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Supreme Court of Texas.
In re Stephanie Lee, Relator.
No. 11-0732.

February 28, 2012.

Appearances:

Scott Rothenberg, Law Offices of Scott Rothenberg, Houston, TX, for the relator.

Clinton F. Lawson, The Law Offices of Clinton F. Lawson, San Antonio, TX, for the Real Party in Interest.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in the final case. It's 11-0732 In re Stephanie Lee.

MARSHAL: May it please the Court, Mr. Rothenberg will present argument for the Relator. Relator has reserved five minutes for rebuttal.

ORAL ARGUMENT OF SCOTT ROTHENBERG ON BEHALF OF THE PETITIONER

ATTORNEY SCOTT ROTHENBERG: May it please the Court, the question presented by this original proceeding is whether a trial court has discretion to refuse to grant judgment on a mediated settlement agreement in the absence of any evidence of family violence, which caused one or the other of the parties to that agreement to enter into the agreement when otherwise he or she would not have.

JUSTICE DAVID M. MEDINA: That sounds too simplistic. So you're asking that the trial judge not look into the order just when it looks like one of the parties is a sex offender?

ATTORNEY SCOTT ROTHENBERG: I'm not asking that at all, Your Honor. I think the Legislature is asking that in the statute and that's why I was going to go into the provisions of this statute if the Court, before we get to the portion that applies to this case, let's look at the portion that doesn't apply. It has to do with arbitrations. It's right above the section that applies to this case in Section 153.0071. There, the Legislature instructed that parties enter into binding mediations, I'm sorry, binding arbitrations in family law cases. The trial court shall enter judgment on the arbitrator's order unless the trial court determines that that arbitrator's order is not in the best interest of the child. The Legislature, not Scott Rothenberg, determined that in the case of binding arbitration,

we need the family courts to supervise and oversee when a stranger to the family of the child that's in question makes binding decisions about that child and that child's best interest. The Legislature, not Scott Rothenberg, gave the family courts of this state the authorization, not only the authorization, but the duty to determine whether that arbitration agreement is in the best interest of the child. Now we turn to mediated settlement agreements. The reason I started with arbitration is because the language that the Legislature chose for arbitration orders is very different than the language that the Legislature chose for mediated settlement agreements. As to mediated settlement agreements, the Legislature said that a party to a mediated settlement agreement in a family law case shall be entitled to judgment on that mediated settlement agreement unless, and here are the three clauses, (1) that there was family violence, (2) that that family violence caused that party to enter into the agreement when otherwise they would not have and, and that's the most important word today, and (3) that the agreement is not in the best interest of the child.

CHIEF JUSTICE WALLACE B. JEFFERSON: So you think the Legislature then said it is permissible for a mediated settlement agreement to be not in the best interest of the child because of neglect, for example, and the trial court has no discretion to disturb an agreement that is clearly not in the child's best interest, that's fine.

ATTORNEY SCOTT ROTHENBERG: It is and I think the answer to why that's fine even though as a, in my capacity as a parent, I'm disturbed by that. As an advocate in the system of civil justice, I'm not. The judgment is not the be-all and end-all of protecting and taking care of a child. As Your Honor knows, there are criminal statutes in terms of what happens if a child suffers or is threatened with potential abuse. We have Children's Protective Services. We have emergency orders for the child court. There are a number of different remedies that can come in after a mediated settlement agreement is turned into the judgment if it turns out that, in fact, that-

CHIEF JUSTICE WALLACE B. JEFFERSON: Yeah, if the child survives during that time. I mean, we're talking about sending a child to somebody who is on record, the hypothetical is neglecting the child either nutrition or otherwise, leaving the child home alone and even if it's for one day. The rest of the family code says the court s are supposed to be guided by what's in the best interest of the child. It seems to me that that best interest determination that overrides that oversees the whole family code conflicts with the provision that says the child's best interest doesn't matter in some circumstances.

JUSTICE DEBRA H. LEHRMANN: May I ask something?

CHIEF JUSTICE WALLACE B. JEFFERSON: I would like an answer to that question first, please.

ATTORNEY SCOTT ROTHENBERG: I think the answer is if the Court is concerned about that as I am, we ought to be the first 10 people online when the Legislature opens for bill filing for the next session and suggest to the Legislature that maybe this isn't the best idea, but in our system of government, if the Legislature as a matter of public policy says mediated settlement agreements are so important to this system and getting these cases out of the pipeline is so important and they said this in the Civil Practices and Remedies Code I believe it's Chapter 154.002 that we have to weigh and balance the safety of this child and the potential of risks to this child giving mind to the fact that there are other remedies to protect this child versus getting a huge number of these cases out of the system early-

JUSTICE DAVID M. MEDINA: What's the other remedy to protect the child here?

ATTORNEY SCOTT ROTHENBERG: On the threat or risk or fear of any sort of injury that's credible, Children's Protective Services can be called. An emergency order from the family court can be requested. The police can be called.

JUSTICE DAVID M. MEDINA: So in this instance, Judge, I think it was Judge Dean didn't have any discretion to make that determination in the first instance?

ATTORNEY SCOTT ROTHENBERG: I have never been one to tell judges what they can and cannot do. I'm simply here as an advocate in the system-

JUSTICE DAVID M. MEDINA: Well as you read the statute, I mean that's what your interpretation is.

ATTORNEY SCOTT ROTHENBERG: It's not an interpretation. It's the plain word of the statute. The Legislature said shall be entitled. Shall be entitled, I don't think there's any room for disagreement about what that means.

JUSTICE DAVID M. MEDINA: Oh sure there is. Case law is full with sometimes shall means shall. Sometimes it shall not mean shall.

ATTORNEY SCOTT ROTHENBERG: Okay. Well then that brings us to the next question of whether under this particular circumstance, the agreement in question results in an absurd result. Is it absurd to allow a parent to have visitation with a child under a situation where that parent and a registered sex offender have both agreed under threat of jail for contempt of court that the registered sex offender will not be allowed within five miles of that child any time that that parent has visitation with the child.

JUSTICE NATHAN L. HECHT: And there is one additional fact, has violated that requirement at least once.

ATTORNEY SCOTT ROTHENBERG: Has not violated that, with all due respect, Justice Hecht, has not violated that requirement because that requirement was not in place at the time of the contact between the minor and that adult pre the mediation agreement.

JUSTICE NATHAN L. HECHT: It wasn't a violation of his probation?

ATTORNEY SCOTT ROTHENBERG: If it were credible and if there were evidence of it, then yes, but I want to be clear. The child did not testify that this occurred. Benjamin, the father, did not testify that he was present when this occurred. The father was testifying with no evidentiary basis, did not say I was told by so and so. I saw it for myself. He just blurted it out during the hearing and so I think that the Court has to discount the evidentiary value of that because there was no indication that he had any foundation to be able to make the statement that he made unless he was standing in the bedroom at the time of the alleged incident.

JUSTICE EVA M. GUZMAN: But-

JUSTICE DALE WAINWRIGHT: If-

JUSTICE EVA M. GUZMAN: Sorry, go ahead.

JUSTICE DALE WAINWRIGHT: Thank you. If, to take the Chief's hypothetical another step further, take it to the extreme. Under a mediated settlement agreement, a child is being placed in a home where the last seven children have been injured or attacked or killed and there's no history of family violence. Must the trial court enforce that mediated settlement agreement? I'm hypothesizing something that is clearly against the child's best interest to see how far your argument actually goes, how far you'll stay with it.

ATTORNEY SCOTT ROTHENBERG: My answer would be yes, but if I were a trial court judge in my continuing supervisory capacity over the case, I might consider some additional conditions that might serve to protect the child.

JUSTICE DALE WAINWRIGHT: Which are not required in the statute.

ATTORNEY SCOTT ROTHENBERG: Which are not required.

JUSTICE DALE WAINWRIGHT: Saying placement under that mediated settlement agreement in that house is.

ATTORNEY SCOTT ROTHENBERG: Right, what I'm talking about-

JUSTICE DALE WAINWRIGHT: Because of statutory language.

ATTORNEY SCOTT ROTHENBERG: What I'm talking about is the statute goes to the time, conduct going up to the time of the mediated settlement conference, and then locks in the parent as to what it is that parent agreed to at the mediated settlement conference through the time of the judgment. That does not take into account any conduct that might occur from the point of judgment after or from the time of the mediated settlement conference after. If the judge in the judge's continuing supervisory capacity determines that there's reason to have cause for concern, a judge always has continuing jurisdiction to take other steps to try to ensure the benefit and protection of the child.

JUSTICE EVA M. GUZMAN: On proper motion, most family law judges have thousands of cases on their docket and they're not necessarily going to know that they need to take additional action, but I want to ask you a question about this concept of absurd results. Does removing the trial court's discretion have the potential to lead to absurd results? I remember at least a couple of cases where both parents were involved in sexual contact with their own child. Now I can envision where those parents would enter into a mediated settlement agreement and if the trial court has no discretion to look into that, doesn't that lead to absurd results in that case and in similar cases?

ATTORNEY SCOTT ROTHENBERG: I think that if we were solely talking about the entry of the judgment, yes, but because that trial court judge has the capacity knowing that that information is present or the potential is present at the time the judgment is entered, can enter additional orders to serve to protect the children.

JUSTICE EVA M. GUZMAN: But what you're saying is the judge shouldn't even ask the best interest question because the judge has no discretion to do anything other than enter a judgment that complies with the agreed-to terms in the mediated settlement agreement. And I guess I'm trying to get you to this point that can lead to absurd results because it would not be uncovered that both of these parents were sleeping with their daughter.

ATTORNEY SCOTT ROTHENBERG: But that is taking this one case in isolation. What I'm suggesting is we've got to look at this the way the Legislature looks at it in terms of balancing the public policy in creating the interest to go through mediated settlements to get these cases out of the system early versus protecting the children. Would I necessarily have balanced that point as the father of four children where the Legislature did? No.

JUSTICE EVA M. GUZMAN: But we have to construe the statute to avoid absurd results and what you're suggesting completely removing the trial court's discretion to look into best interest can lead to absurd results in many, many circumstances, yes or no?

ATTORNEY SCOTT ROTHENBERG: Yes, but not doing it will also lead to absurd results and this is why. The whole point of mediation and the whole reason it's successful in pulling cases out of the system and protecting families is in order to get parties in a situation where they are comfortable, where they can talk without fear of losing confidentiality, where they can disclose matters that occur during the mediation without worrying about them being used later on.

JUSTICE DEBRA H. LEHRMANN: Well isn't there also a recognition by the Legislature that the process of litigation with regard to children and families is harmful to the child?

ATTORNEY SCOTT ROTHENBERG: Absolutely and-

JUSTICE DEBRA H. LEHRMANN: And that if a child is in the process of this type of litigation, that in itself is not in the best interest of the child.

ATTORNEY SCOTT ROTHENBERG: Correct and, in fact, that's embodied in Section 154 where the Legislature talks about the public policy of the state of doing this in order to protect families and to foster a healing so that the parties can go on with their lives.

JUSTICE DEBRA H. LEHRMANN: Exactly, so the policy reasons behind this are not necessarily to enhance the court's ability to run the docket. It's largely isn't it because of this same best interest issue that we are focusing on.

ATTORNEY SCOTT ROTHENBERG: Right, but what I was getting to just now is if we don't do this. If we were to say that in all instances, the trial court has the option and opportunity to reject a mediated settlement because it's not in the best interest, it is the likely situation that family lawyers will have to disclose to their clients, yes, you may go to mediation and, yes, they may lock the doors after 11 hours and lock the bathrooms and you may be tired, but ultimately you get an agreement that you and you former spouse think is in the best interest of the child. You sign this agreement. You're emotionally exhausted. You sleep for two days after that and suddenly one or the other of you decides, you know, I don't really think this is my child's best interest. I'm having buyer's remorse. I want to go back on this.

JUSTICE DON R. WILLETT: Mr. Rothenberg, can a mediated settlement agreement validly allow visitation or contact with somebody that the parties agree to, but that may be in violation of someone's condition of probation?

ATTORNEY SCOTT ROTHENBERG: No and this one does not. I want to be clear about that. The gentleman in question is no longer under the terms of his probation and it would not in this case.

JUSTICE DON R. WILLETT: So in a situation was, okay, assume this because you're arguing boil it down. There's complete autonomy. Parties to a mediated settlement agreement have complete unfettered autonomy assuming no family violence and the other conditions, but unfettered autonomy to agree to whatever they want to agree to, correct?

ATTORNEY SCOTT ROTHENBERG: Yes.

JUSTICE DON R. WILLETT: So if there were a situation where and again there's no evidence of family violence or the other kind of [inaudible] trapdoors or reasons to get out of the mediated settlement agreement, but if a mediated settlement agreement purported to allow contact with or interaction with somebody who was on probation and a condition of that probation was no contact with or interaction with children or this child specifically or something like that, that would not be something parties could agree to in a mediated settlement agreement.

ATTORNEY SCOTT ROTHENBERG: That would be the distinction between a buyer's remorse on one hand versus an illegal agreement on the other hand and I would never say that a court should sign an order based on illegality an agreement that's illegal.

JUSTICE DON R. WILLETT: Well legality is just sort of kind of presumed kind of in the background of the statute?

ATTORNEY SCOTT ROTHENBERG: Well no. Illegality is presumed in the very term mediated settlement agreement because the mediated settlement agreement is nothing more than a contract which is subject to con-

tractual terms and a contract not having--

JUSTICE DON R. WILLETT: Contracts could be void for public policy.

ATTORNEY SCOTT ROTHENBERG: Right, but the public policy of the state is stated in two different ways. One, we want these cases mediated. Two, we want to protect children and the weighing and balancing that goes on is something that the Legislature, I'm certain, agonized over, but it's something that if there's any second-guessing to be done, I would hope it would be done over the bill filing for next session.

JUSTICE DON R. WILLETT: But to be clear, a mediated settlement agreement you're saying implicit in the word mediated is the parties can't agree to something that would be otherwise a violation of a court order or some other law?

ATTORNEY SCOTT ROTHENBERG: No, I'm saying you cannot, it can't be illegal and it cannot be fraudulent and that's implicit in the nature of it being an agreement which has to meet the other terms of the contract.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any other questions? Thank you, Counsel. The Court is ready to hear argument from the Real Party in Interest.

MARSHAL: May it please the Court, Mr. Lawson will present argument for the Real Party in Interest.

ORAL ARGUMENT OF CLINTON F. LAWSON ON BEHALF OF THE RESPONDENT

ATTORNEY CLINTON F. LAWSON: Good morning. My name is Clint Lawson. I represent Benjamin Redus, the Real Party in Interest in this case. As you've heard, the issue today is whether Judge Sheri Dean clearly abused her discretion at the trial court level in refusing to enter a mediated settlement agreement that was not in the child's best interest. The test for a clear abuse of discretion is whether the trial court acted without reference to any guiding principles or rules, whether the act was arbitrary or unreasonable. In this instance, it was not. What is clear is that Sheri Dean acted to safeguard the environment of the child.

JUSTICE PHIL JOHNSON: Is it an abuse of discretion to disregard a statute or to rule in contravention of a statute?

ATTORNEY CLINTON F. LAWSON: Well it may be, but it has to be a clear abuse of discretion.

JUSTICE PHIL JOHNSON: Well is it not a clear abuse of discretion then if a statute is clear and unambiguous and a trial court rules in contravention to that statute, is there any time that that would not be a clear abuse of discretion for a trial court?

ATTORNEY CLINTON F. LAWSON: I'm not sure if it would ever if the situation ever would be, but in this situation, the statutes are in conflict. So to answer your question-

JUSTICE PHIL JOHNSON: Well one of them has to prevail at some point. One of them has to prevail.

ATTORNEY CLINTON F. LAWSON: I believe there is a statutory interpretation that can reconcile the statutes where this situation is not a clear abuse of discretion.

JUSTICE DEBRA H. LEHRMANN: Can I ask you please, if you were to prevail, wouldn't that prevent people from going to mediation because if you're going to have at the motion to enter a judgment, a hearing basically on best interest, which is a major issue. That's not an easy thing to decide. That takes a lot of evidence to figure out what's in the best interest of a child and the purpose of mediation being to keep that from happening so that the child doesn't get put in the middle of that litigation, that fight, wouldn't if you prevail that just be under-

mined?

ATTORNEY CLINTON F. LAWSON: I believe that under limited circumstances, the court would have discretion to reject the entry of an agreement that places a child in danger.

JUSTICE DEBRA H. LEHRMANN: Okay and that's what I'm trying to get at. What would those limited situations be and how do you suggest that we would be able to construe that by reading the statute?

ATTORNEY CLINTON F. LAWSON: Well, the strong public policy statements in Chapter 153, as a whole, cannot be read and overcome by the isolated provisions set forth in Family Code Section 153.0071, which are more isolated and generalized concerning the entry of a judgment.

JUSTICE NATHAN L. HECHT: But the question is, when. Assuming you're right, when? What if the testimony is, I'm afraid there might be sexual harassment? What if the testimony is well, I'm not even afraid, but I just know he's a no-good person and I just think inevitably there probably will be? In the great spectrum of evidence that you're going to get on what's the best interest.

ATTORNEY CLINTON F. LAWSON: Your Honor, in this circumstance, there are two facts that are relevant that are undisputed. The first is that the mother of the child knowingly placed the child in the presence of a registered sex offender and, two, that at least on one occasion, the sex offender slept naked with the child.

JUSTICE PHIL JOHNSON: Well he said, Opposing Counsel says that's hearsay. He said that that testimony is incompetent.

ATTORNEY CLINTON F. LAWSON: Well, Your Honor, I believe that that's in the record. There was no objection and I believe it's an undisputed fact at the trial court level.

JUSTICE PHIL JOHNSON: That somebody actually saw that happen or the husband said that it happened?

ATTORNEY CLINTON F. LAWSON: There was no cross examination of the father at the trial court level on that issue so I can't answer your question.

JUSTICE NATHAN L. HECHT: What short of those circumstances would be enough to set aside the agreement?

ATTORNEY CLINTON F. LAWSON: Well, certainly, evidence of danger would be sufficient to set aside an agreement and I believe a trial court judge would be granted the discretion to make that determination as they would be if it was an illegal agreement.

JUSTICE DAVID M. MEDINA: Where do you read that in the statute, that the trial judge has discretion? Where is that in the statute?

ATTORNEY CLINTON F. LAWSON: Well, it's essentially the public policy of the State of Texas in the 153.001, which sets forth the, it's the public policy of the State of Texas to provide for the safe, stable and nonviolent environment of the child.

JUSTICE EVA M. GUZMAN: 153.002 says that the best interest of the child shall always be the primary con sideration of the court in determining the issues of conservatorship and possession and access. When the court enters that judgment, is it making a determination when it enters that mediated settlement agreement?

ATTORNEY CLINTON F. LAWSON: Yes, it is, Your Honor, and the fact is that 153.002 (a) (2), it simply furthers the trial court's role in the public policy stated in 153.001.

JUSTICE EVA M. GUZMAN: So I guess because when you're granting a divorce, you have to make certain findings that the terms are in the best interest of the children. Is a trial court making the same determinations when it enters a judgment that incorporates a mediated settlement agreement and if it is, it seems that 153.002 would have paramount relevance.

ATTORNEY CLINTON F. LAWSON: Well, yes, Your Honor, you're correct. However, if you wanted to apply the rules of statutory construction-

JUSTICE EVA M. GUZMAN: Well I know the other one was later enacted, but I'm talking about the words in 153.002 determining.

ATTORNEY CLINTON F. LAWSON: Well, Your Honor, I believe that that might be, well it would be determinative due to the fact that it is more specific than simply the best interest provision in 153.0071.

JUSTICE DON R. WILLETT: Do we not give any interpretative weight at all to the fact that lawmakers specifically included a best-interest exception in the arbitration provision, but for whatever reason chose not to in the mediated settlement agreement provision. Are you saying the best interest language is just sort of superfluous and redundant there because you've got the overall kind of generic backdrop of best interest? Was it not necessary to put it in the arbitration provision or why would it be there, but not here? How do we sort of untangle that and what merits interpretative weight as we kind of sort through all that?

ATTORNEY CLINTON F. LAWSON: Your Honor, I believe that the Legislature is certainly diligent in their attempt to draft 153.0071, yet that isolated provision in 0071 is a more generalized provision and it's more isolated in its application and if you apply to that provision over 153.001 and 153.002, you would essentially have a partial revocation of 153.001 and 153.002. I'm not sure what the intentions of the Legislature were, but I do believe that a safety exception under public policy concerns would be appropriate.

JUSTICE DAVID M. MEDINA: Let me ask you this.

JUSTICE PAUL W. GREEN: One of them is obviously, you've got an agreement you're dealing with a mediated settlement agreement and arbitration, of course, is not an agreement. It's imposed, but with respect to the fact that there is an agreement between the parties, it seems to me that one way to look at this is the statute provides a way of setting aside the agreement if those three factors are laid out, but also there are other ways of setting aside agreements as suggested by your other counsel here. If to enforce the agreement is to enforce an illegal act as we did enforce illegal conduct, but in doing so, wouldn't the trial court in setting aside the mediated settlement agreement be required some how, to set out the reasons for avoiding the agreement rather than just simply say well, I'm not going to enforce it because I don't think it's in the best interest of the child just generally speaking. Wouldn't there have to be, under the statute, wouldn't there have to be some articulation of the reasons for avoiding the agreement?

ATTORNEY CLINTON F. LAWSON: Under the statute, I don't believe there's a requirement to do that at this time. Certainly, if this were a final trial, findings of fact could be requested, but this is a mandamus proceeding.

JUSTICE PAUL W. GREEN: Right. I'm, the enforceability, what the trial court did in this instance, refused to enforce the agreement, but just separate from the court's own perspective just didn't think it was in the best interest of the child.

ATTORNEY CLINTON F. LAWSON: Right.

JUSTICE PAUL W. GREEN: And in the face of this statute, it just seems to me that if you're going to ignore that statutory language and the agreement that you have to do more than that.

ATTORNEY CLINTON F. LAWSON: Well, that may be, but Opposing Counsel did not request any findings in that regard and I don't believe that the statute requires the court to make those findings absent a request. Now there are three-

JUSTICE PHIL JOHNSON: Counsel, let me ask a question. Opposing and you may want to respond, Opposing Counsel suggests that even if the trial court entered a judgment on this mediated settlement agreement, then the trial court still has discretion to impose conditions on the possession that the mother and her husband would have, that it could be supervised and, as I recall from having read through this, actually they were required to give the father, your client, notice of when and where the visitation was going to occur and so was the trial court limited in what it could do? Call CPS down right now. I want to enter this, but I want you to talk to these people and I want some supervision and the trial court have discretion to do those other things to protect this child.

ATTORNEY CLINTON F. LAWSON: In the case of Garcia Udall v. Udall, I believe that the Dallas Court of Appeals stated that a trial court has no authority to modify the terms of a mediated settlement agreement so that would certainly-

JUSTICE PHIL JOHNSON: Not to modify, but to supervise and to call CPS down and make arrangements and impose some additional requirements between the mother and her husband and the child for supervision.

ATTORNEY CLINTON F. LAWSON: Well I believe arguably that the imposition of additional safeguards would be a modification of the mediated settlement agreement and would be improper.

JUSTICE EVA M. GUZMAN: How does this necessity for additional safeguards come to the attention of the trial court in this context absent an inquiry into best interest?

ATTORNEY CLINTON F. LAWSON: It doesn't.

JUSTICE EVA M. GUZMAN: Otherwise stated what are the child's rights in this entire scenario when a child has two parents who agree to something that is not in that child's best interest?

ATTORNEY CLINTON F. LAWSON: Certainly, the public policy of the State of Texas in 153.001 through .002 since 1935, trial courts have been empowered to protect the best interest of the children. The global impact of 153.001 and 002 throughout the chapter provides that the trial courts have that power to be the gatekeeper of the safety of children.

JUSTICE EVA M. GUZMAN: Okay and-

CHIEF JUSTICE WALLACE B. JEFFERSON: Well that's right, but there are, there are experts, family law experts that have written to the court and as the friend and say essentially what your Opposing Counsel said that there are interests here that have to be protected in order for the system to be efficient, for people to want to engage in mediation and get some of these thousands of cases off the court's docket and you have a specialty in family law as well?

ATTORNEY CLINTON F. LAWSON: Yes, sir.

CHIEF JUSTICE WALLACE B. JEFFERSON: Or do you practice that? How do you respond to your colleagues on that point?

ATTORNEY CLINTON F. LAWSON: Your Honor, I'm board certified in family law. I've been practicing for 16 years and the practical reality is that a mediated settlement agreement that has circumstances whereby the

parents entered into an ill-advised or a mistaken mediated settlement agreement are few and seldom. This is the first time in 16 years that I've come across the unique facts of this case. The argument of the family law counsel and Opposing Counsel in referencing thousands of cases that this will impact, I believe is incorrect. I believe the limited facts of a safety-related or dangerous mediated settlement agreement are just that, very limited.

JUSTICE DAVID M. MEDINA: So are they only limited to children? What would your answer be if it just involved property and no children were involved? Can a mediated settlement agreement be torn apart then? I know that's not your case, but-

ATTORNEY CLINTON F. LAWSON: Your Honor, I can't see a circumstance where an issue regarding property would be-

JUSTICE DAVID M. MEDINA: Well, Opposing Counsel said that it just falls under standard contract law. There are always defenses to a contract.

ATTORNEY CLINTON F. LAWSON: Well the provisions in 153.0071 are not exclusive. They are subject to contact provisions, fraud, duress, coercion, illegality and based upon my interpretation, the public policy of the safety of the child, placing the child in a dangerous situation.
JUSTICE PAUL W. GREEN: Let me ask you this. The statute says that a mediated settlement agreement is they're entitled to entry of that order notwithstanding any other law. What do you think that the Legislature meant by any other law?

ATTORNEY CLINTON F. LAWSON: Your Honor, that's an excellent question. It appears from the reading of the statute that it limits the court to the provisions contained in 153.0072,71. However, that would be in conflict with the provisions for illegality, fraud, duress and coercion.

JUSTICE PAUL W. GREEN: Well they had to been thinking of something.

ATTORNEY CLINTON F. LAWSON: Yes, sir. I agree. I'm not sure what that is.

JUSTICE PAUL W. GREEN: Well it seems to me that the only thing it could apply to would be since they are talking about it, is the best interest requirement.

ATTORNEY CLINTON F. LAWSON: Well, Your Honor, I think that's a reasonable interpretation. However, if you wanted to analyze a more specific and directive provision, 153.001(a)(2) specifically speaks to the public policy to provide children with a safe, stable and nonviolent environment. This Court in Holly v. Adams has provided a long list of considerations used in determining a child's best interest, including one of the factors, which we do in this case is the danger to the child now and in the future, which clearly is a safety-related issue, which clearly makes 153.001(a)(2) a much more specific public policy statement than the best interest, the more isolated, but yet generalized best interest provision in 153.0071.

JUSTICE EVA M. GUZMAN: So in adopting your rule and in trying to provide trial courts with guidance on what type of inquiry they should conduct at a mediated settlement agreement hearing, how deep into the Holly factor should a court inquire in order to make a best interest determination because that's the subject of 7-week trials. So how would you instruct a trial court to proceed in these circumstances?

ATTORNEY CLINTON F. LAWSON: Well, Your Honor, I believe they would under my analysis, an interpretation to reconcile the three statutes, I believe the court would be limited to the safe, stable and nonviolent environment of the child.

JUSTICE PHIL JOHNSON: Would that be whether a motion was made to revoke or withdraw the agreement on behalf of one party? Does the trial court would have an independent duty to examine every one of these or

how does the trial court as Justice Guzman alluded to a moment ago, how would the trial court find about this is or do they have to inquire sua sponte?

ATTORNEY CLINTON F. LAWSON: Well I believe that Justice Guzman was correct when she stated that trial court judges have thousands of cases and I think that it would be incumbent on the attorneys to file an appropriate motion. Otherwise, I don't believe that the courts have the resources to conduct this kind of an inquiry in every single case.

JUSTICE EVA M. GUZMAN: But that doesn't address the real issue that I have with this and that's two parents and their counsel who act in a concerted effort against a child's best interest. They're never going to bring it up to the court so if we're going to say that a court has discretion to make a best-interest inquiry, I guess I'm trying to get to how broad should that inquiry be and how many Holly factors should the court consider. You have to assume that the parties aren't interested in protecting the child.

ATTORNEY CLINTON F. LAWSON: Well, certainly, today there is no duty for the court to conduct a best-interest analysis of a mediated agreement, I don't believe, not compelled to although they're authorized to. Well, excuse me, they are compelled to under 153.0071. As I stated before, the safe, stable and nonviolent environment would the consideration and-

JUSTICE DEBRA H. LEHRMANN: And you said a minute ago that this is the exception. That this would be the exceptional case.

ATTORNEY CLINTON F. LAWSON: Yes.

JUSTICE DEBRA H. LEHRMANN: And it sounds to me like the test that you're setting forth right now would not be exceptional, that that would be in every case because safety is certainly a very large component of best interest.

ATTORNEY CLINTON F. LAWSON: Well, I certainly think that safety is a large component of best interest, but yet I think that the application in revoking a mediated agreement would seldom occur. It's counterintuitive that parents act, one parent would act in an unsafe manner to their child. It's something that generally doesn't occur in the population. It does occur periodically, but I don't believe that it occurs as frequently as opposing counsel would represent.

JUSTICE DON R. WILLETT: Looking back, do you think lawmakers just made a drafting error with .0071 by using and instead of or?

ATTORNEY CLINTON F. LAWSON: I do.

JUSTICE DON R. WILLETT: And if you believe that, if you believe that they just messed up, what kind of recourse does that give us? Do we just simply alert the Legislature to the error and exhort or invite them to fix it when they reconvene in a few months or do we follow the words they used, however inadvertent they might have been?

ATTORNEY CLINTON F. LAWSON: Your Honor, I see my time is coming to a close.

CHIEF JUSTICE WALLACE B. JEFFERSON: You may answer that, please.

ATTORNEY CLINTON F. LAWSON: Thank you. I believe the proper approach presently is to provide an exception for the placing child in danger, I believe that there was a drafting error of the legislation. The reality is that if the relief that my client is requesting is not granted, we still have a mediated agreement that places a child in danger. Certainly, Judge Dean and any other Harris County family law judge under similar circumstances

would likely make the same ruling that she made.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counsel.

JUSTICE PHIL JOHNSON: One other question. Did you attend the mediated settlement conference?

ATTORNEY CLINTON F. LAWSON: I did, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court will hear rebuttal.

REBUTTAL ARGUMENT OF SCOTT ROTHENBERG ON BEHALF OF PETITIONER

ATTORNEY SCOTT ROTHENBERG: May it please the Court. It seems as though what we've been focusing on is fixing a situation after a mediated settlement agreement is entered when we have a concern that their parties may not be acting in the best interest of the child. I would suggest that there's a much better remedy which preserves the ability of the thousands of typical cases to go through mediated settlements and get those judgments entered and that would be inserting an attorney early in the case if the court has any concern or belief based upon the facts of the case that there's reason to believe that both parents won't act in the best interest of the child whether by criminal background or evidence or otherwise and before the mediation is scheduled or allowed to go forward, the court appoints and forgive me for not knowing the correct term, an attorney ad litem or guardian ad litem, someone in addition to the parents, because there's a potential conflict between the child and the parents to participate in that mediation and to look out for the children's best interest and not to allow the mediated settlement agreement to be entered unless that person is confident and comfortable that the parties, the parents are, in fact, acting in the best interest of the child.

JUSTICE EVA M. GUZMAN: And that also, conversely, certainly gives the trial court more comfort in the scope of its best interest inquiry. There's an ad litem so that gives more comfort, but that's not always the case, but I guess my question to you is does the trial court determine best interest when it enters a mediated settlement agreement in according with 153.002.

ATTORNEY SCOTT ROTHENBERG: If the Legislature amends 153.0071, then yes. Otherwise, I believe no.

JUSTICE EVA M. GUZMAN: It says the child's best interest shall always be the primary consideration in determining possession and access and conservatorship. Is there a determination made when the trial judge signs their name to that judgment?

ATTORNEY SCOTT ROTHENBERG: No because the legislature said specifically shall be entitled. It doesn't say the party may ask the court for or may petition for.

JUSTICE EVA M. GUZMAN: Don't all those decrees have language that say the court finds that the following orders are in the best interest of the children. I mean, first it says the parties agree. Then the court makes a finding in all of those orders that says it's in the best interest of the children so how does the court make that finding just based on what you agreed to in the mediated settlement agreement or how does it, what supports that finding?

ATTORNEY SCOTT ROTHENBERG: I think the Legislature's determination that the parents in the vast majority of the cases act in the best interests of their children, which is why the Legislature created the dichotomy between the arbitration cases with an arbitration award by someone who is not a parent versus the parent who enter into the mediated settlement agreement who are presumed by the Legislature to act in the children's best interest.

JUSTICE EVA M. GUZMAN: So going forward, should trial court's delete that finding from all of its orders

because certainly if the trial court is going to sign its name to it, I find that the following orders are in the children's best interest, there ought to be some kind of inquiry so should from now on after if we adopt your rule, do they have to delete that language?

ATTORNEY SCOTT ROTHENBERG: I think the Legislature has told the trial courts that if the parents both come to the court and in the mediated settlement agreement represent as they did in this case. It's actually written into the mediated settlement agreement that they both agree that this agreement is in the child's best interest, that that is prima facia evidence to support the trial court's finding of best interest.

JUSTICE EVA M. GUZMAN: The trial court cannot inquire any further into the basis for their agreement.

ATTORNEY SCOTT ROTHENBERG: Simply because the Legislature used the words shall be entitled. I believe that's correct. So by inserting an attorney to represent the children's interests before the mediation, we take care of all of the problems here. We make sure the children's interests are protected. We get the benefit in the thousands and thousands of cases where these agreements aren't sought to be abrogated, of getting those cases through the system quickly, efficiently and without, with minimal harm to the children.

JUSTICE PAUL W. GREEN: But that usually doesn't come up does it, until the mediated settlement agreement is set to be entered and somebody challenges it? Nobody knows.

ATTORNEY SCOTT ROTHENBERG: I'm suggesting that in order to avoid the hundreds of hours potentially, we were talking about a 7-week trial on some of these best interest inquiries. In order to avoid that kind of burden on the system, there's no harm in a trial court before it enters an order sending a case to a mediated settlement conference and the same parents come on down. I want to spend 15, 20 minutes with you all and I want to ask you some questions about your backgrounds and about your involvement with the kids and if the court is confident that those parents based on those appearances, that the parents are acting in the children's best interest can allow those parents to continue going forward and acting solely on the kids' best interest themselves and if not, they insert a lawyer if they say ah-ha, something just doesn't seem right here. What's the harm? The minimal intrusion of an additional lawyer in a mediation for one day compared to weeks and months of further litigation in a case, it seems like a no-brainer.

CHIEF JUSTICE WALLACE B. JEFFERSON: It sounds like you're agreeing that best interest has to drive this determination whether it is before the mediated settlement agreement happens or after.

ATTORNEY SCOTT ROTHENBERG: No, Your Honor, as a lawyer who is looking at the legislation, I am telling this court with a straight face straight out, I believe that because of the way this statute is written, the Legislature intended that best interest not be a consideration except as between the parents. I'm suggesting that the nine members of this Court and myself be the first 10 people online at bill filing time and saying, Legislature, we want you to look at this because we're concerned about it, but as a parent, as Scott Rothenberg, the parent of a 12-year-old,. I'm saying I have no problem with the court asking another lawyer to come in and say, I want you to kind of look this over and eyeball these folks and make sure that these parents are-

CHIEF JUSTICE WALLACE B. JEFFERSON: So we would write an opinion that would require child courts to get the counsel of an ad litem before sending a case to mediated settlement agreement? Our opinion should do this?

ATTORNEY SCOTT ROTHENBERG: The Court could instruct through a suggestion in the opinion. The Court could order it as a mandatory step. I think trial courts are afforded a great deal of discretion and I think there's the opportunity to suggest to trial courts not only in this case-

CHIEF JUSTICE WALLACE B. JEFFERSON: So in this case, we'd send it back down to the trial court, order the trial court to get an ad litem to look at the child's best interest?

ATTORNEY SCOTT ROTHENBERG: No, Your Honor, because the statute is what the statute is. I believe it says what it says and I believe the Legislature intended exactly what it meant. The reason I think that is because this past session, there was an effort to change the statute. A bill was filed to amend it and it didn't pass. They had the opportunity if they wanted to.

CHIEF JUSTICE WALLACE B. JEFFERSON: Justice Lehrmann.

JUSTICE DEBRA H. LEHRMANN: I just have one question to follow up on the Chief and that is with regard to the necessity or our requiring appointment of an ad litem being an attorney, isn't it true that the social studies are often conducted in these cases and that would serve the same type to accomplish what you're talking about?

ATTORNEY SCOTT ROTHENBERG: Absolutely. I'm speaking generically about a child advocate and if I was using a term of art when I said attorney ad litem or guardian ad litem, I meant generally some, a responsible adult who's outside the parents in a case where the court has reasons to believe or reason for concern that they might not be acting in the children's best interest.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Mr. Rothenberg and Mr. Lawson. The cause is submitted and that concludes the arguments for this morning and the Marshall will now adjourn the Court.

MARSHAL: All rise. Oyez, oyez, oyez, The Honorable the Supreme Court of Texas now stands adjourned.

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