Case No. 11-0732

In the Supreme Court of Texas

Austin, Texas

In re: Stephanie Lee
Relator

RESPONSE TO PETITION FOR WRIT OF MANDAMUS

***

From the 309th Judicial District Court
Harris County, Texas
Trial Court No. 2005-41798;
Honorable Sherry Y. Dean, Judge Presiding

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CLINTON F. LAWSON
State Bar No. 00794146
755 E. Mulberry, Suite 200
San Antonio, Texas 78212
Telephone: (210) 244-2701
Telecopier: (210) 244-2703

ATTORNEY FOR 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"), files this response to Relator's petition for writ of mandamus. Mr. Redus asks this court to deny the request of Relator, Stephanie Lee (hereinafter "Lee") to issue a writ of mandamus to Judge Sherri Y. Dean, Presiding Judge of the 309th Judicial District Court of and for Harris County, Texas, denying her request to enter judgment based upon a mediated settlement agreement. In addition, Relator's request to vacate the trial setting has been resolved as Judge Sherry Y. Dean has reset this setting until January 30, 2012.

In support of this request, Real Party in Interest, Benjamin Jay 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 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 309th 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 her 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 may deny entry of judgment on a mediated settlement agreement where the agreement does not meet the requirements of a binding mediated settlement agreement and/or where the agreement is not in the child's best interest.

    A. The trial court has discretion to deny judgment of a mediated settlement agreement that does not meet the Texas Family Code 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 subject 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. The best interest of the child shall always be the primary consideration of the court and the entry of judgment on a mediated settlement agreement is not a ministerial act.

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 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.

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, of 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.

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. Applying this reasoning, the statutory language "notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law" deprives the trial court of the 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.3rd 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 [1st 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 [14th 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 five 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 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); *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). Relator's reasoning is flawed in that none of the foregoing cases 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, 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 [14th 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,

Law Offices of Clinton F. Lawson
755 E. Mulberry, Suite 200
San Antonio, Texas 78212
210.244.2701 Telephone
210.244.2703 Facsimile

By: /s/ Clinton F. Lawson
Clinton F. Lawson
Attorney for Real Party in Interest
State Bar No. 00794146

CERTIFICATE OF SERVICE

I, CLINTON F. LAWSON, hereby certify that a true and correct copy of the foregoing Response to Petition for Writ of Mandamus was served via facsimile and/or U.S. Mail, and/or certified mail, return receipt requested, and/or via hand delivery on September 18, 2011, to the following:

Trial Counsel for Relator, Stephanie Lee:
Ms. Marcela Halmagean
1800 Bering Drive, Suite 480
Houston, Texas 77057
(713) 975-1085 facsimile
marcela@halmagean.com email

Appellate Counsel for Relator, Stephanie Lee:
Mr. Scott Rothenberg
Law Offices of Scott Rothenberg
2777 Allen Parkway, Suite 1000
Houston, Texas 77019-2165
(713)667-5300 telephone (713) 975-1085 facsimile
scott@texascivilappeals.com email

Counsel for the Office of the Attorney General for the State of Texas:
Mr. John Anthony Ramirez
Assistant Attorney General
Office of the Attorney General for the State of Texas
12605 E. Freeway, Suite 300
Houston, Texas 77015
(713) 451-4694 telephone (713) 451-4694 facsimile
john.ramirez@cs.oag.state.tx.us email

Counsel for the Office of the Attorney General for the State of Texas
Mr. Rande Herrell
Assistant Attorney General
Office of the Attorney General for the State of Texas
Post Office Box 12017
MC 038-1
Austin, Texas 78711-2017
(512) 460-6445 telephone, (512) 460-6612 facsimile
rande.herrell@cs.oag.state.tx.us email

Trial Court Judge(Respondent):
Honorable Sherry Y. Dean
Family Law Center
1115 Congress Ave., 7th Floor
Houston, Texas 77002
sherri_dean@justex.net email

/s/ Clinton F. Lawson
CLINTON F. LAWSON