YOU SETTLED IT, RIGHT? FAMILY SETTLEMENT AGREEMENTS IN PROBATE, TRUST, AND GUARDIANSHIP DISPUTES

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I. INTRODUCTION

In practice, very few cases proceed to trial.[1] Statistically, most disputes are settled (usually through mediation).[2] Probate, trust, and guardianship disputes are no exception.[3] These cases are frequently resolved by utilizing what is known as the family settlement doctrine and entering a family

1. Jonathan D. Glater, *Study Finds Settling is Better Than Going to Trial*, N.Y. TIMES (Aug. 7, 2008), https://www.nytimes.com/2008/08/08/business/08law.html (stating that eighty to ninety-two percent of cases settle) [perma.cc/9T58-GEDD].

2. *See generally id.*

3. *See id.*

settlement agreement (FSA).[4] Despite the frequency with which these cases settle, drafting effective probate, trust, or guardianship FSAs can be more complicated than anticipated.[5] For a variety of reasons, these FSAs can be both substantively and procedurally tricky.[6] This article highlights some of the common procedural issues the practitioner may frequently encounter in the three key phases of entering a probate, trust, or guardianship FSA: (1) formation; (2) exchanging consideration; and (3) enforcement.[7]

The complexity of probate, trust, and guardianship settlements is driven by a variety of factors.[8] First, it can be challenging to identify all of the necessary parties who must sign a probate, guardianship, or trust settlement as compared to those who *should*, but are *not required*, to sign it.[9] This analysis is usually at the forefront of the minds of the parties, who want to finally resolve their dispute and eliminate the possibility for someone to later challenge it or claim that the settlement is not binding on them.[10] Even after all of the necessary parties are identified, however, settling parties who are serving as fiduciaries must be mindful to fulfill their disclosure duties to the appropriate persons *before* entering a settlement.[11] Additionally, in a typical probate, trust, or guardianship dispute, there are frequently parties, such as administrators, guardians, or attorneys *ad litem*, who require court authority to enter a settlement or to fulfill its terms.[12] Thus, unlike other areas of the law, a probate, trust, or guardianship settlement may—even after all the parties have signed it—be subject to additional conditions precedent before the parties are actually required to perform their contractual obligations in earnest.[13] Additionally, depending on the terms of the FSA, any later court order may be limited to merely approving the FSA, or the court may adopt and incorporate the FSA into the order, thereby making it the judgment of the

4. *See, e.g.*, *In re* Estate of Halbert, 172 S.W.3d 194, 199–200 (Tex. App.—Texarkana 2005, pet. denied) (utilizing an FSA).

5. *See infra* Part III.

6. *See infra* Part III.

7. *See infra* Parts II–IV.

8. *See infra* Part III.

9. *See infra* Section III.A.

10. *See infra* Section III.A; *see also* Estate of Morris, 577 S.W.2d 748, 755–56 (Tex. App.—Amarillo 1979, writ ref'd n.r.e.) ("And it remains our law that a family settlement in which *all of the heirs and beneficiaries* agree that a purported will shall not be probated is valid and enforceable.") (emphasis added).

11. *See generally* Avary v. Bank of Am., N.A., 72 S.W.3d 779 (Tex. App.—Dallas 2002, pet. denied) (discussing the duties of a trustee to a beneficiary); *see generally* TEX. EST. CODE ANN. §§ 751.101–.102 (Supp.) (describing the fiduciary duties owed by an agent under a durable power of attorney).

12. *See* TEX. EST. CODE ANN. §§ 351.051, 452.101, 1151.102 (Supp.).

13. *See infra* Part III.C.2.

court.[14] These different acts significantly impact the parties' options to enforce the FSA.

These unique dynamics present complexities that many settling parties (and their counsel) do not anticipate when drafting the FSA.[15] As with most contracts, the devil can be in the details.[16] Careful attention should be given to expressly stating what happens if things do not go as planned (e.g., when a necessary party ends up not signing the FSA or the parties fail to secure court approval of the FSA) and knowing the applicable law in default.[17]

II. FUNDAMENTAL SETTLEMENT CONCEPTS

A. Public Policy Favoring Settlements and the Use of the Family Settlement Doctrine

It is the public policy of Texas to encourage the peaceable resolution of disputes and the early settlement of pending litigation through voluntary settlement procedures.[18] Furthermore, Texas jurisprudence has long favored the settlement and distribution of property of trusts and estates pursuant to settlement agreements.[19] As the Texas Supreme Court announced, such an agreement "is an alternative method of administration in Texas that is a favorite of the law."[20] The beneficiaries of such a trust or estate are "free to arrange among themselves for the distribution of the estate and for the payment of expenses from that estate."[21] Moreover, an executor or other personal representative who is not a beneficiary under a will has no standing to oppose an FSA and is not a necessary party thereto.[22]

The family settlement doctrine is generally utilized when there is a disagreement on the distribution of an estate, and the beneficiaries enter into

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14. *See generally* Mantas v. Fifth Court of Appeals, 925 S.W.2d 656, 658 (Tex. 1996) (per curiam) (citing Padilla v. LaFrance, 907 S.W.2d 454, 462 (Tex. 1995)) (limiting enforcement of an FSA to only a written contract).

15. *See infra* Part III.

16. *See infra* Part III.

17. *See infra* Part III.

18. Adams v. Petrade Int'l, Inc., 754 S.W.2d 696, 715 (Tex. App.—Houston [1st Dist.] 1988, writ denied) (stating that the Texas legislature has expressly declared the state's policy of encouraging the peaceable settlement of citizens' disputes and has placed on the courts the responsibility for carrying out that policy); TEX. CIV. PRAC. & REM. CODE ANN. § 154.002 (Supp.).

19. Stringfellow v. Early, 40 S.W. 871, 874 (1897, no writ) (stating that heirs/legatees can agree not to probate the will and to distribute property pursuant to laws of intestacy); *see, e.g.*, Everett v. Everett, 309 S.W.2d 893, 896 (Tex. App.—Waco 1958, writ ref'd n.r.e.).

20. Shepherd v. Ledford, 962 S.W.2d 28, 32 (Tex. 1998).

21. *Id.*; *In re* Estate of Hodges, 725 S.W.2d 265, 267 (Tex. App.—Amarillo 1986, writ ref'd n.r.e.) (citing Pitner v. U.S., 388 F.2d 651, 656 (5th Cir. 1967); Salmon v. Salmon, 395 S.W.2d 29, 32 (Tex. 1965); Estate of Morris, 577 S.W.2d 748, 755–56 (Tex. App.—Amarillo 1979, writ ref'd n.r.e.).

22. *In re* Estate of Hodges, 725 S.W.2d at 269; Estate of Morris, 577 S.W.2d at 755.

an agreement to resolve the controversy.[23] The theory underlying the validity of family settlement is stated in *Pitner v. United States*:

> This approach is made possible by section 37 of the [Texas] Probate Code which provides that when a person dies leaving a will, [. . .] 'all of his estate devised or bequeathed by such will shall vest immediately in the devisees or legatees;' [. . .] subject to the payment of the decedent's debts. This provision leaves the beneficiaries of an estate free to arrange among themselves for the distribution of the estate and for the payment of expenses from that estate.[24]

The family settlement doctrine involves three basic principles: the decedent's right to make a testamentary disposition, the beneficiaries' ability to convey their rights, and balancing those competing rights by requiring an agreement to an alternative distribution plan.[25] It does not matter whether the parties agree to probate one of many wills or not to probate a will at all — the critical element is that the parties have agreed to an alternate disposition of the estate.[26] The parties can even agree to not probate a will and to allow the estate to pass through the intestacy statutes.[27] Alternatively, the parties can agree to probate a will merely as a muniment of title when the FSA obviates any need for estate administration.[28] The mere agreement not to probate a certain will, however, if not combined with an agreement about distributing the estate, cannot constitute an FSA.[29]

B. Some Parties Require Court Permission to Enter an FSA

In the context of a probate, trust, and guardianship dispute, the process of reaching an enforceable settlement agreement differs from the process applicable in other contexts in at least one key respect: not every stakeholder is free to voluntarily enter a settlement agreement.[30] Certain persons, such as dependent administrators, temporary administrators, and guardians, require

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23. *In re* Estate of Halbert, 172 S.W.3d 194, 200 (Tex. App.—Texarkana 2005, pet. denied); *see also In re* Estate of Hodges, 725 S.W.2d at 267.

24. Pitner v. U.S., 388 F.2d 651, 656 (5th Cir. 1967).

25. *In re* Estate of Halbert, 172 S.W.3d 194 (Tex. App.—Texarkana, pet. denied), at n. 9–11; *Shepherd*, 962 S.W.2d at 32.

26. *In re* Estate of Halbert, 172 S.W.3d at 200.

27. *Id.* (citing Cook v. Hamer, 309 S.W.2d 54, 56 (Tex. 1958)); Hopkins v. Hopkins, 708 S.W.2d 31, 32 (Tex. App.—Dallas 1986, writ ref'd n.r.e.).

28. *In re* Estate of Hodges, 725 S.W.2d 265, 270–71 (Tex. App.—Amarillo 1986, writ ref'd n.r.e.).

29. Estate of Morris, 577 S.W.2d 748, 755–56 (Tex. App.—Amarillo 1979, writ ref'd n.r.e.) (citing Stringfellow v. Early, 40 S.W. 871, 874, (1897, no writ); Fore v. McFadden, 276 S.W. 327, 329 (Tex. App.—Texarkana 1925, writ dism'd w.o.j.)).

30. *See generally* Mary F. Radford, *An Introduction to the Uses of Mediation and Other Forms of Dispute Resolution in Probate, Trust, and Guardianship Matters*, 34 REAL PROB. & TR. J. 601–67 (2000).

court authority to make a compromise or a settlement in relation to property or a claim in dispute or litigation.[31]

Typically, a person applies to the court to obtain this court authority and acquires an order authorizing him or her to sign the settlement agreement or, in some cases, obtains an order approving a settlement agreement that has already been signed by such person subject to court approval.[32]

Obtaining enforceable FSAs in contested guardianship proceedings through mediation can be particularly challenging and poses a significant trap for the unwary.[33] Effective January 1, 2014, Texas Estates Code Section 1055.151 entitled "Mediation of Contested Guardianship Proceeding" provides:

> (a) On the written agreement of the parties or on the court's own motion, the court may refer a contested guardianship proceeding to mediation.
>
> (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,* in capital letters, or underlined, that the agreement is not subject to revocation by the parties;
>
> (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 or law*.
>
> (d) Notwithstanding Subsections (b) and (c), *a court may decline to enter a judgment* on a mediated settlement agreement if the court finds that the agreement *is not in the* ward's or *proposed ward's best interests*.[34]

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31. TEX. EST. CODE ANN. §§ 351.051, 452.101, 1151.102 (Supp.).

32. *See, e.g.*, Carter *ex rel.* Estate of Haley v. Campbell, 427 S.W.3d 503, 507 (Tex. App.—Austin 2014, no pet.) (holding that "the mere existence of a settlement agreement in a will contest does not automatically take an estate entirely outside of probate court jurisdiction").

33. *See generally* Radford, *supra* note 30.

34. *See* TEX. EST. CODE ANN. § 1055.151(a)–(d) (Supp.) (emphasis added).

Note carefully the textual requirements for a mediated FSA to be entitled to *judgment*.[35] But even if the mediated settlement agreement (MSA) has these requisite displays and signatures, the court can still refuse to enter a judgment on the MSA if it finds the agreement not in the best interests of the ward *or proposed ward*.[36] So, even if the subject of the proceeding has not yet been declared incapacitated, the MSA must still meet these statutory requirements to obtain a judgment.[37] These statutory conditions will sometimes be referred to in the balance of this article as the "Guardianship Caution."[38] But, based on section 1055.151(b), could the MSA still be "binding on the parties" even if "not entitled to judgment"?[39] These questions are discussed further in section III.C.[40] Lawyers who act as mediators in guardianship matters must maintain vigilance regarding this section 1055.151 as well.[41] Finally, judges who send their contested guardianships to mediation should exercise care that those mediators and the participating attorneys understand section 1055.151's provisions.[42]

C. A Court Authorizing Certain Parties to Sign an FSA is Not the Same as a Court Rendering Judgment on the FSA

Obtaining court authority to enter into a settlement agreement is separate and distinct from having the court render judgment on the agreement.[43] Indeed, the court's act of approving a settlement does not necessarily constitute rendition of judgment.[44] There are distinct enforcement advantages to having the court render judgment on the settlement.[45]

Texas Rule of Civil Procedure 308 provides that "the court shall cause its judgments and decrees to be carried into execution; and where the judgment is for personal property, and it is shown by the pleadings and evidence and the verdict, if any, that such property has an especial value to the plaintiff, the court may award a special writ for the seizure and delivery

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35. *Id.*
36. *Id.*
37. *Id.*
38. *See supra* notes 34-37 and accompanying text.
39. TEX. EST. CODE ANN. § 1055.151(b) (Supp.).
40. *See infra* Section III.C.
41. TEX. EST. CODE ANN. § 1055.151 (Supp.).
42. *Id.*
43. *Id.*
44. S & A Rest. Corp. v. Leal, 892 S.W.2d 855, 857 (Tex. 1995) (per curiam) (stating that the trial court did not render judgment at settlement hearing when it approved the settlement agreement because the trial judge did not clearly indicate that he intended to render judgment during that hearing; thus, the party properly revoked consent before judgment was rendered) (citing Buffalo Bag Co. v. Joachim, 704 S.W.2d 482, 484 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.)).
45. *See id.*

of such property to the plaintiff; and in such case may enforce its judgment by attachment, fine and imprisonment."[46]

A court may enforce a judgment by using various rules and statutes.[47] The court may order execution.[48] The court may order attachment.[49] The court may order garnishment.[50] The court may order postjudgment turnover of a judgment debtor's property.[51] The trial court also may enforce its judgments through orders of contempt, and by issuing orders that are necessary or proper in aid of its jurisdiction.[52] Without these judicial enforcement options, a party seeking to enforce a settlement agreement is limited to bringing a lawsuit for breach of contract or seeking specific performance.[53]

If one desires to obtain a judgment on the settlement agreement, it is critical that: (1) the correct language be included in the order approving the settlement or in a separate judgment; and (2) the court renders judgment *before* any signer withdraws his or her consent.[54] What exactly constitutes the court's rendition of judgment has been the subject of frequent litigation.[55] Indeed, the failure of the trial court to use the "right words" can be fatal if the settling parties desire for the court to render judgment on the settlement agreement:

> You realize that once this judgment is signed and I approve it, everything else, it's full final and complete? . . . And you want me to approve the settlement and sign the judgment? I'll approve the settlement.[56]

In examining the above statement, the Texas Supreme Court held, "although the trial court expressly approved the settlement, he did not clearly indicate that he intended to render judgment" at the hearing.[57] A judgment can be made orally, when the trial court officially announces its decision in open court or in writing, by written memorandum filed with the clerk.[58]

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46. TEX. R. CIV. P. 308.
47. *See, e.g.*, *id.*
48. Greiner v. Jameson, 865 S.W.2d 493, 498 (Tex. App.—Dallas 1993, writ denied) (citing TEX. R. CIV. P. 622; TEX. CIV. PRAC. & REM. CODE ANN. § 34.001 (Supp.)) (discussing dormant judgments).
49. *Id.* (citing TEX. R. CIV. P. 592 (discussing writs of attachment)); TEX. CIV. PRAC. & REM. CODE ANN. § 61.021 (Supp.).
50. *Id.* (citing TEX. R. CIV. P. 658 (discussing garnishment writs)); TEX. CIV. PRAC. & REM. CODE ANN. § 63.001 (Supp.).
51. *Id.* (citing TEX. R. CIV. P. 621a; TEX. CIV. PRAC. & REM. CODE ANN. § 31.002) (Supp.).
52. *Id.* (citing TEX. GOV'T CODE ANN. §§ 21.001(a), 21.002) (Supp.)); *see Ex parte* Pryor, 800 S.W.2d 511, 512 (Tex. 1990).
53. *See* Stevens v. Snyder, 874 S.W. 2d 241, 243 (Tex. App.—Dallas 1994, writ denied).
54. *Id.*
55. *See*, *e.g.*, S & A Rest. Corp. v. Leal, 892 S.W.2d 855, 858 (Tex. 1995) (per curiam).
56. *Id.* at 857.
57. *Id.* at 858.
58. *Id.* (citing Samples Exterminators v. Samples, 640 S.W.2d 873, 874–75 (Tex. 1982) (per curiam); Comet Aluminum Co. v. Dibrell, 450 S.W.2d 56, 59 (Tex. 1970)).

However, the fact that a trial court believes that it has rendered judgment is not dispositive.[59] The Texas Supreme Court has explained that the rendition of a judgment requires a present act by spoken words expressing the clear intent to render judgment at the time the words are expressed:

> The judge's intention to render judgment in the future cannot be a present rendition of judgment. The rendition of judgment is a present act, either by spoken word or signed memorandum, which decides the issues upon which the ruling is made. The opportunities for error and confusion may be minimized if judgments will be rendered only in writing and signed by the trial judge after careful examination. Oral rendition is proper under the present rules, but orderly administration requires that form of rendition to be in and by spoken words, not in mere cognition, and to have effect only insofar as those words state the pronouncement to be a present rendition of judgment.[60]

Moreover, the fact that everyone at a settlement hearing *believes, assumes*, or "clearly understands that the case is all over (*'full, final, and complete'*) and that thereafter the parties cannot come back to seek further recovery" is insufficient.[61] As the Texas Supreme Court has noted, "orderly administration requires [a] rendition [in open court] to be in and by spoken words, not in mere cognition."[62] Similarly, the intention to render judgment *in the future* is not the functional equivalent to rendering judgment.[63]

D. What Does It Mean When the Court "Approves" an FSA?

Probate courts are authorized to approve settlement agreements.[64] Indeed, such orders become fully enforceable final judgments upon a party's motion to enforce them.[65] Final orders approving settlement agreements have

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59. *Leal*, 892 S.W.2d at 858.

60. Reese v. Piperi, 534 S.W.2d 329, 330 (Tex. 1976).

61. *See Leal*, 892 S.W.2d at 858.

62. *Reese*, 534 S.W.2d at 330.

63. *See In re* Estate of Spiller, No. 04–15–00449–CV, 2016 WL 3557206, at *3 (Tex. App.—San Antonio June 29, 2016, no pet.) (mem. op.) (holding that the trial court stating that he approved the family settlement agreement and "will sign an order" admitting the will to probate in accordance with the agreement expressed an intention to render the order in the future; consequently, the order, admitting will to probate and ordering the distribution of the estate in accordance with a family settlement agreement *after* a party revoked his consent to the family settlement agreement, was void). And beware the Guardianship Caution.

64. Metro. Cas. Ins. Co. v. Foster, 226 S.W.3d 597, 600 (Tex. App.—Houston [1st Dist.] 2007, no pet.).

65. *Id.* at 600–02 (stating that the probate court's prior order approving a settlement agreement was enforceable months later by a party's motion to enforce that order, and the probate court properly exercised its inherent power to enforce its prior approval order and to compel compliance with the settlement agreement); Long v. Spencer, 137 S.W.3d 923, 925–27 (Tex. App.—Dallas 2004, no pet.) (stating that in a probate proceeding, the executrix filed action to partition real property because of disagreement among heirs entitled to property interests; probate court executed an agreed order identifying the property interest

the same force and effect as a judgment.[66] The exact effect of the order approving the agreement will depend, of course, on the terms of the order.[67]

The court's act of approving a settlement agreement does not inherently constitute rendition of judgment or of an order enforcing the settlement.[68] In a probate, trust, or guardianship context, when a court approves an FSA, it usually authorizes a party to enter the settlement on behalf of, and/or to bind, certain individuals, such as minor or incompetent persons who may be affected by the FSA or the heirs of a decedent's estate that is under court supervision.[69]

It is usually advantageous for the order approving a settlement agreement to contain certain findings.[70] The party seeking court authority to enter a settlement agreement will usually request that the court find that the settlement is fair, reasonable, and in the best interest of the estate.[71] As two authors note, these findings can be particularly important if there are multiple claimants and the recovery is being allocated among them and the estate.[72]

A trial court's approval of a probate or guardianship settlement is reviewed under an abuse of discretion standard.[73] Probate courts, however,

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owners, ordering the property sold, and naming a receiver to accomplish the sale; an order approving the terms of a proposed sale of real property in a partition suit becomes final immediately, may not be appealed later, and is fully enforceable at a later date).

66. Maxfield v. Terry, 885 S.W.2d 216, 220 (Tex. App.—Dallas 1994, writ denied) ("Under Texas law, probate orders are the functional equivalent of a judgment when the order finally disposes of a particular issue between the parties.") (citing Fischer v. Williams, 331 S.W.2d 210, 213–14 (Tex. 1960)).

67. *See id.* at 601–02.

68. S & A Rest. Corp. v. Leal, 892 S.W.2d 855, 857 (Tex. 1995) (per curiam); Qwest Commc'ns Int'l, Inc. v. AT & T Corp., 114 S.W.3d 15, 30 (Tex. App.—Austin 2003) *rev'd on other grounds*, Qwest Intern. Commc'ns, Inc. v. AT & T Corp., 167 S.W.3d 324 (Tex. 2005) (per curiam).

69. *See* TEX. EST. CODE ANN. § 351.051 (Supp.) (stating, in relevant part, that if a personal representative considers it in the interest of the estate, the representative may, on written application to the court and if authorized by court order, make a compromise or settlement in relation to property or a claim in dispute or litigation); Estate of Lambeck, No. 04-17-00065-CV, 2017 WL 4655020, at *2 (Tex. App.—San Antonio Oct. 18, 2017, no pet.) (mem. op.) ("In a dependent administration, the administrator generally must seek the probate court's permission to act, and only the probate court has the jurisdiction to grant such permission"; thus, probate court was the only court who could grant permission to administrator to assign wrongful death claim); Wilder v. Mossler, 583 S.W.2d 664, 667 (Tex. App.—Houston [1st Dist.] 1979, no writ) (stating that the probate court had authority to permit compromise by temporary administrator of two tort suits in district court); TEX. EST. CODE ANN. § 1151.102 (Supp.) (stating, in relevant part, that on written application to the court, a guardian of the estate may make a compromise or a settlement in relation to property or a claim in dispute or litigation if the guardian considers the action in the best interests of the estate and the action is authorized by court order); *see also* TEX. R. CIV. P. 44 (stating that such next friend or his attorney of record may with the approval of the court compromise suits and agree to judgments, and such judgments, agreements and compromises, when approved by the court, shall be forever binding and conclusive upon the party plaintiff in such suit).

70. *See* TEX. EST. CODE ANN. § 351.051 (Supp.).

71. *See In re* Estate of Hodges, 725 S.W.2d 265, 270 (Tex. App.—Amarillo 1986, writ ref'd n.r.e.).

72. Judge Steve King et al., COLLECTION OF CLAIMS—COMPROMISE AND SETTLEMENT, 1 TEX. PRAC. GUIDE PROBATE § 8:36 (2018).

73. Epstein v. Hutchison, No. 01-03-00279-CV, 2004 WL 2612258, at *1 (Tex. App.—Houston [1st Dist.] Nov. 18, 2004, no pet.) (mem. op.).

do not have unbridled discretion in determining whether to approve or disapprove settlement agreements.[74]

Texas courts have noted that the Texas Estates Code does not directly answer the question of whether the probate court's order must precede the administrator's agreement to settle or whether it may be approved by ratification.[75] Several courts have concluded that an administrator's unauthorized compromise and settlement of litigation in open court is an act that is voidable, but not void.[76]

E. What Does It Mean When the Court "Renders Judgment" on an FSA?

Three distinct stages of a judgment are as follows: "1) rendition, 2) reduction to writing and judicial signing, and 3) entry."[77] Texas case law explains that "a judgment is 'rendered' when the trial court's decision upon the matter submitted to it for resolution is officially announced either orally in open court or by memorandum filed with the clerk."[78] The rendition of the trial court's decision, whether in open court or by official document of the court, is the critical moment when the judgment becomes effective.[79]

> The signature of the trial court upon the writing is merely a ministerial act of the court conforming to the provision of Rule 306a(2) of the Texas Rules of Civil Procedure which calls for 'all judgments, decisions and orders of any kind to be reduced to writing and signed by the trial judge with the date of signing stated therein.
>
> A judgment is 'entered' when it is recorded in the minutes of the trial court by a purely ministerial act of the trial court's clerk, thereby providing enduring evidence of the judicial act.[80]

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74. Webre v. Black, 458 S.W.3d 113, 116 (Tex. App.—Houston [1st Dist.] 2015, no pet.) (holding that the trial court abused its discretion in approving settlement; holding that a trial court may not refuse to consider evidence balancing the merits of the lawsuit and how those merits could affect a ward's estate with the costs of pursuing the litigation simply because the ward is elderly and unable to participate); *In re* Guardianship of DeLuna, 286 S.W.3d 379, 387 (Tex. App.—Corpus Christi 2008, no pet.) (stating that the party was entitled to mandamus relief when trial court clearly abused its discretion in denying approval of a settlement agreement involving minor).

75. *See* Catlett v. Catlett, 630 S.W.2d 478, 483 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.) (discussing former Texas Probate Code § 234(a)(4)); Hughes v. Hess, 172 S.W.2d 301, 305 (Tex. 1943).

76. *Catlett*, 630 S.W.2d at 483; *see* TEX. EST. CODE ANN. § 351.051 (Supp.).

77. Araujo v. Araujo, 493 S.W.3d 232, 235 (Tex. App.—San Antonio 2016, no pet.) (quoting Henry v. Cullum Co., Inc., 891 S.W.2d 789, 792 (Tex. App.—Amarillo 1995, writ denied)).

78. *Id.* at 235 (citing Samples Exterminators v. Samples, 640 S.W.2d 873, 875 (Tex. 1982) (per curiam)); *Henry*, 891 S.W.2d at 792.

79. *Samples*, 640 S.W.2d at 875; *Henry*, 891 S.W.2d at 792.

80. *Henry*, 891 S.W.2d at 792.

An agreed judgment means essentially the same thing as a judgment by consent.[81] A judgment by consent is a judgment in which the terms are settled and agreed to by the parties and which is entered into the record by authorization of the trial court.[82] In a consent judgment, the terms must have been definitely agreed upon by all parties and either reduced to writing, signed by all parties and filed among the papers of the case, or made in open court and dictated into the record.[83] Consent judgments have a few other special characteristics:

- "The trial court has no power to supply terms, provisions or essential details not previously agreed to by the parties. The trial court is without authority to render judgment which does not fall strictly within the terms of the agreement dictated into the record by the parties themselves."[84]
- A consent judgment has both contractual and adjudicatory characteristics: "A consent or agreed judgment is contractual in nature and in effect is a written agreement between the parties as well as an adjudication."[85]
- "A consent judgment" is as conclusive as any other judgment as to the matters adjudicated,[86] but it is binding only as to the parties to the agreement and not as to any other party,[87] unless the other parties are bound by the doctrine of virtual representation.[88] Thus, even a minor who is properly represented and his interests protected may be bound by a consent judgment.[89]
- No pleadings are required to support an agreed or negotiated judgment.[90]
- In fact, with an agreed judgment, it is not necessary for the pleadings to support the judgment, and, assuming the court has jurisdiction, the decree cures every pleading defect and all other errors not going to jurisdiction.[91]

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81. Johnson v. Rancho Guadalupe, Inc., 789 S.W.2d 596, 603 (Tex. App.—Texarkana 1990, writ denied).
82. *Id.* (citing Matthews v. Looney, 123 S.W.2d 871 (Tex. [Comm'n Op.] 1939)).
83. Guynn v. Corpus Christi Bank & Tr., 580 S.W.2d 902, 906 (Tex. App.—Corpus Christi 1979, no writ).
84. *Id.*
85. Avila v. St. Luke's Lutheran Hosp., 948 S.W.2d 841, 854 (Tex. App.—San Antonio 1997, pet. denied) (citing Wagner v. Warnasch, 295 S.W.2d 890, 893 (Tex. 1956)).
86. *Id.* (citing *Wagner*, 295 S.W.2d at 893).
87. *Id.* (citing Lowe v. Ragland, 297 S.W.2d 668, 673 (Tex. 1957)).
88. *Id.* (citing Sawyer v. Smith, 552 S.W.2d 936, 940 (Tex. App.—Waco 1977, writ ref'd n.r.e.)).
89. *Id.* (citing TEX. R. CIV. P. 44); Berry v. Lowery, 266 S.W.2d 917 (Tex. App.—Dallas 1954), *aff'd in part and rev'd in part on other grounds*, 269 S.W.2d 795 (Tex. 1954).
90. Gracia v. RC Cola-7-Up Bottling Co., 667 S.W.2d 517, 519 (Tex. 1984).
91. Travelers Ins. Co. v. Williams, 603 S.W.2d 258, 262 (Tex. App.—Corpus Christi 1980, no writ).

When the parties have reached a settlement agreement, the trial court acts in a ministerial capacity in entering judgment.[92] Once the requisites of Texas Rule of Civil Procedure 11 have been satisfied, the trial court has a ministerial duty to then render judgment in strict accordance with the parties' agreement.[93] However, some advance notice to the parties to the agreement is required before a party may enforce a Rule 11 agreement through entry of a judgment.[94]

Final judgments in probate court are the subject of another (lengthy) paper, but if the judgment approving the FSA settles all legal issues and all rights between or among the parties, it may be final and appealable even if further proceedings may be necessary for purposes of its execution or an incidental or dependent matter remains to be settled.[95]

A party may revoke his consent to settle a case any time before judgment is rendered.[96] Without consent, an agreed judgment is void.[97] Where consent is lacking a court may not render an agreed judgment on the settlement agreement; it may instead enforce it only as a written contract.[98] Thus, the party seeking enforcement must pursue a separate breach of contract claim, which is subject to the normal rules of pleading and proof.[99]

III. COMMON LEGAL ISSUES WITH FSAS IN THE CONTEXT OF PROBATE, TRUST, AND GUARDIANSHIP DISPUTES

A. Have all Interested and Necessary Parties Signed the FSA?

Generally, a person is not bound by a contract that he or she did not sign.[100] Additionally, a person is normally not bound by a judgment rendered

92. Nuno v. Pulido, 946 S.W.2d 448, 451 (Tex. App.—Corpus Christi 1997, no writ).

93. Guynn v. Corpus Christi Bank & Tr., 580 S.W.2d 902, 906 (Tex. App.—Corpus Christi 1979, no writ).

94. Garcia v. Harding, No. 08-16-00096-CV, 2017 WL 2464689, at *3 (Tex. App.—El Paso June 7, 2017, no pet.) (mem. op.) (holding the party was entitled to some notice that the trial court was intending to enter a final judgment where variances existed between judgment as entered and the Rule 11 agreement; and noting ministerial does not necessarily mean without notice).

95. Hinde v. Hinde, 701 S.W.2d 637, 639 (Tex. 1985) (per curiam) (citing Hargrove v. Ins. Invs. Corp., 176 S.W.2d 744, 747 (Tex. 1944)).

96. Giles v. Giles, 830 S.W.2d 232, 235 (Tex. App.—Fort Worth 1992, no writ) (citing Samples Exterminators v. Samples, 640 S.W.2d 873, 874–75 (Tex. 1982) (per curiam)); Quintero v. Jim Walter Homes, Inc., 654 S.W.2d 442, 444 (Tex. 1983). But this general statement is subject to the Guardianship Caution and, in divorce cases, the anti-revocation provisions for *mediated* settlements of Texas Family Code § 6.602.

97. *Id.* (citing *Samples*, 640 S.W.2d at 875).

98. Mantas v. Fifth Court of Appeals, 925 S.W.2d 656, 658 (Tex. 1996) (per curiam) (citing Padilla v. LaFrance, 907 S.W.2d 454, 462 (Tex. 1995)).

99. *Id.*

100. *See* Beaumont v. Excavators & Constrs., 870 S.W.2d 123, 129 (Tex. App.—Beaumont 1993, writ denied) ("*a contract between other parties cannot create an obligation or duty on a non-contracting party*") (quoting Bernard-Johnson v. Continental Constructors, 630 S.W.2d 365 (Tex. App.—Austin 1982, writ ref'd n.r.e.).

in a case to which he or she was not a party[101] or in privy to a party.[102] However, in the probate context, this rule is not absolute.

1. Decedent's Estate Disputes

While it is generally not necessary for beneficiaries of an estate to be made parties to a settlement agreement when the interests of those non-joining beneficiaries were not changed by the agreement, every person having a "pecuniary" interest in the estate should certainly be joined as a party to an FSA, if possible.[103] Some cases hold, however, that a beneficiary under a proffered will may not be a named party to an FSA and yet be bound thereby if he, by his reliance on the FSA, affirms and ratifies it.[104] Most likely these parties will already be joined in the lawsuit. Parties who should be joined to the FSA include:

- a decedent's heirs at law, to the extent a will contest has been or may be filed which would result in the decedent dying intestate;[105]
- all persons who are or may be beneficiaries of the estate under a probated or alleged will;[106]
- the named trustee of a testamentary trust that is a beneficiary under the will;[107] and

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101. Smith v. Bayer Corp., 564 U.S. 299, 312 (2011) ("A court's judgment binds only the parties to a suit, subject to a handful of discrete and limited exceptions."); Brown v. Zimmerman, 160 S.W.3d 695, 703 (Tex. App.—Dallas 2005, no pet.) ("Generally a person is not bound by a judgment in a suit to which he was not a party."); Garcia v. Home State Cty. Mut. Ins. Co., 343 S.W.3d 458, 465 (Tex. App.—El Paso 2010, no pet.) (noting that "as a general rule, a party is not bound by a judgment in personam in litigation in which he was not designated as a party or to which he has not been made a party by service of process" and discussing six categories of exceptions); *see also* Fuqua v. Taylor, 683 S.W.2d 735, 738 (Tex. App.—Dallas 1984, writ ref'd n.r.e.) ("Judgment may not be granted in favor of a party not named in the suit as a plaintiff or a defendant."); Mapco, Inc. v. Carter, 817 S.W.2d 686, 687 (Tex. 1991) (per curiam); *see* TEX. R. CIV. P. 79 (petition must state names of the parties).

102. B.M.L. Through Jones v. Cooper, 919 S.W.2d 855, 858–59 (Tex. App.—Austin 1996, no writ) (per curiam) (noting "[t]he preclusive effect of prior judgments extends beyond parties named in the suit and applies to the privies of those parties . . . [a] privy is one who is so connected in law with a party to a judgment as to have such an identity of interests that the party represented the same legal right in the previous suit.").

103. Fore v. McFadden, 276 S.W. 327, 329 (Tex. App.—Texarkana 1925, writ dism'd w.o.j.); *see* Pickelner v. Adler, 229 S.W.3d 516, 524 (Tex. App.—Houston [1st Dist.] 2007, pet. denied) (stating that family settlement agreement "generally requires all heirs' or beneficiaries' agreement on the distribution").

104. Estate of Morris, 577 S.W.2d 748, 756.

105. *See* Leon v. Keith, 733 S.W.2d 372 (Tex. App.—Waco 1987, writ ref'd n.r.e.).

106. *See* Manning v. Sammons, 418 S.W.2d 362, 367 (Tex. App.—Fort Worth 1967, writ ref'd n.r.e.).

107. *See In re* Estate of Webb, 266 S.W.3d 544 (Tex. App.—Fort Worth 2008, pet. denied) (stating that when a testator devised his residuary estate to party as trustee of a spendthrift trust, the party's interest as trustee vested at the moment of testator's death; thus, other beneficiaries were free to decide between the two of them on an alternate distribution of the specific bequests left to them, but if they wanted to divide assets to which another devisee had a claim, they have to include that devisee in the agreement);

- the personal representative, if any, and the heirs must be made parties in a suit against the estate of a decedent involving title to real property.[108]

Additionally, parties should consider the appointment of an attorney *ad litem* to represent the interests of a person whose whereabouts are unknown, a possibly incapacitated person, a minor, or any other person whose interests may not be represented.[109]

A different analysis applies when a personal representative is sued or sues third parties to collect a claim on behalf of the estate.[110] Judgments rendered in suits brought by personal representatives to recover estate property are generally binding on heirs and/or beneficiaries of estate.[111] It is well established in Texas that the "estate" of a decedent is not a legal entity and may not properly sue or be sued as such.[112]

The Texas Supreme Court announced that a suit seeking to establish a decedent's liability on a claim and to subject property of the estate to its payment should ordinarily be instituted against the personal representative or, under appropriate circumstances, against the heirs or beneficiaries.[113] "The general rule is that the heirs of a decedent are *neither necessary nor proper parties* defendant to a suit brought against the administratrix to establish a claim against the decedent's estate."[114]

2. *Trust Disputes*

With respect to controversies between the trustee and third parties, the trustee has full authority to enter settlements to resolve such claims.[115] Texas Trust Code Section 113.019 expressly grants a trustee the power to compromise, contest, or settle claims of or against the trust estate or the trustee.[116] Thus, when a trustee settles claims against third parties, the

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see also In re Estate of Isaacs, No. 12-10-00048-CV, 2012 WL 524315, at *6 (Tex. App.—Tyler Feb. 15, 2012, pet. denied) (mem. op.) (rejecting argument that an agreement not to probate a will is invalid if it defeats a testamentary trust).

108. TEX. CIV. PRAC. & REM. CODE ANN. § 17.002 (Supp.); Martinez v. Benavides, No. 04-15-00465-CV, 2016 WL 3085913, at *3 (Tex. App.—San Antonio June 1, 2016, no pet.) (mem. op.).

109. *See* TEX. EST. CODE ANN. § 53.104 (Supp.); *see also infra* Section III.J.

110. *See* Cain v. Church, 131 S.W.2d 400, 402 (Tex. App.—Dallas 1939, no writ) (stating that executors filed suit to collect past due debt owed to estate; judgment was conclusive on intervener surviving spouse and all interested parties).

111. *Id.*

112. Price v. Anderson's Estate, 522 S.W.2d 690, 691 (Tex. 1975).

113. *Id.*

114. Wilder v. Mossler, 583 S.W.2d 664, 668 (Tex. App.—Houston [1st Dist.] 1979, no writ) (citing Garza v. Wilkinson, 129 S.W.2d 839 (Tex. App.—San Antonio 1939, writ dism. judg. corr.)) (emphasis added); 18 TEX. JUR. 2D 506, *Decedents' Estates* § 648.

115. *See infra* Section III.A.2 (explaining the power trustees have).

116. *See* TEX. PROP. CODE ANN. § 113.019 (Supp.) ("A trustee may compromise, contest, arbitrate, or settle claims of or against the trust estate or the trustee.").

settlement will be binding on the trust's beneficiaries. Indeed, "in actions and proceedings involving trusts," the Texas Trust Code codifies the Texas common-law doctrine of virtual representation, which dictates that beneficiaries of a trust are virtually represented by their trustee in transactions, contracts, and litigation entered into by the trustee for the trust, and those beneficiaries have no standing or right to question or contest such actions taken by the trustee.[117] More specifically, the doctrine of virtual representation extends particularly to contracts entered into by the trustee regarding trust property and claims, including settlement agreements and settlement authority.[118]

Texas cases declare that mere disagreement between trust beneficiaries and their trustees about whether the trustees should settle a controversy or execute a settlement agreement does not negate the doctrine of virtual representation, and those beneficiaries are still bound by the trustee's settlement agreements.[119] If an objecting beneficiary contends that the trustee acted improperly in settling claims of the trust or in entering into contracts, that beneficiary is still bound by the settlement or contract.[120] Such beneficiaries may, however, have a cause of action against the trustee for breach of fiduciary duty.[121] Consequently, many trustees will request their beneficiaries sign off on any settlement.[122] At a bare minimum, the trustee should make adequate disclosure of any settlement between the trustee and a third party.[123]

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117. *See* TEX. PROP. CODE ANN. § 115.013 (Supp.) (in trust litigation, a court order binding a trustee binds the beneficiaries of the trust); Mason v. Mason, 366 S.W.2d 552 (Tex. 1963) (stating that trust beneficiaries bound by judgment in court action in which trustee represented trust); Hendley Feedlot, Inc. v. Weatherly Trust, 855 S.W.2d 826, 833 (Tex. App.—Amarillo 1993, writ denied) (regarding suits involving trust property in which trust delegates power to litigate to trustee, beneficiaries are not necessary parties but are bound by the judgment).

118. Davis v. Ward, 905 S.W.2d 446, 448, 450–51 (Tex. App.—Amarillo 1995, pet. denied) (trustee of trust had authority to enter into settlement agreement with third party, and such settlement was binding upon the trust beneficiary and his assignee); Cogdell v. Fort Worth Nat'l Bank, 544 S.W.2d 825, 828 (Tex. App.—Eastland 1976, writ ref'd n.r.e.), *cert. denied*, Cogdell v. Cogdell, 434 U.S. 923 (1977) (even an objecting beneficiary has no standing to represent the trust or trustee and carry on causes of action settled and released by the trustee); Armstrong v. Steppes Apartments, Ltd., No. 2-97-250-CV, 1998 WL 34202656, at *10 (Tex. App.—Fort Worth Aug. 10, 1998, no pet.) (not designated for publication) (beneficiaries of a trust are bound by judgment in which trustee represented trust).

119. *Davis*, 905 S.W.2d at 450-51; *Cogdell*, 544 S.W.2d at 828–29; *In re* Weekley Homes, L.P., 180 S.W.3d 127, 133–34 (Tex. 2005) (trust beneficiaries bound by agreement regarding litigation entered into by trustee); Wohler v. La Buena Vida in Western Hills, Inc., 855 S.W.2d 891, 893 (Tex. App.—Fort Worth 1993, no pet.) (trustee has full authority to represent beneficiaries in litigation and beneficiaries are bound thereby).

120. *Cogdell*, 544 S.W.2d at 829.

121. *Id.*

122. *See generally* Avary v. Bank of Am., N.A., 72 S.W.3d 779 (Tex. App.—Dallas 2002, pet. denied) (discussing the duties of a trustee to a beneficiary).

123. *Id.* (explaining that this fiduciary duty of full disclosure is so extensive that it requires a fiduciary to fully disclose to his beneficiaries, even in derogation of the mediation-privilege, the details of a proposed settlement of litigation involving the trust at issue, including explanation of potential tax or other effects of such settlement, all possible benefits and detriments to the beneficiaries, the specific allocation

Any time a trustee is involved in litigation, the best practice is to review Texas Trust Code Sections 115.011, concerning parties, and 115.001, concerning jurisdiction, to determine if such litigation involves any of the actions listed in section 115.001.[124] If so, then contingent beneficiaries designated as a class are not necessary parties to an action under section 115.001.[125] The only necessary parties to such an action are: (1) a beneficiary of the trust on whose act or obligation the action is predicated; (2) a beneficiary of the trust designated by name, other than a beneficiary whose interest has been distributed, extinguished, terminated, or paid; (3) a person who is actually receiving distributions from the trust estate at the time the action is filed; and (4) the trustee, if a trustee is serving at the time the action is filed.[126] Additionally, the Attorney General shall be given notice of any proceeding involving a charitable trust, as provided by Chapter 123 of the Texas Trust Code.[127] Special rules apply with respect to declaratory judgment actions.[128] Although not technically "necessary parties," contingent beneficiaries designated as a class (like children, grandchildren, and/or descendants) may be proper parties depending on the case dynamics and desire for finality.[129] Unborn and unascertained beneficiaries may be virtually represented by another party having a "substantially identical interest in the proceeding."[130] In certain situations, consideration should be given to joining co-trustees and successor trustees to clarify whether any claims belong (or do not belong) to them and/or whether they are being impacted by the settlement.[131]

Finally, with respect to actions and proceedings involving trusts, the Texas Trust Code contains important notice provisions.[132] Texas Trust Code Section 115.013(d) states, "Notice under [Texas Trust Code] Section 115.015 *shall* be given either to a person who will be bound by the judgment or to one who can bind that person under this section, and notice may be given to both.[133] Notice *may* be given to unborn or unascertained persons who are not represented under Subdivision (1) or (2) of Subsection (c) by giving notice to all known persons whose interests in the proceedings are

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of such settlement proceeds or liabilities among the parties, and the existence and details of other settlement offers previously rejected by the fiduciary, all *before* the fiduciary agrees to a settlement in that litigation).

124. TEX. PROP. CODE ANN. §§ 115.001, 115.011 (Supp.).

125. *Id.* § 115.011(b).

126. *Id.* § 115.011(b)(1)–(4).

127. *Id.* § 115.011(c); TEX. PROP. CODE ANN. § 123.003 (Supp.).

128. TEX. CIV. PRAC. & REM. CODE ANN. § 37.006(a) (Supp.) ("When declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties.").

129. TEX. PROP. CODE ANN. § 115.011 (Supp.).

130. *Id.* § 115.013(c)(4); *see also infra* Section III.J.

131. *See id.* § 114.006 (explaining the liabilities of co-trustees).

132. *Id.* §§ 115.013(d), 115.015.

133. *Id.* § 115.013(d) (emphasis added).

substantially identical to those of the unborn or unascertained persons."[134] Plaintiffs in an action on a contract executed by the trustee or in an action against the trustee as representative of the trust for a tort committed in the course of the trustee's administration should be sure to provide the notice set forth in Texas Trust Code Section 115.015.[135]

Prior to September 1, 1999, the doctrine of virtual representation did not apply outside of judicial proceedings.[136] Now, as long as the agreement does not modify or terminate a trust in whole or in part, a written agreement between a trustee and a beneficiary, including a release, consent, or other agreement relating to a trustee's duty, power, responsibility, restriction, or liability, is final and binding on a beneficiary who is a minor if: (1) the minor's parent, including a parent who is also a trust beneficiary, signs the instrument on behalf of the minor; (2) no conflict of interest exists; and (3) no guardian, including a guardian ad litem, has been appointed to act on behalf of the minor.[137] Careful attention must be given as to whether there is a conflict of interest between a parent and the minor.[138] When both classes of such beneficiaries have equal rights to distributions, remainder beneficiaries are probably necessary parties to an FSA (and if they are minors, they cannot be represented by their parents to the extent their parents are present beneficiaries, which can happen in GST trusts).[139] Similarly, a written instrument is final and binding on an unborn or unascertained beneficiary if a beneficiary who has an interest substantially identical to the interest of the unborn or unascertained beneficiary signs the instrument.[140] An unborn or unascertained beneficiary has a substantially identical interest only with a trust beneficiary from whom the unborn or unascertained beneficiary descends.[141] Ultimately, minors and unascertained beneficiaries are only going to be bound to a settlement reached outside of a judicial proceeding if there is no conflict of interest between the parent or virtual representative and the minor or unascertained beneficiary.[142]

With respect to controversies between a trustee and a beneficiary in a non-judicial context, a beneficiary who has full legal capacity and is acting on full information may release a trustee from any duty, responsibility, restriction, or liability as to the beneficiary that would otherwise be imposed on the trustee by this subtitle, including liability for past violations.[143]

134. *Id.* (emphasis added).
135. *Id.* § 115.015.
136. *Id.* § 114.032.
137. *Id.* § 114.032(c), (e).
138. *Id.*
139. *Id.*
140. *Id.* § 114.032(d).
141. *Id.*
142. *Id.*
143. *Id.* § 114.005(a)–(b).

Additionally,"[t]he release must be in writing and delivered to the trustee."[144] However, any attempt by a trustee to enter into a contract with his or her beneficiary during the existence of a fiduciary relationship will be presumed unfair to the beneficiary and, quite possibly, void *ab initio*.[145] The case of *Harrison v. Harrison Interests, Ltd.*, is instructive regarding situations in which co-trustees attempt to obtain valid releases from their beneficiaries.[146] That court recognized the case law in Texas holding that any such agreements between trustees and beneficiaries involve a presumption that the transactions are unfair to the beneficiaries and thus invalid.[147] The court held that the subject releases should be upheld only when: the beneficiary is "of legal age;" the specific terms of the release were negotiated; the beneficiaries were represented by qualified counsel; the parties dealt with each other in an arms-length transaction; all parties were knowledgeable in business matters; and the release language was clear.[148]

Ultimately, it is important to closely examine the terms of the trust to ascertain the nature of the rights of the respective beneficiaries (present and remainder).[149] Also, courts have wide discretion to appoint a guardian *ad litem* or attorney *ad litem* under the Texas Trust Code.[150]

3. *Guardianship Disputes*

Disputes can arise in guardianship cases during the two distinct phases of a guardianship: before the proposed ward is deemed incapacitated, and after.[151] In the first phase, the Texas Estates Code provides clear requirements for who receives notice of a guardianship proceeding.[152]

Simply receiving notice of a guardianship does not automatically make that person a party to the action.[153] A person can receive a notice and then choose not to enter an appearance or sign a waiver.[154] Texas courts have held that a "party" is one by or against whom a suit is brought, while all others who may be incidentally or consequentially affected were "persons interested," not parties.[155] However, there will be certain parties: the

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144. *Id.* § 114.005(b).

145. *Id.* § 114.007.

146. Harrison v. Harrison Interests, Ltd., No. 14-15-00348-CV, 2017 WL 830504, at *1 (Tex. App.—Houston [14th Dist.] Feb. 28, 2017, no pet.) (mem. op.).

147. *Id.* at *4.

148. *Id.* at *5.

149. *Id.*

150. TEX. PROP. CODE ANN. § 115.014 (Supp.); *see also infra* Section III.J.

151. *See generally* TEX. EST. CODE ANN. §§ 1101.001–.156 (Supp.) (specifying the process for creating a guardianship, including the determination on whether a ward is incapacitated).

152. *See* TEX. EST. CODE ANN. §§ 1051.103–.104 (Supp.).

153. *See generally id.* § 1051.104 (lacking language which binds a non-party).

154. *Id.*

155. *In re* E. L. P., 636 S.W.2d 579, 581 (Tex. App.—San Antonio 1982, no writ) (citing Doe v. Roe, 600 S.W.2d 378 (Tex. App.—Eastland 1980, writ ref'd n.r.e.) and the cases cited therein).

applicant, the proposed ward (by and through the attorney *ad litem*), perhaps a contestant (if not the proposed ward), and possibly a guardian *ad litem*.[156] Additionally, persons named as agents under a power of attorney or appointed in a declaration of guardianship could also be made parties, depending on the issues in the case.[157]

In a guardianship matter, the parties to the FSA should certainly include the applicant, the proposed ward (by and through any appropriate representative, if necessary), the contestant, and all other parties to the guardianship action.[158] Depending on the situation, it may be prudent to seek the appointment of a guardian *ad litem* and join the persons entitled to notice of the proceeding, whether or not they have joined the case as parties.[159] Also, beware of the Guardianship Caution.[160]

Common purposes for settlement agreements in guardianships are to set a care plan for a proposed ward, ensure that a proposed ward's whereabouts are known and that the person is safe, and to restore funds or property to the proposed ward's estate.[161] Often, heirs of the proposed ward will also come to an agreement about whether an alleged will is valid or how to divide the proposed ward's estate.[162] If the settlement agreement touches on those decedent's estate-related issues, all persons interested in the estate or named in any will (or purported will) should also be joined to the FSA.[163]

4. *Is a Durable POA Effective to Bind the Principal, Either Competent or Incompetent?*

A durable power of attorney (POA) is a stalwart alternative to guardianship, when used appropriately and effectively.[164] In the right circumstances, an agent under a POA could bind the principal to an FSA.[165]

The first question in whether the circumstances are right is: Is the POA itself a valid legal document; in other words, does it meet the requirements of Texas Estates Code Section 751.0021?[166] Generally, a valid durable POA must grant another person authority to act on behalf of the principal, be signed by the principal (or by another person in the principal's conscious

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156. TEX. EST. CODE ANN. § 1051.102 (Supp.).

157. *Id.*

158. *See generally id.* § 1051.003 (directing that notice should be given to certain people).

159. *See generally id.* § 1054.051 (appointing a guardian *ad litem*).

160. *See supra* notes 34–38 and accompany text.

161. *See generally* TEX. EST. CODE ANN. § 1055.151 (Supp.) (describing a settlement agreement); *see also* SARAH PATEL PACHECO ET AL., GUARDIANSHIP ALTERNATIVES § 35 (2016), Westlaw.

162. *See* Shepherd v. Ledford, 962 S.W.2d 28, 35 (Tex. 1998); PACHECO ET AL., *supra* note 161.

163. *See* TEX. EST. CODE ANN. § 1055.151 (Supp.).

164. *See* Thomas M. Featherston, Jr., *Alternatives to Guardianship—Durable Power of Attorney*, 3 TEX. PRAC. GUIDE PROBATE § 17:16, Westlaw (2018).

165. *See generally* Kristina E. Music Biro et al., *Generally; Definition*, 42A Tex. Jur. 3d Guardianship & Conservatorship § 555 (defining and discussing The Durable Power of Attorney Act).

166. *See* TEX. EST. CODE ANN. § 751.0021 (Supp.).

presence), be notarized, and state whether it is effective upon the disability or incapacity of the principal, or whether it is immediately effective and not affected by subsequent disability or incapacity.[167]

If the POA is effective only upon the disability or incapacity of the principal, most POAs, including the statutory form, contain the requirement that the principal is considered disabled or incapacitated (i.e., the POA is effective only if) if a physician certifies in writing after the date of the POA that the principal is mentally incapable of managing her financial affairs.[168] If the form does not contain this requirement, the statute provides it.[169]

The next step in the analysis is a thorough investigation of whether the terms of the POA allow the agent to compromise (or litigate) claims on behalf of the principal,[170] and to perform any other acts proposed by the FSA, including: using the principal's funds to pay another party's attorney's fees; creating, amending, or revoking a trust; making a gift; creating/changing rights of survivorship; creating/changing a beneficiary designation; delegating authority; rejecting/disclaiming a payment; participating in a judicial proceeding to ascertain the validity of a will, trust, or transaction; and transferring property to a revocable trust.[171]

The agent also owes duties to the principal, including the duties of disclosure and fair dealing.[172] Other parties to the FSA would be prudent to ensure that the FSA is fair to the principal, that the agent has made all required disclosures to the principal, and if the principal is competent, that the principal has agreed to the terms.[173] Those parties might also consider: delivering copies of the POA to the other settling parties (to estop them from claiming invalidity); including an FSA term that all parties agree the POA is valid; and recording the POA in the county deed records if real estate is involved.[174]

5. Strategies to Bind Persons to the FSA

Thus, there are a few strategies to consider when attempting to bind certain persons to settlement agreements in the context of a probate, trust, and guardianship dispute: (1) make such persons parties to the litigation; (2) give them notice of, and an opportunity to participate in, mediation; or

167. *Id.*

168. *Id.* § 752.051.

169. *Id.* § 751.00201.

170. TEX. EST. CODE ANN. § 752.101(3)–(5) (Supp.) (giving a POA agent broad authority to litigate and settle claims); *see also* § 752.110(4) (covering the power to settle or compromise a claim covered by general litigation authority).

171. *Id.* §§ 751.031, 752.109; *see also* Gouldy v. Metcalf, 12 S.W. 830, 831 (Tex. 1889) (construing the authority of an agent under a POA strictly).

172. *Id.* §§ 751.101–.102.

173. *Id.*

174. *Id.* § 751.151.

(3) have such persons sign the settlement agreement.[175] As explained above, in certain situations, like when the doctrine of virtual representation applies, a settlement agreement will bind a person who did not sign it.

When it comes time to submit the settlement agreement to the court for approval or to make it the judgment of the court, all persons desired to be bound by the order approving the settlement or judgment should, as stated above, be: (1) made parties to the lawsuit and (2) timely served with a copy of any motion to approve a settlement agreement or to enter judgment thereon and be given notice of any hearing thereon.[176] The notice should expressly warn those persons that the party seeking to have the settlement agreement approved by the court, or made the judgment of the court, intends to make the order/judgment binding on all such persons.[177] For example, the notice could include the following warning:

> PLEASE TAKE NOTICE that Movants seek court approval of the enclosed Settlement Agreement and request that the Settlement Agreement be made binding on all [beneficiaries, heirs, etc.] and parties to this litigation. Any objections to same must be filed with the court in writing on or before ______ a.m./p.m. on _______, or asserted in open court on the record at such hearing commencing at ______a.m./p.m. on that same date.

The person providing such notice should consider admitting proof of providing the notice into evidence at the hearing on the settlement agreement or, at the very least, executing an affidavit of mailing with appropriate exhibits showing the method of delivery for the notice and filing it before such hearing.[178]

B. Choice of Law Issues Between the Operative Instruments and the FSA

Whenever a settlement agreement will be signed by, or affect, persons who are not Texas residents, careful consideration should be given to analyzing the choice of law provisions in any underlying operative instruments and the choice of law provisions in the FSA—particularly with respect to formation, validity, construction, interpretation, and administration.[179] When a trust is involved, the parties should consider

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175. *See generally id.* §§ 1051.051–.056 (binding parties through service to a guardianship hearing).

176. *Id.*

177. *Id.* §§ 1051.001–.003.

178. *Id.*

179. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 268, 271, 272 (AM. LAW INST. 1971) (explaining how applicable trust authorities dictate that different states' laws may apply to each of the validity, interpretation, construction, management, and/or administration of a trust); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 268, cmt. a; *see also In re* Ray Ellison Grandchildren Tr., 261 S.W.3d 111, 117–18 (Tex. App.—San Antonio 2008, pet. denied); *see also* Heironimus v. Tate, 355 S.W.2d 76, 77, 80–81 (Tex. App.—Austin 1962, writ ref'd n.r.e.). The Court in which the case is pending, or the "forum court," will apply its own state rules of evidence and procedure to determine

amending the trust so that the choice-of-law provisions in the trust will conform to the choice-of-law provisions in the FSA.[180] Any change-of-situs clause in a trust will complicate this governing law issue (the details of which are beyond the scope of this article).[181]

C. How Does Making an FSA "Subject to Court Approval" or "Subject to the Court Rendering Judgment on the FSA" Impact the Validity and Enforceability of the FSA?

Many probate, trust, and guardianship settlement agreements contain provisions that the state that the agreement is "subject to court approval."[182] The words "subject to" are unambiguous and indicate a condition when used in a contract.[183] Whether such clauses affect the validity of the settlement agreement itself is the focus of frequent debate.[184]

1. Validity

What happens when a court does not "approve" a settlement agreement that was specifically made "subject to court approval?" As recently as 2017, the Amarillo Court of Appeals considered this very issue in the case *Estate of Riefler*.[185] The case serves as an effective analysis on the interplay between a court-supervised fiduciary's authority to settle a claim involving mediation and whether and under what conditions the failure to obtain court approval can still not void the underlying settlement agreement entered into by the fiduciary.[186]

Estate of Riefler involved a fairly common fact pattern about settling a probate dispute.[187] A husband died, predeceased by his wife, who also left behind a daughter, Claudia, who was not a child born to the husband.[188] The

properly admissible evidence, and it will use its own judgment in drawing conclusions from the admissible evidence to arrive at the intention of the settlor. This process is referred to as "interpretation," and if this process determines the settlor' s intent, no further inquiry is necessary; only if it is "impossible to ascertain from the evidence the settlor's intention" will a court indulge in "construction," which involves a "presumption" as to the settlor's probable intention. Under Texas law regarding trust interpretation and evidence, extrinsic evidence and testimony regarding a settlor's alleged intent different from that displayed by the trust instrument's language itself is inadmissible.

180. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 268.

181. *Id.*

182. *See, e.g.*, TEX. EST. CODE ANN. § 1158.701 (Supp.); Estate of Riefler, 540 S.W.3d 626, 631 (Tex. App.—Amarillo 2017, no pet.); *Admin. Decedent Est. & Guard.*, 12B WEST'S TEX. FORMS § 67:1 (4th ed.).

183. Sears, Roebuck & Co. v. AIG Annuity Ins. Co., 270 S.W.3d 632, 635 (Tex. App.—Dallas 2008, pet. denied).

184. *See infra* Section III.C.1.

185. Estate of Riefler, 540 S.W.3d at 631.

186. *See id.*

187. *Id.* at 629–31.

188. *Id.* at 629.

husband's will named no contingent beneficiary, resulting in a partial intestacy.[189] The husband was survived by one of two sisters, his predeceased wife's daughter, Claudia, and two nieces and a nephew, who were the children of the husband's other predeceased sister.[190] The predeceased wife's daughter, Claudia, filed an application to determine heirship and a separate petition, claiming she was the sole child and heir by virtue of the doctrine of equitable adoption.[191] The husband's surviving sister, by and through her guardian, Ronald Ayers, appeared and denied the daughter's status as an heir.[192]

Importantly, the order authorizing the guardian to appear and participate in the probate case stated that:

- Ayers was "approved to act on behalf of Mary Theresa Ayers in all those legal proceedings currently pending in Cooke County involving the estate of Gus W. Riefler, Jr."; and
- "The Court further ORDERS that any settlement of the above matter be submitted to this Court for review before disposition of the Cooke County litigation."[193]

The parties litigated three discrete matters.[194] During the litigation, the predeceasing wife's daughter, Claudia, died.[195] Her four children sought to substitute in her place.[196] Eventually, all parties attended mediation.[197] The mediation lasted ten hours and resulted in the parties signing a "Rule 11 & Settlement Agreement" and a "Compromise Family Settlement Agreement and Mutual Release Arising During Mediation."[198] Both agreements referenced all three pending cases.[199] The parties agreed that the daughter was the husband's sole heir and that other family members, including the sister's guardian, would receive a share of the estate.[200]

Here is where things get really interesting.[201] After mediation, one of the parties filed the two agreements in all three pending cases, together "with an application requesting the trial court approve them."[202] Apparently, the

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189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* (quoting Cause No. PR 17203-2).
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.* at 629–30.
198. *Id.* at 630.
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*

guardian, Ayers, had a change of heart, and he objected.[203] One of the arguments he made was that the approval of the settlement agreement by the Dallas County Probate Court, where the guardianship was pending, "was necessary before the County Court at Law of Cooke County could approve it, and that he [would] not request such approval."[204] He further argued that, "this Court should take no action until the mediation agreement is reviewed and approved by Dallas Probate Court."[205]

Some of the other family members took the usual steps in response to Ayers' repudiation. First, they amended their pleadings, requesting that the daughter be declared to be the husband's child under the doctrine of adoption by estoppel.[206] Alternatively, they claimed Ayers breached the agreement, entitling them to specific performance or damages.[207]

The trial court signed an order approving the settlement agreement.[208] One of the parties filed a motion for entry of judgment.[209] The trial court heard that motion and appointed an independent administrator as the parties had agreed.[210] Eventually, after Ayers filed a motion to vacate judgment, the trial court entered a final judgment in all three probate cases, accepting and giving full effect to the agreements the parties signed at mediation.[211]

On appeal, Ayers contended that "the Rule 11 & Settlement Agreement signed by the parties at mediation and accepted by the trial court *is void and without effect* because it was *not approved* by the probate court following the parties' mediation."[212] Ayers further argued that "approval by the probate court was required by the parties' agreement, by the probate court's order dated October 15, 2015, and by section 1151.102 of the Texas Estates Code."[213]

In its analysis, the Court of Appeals noted that "[t]he Dallas County Probate Court had the authority to approve a distribution to the guardianship, but it did not have jurisdiction over the Cooke County [probate] litigation."[214] Then, the Court analyzed the parties' Rule 11 & Settlement Agreement and how it referred to the Dallas County Probate Court.[215] That section provided:

> Subject to approval of the Dallas County Probate Court in pending Cause No. PR-15-02388-1 (Guardianship of Mary Ayers), RONALD AYERS, as

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203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.* at 631.
212. *Id.* (emphasis added).
213. *Id.*
214. *Id.*
215. *Id.*

> Guardian of MARY AYERS, a/k/a MARY THERESA AYERS and JAMES TIMOTHY NELSON shall receive the total sum of $440,000.00 and shall receive such assets in full and final settlement of their interest in the Decedent's Estate. The Parties agree that DANNY JOE JONAS, JR., once appointed as Independent Administrator, shall deliver a check payable jointly to RONALD AYERS, Guardian of MARY AYERS, a/k/a MARY THERESA AYERS, and his counsel and JAMES TIMOTHY NELSON in accordance with the terms of this agreement.[216]

The Court of Appeals noted that the "subject to approval" language appeared "only before the provision setting forth the amount of money to be received by Ayers and James Timothy Nelson."[217] The agreement made no other reference to the Dallas County Probate Court.[218] "Notably, the agreement did not provide that the resolution of any other issue, such as the recognition of [the daughter] as [the husband's] only child, was made subject to the approval of another court."[219]

Additionally, "[it] was Ayers' obligation, as guardian, to present the agreement to the Dallas County Probate Court for review, and he was the only party in a position to do so."[220] The Court of Appeals agreed that Ayers' failure to fulfill his obligation to have the agreement approved "waived the right to avoid enforcement of the settlement agreement on [that] basis."[221] In other words, because Ayers' own tactics prevented the court from reviewing the agreement, he could not later complain that such review did not occur.[222]

With respect to "Ayers' argument that the Rule 11 & Settlement Agreement was void . . . because the Order Approving Authority to Act in Pending Litigation issued by the Dallas County Probate Court and the Texas Estates Code require[d] that the Dallas County Probate Court approve of the agreement to make it effective", the Court of Appeals noted that the Dallas County Probate Court:

- authorized Ayers "to act on behalf of Mary Theresa Ayers in all those legal proceedings currently pending" involving the Riefler estate; and
- the probate court's order required "that any settlement of the above matter be submitted to this Court *for review* before disposition of the Cooke County litigation" (emphasis in original).[223]

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216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* at 632 (citing TEX. EST. CODE ANN. § 1151.105 for the proposition that a guardian has a duty to use ordinary diligence to collect any claim or property for the guardianship estate).
221. *Id.*
222. *Id.*
223. *Id.*

"While Ayers argue[d] that the failure to comply with this provision rendere[d] the settlement agreement void, [two of Claudia's sons contended] that the agreement was not void, but merely voidable.[224] A contract that is void cannot be ratified, whereas a voidable contract can be ratified."[225] The Court of Appeals noted that this distinction was "important because a void contract is a nullity from its inception, while a voidable contract continues in effect until repudiated."[226]

The Court of Appeals zeroed in on the pleadings Ayers filed post mediation.[227] "Ayers did not assert that the contract never came into existence; rather, he maintained that the agreement was subject to ratification (or avoidance) by the other court."[228] The Court noted that this "is the characteristic of a voidable agreement, not a void one."[229]

Additionally and importantly, "[a]n allegation that a provision in a contract is void, unenforceable, or unconscionable is a matter in the nature of avoidance and must be affirmatively pleaded."[230] The Court of Appeals stated, however, that "even if Ayers had not waived this issue, [they] would [have] nevertheless [found] that the Rule 11 & Settlement Agreement [was] not void but, at most, voidable."[231]

The Court of Appeals further analyzed Ayers' claim that he lacked authority to settle on behalf of the ward.[232] It reasoned that the record did not show that he was *not* duly authorized to enter into the agreement.[233] As a guardian, Ayers could make a compromise or settlement if he complied with Texas Estates Code Section 1151.102, which states:

> (b) On written application to the court, a guardian of the estate may take an action described by Subsection (c) if: (1) the guardian considers the action in the best interests of the estate; and (2) the action is authorized by court order.
>
> (c) A guardian of the estate who complies with Subsection (b) may: . . . make a compromise or a settlement in relation to property or a claim in dispute or litigation.[234]

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224. *Id.*
225. *Id.* (citing Harris v. Archer, 134 S.W.3d 411, 427 (Tex. App.—Amarillo 2004, pet. denied)).
226. *Id.* (citing Mo. Pac. R.R. Co. v. Brazil, 10 S.W. 403, 406 (Tex. 1888)).
227. *Id.*
228. *Id.*
229. *Id.*
230. *Id.* at 632–33 (citing TEX. R. CIV. P. 94 (noting a party must affirmatively plead any matter constituting an avoidance or affirmative defense)) ("If a party fails to plead an affirmative defense, it is waived.") (internal citations omitted).
231. *Id.* at 633 (citing Catlett v. Catlett, 630 S.W.2d 478, 483 (Tex. App.—Fort Worth 1982, writ ref'd n.r.e.) (stating that unauthorized settlement of litigation in decedent's estate were deemed voidable but not void)).
232. Estate of Riefler, 540 S.W.3d at 629.
233. *Id.* (emphasis added).
234. TEX. EST. CODE ANN. § 1151.102 (Supp.).

The Court of Appeals noted that by its Order Proving Authority to Act in Pending Litigation, the Dallas County Probate Court authorized Ayers "to act on behalf of Mary Theresa Ayers in all those legal proceedings currently pending in Cooke County involving the estate of Gus W. Riefler, Jr."[235] This order gave Ayers broad authority to act on behalf of the ward, which presumably included the authority to enter into binding settlement agreements.[236]

Moreover, although he clearly had a change of position after the settlement agreement was signed, Ayers failed to argue that he, as guardian, did not consider the action to be in the best interests of the estate.[237] Therefore, because the court had conferred on Ayers the power necessary to make the bargain, the Court of Appeals held that Ayers had the authority contemplated by Texas Estates Code Section 1151.102, and his actions taken pursuant to that authorization were binding.[238] Consequently, the Court of Appeals held that the Rule 11 & Settlement Agreement was not void.[239]

The Guardianship Caution also instructs that the practitioner should consider seeking an affirmative court finding that the mediated agreement is in the ward's best interests, to assure its enforcement through a judgment thereon.[240]

2. *Conditions Precedent Generally Act as Pre-Conditions to Enforcement*

"A condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation."[241] A covenant, as distinguished from a condition precedent, is an agreement to act or refrain from acting in a certain way.[242] Breach of a covenant may give rise to a cause of action for damages, but it does not affect the enforceability of the remaining provisions of the contract unless the breach is a material or total breach.[243] Conversely, if an express condition is not satisfied, then the party

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235. Estate of Riefler, 540 S.W.3d at 629.

236. *Id.* (citing Jones v. Griffith, 109 S.W.2d 565 (Tex. App.—Eastland 1937, no writ) (indicating that when the record did not affirmatively show that guardian was not duly authorized to enter agreement, such authority was presumed)).

237. Estate of Riefler, 540 S.W.3d at 629.

238. *Id.*

239. *Id.*

240. *See* TEX. EST. CODE ANN. § 1055.151(d) (Supp.).

241. Centex Corp. v. Dalton, 840 S.W.2d 952, 956 (Tex. 1992); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 224 (AM. LAW INST. 1981) ("determining a condition is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due."); TEX. EST. CODE ANN. § 225 (Supp.) (noting the effects of the non-occurrence of a condition).

242. Reinert v. Lawson, 113 S.W.2d 293, 294 (Tex. App.—Waco 1938, no writ).

243. *Id.* (citing Hernandez v. Gulf Grp. Lloyds, 875 S.W.2d 691, 692–94 (Tex. 1994)), RESTATEMENT (SECOND) OF CONTRACTS §§ 236 cmt. a, 241, 242 cmt. a.

whose performance is conditioned is excused from any obligation to perform.[244]

A condition precedent may be either a condition to the formation of a contract or to an obligation to perform an existing agreement.[245] Conditions may, therefore, relate either to the formation of contracts or to liability under them.[246] Conditions precedent to an obligation to perform are those acts or events, which occur after the making of a contract, that must occur before there is a right to immediate performance and before there is a breach of contractual duty.[247] Many "subject to court approval" terms inserted into probate, trust, and guardianship settlement agreements operate as conditions precedent to an obligation to perform.[248] This is because most parties in a probate, trust, or guardianship case want the settlement agreement to be effective the moment it is signed by all the parties—even though court approval may be required before the parties are obligated to perform.[249]

3. Recommended Settlement Clauses

The authors have collected a few options for possible settlement clauses to clear up common issues without warranting their effectiveness.[250] One option to clear up questions of when an FSA is effective is to simply state the parties' intent:

> This FSA shall be binding on all parties as a contract immediately upon it being fully executed by all parties, and each party hereby agrees that he shall not withdraw, revoke, or repudiate his consent to this FSA and that he is estopped from attempting to do so. The FSA's binding effect as a contract is not contingent on court approval of the FSA. Notwithstanding the preceding, all parties hereto agree to submit this FSA to the court for approval, to represent to the court that this FSA represents the parties' agreement, and not to object thereto. The terms of the FSA shall, upon approval by the court, be adopted and incorporated by reference into a final judgment as if fully set forth therein. Such final judgment constitutes the court's final judgment, which shall end this litigation and have *res judicata* effect.[251]

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244. Solar Applications Eng'g, Inc. v. T.A. Operating Corp., 327 S.W.3d 104, 108 (Tex. 2010); RESTATEMENT (SECOND) OF CONTRACTS § 225.
245. Hohenberg Bros. Co. v. George E. Gibbons & Co., 537 S.W.2d 1, 3 (Tex. 1976) (emphasis added).
246. *Id.*
247. *Id.*
248. *Id.*
249. *Id.*
250. *See infra* note 253 and accompanying text.
251. *Id.*

However, the provisions above fail to cover the possibility that the court will not approve the FSA.[252] If the parties have concerns about whether the court will approve the FSA, another option covers those bases:

> This FSA shall be binding on all parties as a contract immediately upon it being fully executed by all parties, and each party hereby agrees that he shall not withdraw, revoke, or repudiate his consent to this FSA and that he is estopped from attempting to do so. This FSA's effect shall remain binding unless the court herein fails to approve it. Should the court fail to approve this FSA, all parties agree to revise and reform this FSA to adhere as closely as possible to the existing terms herein while ensuring the court's approval of the reformed FSA. The parties will work together to jointly submit this FSA (and, if necessary, future reformed FSA(s)), to the court for approval, and, upon approval, the terms of the FSA shall be adopted and incorporated by reference into a final judgment as if fully set forth therein. Such final judgment constitutes the court's final judgment, which shall end this litigation and have *res judicata* effect.[253]

D. What if the FSA is Also an MSA?

Section II.B above has discussed MSAs in contested guardianships and their special requirements.[254] But, can Probate Court FSAs/MSAs be analogized to Family Court MSAs?[255] The answer is yes, but only as to guardianship MSAs.[256]

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252. *Id.*

253. If the FSA contains mutual releases with or without an indemnity provision, those provisions must comply with the conspicuousness requirement of the express negligence rule. *See* Ling & Co. v. Trinity Sav. & Loan Ass'n, 482 S.W.2d 841, 843 (Tex. 1972). In *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 509–11 (Tex. 1993), the Texas Supreme Court adopted the U.C.C.'s standard for conspicuousness, as then found in TEX. BUS. & COM. CODE ANN. § 1.201, which provided: "A term or clause is conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. A printed heading in capitals (as: NON–NEGOTIABLE BILL OF LADING) is conspicuous. Language in the body of a form is 'conspicuous' if it is in larger or other contrasting type or color. But in a telegram any stated term is 'conspicuous.'" The current standard in TEX. BUS. & COM. CODE ANN. § 1.201 provides that conspicuous terms include: "(A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and (B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language." TEX. BUS. & COM. CODE ANN. § 1.201. In addition, the language must expressly reference the specific negligence claims being released/indemnified (e.g., negligence, negligence per se, negligent misrepresentation). See Trinity Indus. v. Ashland, Inc., 53 S.W.3d 852, 869 (Tex. App.—Austin 2001, pet. denied) (stating that negligent misrepresentation claim not released by general language referencing "all claims and liabilities of any nature whatsoever").

254. *See* Radford, *supra* note 30 and the Guardianship Caution explained in the text corresponding to notes 34–38.

255. *Id.*

256. *See* TEX. FAM. CODE ANN. § 6.602 (Supp.).

Texas Family Code Section 6.602, entitled "Mediation Procedures," contains language mirroring Texas Estates Code Section 1055.151, except that the Family Code provision omits the section 1055.151(d) language authorizing the court to refuse to enter judgment on the MSA if it is not in the best interest of the ward.[257] Thus, as between divorcing parties participating in mediation, "once signed, an MSA cannot be revoked like other settlement agreements."[258] Since the Family Code provision was enacted effective 1997, and the Estates Code provision effective 2014, it is probable that the Family Code section served as the model for the Estates Code language.[259] Thus, section 6.602 jurisprudence should inform section 1055.151 decisions, and unless the section 1055.151(d) exception applies, a probate court should grant judgment based on a guardianship FSA/MSA and should dictate that the FSA/MSA cannot be revoked like other settlement agreements prior to the final judgment being signed.[260] Accordingly, a guardianship party to a MSA should be able to merely file a motion with the probate court to enforce the MSA and to enter a judgment thereon.[261]

E. Withdrawing Consent and/or Starting to Perform Before the Court Approves and/or Renders Judgment on the FSA

As stated above, a court may, after proper notice and hearing, enforce an agreement complying with Rule 11 even though one side no longer consents to the agreement.[262]

1. Can a Signatory Withdraw, Revoke, or Repudiate His or Her Consent Before the Court Approves and/or Renders Judgment on the FSA?

Subject to the special rules applying to guardianship (and divorce) proceedings explained in sections II.B and III.D above, generally a party to a settlement agreement, including an FSA, may revoke its consent to the agreement before the court renders a judgment thereon.[263] The revoking party, however, will then be liable for breaching the FSA, assuming no valid defenses exist.[264]

Such revocation or repudiation of the agreement may be evidenced by unconditional words or actions that the party will not perform pursuant to the

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257. *Id.*; *see also* TEX. EST. CODE ANN. § 1055.151 (Supp.).
258. Milner v. Milner, 361 S.W.3d 615, 618 (Tex. 2012).
259. *Id.*
260. *See id.* at 618, n.2.
261. *Id.* at 619.
262. *In re* Guardianship of Virgil, 508 S.W.3d 591, 596 (Tex. App.—El Paso 2016, no pet.).
263. *Id.*; *see supra* notes 34–38 and accompanying text; Ford Motor Co. v. Castillo, 279 S.W.3d 656, 663 (Tex. 2009); S & A Rest. Corp. v. Leal, 892 S.W.2d 855, 857 (Tex. 1995) (per curiam).
264. *Castillo*, 279 S.W.3d at 663; *Leal*, 892 S.W.2d at 857, n.1.

agreement's terms.[265] That repudiation may be retracted, however, before the other party materially changes his position or notifies the repudiating party that he considers the repudiation final.[266]

2. Can or Should a Party Start Performing His or Her Obligations under the FSA Before the Court Approves and/or Renders Judgment on the FSA?

To guard against a potential revocation or repudiation before judgment, a contracting party may initiate his own performance under the FSA.[267] Such substantial performance would justify that party's recovery under the agreement and may suffice to prevent revocation before judgment.[268]

F. Is the FSA Binding if the Court Does Not Approve and/or Render Judgment on the FSA?

In certain probate cases, the FSA will not be binding on all parties unless the court expressly approves the FSA.[269] For example, dependent administrators and guardians properly act only as authorized by the court, and unless and until the court approves or ratifies the FSA, the dependent administrator or guardian will not be bound.[270] However, if the terms of the FSA state that it is immediately enforceable as a contract regardless of court approval, then the FSA is binding on those parties.[271]

G. If the Court Refuses to Authorize a Party to Sign the FSA, or if One or More Parties Do Not Sign the FSA, is the FSA Still Binding on the Other Signatories?

A well drafted FSA will include an "Effective Date" clause that will expressly address this issue:

> By completing and signing this Agreement, the parties agree to be bound to its terms once it is signed by all the parties hereto. All parties must execute this Agreement for it to be effective. The "Effective Date" is the date on which the last party signs the Agreement.

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265. City of The Colony v. N. Tex. Mun. Water Dist., 272 S.W.3d 699, 738 (Tex. App.—Fort Worth 2008, pet. dism'd), El Paso Prod. v. Valence Oper. Co., 112 S.W.3d 616, 621–22 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

266. Glass v. Anderson, 596 S.W.2d 507, 512–513 (Tex. 1980); Helsley v. Anderson, 519 S.W.2d 130, 133 (Tex. App.—Dallas 1975, no writ).

267. Vance v. My Apartment Steak House of San Antonio, Inc., 677 S.W.2d 480, 481 (Tex. 1984).

268. *See* Dobbins v. Redden, 785 S.W.2d 377, 378 (Tex. 1980) (per curiam).

269. *See* Eastland v. Eastland, 273 S.W.3d 815, 821 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

270. *See id.*

271. *See id.*

H. Can an FSA be Utilized to Modify/Amend an Inter Vivos Family Trust (Revocable or Irrevocable); Establish a New Management Trust; Memorialize ("Freeze") or Modify Existing Wills/Codicils; and Revoke or Revise a POA?

FSAs are frequently used, especially in guardianship cases, to modify or amend existing *inter vivos* family trusts.[272] If the settlor participates and the trust is revocable, Texas Trust Code Section 112.051(b) authorizes such amendments.[273] If the trust is irrevocable, it may be modified/amended only by a Texas Trust Code Section 112.054 judicial proceeding and order, or by judicial application of the doctrine of equitable deviation.[274] The FSA, however, can bind all parties to jointly apply to the court for such a section 112.054 modification and/or equitable-deviation order, and the agreement can prohibit any party from objecting the same.[275]

Similarly, an FSA can commit the parties to jointly move the court to establish a management trust pursuant to Texas Estates Code Section 1301.053.[276] And the written FSA, if enforceable, can require the expected testator to maintain an existing will or to modify that will with agreed terms and then not change those terms.[277] Finally, the FSA can bind a principal to revoke or revise a POA, unless the POA is coupled with an interest.[278]

I. Are Partial FSAs Effective?

An FSA may be "partial" as to parties or property.[279] As discussed in section III.A, beneficiaries whose interests in the estate are not changed by the FSA are not necessary parties to that agreement.[280] Thus, beneficiaries seeking to settle estate controversies should be able to do so "around" (or without the participation of) other beneficiaries unwilling to settle so long as the interests of those non-settling parties are not affected.[281]

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272. Glass v. Anderson, 596 S.W.2d 507, 512–13 (Tex. 1980); Helsley v. Anderson, 519 S.W.2d 130, 133 (Tex. App.—Dallas 1975, no writ).

273. *See* TEX. PROP. CODE ANN. § 112.054 (Supp.).

274. *See* Conte v. Ditta, 287 S.W.3d 28, 37 (Tex. App.—Houston [1st Dist.] 2007) (mem. op.), *remanded*, 298 S.W.3d 187 (Tex. 2009), *on remand*, 312 S.W.3d 981 (Tex. App.—Houston [1st Dist.] 2010).

275. *See id.*

276. TEX. EST. CODE ANN. § 1301.053 (Supp.).

277. *Id.* § 254.004(1).

278. *Id.* §§ 751.131, 751.0015(1).

279. *See generally* Estate of Morris, 577 S.W.2d 748, 756 (Tex. App.—Amarillo 1979, writ ref'd n.r.e) (noting that a non-signing party can affirm and ratify an FSA by relying thereon and not objecting thereto).

280. Fore v. McFadden, 276 S.W. 327, 329 (Tex. App.—Texarkana 1925, writ dism'd w.o.j.).

281. *See generally Morris*, 577 S.W.2d at 756 (noting that a non-signing party can affirm and ratify an FSA by relying thereon and not objecting thereto).

An FSA may also be "partial" when all beneficiaries join in the agreement, but some property of the estate is intentionally or unintentionally omitted from its coverage.[282] In that instance, the omitted property should pass pursuant to the terms of the agreed probated will (as modified by the FSA), if any, and/or in accordance with the laws of intestacy.[283]

J. What if There are Unknown/Unascertained Heirs; Can an FSA be Combined with an Heirship Proceeding, or Will Appointment of a Reasonable Ad Litem Suffice?

If the parties' FSA does not affect the interests of any unknown or unascertained heirs, those heirs are not necessary parties to the agreement, so no heirship proceeding or *ad litem* should be necessary.[284] If such heirs' interests are affected by the FSA, the better practice would be to combine a motion to approve the FSA and render judgment on it with a proceeding to declare heirship ("PDH") under Texas Estates Code Chapter 202.[285] Any person claiming to be an owner of any part of the decedent's estate (or a trustee for the benefit of decedent) may file an application in a PDH when a person dies intestate or his will has been probated but property was omitted therefrom or any administration begun has not yet concluded with a final disposition.[286] The application may seek a determination whether any administration is necessary, and the FSA may obviate any need for administration.[287] The court must appoint an attorney *ad litem* for heirs whose names or locations are unknown, and after service by publication, the court's judgment shall state the names of the heirs and their shares in the decedent's property.[288] This judgment is final and provides protection for future bona fide purchasers for value and for transferors of estate property to the declared heirs.[289] Mere appointment of an ad litem outside the confines of such a Chapter 202 proceeding is not recommended.[290]

282. *See id.* at 751.
283. *See id.*
284. *See Fore*, 276 S.W. at 329.
285. TEX. EST. CODE ANN. ch. 202 (Supp.).
286. TEX. EST. CODE ANN. §§ 202.002, 202.004 (Supp.).
287. *Id.* § 202.006.
288. *Id.* §§ 202.009, 202.052, 202.201.
289. *Id.* §§ 202.202, 202.204, 202.205.
290. *Id.* §§ 202.202, 202.006.

K. To Enforce an FSA, Must a Plaintiff Initiate a New Suit in a Potentially Different Court, Merely File a Motion to Enforce in the Existing Court, or File a Will Contest, and if the FSA is Incorporated into the Judgment, is the Procedure Different?

An FSA may be enforced as a contract, or, if its terms are incorporated into a judgment, as a judgment.[291] It might also be necessary to file a will contest action to enforce certain FSAs.

1. Enforcement as a Contract

A settlement is an agreement by which parties reach an understanding in compromise of disputed matters.[292] Contract law applies to settlement agreements.[293] This precept applies to formation and interpretation.[294] Once the parties accept the terms of the settlement, the agreement is binding and can be enforced by the courts.[295] A party to a written settlement agreement may seek to enforce the agreement under general contract law.[296] The party seeking to enforce the settlement agreement will typically bring suit to enforce the contract alleging breach of contract or seeking specific performance.[297] A party resisting the enforcement of a settlement contract must negate its existence, prove timely performance, or raise some other valid defense.[298] Without the court rendering judgment on an FSA, attempting to remedy a breach of an FSA generally requires a new breach of contract lawsuit.[299] "The law does not recognize the existence of any special summary proceeding for the enforcement of a written agreement, even one negotiated in the context of a mediation."[300] "Thus, the party seeking enforcement of an agreement for which consent has been withdrawn must bring an action for breach of contract."[301] "Like any other breach of contract claim, a claim for breach of a settlement agreement is subject to the established procedures of pleading and proof."[302] "A party against whom a claim for breach of contract has been asserted is entitled to be confronted by appropriate pleadings, assert defenses, conduct discovery, and submit any

291. *See* Stevens v. Snyder, 874 S.W.2d 241, 243 (Tex. App.—Dallas 1994, writ denied).
292. Rose v. Pfister, 607 S.W.2d 587, 590 (Tex. App.—Houston [1st Dist.] 1980, no writ).
293. *Stevens*, 874 S.W.2d at 243.
294. Peterson v. Farmers Tex. Cty. Mut. Ins. Co., No. 05-15-00678-CV, 2016 WL 3448067, at *3 (Tex. App.—Dallas 2016, no pet.) (mem. op.) (laying out common contract interpretation rules).
295. Shaw v. Kennedy, Ltd. 879 S.W.2d 240, 247 (Tex. App.—Amarillo 1994, no writ).
296. Garcia v. Harding, 545 S.W.3d 8, 12 (Tex. App.—El Paso 2017, no pet.).
297. *See Stevens*, 874 S.W.2d at 243.
298. *Garcia*, 545 S.W.3d at 12.
299. Levetz v. Sutton, 404 S.W.3d 798, 805–06 (Tex. App.—Dallas 2013, pet. denied).
300. *Id.*
301. *Id.*
302. Ford Motor Co. v. Castillo, 279 S.W.3d 656, 663 (Tex. 2009).

factual disputes to a fact finder."[303] However, while "proper pleading and proof" is required to enforce a settlement agreement, Texas courts have held that such requirement does not necessitate the filing of a new cause of action or even a counterclaim for breach of contract; rather, the filing of a motion to enforce a settlement agreement before the trial court's plenary jurisdiction has expired is "sufficient to give a party notice of" the breach-of-contract claim or defense, as such a motion constitutes a "pleading.[304] This process can be time-consuming and expensive.[305] Thus, the best way to guard against repudiation is to attempt to have the court approve and render judgment on the agreement.[306]

2. *Enforcement as a Judgment*

While a settlement agreement can always be enforced through a breach of contract action, it cannot always be enforced by contempt or any other method which applies to the enforcement of judgments.[307] This results because a settlement agreement is not a judgment—it is a contract.[308]

A court may, in its discretion, render an agreed judgment on a settlement agreement.[309] The entry of an enforceable agreed judgment requires (i) the continued consent of all parties at the time the judgment is rendered, and (ii) the entry of an agreed judgment which literally complies with the terms of the settlement agreement.[310]

It is important to remember that any party may revoke their consent prior to the time the court renders judgment.[311] If such revocation were to happen, the non-revoking party's remedy would be limited to enforcing the

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303. *Levetz*, 404 S.W.3d at 806.

304. Scott v. Am. Home Mortg. Serv., Inc., No. 03–14–00322–CV, 2015 WL 8593622, at *3 (Tex. App.—Austin Dec. 8, 2015, pet. denied) (mem. op.) (holding that Motion to Enforce filed after opposing party's notice of non-suit but during the trial court's plenary jurisdiction satisfied the "proper pleading and proof" requirement of *Padilla*) (citing Neasbitt v. Warren*,* 105 S.W.3d 113, 117–18 (Tex. App.—Fort Worth 2003, no pet.) (holding that defendant raised breach of contract claim in motion to enforce settlement agreement and satisfied *Padilla* requirement of proper notice and hearing)); Browning v. Holloway*,* 620 S.W.2d 611, 615 (Tex. App.—Dallas 1981, writ ref'd n.r.e.); *see also Castillo*, 279 S.W.3d at 663 (Tex. 2009) (holding motion to enforce sufficient as pleading to support judgment for breach of contract).

305. *See* Padilla v. LeFrance, 907 S.W.2d 454, 461 (Tex. 1995).

306. *See id.*; S & A Rest. Corp. v. Leal, 892 S.W.2d 855, 857 (Tex. 1995); *In re* Joyner, 196 S.W.3d 883, 890 (Tex. App.—Texarkana 2006, pet. denied).

307. *See* 12A TEX. JUR. 3D *Compromise and Settlement* § 21.

308. *See id.*

309. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 154.071 (Supp.) ("The court in its discretion may incorporate the terms of the agreement in the court's final decree disposing of the case."). Note also the Guardianship Caution, TEX. EST. CODE ANN. § 1055.151(d) (Supp.) (stating that the court may decline to enter judgment on an MSA in a guardianship if the court finds the agreement not in the ward's best interest).

310. *See* 47 TEX. JUR. 3D *Judgments* § 23.

311. *See Leal*, 892 S.W.2d at 855 (citing Quintero v. Jim Walter Homes, Inc., 654 S.W.2d 442, 444 (Tex. 1983)); Samples Exterminators v. Samples, 640 S.W.2d 873, 874–75 (Tex. 1982) (per curiam).

FSA as a contract.[312] If the probate court has already issued orders pursuant to a mediated FSA, however, one party to the FSA may not unilaterally rescind the FSA by filing a "notice to rescind."[313]

Again, it is important to recognize the distinction between the *approval* of a settlement and the *rendering* of a judgment.[314] In *S&A Restaurant*, the Texas Supreme Court clarified how the approval of a settlement agreement does not automatically constitute the entry or rendering of a judgment.[315] The words used by the trial court must indicate a present intention to render judgment.[316]

In certain situations, an order from a probate court approving a settlement agreement can be treated as a judgment.[317] A probate order is final "if it conclusively disposes of and is decisive of the issue or controverted question for which that particular part of the proceeding was brought, even if the decision does not fully and finally dispose of the entire probate proceeding."[318]

Generally, the only limit on a trial court's enforcement order is that the order "may not be inconsistent with the original judgment and must not constitute a material change in substantial adjudicated portions of the judgment."[319]

Thus, until a settlement agreement is reduced to a written order, a party does not have any of the remedies available for enforcing a judgment (*i.e.*, contempt, writ of execution, writ of garnishment, reduction to a money judgment, etc.) provided by the rules and statutes governing judgments.[320]

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312. Mantas v. Fifth Court of Appeals, 925 S.W.2d 656, 658 (Tex. 1996) (per curiam) (when consent has been withdrawn, a court may not render judgment on the settlement agreement, but may *only enforce it as a written contract*); Staley v. Herblin, 188 S.W.3d 334, 336 (Tex. App.—Dallas 2006, pet. denied) (a written settlement agreement may be enforced even though one party withdraws consent before judgment is rendered on the agreement); Gamboa v. Gamboa, 383 S.W.3d 263, 269 (Tex. App.—San Antonio 2012, no. pet.) (citing *Mantas*, 925 S.W.2d at 658; *Staley*, 188 S.W.3d at 336).

313. Estate of Mathis, 543 S.W.3d. 927, 932 (Tex. App.—Eastland 2018, no pet.); *see also In re* Estate of Sheshtawy, 478 S.W.3d 82, 86 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (holding that FSA in which surviving wife waived her homestead rights barred later suit to enforce those rights).

314. *See Leal*, 892 S.W.2d at 858.

315. *Id.*

316. *Id.*; *In re* Estate of Denison, No. 11-04-00058-CV, 2005 WL 2404046, at *2 (Tex. App.—Eastland 2005, pet. denied) (mem. op.) (holding that "[b]ecause the trial court did not render judgment on the settlement agreement at the June 3 hearing and because enforcement of the settlement agreement was not based upon a breach of contract claim . . . the trial court erred in entering a judgment enforcing the settlement agreement.").

317. *See* 17 TEX. PRAC. PROB. & DECEDENT'S ESTATES § 9.5.

318. Metro. Cas. Ins. Co. v. Foster, 226 S.W.3d 597, 600–01 (Tex. App.—Houston [1st Dist.] 2007, no pet.) (stating that when a probate court approved the settlement entered into between a guardian and an insurance carrier and *ordered the insurance company to pay a fixed sum in accordance with the parties' settlement*, such order was a final adjudication on the guardian's claim against insurance carrier; no further hearings were necessary).

319. *Id.* at 601–02; *see also* Matz v. Bennion, 961 S.W.2d 445, 452 (Tex. App.—Houston [1st Dist.] 1997, writ denied).

320. *See, e.g.*, *Ex parte* Chambers, 898 S.W.2d 257, 262 (Tex. 1995) (holding that a contemnor may not be held in constructive contempt of court for actions taken prior to the time that the court's order is

3. *Enforcement through a Will Contest*

Surprisingly, even some verbal FSAs can be enforceable,[321] so long as they do not involve real property.[322] However, the enforcement process is complicated if a party seeks enforcement before the relevant will has been probated and the alleged verbal FSA contains a distribution scheme different from the proffered will.[323] In that situation, the FSA proponent must contest the will, or the FSA will not be enforceable.[324] Moreover, by not contesting a will later offered for probate after all beneficiaries entered into an earlier FSA mandating that the will would not be offered for probate, the parties effectively abandon the FSA.[325]

IV. AN IDEAL TIMELINE FOR IMPLEMENTING AN FSA IN THE CONTEXT OF PROBATE, TRUST, AND GUARDIANSHIP DISPUTES

The order of reaching and implementing a settlement in probate, trust and guardianship disputes can be complex and involve many moving parts.[326] This dynamic often results because court approval is required by one or more parties, a guardian *ad litem* or attorney *ad litem* must be appointed to represent one or more parties, or a personal representative, receiver, successor trustee, or guardian must be appointed to implement the settlement.[327] Thus, the parties must carefully consider the "settlement steps" in negotiating a settlement and should expressly include those steps in the FSA itself.[328]

A. *Ensure that all Interested and Necessary Parties Sign the FSA*

Ideally, all of the interested and necessary parties should be identified before starting settlement negotiations and/or attending mediation.[329] If a guardian *ad litem* or attorney *ad litem* is required, the parties should consider requesting their appointment before attending mediation to allow the *ad*

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reduced to writing); Dechon v. Dechon, 909 S.W.2d 950, 958 (Tex. App.—El Paso 1995, no writ) (holding if an order or agreement dividing marital property lacks order language, then party must seek clarification of the order or agreement before it may be enforced).

321. *In re* Estate of Hutchins, 391 S.W.3d 578, 588 (Tex. App.—Dallas 2012, no pet.).

322. Womack v. Worthington, 561 S.W.2d 564, 566 (Tex. App.—Fort Worth 1978, writ ref'd n.r.e.).

323. *In re* Estate of Hutchins, 391 S.W.3d at 588.

324. *Id.* at n.5; Estate of Morris, 577 S.W.2d 748, 752 (Tex. App.—Amarillo 1979, writ ref'd n.r.e.); Stringfellow v. Early, 598, 40 S.W. 871, 872 (Tex. App.—Austin 1897, no writ).

325. Estate of Lee, 981 S.W.2d 288, 290 (Tex. App.—Amarillo 1998, pet. denied).

326. *See* Gerry W. Beyer, *Texas Law of Wills*, 9 TEX. PRAC. SERIES § 51.50 (4th ed. 2018) (explaining the implementation of an FSA).

327. *Id.*

328. *Id.*

329. *Id.*

litems to participate in the settlement process.[330] To the extent a personal representative, receiver, successor trustee, or guardian must be appointed to implement the FSA, the parties should attempt to identify and narrow the field of potential acceptable candidates.[331]

Additionally, not only should all of the interested and necessary parties be identified in the FSA itself, each parties' relevant capacity or capacities should be identified.[332] It is a well-established principal of contract law that a person must generally be a party to the agreement in order to be bound by that agreement.[333] Case law dictates that a person acting in his fiduciary capacity is a completely different and distinct juridical entity from the same person acting in his individual capacity.[334]

B. Have the Court Approve and/or Render Judgment on the FSA and Appoint any Appropriate Fiduciaries

Once all the interested and necessary parties have signed the FSA or the settling parties feel comfortable that such parties will otherwise be bound by the settlement, the parties should consider whether one or more parties require court approval to sign the FSA and/or whether the parties want to make the FSA the judgment of the court.[335] If that is the case, the parties should then consider (and expressly state in the FSA) whether such court action is a condition precedent to enforcement.[336] If the FSA calls for the appointment of a fiduciary who would be subject to court supervision, such fiduciary will probably want the court to approve the FSA and order him or her to carry out its terms.

As one author notes, until a court renders judgment, a party may revoke its consent, and the FSA is nothing more than a contract to enforce (assuming, of course, the FSA did not make court action a condition precedent to enforcement).[337] That author refers to such agreements as "pocket judgments."[338] Thus, the parties should consider adding "non-revocation"

330. Chavez v. Kan. City S. Ry. Co., 518 S.W.3d 33, 43 (Tex. App.—San Antonio 2015), *rev'd*, 520 S.W.3d 898 (Tex. 2017) (per curiam) (citing Suarez v. Jordan, 35 S.W.3d 268, 272 (Tex. App.—Houston [14th Dist.] 2000, no pet.)).

331. *Id.*

332. *Id.*

333. Willis v. Donnelly, 199 S.W.3d 262, 271 (Tex. 2006); *Chavez*, 518 S.W.3d at 43 (citing Suarez v. Jordan, 35 S.W.3d 268, 272 (Tex. App.—Houston [14th Dist.] 2000, no pet.)).

334. *See* Werner v. Colwell, 909 S.W.2d 866, 870 (Tex. 1995) (stating that a defendant named in his individual capacity is a separate juridical person from the same person acting as trustee).

335. *See supra* Section III.A.

336. *See supra* Section III.C.2.

337. D. Hull Youngblood, Jr., *7 Deadly Sins of Settlement Agreements*, CLE Presentation at THE STATE BAR OF TEXAS ADVANCED TRIAL STRATEGIES (Feb. 9–10, 2012).

338. *Id.*

language to the FSA in the form of representations and warranties,[339] and advising their clients of the risks associated with revocation. As previously stated, if court action is contemplated, care should be given to identifying those persons who should be given notice of any motion to approve the FSA and/or motion to make the FSA the judgment of the court.[340]

C. Exchange Consideration and/or Substantially Perform Pursuant to the FSA

If the parties conclude that court approval is required and/or the parties desire for the court to render judgment on the FSA, then the parties should specify the timing of performance in the FSA (i.e., the exchange of consideration).[341] It is generally a better practice not to exchange consideration until after the court approves the FSA and/or renders judgment on it—especially where the FSA may contain language making the entire FSA "subject to" the desired court action—meaning the parties are excused from performance if such court action does not occur.[342] If consideration is prematurely exchanged, and the desired court action is not then obtained, having to recover such previously tendered consideration is less than ideal.[343] Typically, the parties will submit or include the appropriate dismissal language/orders contemporaneously with approval of, or judgment-rendition on, the FSA.[344]

To the extent the FSA is not subject to court approval and/or not to be made the judgment of the court—meaning the FSA is binding as a contract immediately—consideration is generally exchanged shortly after the FSA is

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339. *Id.* ("Plaintiff and Defendant each separately, and independently, represent and warrant to each other, (with the intent that these representations and warranties will be relied upon by the other Party in entering into this Rule 11 Agreement) that: (i) this Rule 11 Agreement is enforceable against them, and binding upon them; (ii) their consent and approval of this Rule 11 Agreement is not subject to revocation; (iii) they intentionally relinquish and knowingly waive any and all rights to withdraw, revoke, change, or otherwise renounce their consent to this Rule 11 Agreement, and (iv) they intentionally relinquish and knowingly waive any and all rights to attack, question, dispute, challenge or otherwise contest the enforceability of this Rule 11Agreement against them; and (v) each of them is separately and independently relying upon these representations and warranties of the other Party in entering into this Rule 11 Agreement." Note also the Guardianship Caution from TEX. EST. CODE § 1055.151 stating, in guardianship disputes, that a mediated **settlement** agreement is binding on the parties if the agreement: (1) provides, in a prominently displayed statement that is in boldfaced type, in capital letters, or underlined, that the agreement is not subject to **revocation** by the parties; (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.).

340. *See generally* Beyer, *supra* note 326, § 51:52 (explaining consideration in relation to FSAs); *see also Consideration and its Sufficiency*, 3 WILLISTON ON CONTRACTS § 7:3 (4th ed. 2018) (explaining consideration generally).

341. *See* Beyer, *supra* note 326, § 51.52; 3 WILLISTON ON CONTRACTS § 7:3 (4th ed. 2018).

342. *See id.*

343. *See id.*

344. *See id.*

fully executed.[345] The final step in such case would be to nonsuit or dismiss the underlying claims of the parties (either with or without prejudice).[346]

D. Have the Court Dismiss the Dispute with Prejudice or Approve Nonsuits with Prejudice

When settling litigation, the settling parties typically have two options to conclude the case: nonsuiting their cases (without prejudice); or nonsuiting (or obtaining dismissal of) their claims with prejudice.[347] There may be reasons for choosing either procedural device.[348] Typically, however, the parties will want finality and the benefits of *res judicata* and thus will seek a nonsuit or dismissal with prejudice.[349]

While the doctrine of *res judicata* is beyond the scope of this paper, the doctrine, when applicable, generally operates to prevent the re-litigation of a claim or cause of action that has been finally adjudicated, as well as related matters that, with the use of diligence, should have been litigated in the prior suit.[350] *Res judicata* only applies to the cause of action filed by the plaintiff and not to the counterclaim, which *might* have been filed by the defendant, unless the compulsory counterclaim rule applies.[351] An interesting issue may arise when the settling parties "carve out" or reserve certain claims among each other.[352] There is significant authority that suggests when parties sign a

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345. *See id.*

346. *See id.*

347. Musgrave v. Owen, 67 S.W.3d 513, 519 (Tex. App.—Texarkana 2002, no pet.) (citing Compania Financiara Libano v. Simmons, 53 S.W.3d 365 (Tex. 2001) (per curiam)) ("Res judicata requires proof of the following elements: (1) a prior final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims that were raised or could have been raised in the first action.").

348. *Id.*

349. *Id.*

350. *Id.*

351. *See* the RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(a) (AM. LAW INST. 1982) (stating in relevant part: "(1) When any of the following circumstances exits, the general rule of § 24 does not apply to extinguish the claim . . . by the plaintiff against the defendant: (a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein; or . . .").

352. *See* Super Van, Inc. v. San Antonio, 92 F.3d 366, 371 (5th Cir. 1996) (waiver of res judicata by conduct); Keith v. Aldridge, 900 F.2d 736, 740 (4th Cir. 1990) ("The law does recognize an exception to the normal application of claim preclusion principles when the parties have agreed to the splitting of a single claim. 'Express agreement' between the parties that litigation of one part of a claim will not preclude a second suit on another part of the same claim is normally honored by courts . . . The parties may be able to settle part of the claim only if another part is left free for later assertion . . . The Restatement goes even further, recognizing an exception when the "parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein." Restatement (Second) of Judgments § 26(1)(a). Since a principal purpose of the general rule of res judicata is to protect the defendant from the burden of relitigating the same claim in different suits, consent, "in express words or otherwise," to the splitting of the claim prevents the defendant from invoking claim preclusion. *Id.* comment a."); Norfolk S. Corp. v. Chevron, 371 F.3d 1285, 1289 (11th Cir. 2004) ("It might be argued that this way of applying *res judicata* to dismissals predicated upon settlement agreements does not adequately respect the fact that such a dismissal is an actual judgment. We believe it does, however, for two reasons. First, *res*

settlement in which claims are expressly reserved and the court signs an agreed order of dismissal with prejudice, the parties effectively waive any *res judicata* defense to a later action on the reserved claims.[353]

When a case is nonsuited without prejudice, *res judicata* does not bar re-litigation of the same claims.[354] Indeed, "a nonsuit without prejudice works no such change in the parties' legal relationship; typically, the plaintiff remains free to re-file the same claims seeking the same relief."[355] A party may be barred, however, from re-litigating a claim that was previously non-suited if limitations has run by the time a second suit is filed.[356]

On the other hand, a dismissal with prejudice functions as a final determination on the merits, to which *res judicata* will apply.[357] "The *res judicata* effect of a nonsuit with prejudice works a permanent, inalterable change in the parties' legal relationship to the defendant's benefit: the defendant can never again be sued by the plaintiff or its privies for claims arising out of the same subject matter."[358]

The following is suggested dismissal-with-prejudice language:

> IT IS THEREFORE ORDERED that all claims and causes of action asserted by the Parties in the above-styled and numbered cause are hereby DISMISSED with PREJUDICE to the refiling of same.

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judicata is an affirmative defense which must be pled, and may be waived, by the defendant . . . When a defendant signs a settlement agreement stating that only some claims will be precluded in the future, it is as if the defendant is preemptively waiving any potential *res judicata* defense he would have had as a result of the dismissal to which the parties consent under the agreement. Thus, we are not treating a dismissal based upon a joint stipulation differently than any other judgment; we simply recognize that a concomitantly created settlement agreement may fairly be read as waiving certain *res judicata* rights to which the dismissal would otherwise give rise.") (internal citations omitted); Aspex Eyewear, Inc. v. Hardy Life, LLC, No. 09-61515-CV, 2010 WL 2926511, at *2 (S.D. Fla. July 23, 2010) ("A defendant who signs a settlement agreement stating that only some claims will be precluded in the future is preemptively waiving any potential *res judicata* defense he would have had as a result of the dismissal. Plaintiffs filed, under seal, a copy of the confidential settlement agreement reached in the 2007 lawsuit. After reviewing the terms of the agreement, I find that *res judicata* does not bar the current action.").

353. Epps v. Fowler, 351 S.W.3d 862, 868 (Tex. 2011) (citing Klein v. Dooley, 949 S.W.2d 307, 307 (Tex. 1997) (per curiam) (holding that in contract dispute when a plaintiff takes a nonsuit with prejudice, the defendant is the prevailing party and is entitled to attorney fees)).

354. *Id.*; *see also* McGowen v. Huang, 120 S.W.3d 452, 462 (Tex. App.—Texarkana 2003, pet. denied) ("A nonsuit without prejudice does not adjudicate the rights of the parties but merely places them in the positions in which they would have been, had suit not been brought.").

355. Bailey v. Gardner, 154 S.W.3d 917, 920 (Tex. App.—Dallas 2005, no pet.).

356. Mossler v. Shields, 818 S.W.2d 752, 754 (Tex. 1991) (per curiam); Freeman v. Cherokee Water Co., 11 S.W.3d 480, 483 (Tex. App.—Texarkana 2000, pet. denied) ("An agreed judgment of dismissal in settlement of a controversy is a judgment on the merits. It too is conclusive, not only on the matters actually raised and litigated, but it is also conclusive on every other matter that could have been litigated and decided as an incident to or essentially connected with the subject matter of the prior litigation.").

357. *Epps*, 351 S.W.3d at 868–69.

358. *Id.*