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No. 11-0732

In The Supreme Court of Texas

Austin, Texas

In re: Stephanie Lee
Relator

From the 309th Judicial District Court
Harris County, Texas
Trial Court Cause No. 2005-41798

BRIEF ON THE MERITS OF RELATOR, STEPHANIE LEE

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ORAL ARGUMENT REQUESTED

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No. 11-0732

In The Supreme Court of Texas

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In re: Stephanie Lee
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BRIEF ON THE MERITS OF RELATOR, STEPHANIE LEE

TO THE HONORABLE SUPREME COURT OF TEXAS:

Relator, Stephanie Lee filed a petition for writ of mandamus with the Clerk of this Court. The petition asked this Court to issue a writ of mandamus to Judge Sheri Y. Dean, Presiding Judge of the 309th Judicial District Court of and for Harris County, Texas, compelling Judge Dean to enter judgment based upon the mediated settlement agreement found under Tab 4 of the Appendix to her petition for writ of mandamus. On October 4, 2011, this Court ordered full briefing on the merits. In this, her brief on the merits, Relator, Stephanie Lee would respectfully show this Honorable Court the following, which supports her request for relief in this original proceeding.

Statement of the Case

Real party in interest, Benjamin Jay Redus ("Redus"), filed an amended petition to modify parent-child relationship and to recover excess child support. Apx 3. The parties entered into a mediated settlement agreement. Apx 4. Relator, Stephanie Lee, filed an unopposed motion to enter judgment on the agreement– Apx 7– after which time Redus contested the motion. Apx 8. The Associate Judge orally refused to enter judgment on the mediated settlement agreement. Apx 5. After an evidentiary hearing, Judge Dean signed an order refusing to enter judgment on the agreement. Apx 6 and 2. Judge Dean set the case for a pretrial conference on September 16, 2011, and for trial on September 26, 2011. Apx 9. Respondent is Judge Sheri Y. Dean, Judge of the 309th Judicial District Court of Harris County, Texas.

Relator seeks relief from Judge Dean's order refusing to enter judgment on the mediated settlement agreement. Apx 2.

Lee filed a petition for writ of mandamus in No. 14-11-00714-CV in the 14th Court of Appeals on August 22, 2011. The parties in the Court of Appeals were Relator, Stephanie Lee; Respondents, Benjamin Jay Redus and the State of Texas; and Judge Sheri Y. Dean. The petition was denied by per curiam unpublished memorandum opinion of Justices Brown, Boyce and McCally on September 13, 2011. Apx 1.

Statement of Jurisdiction

The basis of this Court's jurisdiction is section 22.002(a) of the Texas Government Code Annotated. Section 22.202(a) confers jurisdiction on this Court to issue writs of mandamus agreeable to the principles of law regulating those writs, against a district judge.

Sole Issue Presented

In the absence of any evidence whatsoever of family violence against Benjamin Jay Redus, Judge Dean clearly abused her discretion by refusing to enter judgment based upon the parties' mediated settlement agreement and by setting this case for trial. Appendix, Tabs 2, 4 and 9.

Statement of Facts

In compliance with Texas Rule of Appellate Procedure 55.2(g), Relator, Stephanie Lee, states that the court of appeals' memorandum opinion correctly stated the nature of the case, except as specifically set forth herein.

Real party in interest, Benjamin Jay Redus ("Redus"), filed an amended petition to modify parent-child relationship and to recover excess child support from Relator, Stephanie Lee. Appendix Tab 3. The parties entered into a mediated settlement agreement addressing all outstanding issues, including but not limited to custody of the minor child. Appendix Tab 4.

On the first page of the mediated settlement agreement, the following sentence appears in bold, capitalized and underlined print: "**THE PARTIES ALSO AGREE THAT THIS MEDIATION AGREEMENT IS BINDING ON BOTH OF THEM AND IS NOT SUBJECT TO REVOCATION BY EITHER OF THEM.**" Appendix Tab 4 at 1 (bold, capitalized and underlined emphasis in original). The mediated settlement agreement is signed by each party to the agreement. Appendix Tab 4 at 3; Appendix Tab 6 at 11 and 23. The mediated settlement agreement is also signed by each party's attorney who was present at the mediation. Appendix Tab 4 at 3.

Relator, Stephanie Lee, filed what she believed to be an unopposed motion to enter judgment on the mediated settlement agreement. Appendix Tab 7. Thereafter, Redus changed his mind about the mediated settlement agreement and filed a written objection to entry of judgment on the mediated settlement agreement. Appendix Tab 8.

The Associate Judge expressly took judicial notice on the record of the fact that the parties have a mediated settlement agreement, and that they proved up all elements of the mediated settlement agreement. Appendix Tab 5 at 3-4. Nevertheless, out of concern for the best interests of the minor child, the Associate Judge refused to enter judgment on the mediated settlement agreement. Appendix Tab 5 at 7-8.

The Honorable District Judge Sheri Y. Dean refused to merely adopt the findings of the associate judge. Appendix Tab 6 at 7-8. Instead, Judge Dean chose to hear additional evidence regarding the prove-up of the mediated settlement agreement as well as all parties' concerns about entry of judgment on the mediated settlement agreement. Appendix Tab 6 at 7-8.

Relator, Stephanie Lee, provided testimony to prove up the mediated settlement agreement. Appendix Tab 6 at 9-11. At the request of Ms. Lee's attorney, the trial court took judicial notice of the mediated settlement

agreement, which was present in the trial court's file. Appendix Tab 6 at 12; Appendix Tab 4.

Redus' attorney cross-examined Lee in an attempt to establish why the mediated settlement agreement was not in the best interest of the minor child. Appendix Tab 6 at 12-22. Specifically, Redus' attorney focused upon the fact that Lee's boyfriend received deferred adjudication for a sex offense in March of 2001, and, therefore, is a registered sex offender. Appendix Tab 6 at 13.

During cross-examination, Redus admitted that he signed the mediated settlement agreement– Appendix Tab 6 at 23, and that he believed the mediated settlement agreement was in his daughter's best interest at the time he signed it– Appendix Tab 6 at 24. Redus admitted that at and prior to the time he signed the mediated settlement agreement, he knew that Lee's boyfriend had the status of a registered sex offender. Appendix Tab 6 at 25-26. Redus further admitted that at and prior to the time he signed the mediated settlement agreement, he had not been the victim of family violence of any type, and that he did not sign the mediated settlement agreement as a result of any act of family violence. Appendix Tab 6 at 27-28.

Based upon the prove-up conducted before her, Judge Dean found that entering judgment on the mediated settlement agreement would not be in the

best interest of the "children." Appendix Tab 6 at 38. Accordingly, Judge Dean signed a written order refusing to enter judgment on the mediated settlement agreement. Appendix Tab 6 at 39; Appendix Tab 2.

Lee filed a petition for writ of mandamus with the Court of Appeals of the State of Texas for the Fourteenth District on August 22, 2011. That petition was denied by a per curiam memorandum opinion issued by a panel consisting of Justices Jeff Brown, William J. Boyce and Sharon McCally on September 13, 2011. Appendix Tab 1.

Summary of the Argument

In section 153.0071(e-1) of the Texas Family Code, the Texas Legislature grants trial courts in Texas very limited authority to decline to enter a judgment on a mediated settlement agreement. That authority is limited to situations where: (1) a party to the agreement was a victim of family violence, **and** that circumstance impaired the party's ability to make decisions; **and**; (2) the agreement is not in the child's best interest. Tex. Fam. Code Ann. § 153.0071(e-1) (emphases added).

In this case, the undisputed evidentiary record provides no evidence whatsoever that Benjamin Jay Redus was a victim of family violence, or that family violence impaired his ability to make decisions. Accordingly, Judge

Dean abused her discretion by refusing to enter judgment on the mediated settlement agreement at issue in this original proceeding.

Argument

Sole Issue Presented

In the absence of any evidence whatsoever of family violence against Benjamin Jay Redus, Judge Dean clearly abused her discretion by refusing to enter judgment based upon the parties' mediated settlement agreement and by setting this case for trial. Appendix, Tabs 2, 4 and 9.

The facts underlying this original proceeding could not be simpler. Two parents were in the process of litigating issues surrounding modifications to the custody of their minor child. They participated in mediation in an effort to resolve their differences short of trial. They were successful. They, and their respective attorneys who were present at the mediation, all signed a mediated settlement agreement containing appropriate statutory language regarding finality and irrevocability.

After the mediated settlement agreement was signed, but before the trial court entered judgment based upon it, one of the parents (Benjamin Jay Redus, the minor child's father), had second thoughts about whether the mediated settlement agreement was in the best interests of his minor child. The trial court heard evidence on the issue and concluded that the mediated

settlement agreement was not in the minor child's best interests. As a result, the trial court ignored the mediated settlement agreement, refused to enter judgment based upon it, and set the case for trial on the merits.

In an area of the law as volatile and emotion-charged as family law, this Court might think that the Texas Legislature should address what happens in situations such as this. Fortunately, the Texas Legislature has addressed the precise issue before this Court in section 153.0071 of the Texas Family Code Annotated.

Mediated Settlement Agreement in Question is Binding on the Parties

In section 153.0071(d) of the Texas Family Code Annotated, the Texas Legislature expressly addressed when and under what circumstances mediated settlement agreements are binding on the parties.

In section 153.0071(e) and (e-1), the Texas Legislature expressly addressed when a trial court may– and more importantly for disposition of this original proceeding– must enter judgment based upon a mediated settlement agreement. Based upon the express terms of these statutes, and the undisputed evidence received by the trial court in this case, the trial court clearly abused her discretion in refusing to enter judgment on the mediated settlement agreement and in setting the underlying case for trial on the merits.

In section 153.0071(d) of the Texas Family Code Annotated, the Texas Legislature instructs courts that "[a] mediated settlement agreement is binding on the parties if the agreement" meets three criteria.

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). The mediated settlement agreement in this case fully complies with this requirement. The very first page of the mediated settlement agreement, states in **bolded type** and CAPITAL LETTERS and underlined language as follows: "**THE PARTIES ALSO AGREE THAT THIS MEDIATION AGREEMENT IS BINDING ON BOTH OF THEM AND IS NOT SUBJECT TO REVOCATION BY EITHER OF THEM.**" Appendix Tab 4 at 1 (bold, capitalized and underlined emphasis in original).

Second, the mediated settlement agreement must be "signed by each party to the agreement." Tex. Fam. Code Ann. § 153.0071(d)(2). The mediated settlement agreement at issue in this original proceeding is signed by each party to the agreement. Appendix Tab 4 at 3; Appendix Tab 6 at 11 and 23.

Third, the mediated settlement agreement must be "signed by the party's attorney, if any, who is present at the time the agreement is signed." The mediated settlement agreement is also signed by an attorney for each party who was present at the mediation. Appendix Tab 4 at 3.

In his response to Lee's petition for writ of mandamus, Redus argues to this Court that "the mediated agreement fails to satisfy the requirements for a binding agreement" because "the approval signature of the Office of the Attorney General for the State of Texas, a party to this litigation, is conspicuously absent." Redus' Reply at 3.

Redus is absolutely correct that the approval signature of the Office of the Attorney General for the State of Texas is absent from the mediated settlement agreement. Redus is absolutely incorrect that– under the statute in question– the signature of the Office of the Attorney General for the State of Texas, a party to this litigation– is necessary for the mediated settlement agreement to be legally enforceable and binding on Redus and Lee.

Redus' argument is based upon either a flawed reading of the statute in question or a flawed reading of the mediated settlement agreement in this case. In either instance, it is wrong.

John Anthony Ramirez was the attorney for the Attorney General of the State of Texas in the trial court. Appendix Tab 6 at 2. The Office of the Attorney General of the State of Texas admitted at the prove-up hearing on the mediated settlement agreement that neither it nor its attorney was present at the mediation purportedly because it did not receive notice of the mediation. Appendix Tab 6 at 29. The mediated settlement agreement does not include the Office of the Attorney General of the State of Texas as being present at the mediation and does not state that it was a party to the settlement reached at the mediation. Appendix Tab 4.

Contrary to Redus' argument to this Court, the family court mediation settlement statute does not require a mediated settlement agreement to contain the signature of all counsel for all parties ***in the lawsuit***. The statute requires the signature of "the party's attorney, if any, who is ***present at the time the agreement is signed.***" Tex. Fam. Code Ann. § 153.0071(d)(3). (emphasis added).

Since neither Mr. Ramirez, nor any other attorney on behalf of the Office of the Attorney General of the State of Texas was ***present at the mediation at the time the agreement was signed***– Appendix Tab 6 at 28-29; Appendix Tab 4– neither his signature, nor that of any other person (other than Redus,

Lee, and their respective counsel who ***were*** present at the mediation) was necessary to make the mediated settlement agreement binding under section 153.0071(d) of the Texas Family Code Annotated.

Simply put, the mediated settlement agreement at issue in this original proceeding complies on its face with all three subdivisions of section 153.0071(d) of the Texas Family Code. As a result, in the words of the Texas Legislature, it is "binding on the parties." Tex. Fam. Code Ann. § 153.0071(d).

Now, the issue of whether or not a mediated settlement agreement is binding on the parties is not dispositive of whether or under what circumstances a trial court may refuse to enter judgment based upon it. However, the Texas Legislature has spoken loudly and clearly on this issue as well.

Texas Legislature Speaks in Favor of Enforceability of this Agreement

"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." Tex. Fam. Code Ann. § 153.0071(e). This statutory scheme is entirely consistent with the Texas Legislature's stated, strong

public policy in favor of alternative dispute resolution in child custody cases:

> It is the policy of this state to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children, and the early settlement of pending litigation through voluntary settlement procedures.

Tex. Civ. Prac. & Rem. Code Ann. § 154.002. *See also Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 665 (Tex. 2008) ("The Legislature determines public policy through the statutes it passes. *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 628 (Tex. 2004); *Texas Commerce Bank, N.A. v. Grizzle*, 96 S.W.3d 240, 250 (Tex. 2002) (Texas' public policy is reflected in its statutes); *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 873 (Tex. 2000).

Based upon the plain language of § 153.0071(e), Relator, Stephanie Lee was "entitled to judgment on the mediated settlement agreement" because the agreement complied in all respects with section 153.0071(d), as discussed above.

The Statutory Exception to Enforceability Does Not Apply in this Case

Did the Texas Legislature give Texas trial courts any discretion to refuse to enter judgment based upon a mediated settlement agreement? Yes.

In section 153.0071(e-1), the Texas Legislature states: "Notwithstanding Subsections (d) and (e), a court may decline to enter a judgment on a mediated settlement agreement if the court finds that: (1) a party to the agreement was a victim of family violence, **and** that circumstance impaired the party's ability to make decisions; **and**; (2) the agreement is not in the child's best interest." Tex. Fam. Code Ann. § 153.0071(e-1) (emphases added).

Thus, the only way that the trial court had any discretion to refuse to enter judgment on the mediated settlement agreement in this case is if she found, based upon the evidence received by the court, that Benjamin Jay Redus was "a victim of family violence," **and** that circumstance impaired his "ability to make decisions," **and** the agreement "is not in the child's best interest." It is very important that this Court recognize that the Legislature chose the word "and" between these requirements. The Legislature did not choose the word "or" or the phrase "and/or" in section 153.0071(e-1) of the Texas Family Code Annotated.

If we assume for the sake of argument that the evidence heard by the trial court supported her finding that the mediated settlement agreement "is not in the child's best interest," that still leaves two findings by the trial court

that were necessary before the trial court could refuse to enter judgment on the mediated settlement agreement. To avoid entering judgment on the mediated settlement agreement in question, section 153.0071(e-1) required Judge Dean to find that Benjamin Redus was "a victim of family violence," **and** that circumstance impaired his "ability to make decisions." Tex. Fam. Code Ann. § 153.0071(e-1)(1).

Judge Dean did not find that Benjamin Redus was "a victim of family violence," or that any such family violence impaired his "ability to make decisions." Appendix Tab 2; Appendix Tab 6 at 38-39. Judge Dean was foreclosed from doing so by the absolutely uncontroverted evidence in the record before her that Benjamin Jay Redus was **not** a victim of family violence. Appendix Tab 6 at 11 (Stephanie testifies that Benjamin was not a victim of family violence); Appendix Tab 6 at 27-28 (Benjamin admits that he was not a victim of family violence and that he did not sign the mediated settlement agreement as a result of any act or acts of family violence).

In order to exercise judicial discretion to "decline to enter judgment" on the "mediated settlement agreement" at issue herein, Judge Dean was required to find that Benjamin Redus was "a victim of family violence" and that circumstance impaired his "ability to make decisions." Tex. Fam. Code Ann.

§ 153.0071(e-1). She did not do so, and she could not properly do so, because the evidence before her foreclosed the making of any such findings.

Later & More Specific Statute Controls the Earlier & More General

Why would it be inappropriate for this Court to simply apply the "best interest of the child" test found in section 153.002 of the Texas Family Code and ignore the remaining requirements of section 153.0071(e-1) pertaining to a finding of family violence?

The standalone "best interest of the child" provision found in section 153.002 was incorporated into the Texas Family Code in 1995. Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995. The Texas Legislature added the "mandatory enforcement of mediated settlement agreements" provision as section 153.0071(e-1) of the Texas Family Code a decade later, effective in June of 2005. Acts 2005, 79th Leg., ch. 916, § 7, eff. June 18, 2005.

The standalone "best interest of the child" provision found in section 153.002 is a general statement of legislative intent applicable to family law cases generally. The "best interest of the child" provision found in section 153.0071(e-1) of the Texas Family Code is specific to enforcement of mediated settlement agreements in child custody cases.

As this Court stated mere months ago in *Jackson v. State Office of Administrative Hearings*, 2011 WL 2586865, 54 Tex. Sup. Ct. J. 1443 (Tex. July 1, 2011): "'a specific statutory provision prevails as an exception over a conflicting general provision.' *Tex. Lottery Comm'n v. First State Bank of DeQueen*, 325 S.W.3d 628, 637 (Tex. 2010); *see* Tex. Gov't Code § 311.026(b). Moreover, as a matter of statutory construction, 'if statutes are irreconcilable, the statute latest in date of enactment prevails.' *First State Bank of DeQueen*, 325 S.W.3d at 637; *see* Tex. Gov't Code § 311.025(a)."

There can be no doubt that in enacting section 153.0071(e-1), the Texas Legislature was dealing with two very strong public policies– "best interest of the child" as discussed in section 153.002 of the Texas Family Code, and the very strong public policy favoring alternative dispute resolution in child custody cases as stated in §154.002 of the Texas Civil Practice & Remedies Code Annotated:

> It is the policy of this state to encourage the peaceable resolution of disputes, with special consideration given to disputes involving the parent-child relationship, including the mediation of issues involving conservatorship, possession, and support of children, and the early settlement of pending litigation through voluntary settlement procedures.

This Court should not ignore the Legislature's requirement of a finding of "family violence" in order to avoid a mediated settlement agreement

because doing so would, in essence, make the Legislature's enactment of section 153.0071(e-1) in 2005 a useless act. This is true because if the Legislature had intended that trial courts could refuse to enter judgment on mediated settlement agreements solely based upon the best interest of the child, the existing statutory language contained in section 153.002 of the Texas Family Code would have been quite effective to permit that result. Such an intent on the part of the Texas Legislature would also render its enactment of section 153.0071(e-1) more than a decade later, a useless act.

As this Court has stated on several occasions, the Legislature is never presumed to have done a useless act. *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535, 540 (Tex. 1981) (*citing Red River National Bank v. Ferguson*, 109 Tex. 287, 206 S.W.2d 923 (1918); and *Brown v. Memorial Villages Water Authority*, 361 S.W.2d 453 (Tex. Civ. App.– Houston 1962, writ ref'd n.r.e.).

Notwithstanding Means Precisely What it Says

One final aspect of statutory construction supports Lee's position in this original proceeding.

A trial court's sole consideration of the "best interest of the child" language contained in section 153.002 is negated by the "entitled to judgment. . . notwithstanding. . . another rule of law" provision contained in

section 153.0071(e) as a matter of law. *See Beyers v. Roberts*, 199 S.W.3d 354, 359 (Tex. App.– Houston [1st Dist.] 2006, pet. denied) (section 153.0071, as a specific statute pertaining to moderated settlement agreements, controls over more general provisions of Texas Family Code Annotated).

In *Molinet v. Kimbrell*, No. 09-0544, ___ S.W.3d ___ (Tex. January 21, 2011), this Court held that when the Legislature includes a "nothwithstanding" provision in a statute, the specific statute including that provision trumps any other arguably conflicting statute. In the words of this Court, under these circumstances, "the Legislature has resolved the otherwise-conflicting provisions" of the two statutes. *Id.* at 5.

Simply put, if the Legislature had intended "best interest of the child" to be a sole dispositive factor in refusing to enter judgment on a mediated settlement agreement, it would have left section 153.002 in place and not bothered to enact section 157.0071. Alternatively, it would have passed section 157.0071, but left out any requirement of a finding of family violence.

The Mandamus Relief Sought in this Proceeding is Appropriate

"A writ of mandamus will issue if the trial court committed a clear abuse of discretion for which the relator has no adequate remedy at law." *In re Laibe*

Corp., 307 S.W.3d 314, 316 (Tex. 2010) (orig. proceeding) *(citing In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 135–36 (Tex. 2004) (orig. proceeding)). This is true even when the law is unsettled. *Prudential*, 148 S.W.3d at 135 (*citing Huie v. DeShazo*, 922 S.W.2d 920, 927-28 (1996)).

"A trial court abuses its discretion if 'it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law,' or if it clearly fails to correctly analyze or apply the law." *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding) (*per curiam*); *Walker v. Packer*, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding)).

"In the sensitive context of child-custody proceedings, courts have regularly granted mandamus relief." *In re Reiter*, ___ S.W.3d ___, No. 01-10-00641-CV (Tex. App.– Houston [1st Dist.] 2010, orig. proceeding) (citing *Powell v. Stover*, 165 S.W.3d 322, 323 (Tex. 2005) (orig. proceeding); *In re Forlenza*, 140 S.W.3d 373, 379 (Tex. 2004) (orig. proceeding); *In re Lau*, 89 S.W.3d 757, 759-60 (Tex. App.– Houston [1st Dist.] 2002, orig. proceeding)). "Justice demands a speedy resolution of child custody ... issues." *In re Reiter*, ___ S.W.3d ___, No. 01-10-00641-CV (Tex. App.– Houston [1st Dist.] 2010, orig. proceeding) (citing *Proffer v. Yates*, 734 S.W.2d 671, 673 (Tex. 1987) (orig. proceeding) (granting mandamus relief from trial court's failure to

transfer custody dispute to mandatory venue)).

The most frequent use that this Court has made of mandamus relief involve cases in which "the very act of proceeding to trial– regardless of the outcome– would defeat the substantive right involved." *In re Schmitz*, 285 S.W.3d 451, 459, fn. 43 (Tex. 2009) (orig. proceeding) (*citing In re McAllen Med. Ctr.*, 275 S.W.3d 458, 465 (Tex. 2008) (orig. proceeding)).

In this case, Judge Dean was absolutely entitled to find that the mediated settlement agreement in question is not in the best interest of the minor child. What Judge Dean was prohibited from doing was to refuse to enter judgment based upon the mediated settlement agreement in the absence of any evidence whatsoever that Benjamin Jay Redus was "a victim of family violence" and that the family violence in question impaired his "ability to make decisions." Tex. Fam. Code Ann. § 153.0071(e-1). By doing that, respectfully, Judge Dean clearly abused her discretion as a matter of law.

If this court does not rectify Judge Dean's error by issuing a writ of mandamus, Stephanie Lee will lose the statutory protection that the Texas Legislature granted to her in section 153.0071 of the Texas Family Code Annotated. She will be forced to expend thousands of dollars on a trial (and quite possibly an appeal) that– based upon the principles of law set forth

above– should never take place in the first place.

Conflicting Decisions Make this Important to Texas Jurisprudence

The issue raised in this original proceeding, on an undisputed factual record, is critically important to the jurisprudence of the State of Texas. Ten different intermediate appellate courts have split 7-3 on this issue in favor of enforcement.

Three intermediate appellate courts– including the appellate court from which this original proceeding originates– have incorrectly determined that trial courts in Texas may ignore the Legislature's mandate contained in section 153.0071 of the Texas Family Code and exercise unfettered discretion in deciding whether or not to enforce mediated settlement agreements that comply with section 153.0071. *In re Lee*, No. 14-11-00714-CV (Tex. App.– Houston [14th Dist.] 2011) (orig proceeding) (mem. op.), *Garcia-Udall v. Udall*, 141 S.W.3d 323, 331-32 (Tex. App.– Dallas 2004, no pet.), and *Leonard v. Lane*, 821 S.W.2d 275, 278 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

Seven other intermediate appellate courts have correctly determined that trial courts must follow the Texas Legislature's mandate in section 153.0071 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, 804-05 (Tex. App.– Dallas 2009, orig. proceeding); *Barina v. Barina*, No. 03-08-00341-CV (Tex. App.– Austin 2008, no pet.) (mem. op.); *Zimmerman v. Zimmerman*, No. 04-04-00347-CV (Tex. App.– San Antonio 2005, pet. denied) (mem. op.); *In re Circone*, 122 S.W.3d 403, 406 (Tex. App.– Texarkana 2003, no pet.); *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). This Court has never addressed this issue.

The Texas Legislature is entitled to have its statutes enforced as passed and signed by the Governor. As this Court recently stated:

> A question of statutory construction is a legal one which we review de novo, "ascertaining and giving effect to the Legislature's intent as expressed by the plain and common meaning of the statute's words." *Duenez*, 237 S.W.3d at 683 (*citing Tex. Dep't of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 642 (Tex. 2004)); *see also Leland v. Brandal*, 257 S.W.3d 204, 206 (Tex. 2008) (*citing Nat'l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000)) (observing the necessity of a court determining and giving effect to the Legislature's intent in construing a statute). We first look at "the statute's language to determine that intent, as we consider it 'a fair assumption that the Legislature tries to say what it means, and therefore the words it chooses should be the surest guide to legislative intent.' " *Brandal*, 257 S.W.3d at 207 (*quoting Fitzgerald v. Advanced Spine Fixation*

> *Sys., Inc.*, 996 S.W.2d 864, 866 (Tex. 1999)). Thus, we consider the statute's plain and common meaning, and do not "look to extraneous matters for an intent the statute does not state." *Allen*, 15 S.W.3d at 527.

MCI Sales and Service, Inc. v. Hinton, 329 S.W.3d 475, 500-01 (Tex. 2010), *cert. denied*, 131 S.Ct. 2903 (2011).

The Legislature did this Court's Public Policy Weighing for It

Simply put, section 153.0071 of the Texas Family Code represents the Texas Legislature's weighing and balancing of the sometimes competing interests of "the best interests of a child," on one hand, and the importance of alternative dispute resolution as an effective and vital part of our system of civil justice in child custody cases, on the other hand. If the citizens or courts of the State of Texas disagree with the results of this process of weighing and balancing set forth in section 153.0071, the proper remedy is amendment of section 153.0071 by the Texas Legislature, not nullification of the express terms of that statute by judicial fiat.

Redus' "Best Interest" Arguments are Unsupported by the Record

One final matter needs to be addressed in this case in response to an issue raised in Redus' response to Lee's petition for writ of mandamus.

Real Party in Interest, Benjamin Jay Redus attempts to scare this Court out of granting the relief sought in this original proceeding by expressing

concern that the minor plaintiff would reside "with a registered sex offender." Redus' Response at 3. However, this argument flies in the face of the express provisions of the mediated settlement agreement itself.

In the mediated settlement agreement, Redus and Lee expressly agree that at all times Lee has physical custody of her minor daughter, the registered sex offender is enjoined from being within five miles of the minor plaintiff. Appendix Tab 4 at "Possession and Access" paragraph.

Further, the mediated settlement agreement contains a very specific provision permitting Redus to verify for himself or authorize third parties to verify on his behalf, that the "five mile safety zone" provision is being fully complied with at all times. Appendix Tab 4 at "Possession and Access" paragraph.

Finally, the question must be asked if the possession provisions of the mediated settlement agreement are purportedly so dangerous to the minor child, then why did Redus himself (the minor child's father) agree to them in the first place? Redus' only– and less than satisfying– answer for this question is that he felt it was the best deal he would get under the circumstances. Appendix Tab 6 at 24.

As a result of the absence of any evidence of family violence in this case, it is unnecessary for this Court to wade into the thicket of whether or not the mediated settlement agreement is or is not in the best interest of the child. However, the inclusion of the "five mile safety zone" protective language in the mediated settlement agreement and Benjamin Jay Redus' signature on that agreement plainly cast doubt upon the validity of Redus' "best interests of the child" argument as a whole.

Prayer

WHEREFORE, PREMISES CONSIDERED, Relator, Stephanie Lee respectfully prays that this Honorable Court grant a writ of mandamus requiring Judge Sheri Y. Dean, Presiding Judge of the 309th Judicial District Court of and for Harris County, Texas, to enter judgment based upon the April 18, 2011 mediated settlement agreement between Stephanie Lee and Benjamin Redus. Relator further prays that the costs of this original proceeding be taxed against Respondent, Benjamin Jay Redus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Relator's brief on the merits was served via e-service on November 3, 2011, to the following:

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