

**Case No. 11-0732**

**In the Supreme Court of Texas**

**Austin, Texas**

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**In re: Stephanie Lee**  
*Relator*

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**RESPONSE BRIEF ON THE MERITS OF  
REAL PARTY IN INTEREST,  
BENJAMIN JAY REDUS**

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**From the 309<sup>th</sup> Judicial District Court  
Harris County, Texas  
Trial Court No. 2005-41798  
Honorable Sherry Y. Dean, Judge Presiding**

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**RESPONSE BRIEF ON THE MERITS OF  
REAL PARTY IN INTEREST  
BENJAMIN JAY REDUS**

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**TO THE HONORABLE SUPREME COURT OF TEXAS:**

Real Party in Interest, Benjamin Jay Redus (hereinafter “Redus”), filed a response to the petition for writ of mandamus of Relator, Stephanie Lee (hereinafter “Lee”) requesting denial of Lee’s petition for issuance of a writ of mandamus to Judge Sherri Y. Dean, Presiding Judge of the 309<sup>th</sup> Judicial District Court of and for Harris County, Texas, and who previously denied Relator’s request to enter judgment upon a mediated settlement agreement.



In support of this, Redus' brief on the merits, Real Party in Interest, Benjamin Redus would respectfully show this Honorable Court as follows:

### **STATEMENT OF THE CASE**

Redus and Lee signed a mediated settlement agreement in a suit affecting the parent child relationship regarding terms for modification of conservatorship, possession, access, rights, powers, duties, and support of their daughter. Conspicuously absent from this mediated agreement is the approval signature of the Office of the Attorney General for the State of Texas (hereinafter "OAG"), a party to this proceeding. Redus subsequently withdrew his consent to the agreement.

A hearing was held on Lee's Motion to Enter Judgment on a Mediated Settlement Agreement and at the request of the Presiding Judge of the 309<sup>th</sup> Judicial District Court, testimony regarding the best interest of the child the subject of this suit was elicited from the parties. Lee testified that she and her daughter resided with a registered sex offender with knowledge that this conduct was a violation of the sex offender's terms of probation. At the conclusion of the hearing judgment on the mediated settlement agreement was denied as not being in the child's best interest.

## **RESPONSE TO STATEMENT OF FACTS**

The factual record of this case supports denial of Relator's request for judgment on a mediated settlement agreement in a suit affecting the parent child relationship and denial of Relator's Petition for Writ of Mandamus. Real Party in Interest, Benjamin Jay Redus accepts Relator's Statement of Facts except for the following facts which were omitted and this omission could be misleading. Specifically, Relator's claim that "the parties entered into a mediated settlement agreement addressing all issues" fails to acknowledge that the Office of the Attorney General for the State of Texas filed a Petition in Intervention on March 30, 2011, prior to the mediation on April 19, 2011. Exhibit 1 attached to Response to Relator's Petition for Writ of Mandamus. In addition, the approval signature of the OAG is conspicuously absent from the mediated agreement. Appendix Tab 4 at 3 attached to Relator's Petition for Writ of Mandamus. Prior to the hearing on Relator's Motion to Enter Judgment on Mediated Settlement Agreement, Redus revoked his consent. Appendix Tab 8 at 24 attached to Relator's Petition for Writ of Mandamus.

During the hearing on Relator's motion to enter judgment on the mediated settlement agreement, Relator testified that she and her daughter resided with a registered sex offender and with knowledge that this conduct was a violation of the sex offender's terms of probation. Tab 6 at 16-19 attached to Relator's Petition for

Writ of Mandamus. There is no dispute (and the trial court found) that the mediated settlement agreement is not in the child's best interest. Tab 1 at 3 attached to Relator's Petition to Writ of Mandamus. Relator's motion to enter judgment on a mediated settlement agreement was denied as not being in the child's best interest.

### **ARGUMENT**

1. A trial court does not have duty to enter judgment on a mediated settlement agreement that is not in the child's best interest.

A. The trial court may deny the entry of judgment of an agreement that does not meet the requirements for a binding mediated settlement.

Section 153.0071(d) of the Texas Family Code Annotated sets forth the requirements necessary to establish a binding mediated settlement agreement. First, the mediated settlement agreement must provide "in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation." Tex. Fam. Code Ann. §153.0071(d)(1). Second, the mediated settlement agreement must be "signed by each party to the agreement." Tex. Fam. Code Ann. §153.0071(d)(2). Third, the mediated settlement agreement is binding on the parties if the agreement: is "signed by the party's attorney, if any, who is present at the time the agreement is signed." Tex. Fam. Code Ann. §153.0071(d)(3).

The disputed mediated settlement agreement fails to satisfy the requirements for a binding agreement. Specifically, the approval signature of the Office of the Attorney General for the State of Texas, a party to this litigation, is conspicuously absent. Although not directly on point, the court in *Spinks v. Spinks*, held that if a mediated settlement agreement does not strictly comply with the requirements of section 153.0071(d)(1), a party could repudiate the agreement before rendition of the judgment. *Spinks v. Spinks*, 939 S.W.2d 229, 230 & n.2 (Tex. App.-Houston [1st Dist.] 1997, writ denied) (stating “the requirement in section 153.0071(d)(1) is clear” and “we do not interpret the legislature's intent to require anything other than strict compliance”). Here, although the agreement contains the required language regarding revocation, the approval signature of the Office of the Attorney General for the State of Texas, a party to this litigation, is missing and therefore the agreement is nonbinding on the parties.

- B. An agreement that is not in the best interest of the child violates public policy and is unenforceable.

The courts will not enforce a contract whose provisions are against public policy. *Sacks v. Dallas Gold & Silver Exch., Inc.*, 720 S.W.2d 177, 180 (Tex. App.-Dallas 1986, no writ). In this case, the disputed mediated settlement agreement permits Relator’s unsupervised possession of the child in spite of Relator’s complicity

and disregard of a prior court order prohibiting her present husband from being in the presence of the child the subject of this suit. It is undisputed (and the court found) the subject mediated settlement agreement is not in the child's best interest.

Whether a contract violates public policy is a question of law. *Lawrence v. CDB Servs., Inc.*, 44 S.W.3d 544, 555 (Tex. 2001) (superceded by statute on other grounds). The appropriate test when considering whether a contract violates public policy "is whether the tendency of the agreement is injurious to the public good, not whether its application in a particular case results in actual injury. *Hazelwood v. Mandrell Indus. Co., Ltd.*, 596 S.W.2d 204,206 (Tex. Civ. App.-Houston [1<sup>st</sup> Dist.] 1980, writ ref'd n.r.e.).

Relator agrees that Judge Dean was "absolutely entitled to find that the mediated settlement was not in the best interest of the minor child." What is disputed is under what circumstances the judge may refuse to enter judgment on the agreement.

The Texas Legislature instructs courts that "[t]he best interest of the child **shall always be the primary consideration** of the court in determining the issues of conservatorship, possession of and access to the child." Tex. Fam. Code Ann. 153.002 (emphasis added). Furthermore, trial courts have discretion to void all or part of a mediated settlement agreement if the court determines it is not in the child's

best interest. *Beyers v. Roberts*, 199 S.W.3d 354, 360 (Tex.App.-Houston [1 Dist.] 2006); *See Garcia-Udall v. Udall*, 141 S.W.3d 323, 331 (Tex.App.- Dallas [5 Dist.] 2004) (rejecting argument that trial court had discretion to modify order under Family Code section 153.007, but stating trial court has authority not to enforce agreements for best interest considerations); *See also Leonard v. Lane*, 821 S.W.2d 275, 277 (Tex.App.-Houston [1st Dist.] 1991, writ denied) (“The court has the right to act in the best interest of the child, notwithstanding any agreements of the parties.”). Nothing precludes the court from considering the best interests of a child, including a request for entry of a judgment on a mediated settlement.

Relator asserts that Section 153.007(e-1) of the Texas Family Code Annotated provides the exclusive method for the denial of entry of a mediated settlement agreement under the limited circumstances of family violence.

Section 153.0071 of the Texas Family Code provides:

- (a) On written agreement of the parties, the court may refer a suit affecting the parent-child relationship to arbitration. The agreement must state whether the arbitration is binding or nonbinding.
- (b) If the parties agree to binding arbitration, the court shall render an order reflecting the arbitrator's award unless the court determines at a non-jury hearing that the award is not in the best interest of the child. The burden of proof at a hearing under this subsection is on the party seeking to avoid rendition of an order based on the arbitrator's award.

- (c) On the written agreement of the parties or on the court’s own motion, the court may refer a suit affecting the parent-child relationship to mediation.
- (d) A mediated settlement agreement is binding on the parties if the agreement:
  - (1) provides, in a prominently displayed statement that is in boldfaced type or capital letters or underlined, that the agreement is not subject to revocation;
  - (2) is signed by each party to the agreement; and
  - (3) is signed by the party’s attorney, if any, who is present at the time the agreement is signed.
- (e) If a mediated settlement agreement meets the requirements of Subsection (d), a party is entitled to judgment on the mediated settlement agreement notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law.
- (e-1) Notwithstanding Subsections (d) and (e), a court may decline to enter a judgment on a mediated settlement agreement if the court finds that:
  - (1) a party to the agreement was a victim of family violence, and that circumstances impaired the party’s ability to make decisions; and
  - (2) the agreement is not in the child’s best interest.

Applying Relator’s reasoning to the facts of this case, the statutory language “notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law” deprives the trial court of discretion to refuse judgment on the basis of the best interests of the child. This analysis would circumvent the intent of the Texas Legislature to apply a best interest consideration “always” and is overly restrictive to family courts. Moreover, the Dallas Court of Appeals rejected the precise argument on the predecessor statute and held that, although the trial court does not have

discretion to enter a judgment that varies from the terms of a mediated settlement agreement, the court does have the authority to refuse judgment on illegal provisions in a mediated settlement agreement. *See Garcia-Udall v. Udall*, 141 S.W.3d 323, 331-32 (Tex. App.--Dallas 2004, no pet.) (holding that “[a]n agreement on conservatorship issues that is not in the child’s best interest violates public policy and is unenforceable”) citing *Leonard v. Lane*, 821 S.W.2d 275, 278 (Tex. App.--Houston [1<sup>st</sup> Dist.] 1991, writ denied). *Leonard* succinctly holds that “[p]arties cannot by contract deprive the court of its power to guard the best interest of the child.” *Id.*; *cf. Chenault v. Bankios*, 296 S.W.3d 186, 190 (Tex. App.--Houston [14<sup>th</sup> Dist.] 2009, no pet.) (holding that because the trial court plays an “integral role” in child support proceedings to ensure the protection of the child’s best interests, contracts to bypass this protection are against public policy and unenforceable).

Relator contends that seven intermediate appellate courts have determined that trial courts must follow the requirements of section 153.0071 of the Texas Family Code and render judgment based upon mediated settlement agreements that comply with the requirements of that statute. *In re S.A.D.S.*, \_\_\_ S.W.3d \_\_\_, No. 02-09-00302-CV (Tex. App.– Fort Worth 2010, no pet.); *In re: C.H., Jr.*, 298 S.W.3d 800, 804-805 (Tex. App.- Dallas 2009, orig. proceeding); *Barina v. Barina*, NO. 03-08-03341-CV (Tex. App.- Austin, no pet.) (Mem. Op.); *In re Ciccone*, 122 S.W.3d 403,



406 (Tex. App.– Texarkana 2003, no pet.); *Zimmerman v. Zimmerman*, No. 04-04-00347-CV (Tex. App.– San Antonio 2005, pet. denied) (mem. op.); *In re J.A.W.-N.*, 94 S.W.3d 119, 121 (Tex. App.– Corpus Christi 2002, no pet.); *Alvarez v. Reiser*, 958 S.W.2d 232, 233-34 (Tex. App.–Eastland 1997, pet. denied). None of the foregoing cases cited by Relator deal with a circumstance where it is undisputed (and the court found) that the mediated settlement agreement is not in the child’s best interest.

Furthermore, Relator’s reliance on the “entitled to judgment” language of section 153.0071 of the Texas Family code does not render the entry of judgment on a mediated settlement agreement, even a completely compliant agreement, a ministerial duty. *In re Lee*, No. 14-11-00714-CV (Tex. App.–Houston [14 Dist.] 2011) (orig proceeding) (mem. op.); *See also: In re Kasschau*, 11 S.W3d 305,311-12 (Tex. App. Houston [14<sup>th</sup> Dist.] 2000, orig. proceeding). Once again, there is no dispute (and the trial court found) that the mediated agreement is not in the child’s best interest.

Judge Dean was correct in her denial of entry of judgment on a mediated settlement agreement that is not in the child’s best interest.

## CONCLUSION AND PRAYER

WHEREFORE, PREMISES CONSIDERED, Real Party in Interest, Benjamin Jay Redus respectfully requests this Honorable Court to deny Stephanie Lee's request for Writ of Mandamus and grant Benjamin Jay Redus all other relief to which he is entitled.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I, CLINTON F. LAWSON, hereby certify that a true and correct copy of the foregoing Response to Relator's Brief on the Merits was served via facsimile and/or U.S. Mail, and/or certified mail, return receipt requested, and/or via hand delivery on November 23, 2011, to the following:

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