Use spreadsheets..... 2
 - 2. Share what you prepared for the mediator with the other side..... 3
- III. BE PRESENT AT MEDIATION 3
 - A. Make a successful opening statement..... 3
 - B. There is a time to multi-task, and a time not to multi-task..... 3
 - C. Evaluate the claim(s) in negotiating 3
 - D. Wear your mediation hat..... 3
 - E. Negotiation Strategies 3
- IV. CONFIDENTIALITY ISSUES IN MEDIATION..... 3
 - A. The Mediation Privilege..... 3
 - B. Case Law regarding the Mediation Privilege 4
- V. TAX ISSUES MUST BE CONSIDERED..... 4
 - A. Taxation of Will Contest Settlements..... 4
 - 1. General Rule: An inheritance is not taxable..... 4
 - 2. Exception: Distributable Net Income 4
 - 3. Exception: Bequest of Income..... 4
 - 4. Exception: Bequest for Services Rendered..... 4
 - B. Gift Tax Considerations Arising from Settlements 5
 - C. Estate Tax Considerations Arising from Settlements..... 5
 - 1. Deduction of Debts..... 5
 - 2. Marital Deduction..... 5
 - 3. Other Claims by or Payments made to surviving spouse 6
 - 4. Estate Tax Charitable Deductions 6
 - 5. Tax Apportionment Issues..... 6
- SETTLEMENT CHECKLIST - ESTATE LITIGATION..... 7
- SETTLEMENT CHECKLIST - GUARDIANSHIP LITIGATION..... 11
- SETTLEMENT CHECKLIST - TRUST LITIGATION..... 13

MEDIATION STRATEGIES AND CONSIDERATIONS

“It is the policy of this state to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children, and the early settlement of pending litigation through voluntary settlement procedures.” TEX. CIV. PRAC. & REM. CODE § 154.002.

Most courts now order mediation. Even if mediation is not required, clients need to be informed of the option to mediate in order to resolve their disputes according to Rules 1.03 (explanation to make informed decisions) and 3.02 (unreasonable costs/delays) of the Texas Disciplinary Rules of Professional Conduct.

Should your case involve mediation, the following strategies will lead to an effective and ethical mediation, leaving the client satisfied with your services. Even if an agreement is not reached, a successful mediation consists of a better understanding of the other side’s arguments as you move closer to a resolution.

I. THE TIMING OF THE MEDIATION MAY BE CRITICAL.

Although mediation may take place before a suit is filed, during the suit, or even after a jury verdict or judgment, it should be scheduled after the parties exchange information. That could be in the form of formal discovery requests or informal exchange of documents. Parties are most often motivated to mediate after discovery is over based on what may happen at trial and the cost of going to trial.

Attorneys tend to discuss a date they can both attend regardless of what else is going on around that date. However, mediation is not just like any appointment. Some questions you should consider when scheduling mediation consist of:

1. Do you have enough time before that date to get you and your client ready?
2. Do you have enough time to send and receive information (see below) that you and the other side need in order to mediate?
3. Are the pleadings going to be updated by mediation, if needed?
4. If you are planning to use an expert/forensic accountant/appraiser, is it enough time for them to be ready well in advance and time to meet with you? If you are not using an expert, is there at least enough time to trace property and evaluate value if needed?

5. Will you have the other side’s expert reports well in advance of the mediation date?
6. Is your client going to be ready?

II. IT’S ALL IN THE PREPARATION

The more prepared you are, the more efficient mediation will be and the better result you will achieve. Additionally, most probate cases have an emotional aspect to them, which makes it extremely important to prepare your client, yourself, and the mediator to be successful at mediation.

A. Prepare yourself

1. Be familiar with the pertinent facts and law.

As most of you probably already know, to be prepared, you need to be familiar with the pertinent law and facts of the case for which you are attending mediation. Specifically, you should understand:

1. Which facts are disputed and which are undisputed;
2. Which facts are crucial to the case; and
3. Which facts are merely for argument’s sake and have no bearing on the outcome.

Make sure to use intellectual honesty in addressing the good facts v. not good facts. Be able to justify the relief sought based on the favorable facts and law. You are the attorney, so your legal assistant’s preparation does not translate to the same critical thinking and planning that must be done to have an effective mediation. As a result, you should not just rely on your legal assistant being prepared.

Go through the attached Settlement Checklist¹ prior to the start of mediation to ensure you are prepared.

2. Address any tax issues.

Any tax issues² should be included in your discovery and on your inventory.

3. Make sure all pleadings, discovery responses, and inventories are updated.

This is self-explanatory, but it is a necessary part of preparation.

B. Prepare the Client

1. Put yourself in the client’s shoes.

Mediation is likely what the Client has been paying you for – guiding them and leading them to a good final resolution. Until we truly understand what mediation day means to our clients, we can’t effectively do our job. clients are usually stressed and

¹ Settlement Checklists were prepared by Sarah Pacheco.

² See *infra* Section IV.

thinking about mediation constantly; sometimes they can't sleep, eat, or work productively in the days leading up to mediation. A major obstacle you as the attorney has to overcome is encouraging your clients to think with their heads and not their hearts. Keep this in mind as you prepare your client.

2. Fully advise the client.

- a. Make sure client knows what they are requesting and the documents relied upon to achieve their goals (i.e. be familiar with any spreadsheets/valuations etc.); review the mediation memorandum you have prepared together.
- b. Make sure client knows the level of proof necessary to establish their claim(s).
- c. Discuss the possible result(s) of various outcomes and risks.
- d. Explain the mediator is just the messenger and is a neutral facilitator.
- e. Answer any questions client may have BEFORE mediation.
- f. Discuss objectives.
 1. Inform the client to keep an open mind, and be flexible with their approach.
 2. Tell them to avoid emotional reactions in order to make smart business decisions and to understand the other side's perspective.
 3. Set goals and expectations BEFORE mediation.
- g. Discuss how the day will go:
 1. Whether/when the parties will be in the same room v. different rooms (virtual or physical)
 2. Client will eat lunch there
 3. Where to park/directions or how to get video and audio if virtual
 4. How long to expect to be at mediation
 5. Making childcare arrangements in case mediation runs late
 6. Who's paying for mediation and how
 7. Third parties participating in some way
 8. That they will be asked to sign a binding, irrevocable agreement that day
 9. What they need to update or provide and when
 10. That mediation is a process with multiple offers, and they need to stick with it and let the process work
- h. What not to do:

1. Say anything to get your client fired up about winning because it will likely result in a more combative approach instead of attempting to resolve the dispute peacefully.
2. Allow clients to post anything about the case on social media during mediation.

C. Prepare the Mediator

1. Select your mediator wisely.

Counsel should always try to select the most effective mediator considering personality of your client. Traits to look for include: experienced, patient, good listener, not afraid to opine their views on disputed issues but not overly judgmental, and one who can help the client stay focused on the important issues and avoid getting lost in the weeds.

2. A clear and concise mediation memorandum is key.

- a. Provide the mediator with all of the data and information to move the process along by first preparing a mediation memorandum and present it to the mediator prior to mediation. It needs to be clear and concise but bring the mediator up to speed about the case.
- b. Provide a narrative of the dispute – narrow the issues, provide the factual background, and show the mediator the areas of agreement and disagreement.
- c. Provide the operative language or key documents which form(s) the basis of the dispute.

3. Be ready with an offer.

- a. An offer/counteroffer should have already been exchanged long before mediation.
- b. Tip: always view any demand or offer from the other side's perspective. Don't lose credibility by making a demand or offer that is not supported by legitimate information.

D. General Preparation Tips

1. Use spreadsheets.

Spreadsheets are a cost-effective way to illustrate property and claims or even possible approaches in mediation. Spreadsheets organize the issues on 1 or 2 pages, making the information easy to digest. They are easier for the client and mediator to follow and helps keep them focused. Spreadsheets are also easy to manipulate so that changes and corrections can be done quickly to keep the process moving and to evaluate settlement positions. If a printer is available, a spreadsheet can serve as an exhibit to the MSA.

2. Share what you prepared for the mediator with the other side.

Sharing your evidence shows you are organized, prepared, and ready to proceed. You will ultimately have to produce the evidence you think is good anyway, so getting it to the other side in advance will allow the other side to evaluate it. Showing up at mediation with surprise(s) for the other side will likely not go over well and tend to delay mediation.

III. BE PRESENT AT MEDIATION

A. Make a successful opening statement.

A good opening statement sets the tone for a productive mediation. Make sure you are knowledgeable about the case and avoid a combative attitude. Discuss the evidence and acknowledge your side's weaknesses and how you will handle them. Make it clear that you and your client came to mediation hoping to resolve the dispute.

B. There is a time to multi-task, and a time not to multi-task.

Do not expect to merely attend mediation while you work on other cases. Make sure you are involved in the negotiations and explanations to the client.

C. Evaluate the claim(s) in negotiating.

Be candid with regard to the real value of assets. Concentrate on the objectives, develop creative options, determine validity such that everyone is being treated fairly. Use the Settlement Checklist prepared by Sarah Pacheco and attached as Exhibit A.

D. Wear your mediation hat.

Mediation is the one day in a case to focus exclusively on settlement. Every other day is about why you are right, what the evidence is, and why the other side is wrong, but mediation day means fully exploring settlement options, brainstorming, discussing, and keeping an open mind. Provide leadership to your client and be positive. Remember that a skilled negotiator focuses on creating long-term results and relationships to ensure all objectives are met.

E. Negotiation Strategies

1. Allow the mediator to build a relationship and understand your client's needs prior to getting into specifics.
2. Remember that an offer where your client gets everything is a surrender offer, not a settlement offer; make sure to brainstorm and discuss with the client a variety of potential offers, not just the first, and determine the

offers that will move the ball of settlement or set up the day for a good result.

3. Talk less, listen more. Even allowing your client to vent to the mediator may be cathartic, allow your client to calm down and then focus on resolving the case in a more rational manner.
4. Know the basic/important facts of the case.
5. Be collaborative, not competitive.
6. Duty to be Truthful: We all know that if mediation is successful, it results in a binding contract. However, the contract will be at risk of being set aside if material misrepresentations are made to secure such contract.

IV. CONFIDENTIALITY ISSUES IN MEDIATION

"A cloak of confidentiality surrounds mediation, and the cloak should be breached only sparingly." *Hydroscience Techs., Inc. v. Hydroscience, Inc.*, 401 S.W.3d 783, 796 (Tex. App.—Dallas 2013, pet. denied) (citation omitted). The purpose of mediation is "to allow parties to come to the table knowing they can speak freely about their dispute and have confidence what they say will be confidential." *Id.*

Mediation can be an effective process for reconciliation of contentious parties and resolution of conflict. But its effectiveness depends on the confidence of the public in the integrity of the process. Attorneys, as well as all participants, are responsible for maintaining its integrity.

A. The Mediation Privilege

Subject to certain exceptions, communication related to the subject matter of any civil or criminal dispute made by a participant in mediation, whether before or after suit is filed, is confidential, not subject to disclosure and may not be used as evidence against the participant in any judicial or administrative proceeding. *See* TEX. CIV. PRAC. & REM. CODE § 154.073. Even further, "[u]nless parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointed court." TEX. CIV. PRAC. & REM. CODE § 154.053(c).

Nevertheless, the mediation privilege is not a blanket of confidentiality. The privilege may be waived. The disclosure may be used in a new and independent cause of action, and the disclosure may be used in a separate case against a separate party to prove a claim factually and legally unrelated to the underlying claim. If questions arise regarding the applicability of the mediation privilege, the facts,

circumstances, and context of communications during mediation are reviewed *in camera*.

B. Case Law regarding the Mediation Privilege

There is not much case law regarding the mediation privilege, but similar considerations and policy concerns have arisen under Texas Rule of Evidence 408, the rule excluding evidence of offers to compromise a disputed claim. However, the mediation privilege is broader.

The case law that does exist regarding the mediation privilege does not exactly clarify the circumstances in which communications would be confidential or disclosure would be required. In fact, case law has created another exception regarding the mediation privilege, pertaining to the offensive use doctrine. *See, e.g., Transamerican Natural Gas Corp. v. Flores*, 870 S.W.2d 10 (Tex. 1994); *Alford v. Bryant*, 137 S.W.3d 916 (Tex. App.—Dallas 2004, pet. denied). Specifically, a party waives the mediation privilege if (1) the party is seeking affirmative relief; (2) the information, if believed by the fact finder, in all probability would be outcome determinative; and (3) disclosure of the confidential information is the only means by which the aggrieved party may obtain the evidence. *See Flores*, 870 S.W.2d at 11-12. In *Avary v. Bank of America, N.A.*, the Dallas Court of Appeals concluded that where a case is based on a new tort, and that tort encompasses a duty to disclose, the mediation privilege does not bar disclosure. *See 72 S.W.3d 779* (Tex. App.—Dallas 2002, pet. denied). Courts have also distinguished between procedural information and confidential information. *See, e.g., In re Paul Daley*, 29 S.W.3d 915 (Tex. App.—Beaumont 2000, no pet.) (allowing deposition regarding whether the insurance representative left mediation early). Nevertheless, courts continue to hold that the mediation privilege should be breached only sparingly. *See Pierce v. Stocks*, No. 01-18-00990-CV, 2019 WL 3418513 (Tex. App.—Houston [1st Dist.] July 30, 2019, no pet.). With the lack of and divisive case law, confusion continues to surround the circumstances courts will uphold the confidentiality protection or require disclosure.

Take-Away: What happens in mediation may not stay in mediation.

V. TAX ISSUES MUST BE CONSIDERED.

A. Taxation of Will Contest Settlements

1. General Rule: An inheritance is not taxable.

“Gross income does not include the value of property acquired by gift, devise, or inheritance.” IRC § 102(a). Even if the property is received via settlement in compromise of an inheritance claim as an

heir, it is generally exempt from federal income tax. *See Lyeth v. Hoey*, 305 U.S. 188 (1938).

2. Exception: Distributable Net Income

Income earned by a trust or estate in any year is taxed to the trust or estate to the extent the income is retained but is taxed to the beneficiaries to the extent it is distributed to them. Distributable Net Income (“DNI”) is the amount of trust or estate income available for distribution in a particular tax reporting year. To calculate DNI, find the trust’s taxable income (before the application of the distribution deduction), exclude the net capital gains allocated to principal but include net tax-exempt income, and then subtract allowable deductions and losses. *See IRC § 643(a)*. The three functions DNI serves: (1) to establish the maximum amount a trust or estate can deduct under Code Sections 651 and 661 as distribution to its beneficiaries; (2) to determine the maximum amount that the trust or estate beneficiaries can be taxed upon under Code Sections 652 and 662; and (3) to determine the character of a distribution by a trust or estate.

Exception to DNI: a gift or bequest of a specific sum or property (paid or credited all at once or in not more than three installments). *See IRC § 663(a)(1)*. Accordingly, amounts paid pursuant to a settlement agreement are usually treated as though they were paid under the governing instrument’s terms.

The amount of DNI carried out by an in-kind distribution to a beneficiary is the lesser of: (a) the adjusted basis of the property prior to distribution; (b) the fair market value of the property prior to distribution; or (c) the fair market value of the property at the time of the distribution. *IRC § 643(e)*.

Although the estate does not generally recognize gain or loss as a result of making a distribution to a beneficiary, the following exceptions apply: (1) distribution of assets to fund pecuniary gifts (i.e. the value of the asset increases or decreases from time of death to time of distribution); (2) the separate share rule; (3) distributions to satisfy the estate’s obligations.

3. Exception: Bequest of Income

If the bequest or inheritance is the right to receive income, the amounts are taxable to the beneficiary. *See IRC § 102(b)*. Accordingly, when the settlement payment is in lieu of an income interest, the settlement amount is classified as gross income under Section 102(b).

4. Exception: Bequest for Services Rendered

Bequests made to compensate for services rendered to the decedent are not excluded from income. *See Cotnam v. Comm’r*, 263 F.2d 119 (5th Cir. 1959); see also IRS Pub. 525, p. 32 (Feb. 25, 2020) (“If you receive cash or other property as a bequest for

services you performed while the decedent was alive, the value is taxable compensation.”).

B. Gift Tax Considerations Arising from Settlements

Under Section 2501, property transferred by gift is subject to federal taxation. *See* IRC § 2501. Generally, a transfer of property by settlement of a trust or estate dispute is not a “gift” for federal gift tax purposes because it is a transfer for full and adequate consideration, meeting the following three requirements: (1) bona fide, (2) transacted at arm’s length, and (3) free of donative intent. Several subsidiary factors may be relevant: (i) whether a genuine controversy had existed between the parties (ii) whether the parties were represented by and acted upon the advice of counsel; (iii) whether the parties engaged in adversarial negotiations; (iv) whether the value of the property involved was substantial; (v) whether the settlement was motivated by the parties’ desire to avoid the uncertainty and expense of litigation; and (vi) whether the settlement was finalized under judicial supervision and incorporated in a judicial decree.

The IRS has found no gift tax exposure in the following contexts: (1) a modification to a trust as part of the settlement of a bona fide dispute if the settlement is reflective of the parties’ rights under state law; (2) a division of a discretionary trust into separate trusts for different branches of a family as well as mergers of trusts; (3) a reformation or construction of a trust to reflect or determine the settlor’s original intent or reflect administrative changes.

*Be mindful in settlement negotiations that a taxable gift may result if the mediation agreement grants property to some transferees not part of the dispute.

If mediation involves the surviving spouse, the parties may improve the settlement’s overall tax effect if certain parties agree to forgo claims so that the property passes to the surviving spouse to qualify for the unlimited estate tax marital deduction. Creatively structuring the mediation agreement to use the decedent’s estate tax exclusion and the surviving spouse’s gift tax applicable exclusion amount may allow property to pass to others without paying any current transfer tax.

C. Estate Tax Considerations Arising from Settlements

1. Deduction of Debts

An estate tax deductible claim must be timely asserted so that it is valid under state law and must be payable from property included in the estate tax base. *See* IRC §§ 2053(a), 2053(b). Accordingly, claims paid but could have been barred under state law are not

deductible. However, an enforceable claim not formally filed with the court but presented to the representative within the claims period and paid pursuant to an agreement with the estate’s beneficiaries is deductible for estate tax purposes. *See* Rev. Rule 75-24, 1975-1 CB 306. Nevertheless, no deduction may be taken for a mere potential claim, or one that is contingent. Treas. Reg. § 20.2053-1(d)(1), (4).

Deductibility issues arise when claims are timely filed or asserted but not finally determined or paid at the time the estate tax return must be filed. If not finally determined, the estate must pay tax and claim a refund when a final determination is made. *See Est. of Sachs v. Comm’r*, 856 F.2d 1158 (8th Cir. 1988). In that case, the fiduciary must docket the limitations period during which the claim for refund of estate tax can be made, which is generally the later of three years from the date the estate tax return is filed, or for amounts later paid, two years from the date of payment. *See* IRC § 6511.

Under regulations effective October 20, 2009, the deductibility of claims related to post-death events are limited to bona fide claims enforceable against the decedent’s estate and meet other requirements in the regulations. Treas. Reg. §§ 20.2053-1(d)(1), 20.2053-4(a)(1)(i).

2. Marital Deduction

The marital deduction must be considered when there is a settlement agreement involving a surviving spouse. A “spouse” is determined based on whether persons were legally married in the jurisdiction their marriage commenced, whether or not the state in which decedent died recognizes such marriage. *See Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

To qualify for the marital deduction, the property must have passed from the decedent to the surviving spouse, but not in a manner to characterize it as a non-deductible terminable interest. *See* IRC § 2056. However, if the surviving spouse agrees to reduce his or her outright ownership interest to some form of terminable interest, then the terminable interest will not qualify for the state tax marital deduction. To qualify for the estate tax marital deduction, the surviving spouse must have an “enforceable right” under state law. *Comm’r v. Est. of Bosch*, 387 U.S. 456, 465 (1967).

Qualified Interests include: (1) outright transfer as long as not conditioned upon survival more than six months; (2) interest passing to trust providing spouse with exclusive right to all income for life and grants spouse a general power of appointment over the trust property at death; (3) interest passing to trust providing spouse with exclusive right to all income for life and election made causing property remaining in trust at time of spouse’s later death to be taxed in the spouse’s

estate (QTIP trust); (4) interest passing to trust providing spouse with exclusive right to all income for life and upon death of surviving spouse, remaining trust property vests in a qualified charity (spousal charitable remainder trust); (5) insurance or annuity proceeds held by insurer to an agreement to pay proceeds in installments or pay interest on them, during surviving spouse's life only to surviving spouse, so long as installments are payable at least annually, beginning not later than 13 months after decedent's death and surviving spouse has the power to appoint the amounts to surviving spouse or his or her estate. *See* IRC § 2056.

If an interest is assigned or surrendered to the surviving spouse as a result of a controversy, it will be treated as having passed from the decedent to the surviving spouse. *Treas. Reg. § 20.2056(c)-2(d)(2)*. However, the estate is not entitled to a marital deduction for property or other interests released, assigned, or surrendered by the surviving spouse. *Treas. Reg. § 20.2056(c)-2(d)*. Importantly, payment made to a surviving spouse pursuant to a settlement agreement will be treated the same as one made pursuant to a judgment. *Estate of Barrett v. Commissioner*, 22 TC 606 (1954).

3. Other Claims by or Payments made to surviving spouse

- a. Community Property Claims – The decedent's gross taxable estate includes only the decedent's one-half interest in the property. *See* IRC § 2033.
- b. Claims for Contribution and Reimbursement – Only claims enforceable against decedent's estate may be deducted. *See* IRC § 2053. Reimbursement claims from separate to community property may result in either an asset or liability of the estate of a deceased spouse. Only claims enforceable against decedent's estate may be deducted.
- c. Homestead Claims – State law may grant the surviving spouse the right to occupy the residence as long as her or she desires. *See, e.g., Tex. Est. Code § 102.005*. However, if the homestead right is abandoned, it may constitute a non-deductible terminable interest, and the marital deduction would not be available for a homestead right. *See* § 2056(b)(1).
- d. Family Allowance Claims – Payment of a family allowance will not qualify for a marital deduction.

4. Estate Tax Charitable Deductions

There is an unlimited estate tax deduction for qualifying bequests made to charities, but amounts passing as "split interests" will not qualify for the estate tax charitable deduction unless the interest meets specific requirements. *See* IRC § 2055(e)(2). The amount deductible for estate tax purposes is usually measured by the amount the charity actually receives under the settlement agreement. *See* *Rev. Rul. 145, 1953-2 CB 273*; *Rev. Rule 89-31, 1989-1 CB 277*. The charity must have a bona fide claim and charity's interest must not be contingent. *See* *Rev. Rul. 89-32, 1989-1 CB 277*; *Treas. Reg. § 20.2055-2(b)(1)*.

5. Tax Apportionment Issues

In mediation, you should carefully examine the apportionment of estate and inheritance taxes, calculate the "net" numbers, and explain them to your client. Informing clients of the tax impact of settling the case gives them a realistic expectation of the amount they may reasonably be expected to receive at the conclusion of the dispute. If the agreement is structured with the goal of minimizing or eliminating transfer taxes, more funds will be able to be divided among the parties.

Additionally, consider which party bears the tax risk if the IRS is successful in re-characterizing a component of the transaction such that taxes are owed. Parties may wish to negotiate an indemnity for taxes ultimately assessed and provide notice and an opportunity to participate in the tax dispute if a party is risking liability for such tax.

SETTLEMENT CHECKLIST – ESTATE LITIGATION

The following is a basic checklist for settlement of a will contest:

A. Parties

- State all names
- State all relevant capacities (i.e., executor, trustee, etc.)
- Define appropriately (make sure definition includes all capacities)

B. Recitals

- Identify decedent and date of death
- State facts giving rise to contest or dispute
- State facts evidencing each settling party's standing and validity of his or her claim
- Identify pending legal action, including court, style of case, etc.
- State settlement to avoid continued litigation and buy peace

C. Definitions and Scope

- Define claims
- Define relevant entities and persons included in settlement, i.e., trusts, businesses, etc.
- State what claims or matters, if any, are excluded from agreement

- Define relevant terms – including successor, affiliates, predecessors, litigation, transactions, etc.
- D. Recite Consideration**
 - Good and valuable
 - Other payments provided under terms negotiated
- E. Terms of Settlement**
 - Division of estate assets
 - ⇒ Describe property each person or party to receive
 - ⇒ Time to deliver
 - ⇒ Manner to divide – bid, lots, etc.
 - ⇒ Whether appraiser must be obtained and, if so, who is responsible
 - ⇒ Who pays shipping and delivery costs?
 - ⇒ Who pays/responsible for storage and insurance pending distribution?
 - ⇒ Should a bill of sale be prepared and, if so, who prepares
 - ⇒ Who prepares deeds for real property?
 - ⇒ How disputes should be settled
 - ⇒ Disclaimers or assignments
 - ⇒ Method to divide unknown, undisclosed, or lost assets
 - Continued administration of estate
 - ⇒ Who will be appointed or continue to serve as the personal representative of the estate?
 - ⇒ Limitation on personal representative's powers if any
 - ⇒ Reporting requirements to parties or third parties
 - ⇒ Time period to close estate
 - ⇒ Payment of fees and expenses
 - ⇒ Right to compensation
 - ⇒ Responsibility to execute conveyance documents
 - Waiver of statutory rights
 - ⇒ Homestead
 - ⇒ Family allowance
 - ⇒ Exempt property
- F. Taxes and Debts**
 - Who is responsible for preparing and filing last income tax return, any gift tax returns and death tax returns?
 - Surviving spouse's responsibility to pay income taxes for period prior to spouse's death
 - Who is responsible for payment of taxes, penalties, and interest?
- How and when debts and administration expenses will be paid
- Who is responsible for payment of debts and administration expenses?
- Disclosures as to known debts and taxes due
- Tax apportionment – residuary, Section 322A, otherwise
- Will parties be entitled to request copy of death and income tax return
- Right to access tax records and, if so, periods to be provided
- Indemnity for income, death, and gift taxes and related penalties and interest
- Payments do not constitute distributable net income to recipient
- How will court costs and appointee fees be paid
- G. Representations**
 - Capacity of parties
 - Disclosure of assets
 - Authority to act in stated capacity
 - Party has not assigned, pledged, or disclaimed interest
 - Discharge any reliance on statement by any other party's attorney or advisor
 - Include disclaimer of reliance other than expressly stated in written settlement agreement
- H. Release and Indemnities**
 - Release claims
 - Limitations in release of parties and/or attorney or other advisors if desired
 - Exclude obligations under settlement agreement from release
 - Verify all required parties are releasing and being released in all desired capacities
 - Verify successor, affiliates and predecessor are released, if desired
 - Verify all agents, heirs, etc. are bound
 - Indemnities for taxes, third party claims, tenant claims, environmental claims, alleged spouses, etc.
- I. Disposition of Litigation**
 - Dismissal with prejudice
 - Consent judgment
 - Time to dispose
 - Who is responsible for preparation of paperwork?
 - Rights of counsel to review
 - Whether parties must attend hearing

J. Remedies in Default

- Settlement agreement enforced as contract
- Settlement agreement to be incorporated in judgment and enforced accordingly
- Specific performance
- Right to attorney's fees and expenses

K. Miscellaneous

- Agreement supersedes any oral or prior agreements (exclude any agreements to remain in effect)
- Agreement must be modified in writing
- Choice of law
- Incorporate exhibits
- Advice of own counsel
- Whether agreement can be executed in multiple counterparts
- Whether facsimile signature same as original
- Where future notices should be sent
- Confidentiality agreement
- Heading and titles are for descriptive purposes only
- Agreement to mediate/arbitrate future disputes
- Statement that parties and counsel acted in good faith and just cause
- Effective date
- Court approvals

SETTLEMENT CHECKLIST – GUARDIANSHIP LITIGATION

The following is a basic checklist for settlement of a guardianship contest:

A. Parties

- State all names
- State all relevant capacities
- Define appropriately
- State any ad litem joining as parties

B. Recitals

- Identify guardianship matters at issue
- State facts giving rise to contest or dispute
- State facts evidencing each settling party's standing
- Identify pending legal action, including court, style of case, etc.
- State settlement to avoid continued litigation and buy peace

C. Definitions and Scope

- Define claims
- Define any released entities and persons included in settlement, i.e., other trusts, partnerships, businesses, etc.
- State what claims or matters, if any, are excluded from agreement
- Define relevant terms – including successor, affiliates, predecessors, litigation, transactions, etc.

D. Recite Consideration

- Good and valuable

E. Appointment of Guardian

- General issues
- ⇒ Will guardian be appointed – person and/or estate
- ⇒ If not, ward competent, or less restrictive means
- ⇒ Validity of POA, trust, etc., HCPOA
- ⇒ If guardian appointed, who will be appointed guardian – person and/or estate
- ⇒ Hearing and who will attend
- ⇒ Waiver by anyone with priority to serve permanent/limited
- ⇒ Who serves as representative payee for social security?
- ⇒ Provision to appoint future guardians
- ⇒ Notice of future appointments
- ⇒ Bond requirements
- ⇒ Guardian's compensation
- ⇒ Continued appointment of ad litem(s)
- ⇒ Who prepares paperwork and time frame to do so?

- ⇒ Parties' right to be involved in future hearings
- ⇒ Living arrangements
- ⇒ Funeral arrangements – right to plan
- Property issues
- ⇒ Agreements as to ward's community or separate property
- ⇒ Rights of spouse to manage community property under Estates Code or otherwise
- ⇒ Partition or exchange agreement
- ⇒ Guardian's authority to manage community estate
- ⇒ Annual gifting – allowed and notice requirements
- ⇒ Notice of sales or significant transfers
- ⇒ Guardian's compensation
- ⇒ Payment of fees and expenses
- ⇒ Coordination with any trusts or other entities
- ⇒ Rights of parties to access and audit guardian's books and records
- ⇒ Expenses to be paid by guardian versus wife, trustee or other third party
- ⇒ Right to divorce ward
- ⇒ Homestead rights
- ⇒ Who pays ad litem and applicant's fees and expenses?

F. Termination or Modification of Guardianship

- Termination
- ⇒ Basis for termination
- ⇒ Who prepares paperwork and pleadings?
- ⇒ Payment of any debt, obligations, and taxes
- ⇒ Ad litem's consents
- ⇒ Doctor's letter or other medical opinion
- Modification
- ⇒ How guardianship will be modified
- ⇒ Basis for modification
- ⇒ Doctor's letter or other medical opinion
- ⇒ Who prepares paperwork and pleadings?
- ⇒ What powers will ward have
- ⇒ What powers will guardian have

G. Representations

- Capacity of parties
- Disclosure of assets
- Authority to act in stated capacity
- Discharge any reliance on statement by any other party's attorney or advisor
- Include disclaimer of reliance other than expressly stated in written settlement agreement

H. Release and Indemnities

- Release claims
- Limitations in release of parties and/or attorney or other advisors
- Exclude release for obligations under settlement agreement
- Verify all required parties release and are released in all desired capacities
- Verify successor, affiliates and predecessor are released, if desired
- Verify all agents, heirs, etc. are bound
- Indemnities for third party claims

I. Disposition of Litigation

- Dismissal with or without prejudice
- Time to dispose
- Who is responsible for preparation of paperwork?
- Who must execute written waivers?
- Who must withdraw/dismiss contests?
- Rights of counsel to review
- Whether parties must attend hearing

J. Remedies in Default

- Settlement agreement enforced as contract
- Settlement agreement to be incorporated in judgment and enforce accordingly
- Right to attorney's fees and expenses

K. Miscellaneous

- Agreement supersedes any oral or prior agreements (exclude any agreements to remain in effect)
- Applicant for guardianship was in good faith and just cause
- Agreement must be modified in writing
- Choice of law
- Incorporate exhibits
- Advise of own counsel
- Whether agreement can be executed in multiple counterparts
- Whether facsimile signature same as original
- Where future notices should be sent
- Heading and titles are for descriptive purposes only
- Agreement to mediate/arbitrate future disputes
- Effective date
- Court approvals if any

SETTLEMENT CHECKLIST – TRUST LITIGATION

The following is a basic checklist relating to a lawsuit involving the administration, modification, or termination of a trust:

A. Parties

- State all names
- State all relevant capacities
- Define appropriately
- State how minors and unknown beneficiaries are bound
- State any ad litem joining as parties

B. Recitals

- Identify trust or trusts at issue
- Identify trustees
- State facts giving rise to contest or dispute
- State facts evidencing each settling party's standing and validity of his or her claim
- Identify pending legal action, including court, style of case, etc.
- State settlement to avoid continued litigation and buy peace

C. Definitions and Scope

- Define claims
- Define relevant entities and persons included in settlement, i.e., other trusts, partnerships, businesses, etc.
- State what claims or matters, if any, are excluded from agreement
- Define relevant terms – including successor, affiliates, predecessors, litigation, transactions, etc.

D. Recite Consideration

- Good and valuable
- Other payments provided under terms negotiated

E. Terms of Settlement

- Resignation of Trustee
- ⇒ Basis for resignation
- ⇒ Time for resignation
- ⇒ Any contingent events or actions
- ⇒ Appoint successor trustee
- ⇒ Means to qualify
- ⇒ Who must bring suit to seek appointment, if necessary?

- **Distribution standard issues**
 - ⇒ How future distributions will be determined
 - ⇒ Documentation beneficiaries must submit to support future distributions
 - ⇒ Property to be distributed in settlement of claims for failure to distribute enough in past
 - ⇒ Whether payments are from income or principal
 - ⇒ How past, current, and future payments will be accounted for
- **Disclosure, discharge, and redress**
 - ⇒ Disclosures of Books, Records and Accounts
 - ⇒ Successor trustee has no duty to redress
 - ⇒ Judicial accounting
 - ⇒ Indemnify successor trustee from claims of unknown or minor beneficiary or third parties
 - ⇒ Time and place books and records will be made available
- **Breach of fiduciary duty**
 - ⇒ Payment from fiduciary to trust and/or beneficiary
 - ⇒ Return of trustee fees and expenses paid by trust
- ⇒ Return of compensation by trustee
- ⇒ Whether payment to trustee and property taken by trustee will constitute income to trustee
- ⇒ Note or other means to secure payments
- **Continued administration of trust**
 - ⇒ Who will be appointed or continue to serve as the trustee of the trust?
 - ⇒ Future reporting requirements to parties or third parties
 - ⇒ Payment of trustee's fees and expenses
 - ⇒ Right to compensation
- F. Termination or Modification of Trust**
 - **Termination**
 - ⇒ Basis for termination
 - ⇒ Means to terminate – agreement or by court
 - ⇒ Who prepares paperwork and pleadings?
 - ⇒ Payment of any debt, obligations, and taxes
 - ⇒ How pending debts, notes, leases, contracts, or other obligations will be handled
 - ⇒ Tax effects of termination – income and GST

- **Modification**
- ⇒ **Provision to be modified**
- ⇒ **Basis for modification**
- ⇒ **Means to modification – agreement or by court**
- ⇒ **Who prepares paperwork and pleadings?**
- ⇒ **Tax implications**
- ⇒ **GST considerations**

G. Tax Matters

- **Consider tax implications**
- **Obtain tax opinions**
- **Request private letter rulings**
- **Who is responsible for filing tax returns?**
- **Whether distributions will consider the amount of taxes the beneficiary must pay**
- **Will settlement result in loss of GST “grandfathered” status**

H. Representations

- **Capacity of parties**
- **Disclosure of assets**
- **Authority to act in stated capacity**
- **Party has not assigned, pledged, or disclaimed interest**
- **Discharge any reliance on statement by any other party’s attorney or advisor**
- **Include disclaimer of reliance other than expressly stated in written settlement agreement**

I. Release and Indemnities

- Release claims
- Limitations in release of parties and/or attorney or other advisors
- Exclude from release obligations under settlement agreement
- Verify all required parties release and are released in all desired capacities
- Verify successor, affiliates and predecessor are released, if desired
- Verify all agents, heirs, etc. are bound
- Indemnities for taxes, third party claims, tenant claims, environmental claims, alleged spouses, etc.

J. Disposition of Litigation

- Dismissal with prejudice
- Consent to judgment
- Time to dispose
- Who is responsible for preparation of paperwork?
- Rights of counsel to review
- Whether parties must attend hearing

K. Remedies in Default

- Settlement agreement enforced as contract
- Settlement agreement to be incorporated in judgment and enforced accordingly
- Specific performance
- Right to attorney's fees and expenses

L. Miscellaneous

- Agreement supersedes any oral or prior agreements (exclude any agreements to remain in effect)
- Agreement must be modified in writing
- Choice of law
- Incorporate exhibits
- Advise of own counsel
- Whether agreement can be executed in multiple counterparts
- Whether facsimile signature same as original
- Where future notices should be sent
- Confidentiality agreement
- Heading and titles are for descriptive purposes only
- Agreement to mediate/arbitrate future disputes
- Effective date
- Court approvals if any