

I just agreed to WHAT?!?!?

Legal Requirements and Enforcement of Settlement Agreements

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Description: Discussing the role that settlement agreements play in resolving a *present* dispute while also creating *future* rights and obligations between the parties, and how the terms of your settlement agreement may be more or less likely to cause future litigation or inspire a lasting peace. Considerations of Cal. Code Civ. P. § 664.6 and contracts, security interests, and guarantees in settlement agreements.

- I. Introduction
- II. How do we get here?
 - A. Before you have to worry about the terms and enforceability of a settlement agreement, a few words about *getting to a settlement*
 - B. Direct negotiation
 - i. Can be effective to have principals involved in business negotiation, but not so much in personal matters
 1. Marital dissolution
 2. Trusts & estates disputes
 3. Too much animosity
 - ii. Be careful about offers and acceptance – basic contract principles
 1. It's really easy to make a contract
 - a. Oral vs. written
 2. Reservations in discussions
 - a. Subject to reduction in writing and approval by counsel

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C. Mediation

- i. Costs some money, but much more effective
- ii. Structured environment, physical/virtual separation
- iii. Modern trend:
 1. Zoom mediation versus in-person mediation
 2. Pro and cons of each
 - a. Same place
 - b. Momentum and pressure from physical presence
 - c. Tensions from physical presence
 - d. Remote – less pressure and tension
 - i. Does comfort equal better negotiating?
 - ii. Different attitude about communication face to face versus via a screen
- iv. Mediator provides great value
 1. Honest broker
 2. Neutral perspective
 3. Can objectively convey information about risks and costs
 4. Lends credibility to warnings from counsel
 5. Information sharing via mediator
- v. One caution:
 1. Come prepared with settlement agreement template if possible
 2. Don't let the mediator and parties pressure you into drafting a rushed agreement that does not cover all the bases
 3. Horror stories from bad settlement agreements

D. Strategy consideration?

- i. What if you don't trust the other side?

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- ii. Would you rather litigate over a breach of the settlement agreement, or the original dispute?
- iii. You can use a settlement agreement to avoid weakness or problems you had in the original dispute
 - 1. No attorney's fees clause?
 - 2. Arbitration as the forum for a breach of the agreement?
 - 3. May simplify the case

III. Enforcement of a Settlement Agreement

A. Are you going to have to start a new lawsuit?

- i. Maybe
- ii. Maybe you want to
- iii. Settlement agreement may have a more favorable dispute resolution terms
 - 1. Arbitration
 - 2. Forum & Venue
 - 3. Attorney's fees provisions

B. Code Civ. Proc. § 664.6 – Court Enforcement

- i. If requested by the parties, the court “may” retain jurisdiction to enforce the settlement agreement
- ii. Valuable tool
 - 1. Fastest way to ensure payment
 - 2. Compliance with equitable remedies – child support
- iii. Example:
 - 1. In re Marriage of Armato (2001) 88 Cal.App.4th 1032
 - a. Dissolution action – child support order. Husband agreed to an increase, then breached.
 - b. Wife filed a motion under CCP 664.6 to enforce the agreement. Husband said, Wife should have to file a new lawsuit for breach of contract.

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- c. Trial court granted wife's motion and enforced the agreement. Appeal. Affirmed.
 - d. Interesting point: Even though the case was not technically pending, the trial court determined that the "pendency" requirement was satisfied by the ongoing jurisdiction of the family law court to modify the child support obligation.
- iv. Three requirements for CCP 664.6
- 1. Request made during the pendency of the case (not after – cannot fabricate jurisdiction)
 - 2. Request must be made by the parties themselves
 - 3. Request must be in a writing signed by the parties or orally before the court
- v. Trap for the unwary:
- 1. Parties must sign?
 - 2. Levy v. Superior Court (1995) 10 Cal.4th 578, 586
 - 3. Problem solved!
 - 4. Used to be a problem. Amended by Assembly Bill No. 2723, on Jan 1, 2021 – lawyers can now sign

C. Limitations on CCP § 664.6

- i. The court cannot go beyond the original settlement agreement
- ii. There must be an actual agreement
 - 1. Meeting of the minds
 - 2. All material points!
 - 3. Not just a term sheet or "deal points"
 - 4. Weddington Prod., Inc. v. Flick (1998) 60 Cal. App.4th 793, 810 ("Deal Point Memorandum")
 - 5. Reversed – no evidence of agreement on the material terms

D. Minor children

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- i. Minors often have conflicting interests with their parents
- ii. Fiduciaries have duties to the minor children as well
- iii. Even if parents purportedly waiver the rights of the child, that may not extinguish the fiduciaries duties to the child
- iv. But a fiduciary can protect themselves

E. Scenario:

- i. Fiduciary is negotiating a settlement agreement that will affect the rights of a minor child
 1. Personal representative
 2. Trustee
- ii. Competing interests – surviving spouse vs. children
 1. Fiduciary owes duties to all beneficiaries, not just the adults
- iii. Settlement agreement terms will impact the rights of the child.
- iv. But... what if parent is subverting child's long-term interests for their own interests?
- v. Parent says, I want more money now, and don't worry about the kid's college.

F. How to protect the fiduciary?

- i. Child could file a lawsuit when they turn 18

G. Guardian Ad litem

- i. Guardian "for the purposes of the legal action only"
- ii. Motion with the court
- iii. Guardian represents that child's interests
- iv. So let the guardian ad litem negotiate with the parent

H. Minor's Trust – Cal. Prob. Code § 3611(g)

- i. Cal. Prob. Code § 3610

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1. Applies to settlements/court orders
 2. Minors
 3. Persons with a disability
- ii. Cal. Prob. Code § 3611(g)
 1. Place funds into a trust for the benefit of the minor
 2. (g) That the remaining balance of the money and other property be paid or delivered to the trustee of a trust which is created by, or approved of, in the order or judgment referred to in Section 3600. This trust shall be revocable by the minor upon attaining the age of 18 years, and shall contain other terms and conditions, including, but not limited to, terms and conditions concerning trustee's accounts and trustee's bond, as the court determines to be necessary to protect the minor's interests.
- I. Special needs trust - § 3604
- i. Problem with money – interferes with public benefits
 - ii. Special needs trust
 1. Persons with a disability
 2. Receives benefits from SSI and Medi-Cal
 - iii. Special needs trust does not reduce public benefits
 1. Shewry v. Arnold (2004) 125 Cal.App.4th 186, 194
 2. Cal. Prob. Code § 3604
- J. Other safeguards:
- i. Could the child try to set aside the agreement?
 - ii. Allegations of fraud?
 - iii. Have the court approve any trust or settlement agreement
 - iv. Have the court review when the child becomes an adult
- K. Other mechanisms to aid in enforcement of settlement agreement
- i. Securing the performance with collateral

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1. Easier to enforce (deed of trust can use trustee's sale instead of Judicial foreclosure)
2. Can use third-party escrow agent
 - a. Requires detailed escrow instructions
 - b. Agent can interplead collateral if there is a dispute
 - c. Do not use lawyer's trust account!
 - i. All liability and no compensation
 - ii. Conflicts of interest/duties
- ii. Personal guarantees
 1. Used when payor/obligor has limited resources
 2. Payor may be a minor/estate/trust
 3. Ensures performance by obligor

IV. Questions & Answers

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