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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

REPLY BRIEF ON THE MERITS OF
RELATOR, STEPHANIE LEE

Scott Rothenberg
State Bar No. 17316750
Law Offices of Scott Rothenberg
2777 Allen Parkway, Suite 1000
Houston, Texas 77019-2165
telephone: (713) 667-5300
telecopier: (713) 667-0052
Email: scott@rothenberglaw.com
Appellate Counsel for Relator,
Stephanie Lee

ORAL ARGUMENT REQUESTED

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REPLY BRIEF ON THE MERITS OF RELATOR, STEPHANIE LEE

TO THE HONORABLE SUPREME COURT OF TEXAS:

Relator, Stephanie Lee filed her 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 reply 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.

Response to Solicitor General's Statement of Facts

In his amicus brief, the Solicitor General quotes the associate judge as refusing "to put a kid in a house with a sex offender who violated a child." Brief of Solicitor General at 2. While the quote in question is textually correct, the immediately adjacent portions of the trial court record establish that the associate judge's statement is factually inaccurate and is not supported by the evidence in this proceeding (Appendix Tab 5 at 6-8):

THE WITNESS [Mr. Redus]:	He violated conditions of his probation with my daughter in that house. That's where the mileage comes from, your Honor.
. . . .	
THE COURT:	As long as she's married to that man and he's in that – no. How do I trust a woman who let her child be abused by a convicted sex offender.
MS. DAVIS:	Well, your Honor, there's no record stating that he has abused the child.
THE COURT:	The only testimony I have is his.
MS. DAVIS:	Right. But he did not state that the child was abused by Mr. Lee.
THE COURT:	What did he do?
MS. DAVIS:	[sic] His had nothing to do with this child and those are issues that can be addressed.

Redus testified to his perception that Mr. Lee violated the terms of his probation. The associate judge misunderstood and thought that Redus testified that Mr. Lee physically violated Redus' daughter. The record contains no evidence that Mr. Lee had inappropriate physical contact with Redus' daughter. With respect to the future safety of the minor child, it is undisputedly established that under the terms of the mediated settlement agreement in question– if the trial court enters judgement thereon– Mr. Lee would be enjoined from even being within five miles of Redus' daughter:

> At all times, Scott Lee is enjoined from being within 5 miles of *****. During the mother's periods of possession with *****, Scott Lee shall notify *****'s father through Stephanie Lee by e-mail or other mail where he shall be staying (address and land line telephone number if there is a land line) and the make and model of the vehicle he will be driving. This shall be done at least 5 days prior to any visits. Father shall have the right to have an agent or himself monitor Mr. Lee's location by either calling or driving by the location at reasonable times.

Appendix Tab 4 at 4.

Stephanie Lee offers this factual correction because the above-quoted portion of the Solicitor General's brief incorrectly (and likely inadvertently) creates the impression that the minor child would be put in harm's way if the mediated settlement agreement is enforced. In reality, Mr. Lee would be required to stay at least five miles away from the minor child during any and

all visitations, and Mr. Redus (the child's father) has absolute carte blanche to confirm that the five-mile buffer zone is being honored. Appx Tab 4 at 4.

Response to Solicitor General's Arguments

The Solicitor General's brief on the merits contains four pages of argument. Nowhere in those four pages does the Solicitor General ever deny that the express language chosen by the Texas Legislature in formulating section 153.0071(e) and (e-1) entitled Stephanie Lee to judgment on the mediated settlement agreement in the absence of evidence of family violence. Instead, the Solicitor General asks this Court to use the strong public policy in favor of protecting children contained in section 153.002 to ignore the plain wording of section 153.0071(e-1)(1). That mode of analysis would do great violence to the rules of statutory construction applicable to this original proceeding for several reasons.

Section 153.002 of the Family Code states: "The best interest of the child shall always be the primary consideration of the court ***in determining the issues of conservatorship and possession of and access to the child***" (emphasis added). What the Solicitor General seems to be missing is that in evaluating whether or not to enter judgment on a mediated settlement agreement, in the absence of family violence, the Legislature has withdrawn

from the trial court any authority to determine "the issues and conservatorship and possession of and access to the child."

In lieu thereof, the Legislature instructed family courts that if the mediated settlement agreement meets the requirements of section 153.0071(d)– and this one does– then "a party ***is entitled*** to judgment on the mediation settlement agreement. . . ." Tex. Fam. Code Ann. § 153.0071(e) (emphasis added).

The only exception that the Legislature provided to this absolute rule is where the agreement is not in the child's best interest, ***and*** a party to the agreement was a victim of family violence ***and*** that circumstance impaired the party's ability to make decisions. Tex. Fam. Code Ann. § 153.0071(e-1). Thus, in a case such as this one, where the mediation settlement agreement complies with section 153.0071(d), and the record contains no evidence whatsoever of family violence, the Texas Legislature withdrew from the trial courts all authority to determine "the issues and conservatorship and possession of and access to the child." Under this circumstance, section 153.002 of the Family Code simply does not apply.

Even if the Court were to apply section 153.002 to this original proceeding, the Solicitor General's analysis is deficient because it fails to

consider another extraordinarily strong public policy of the State of Texas– alternative dispute resolution in family law 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.") (citing *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)).

It is nothing short of amazing that both the Solicitor General and the Real Party in Interest could file full briefs on the merits in this important matter and not even cite once– much less analyze– the clear applicability and importance of section 154.002 of the Texas Civil Practice & Remedies Code Annotated to this proceeding.

There exists yet another reason why it would it be inappropriate for this Court to formulaically apply the "best interest of the child" test found in section

153.002 of the Texas Family Code and ignore the requirement of section 153.0071(e-1) pertaining to the necessity of 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 correctly recognized earlier 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)." Section 153.0071(e-1) is both the more specific statute and the later in date of enactment when compared with section 153.002.

Once again, it is disappointing that neither the Solicitor General nor the Real Party in Interest saw fit to address the applicability of these black letter principles of statutory analysis to the issue presented in this original proceeding.

There exists yet another reason why the Court should not ignore the Legislature's requirement of a finding of "family violence" in order for a family court to avoid entering judgment on a mediated settlement agreement. Doing so would, in essence, make the Legislature's 2005 enactment of section 153.0071(e-1)(1) 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.)).

Simply put, if the Legislature had intended "best interest of the child" to be a sole dispositive factor in a trial court refusing to enter judgment on a mediated settlement agreement, it would have left section 153.002 in place and not bothered to later enact sections 153.0071(d), (e) and (e-1). Alternatively, it would have passed section 153.0071, but left out any requirement of a finding of family violence.

Once again, it is disappointing that despite purporting to offering this Court statutory construction analysis, neither the Solicitor General nor the Real Party in Interest so much as even mentioned the *Cameron* line of cases discussed above.

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, there is a proper remedy. However, that remedy is not ignoring clear statutory language. 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 in the guise of statutory construction based upon general statements of public policy.

Yet another aspect of statutory construction wholly ignored by the Solicitor General and the Real Party in Interest 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 mediated settlement agreements, controls over the more general provisions of Texas Family Code Annotated).

In *Molinet v. Kimbrell*, No. 09-0544, ___ S.W.3d ___ (Tex. 2011), this Court held that when the Legislature includes a "nothwithstanding" provision in a statute, the 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. Surprisingly, neither the Solicitor General nor the Real Party in Interest saw fit to address the applicability of the "nothwithstanding" clause to the issue presented in this original proceeding.

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.

The bottom line is that both the Solicitor General and the Real Party in Interest are asking this Court to ignore the plain wording of a statute as passed by the Legislature in order to reach what they each perceive to be "the right" result in this case based upon general statements of public policy. That would be inappropriate because– as this Court has stated on several occasions– the Texas Legislature is entitled to have its statutes enforced as passed and signed by the Governor:

> 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).

This Court has recently recognized that a child custody case presenting "hard facts" is no reason for this Court to engage in applying "bad law."

> The members of this Court recognize the significance of this proceeding to the lives of the children involved—anyone would. But as noted above, it is the Legislature, not the judiciary, that has enacted the Family Code and given the Department the right to intrude into family relationships. And it is the Legislature that has placed limits and restrictions on how the Department can conduct its intrusions. As appellate judges, we cannot ignore or misconstrue statutory language on the basis that in a particular case we as individuals might disagree with the outcome dictated by the policy choices made and embodied in legislation. *See McIntyre*, 109 S.W.3d at 748; *RepublicBank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607 (Tex.1985) (noting that courts must be willing to take statutes as they find them, giving true and fair effect to all provisions of the statutes).

In re Department of Family and Protective Services, 273 S.W.3d 637, 648 (Tex. 2009).

Those words apply to this original proceeding every bit as much as they did the DPS case in which they were first stated by this Court.

On a closing note, the Court may notice that the arguments contained in this reply brief on the merits are addressed to matters asserted in the amicus brief filed by Solicitor General, and not the brief filed by the Real Party in Interest. Lee would point out to the Court that she anticipated each of the arguments raised in the Real Party in Interest's brief on the merits and addressed each of them in her opening brief to this Court. Therefore,

repetition of those arguments in this brief would serve no useful purpose.

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,

LAW OFFICES OF SCOTT ROTHENBERG

/s/ Scott Rothenberg

SCOTT ROTHENBERG
State Bar No. 17316750
2777 Allen Parkway, Suite 1000
Houston, Texas 77019-2165
(713) 667-5300 - telephone
(713) 667-0052 - telecopier
Email: scott@rothenberglaw.com
APPELLATE COUNSEL FOR RELATOR, STEPHANIE LEE

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Relator's reply brief on the merits was served via e-service on December 21, 2011, to the following:

Counsel for Real Party in Interest, Benjamin Jay Redus:
Mr. Clinton F. Lawson
Law Offices of Clinton F. Lawson
755 E. Mulberry, Suite 200
San Antonio, Texas 78212
(210) 244-2703 telecopier
email clintonlawson@gmail.com

Counsel for State of Texas:
Mr. Rande Herrell
Office of the Texas Attorney General
Post Office Box 12017
MC 038-1
Austin, Texas 78711-2017
(512) 460-6612 telecopier
rande.herrell@cs.oag.state.tx.us

Solicitor General of the State of Texas
Mr. Jonathan F. Mitchell, Solicitor General
Office of the Attorney General
P.O. Box 12458 (MC-059)
Austin, Texas 78711-2548
(512) 936-0596 telephone
(512) 474-2697 telecopier
jonathan.mitchell@oag.state.tx.us

Trial Court Judge (Respondent):
Honorable Judge Sheri Y. Dean
309th Judicial District Court
Harris County Courthouse
1115 Congress, 7th Floor
Houston, Texas 77002
sheri_dean@justex.net

/s/ Scott Rothenberg
SCOTT ROTHENBERG