Petition for Writ of Mandamus Conditionally Granted and Majority, Concurring, and Dissenting Opinions filed February 27, 2018.

In The

Fourteenth Court of Appeals

NO. 14-17-00417-CV

IN RE GLADYS N. MINIX, Relator

ORIGINAL PROCEEDING
WRIT OF MANDAMUS
312th District Court
Harris County, Texas
Trial Court Cause No. 2015-65897

MAJORITY OPINION

In this original proceeding, we are asked to decide whether Section 153.0071 of the Texas Family Code permits the parties to a mediated settlement agreement in a suit affecting the parent-child relationship ("MSA") to agree to set aside the MSA. Here, there is evidence that the parties agreed to set aside the MSA. The trial court,

however, never ruled that the MSA was set aside. Subsequently, relator Gladys N. Minix moved to enter judgment on the MSA, and the trial court denied her motion.

Gladys brings this mandamus proceeding, asking this court to compel the Honorable David Farr, presiding judge of the 312th District Court of Harris County, to enter a judgment consistent with the terms of the MSA. *See* Tex. Gov't Code Ann. § 22.221 (West Supp. 2017); *see also* Tex. R. App. P. 52. We conclude that the plain language of section 153.0071 does not permit the parties to the MSA to consent to revoking it, and we conditionally grant the petition for writ of mandamus.

I. BACKGROUND

Gladys and real party in interest Michael Sterling Alexander have a three-year-old child. Michael filed an original petition in a suit affecting the parent-child relationship. After Michael filed his petition, he and Gladys and their respective attorneys signed an MSA and filed it with the trial court on December 1, 2015. Under the MSA, Gladys and Michael were joint managing conservators, and Michael's possession of the child was unsupervised and similar to a standard possession order. Michael was to pay $1,300 per month in child support. The parties did not request the trial court to enter judgment on the MSA at that time. The court was not asked to enter temporary orders.

In January 2016, Michael filed a motion to enforce the MSA, and subsequently filed first and second amended motions to enforce the MSA, alleging that Gladys had failed to comply with the MSA by denying Michael possession of

or access to the child. On March 28, 2016, Michael filed a motion to enter temporary orders consistent with the MSA.

On May 24, 2016, Gladys filed a motion for a temporary restraining order and an emergency motion to modify, requesting the trial court to (1) appoint her sole managing conservator; and (2) deny Michael possession of or access to the child. Gladys alleged that the child had welts across his back, and the child said Michael had hit him with a belt. On May 27, 2016, the trial court signed a temporary restraining order, prohibiting Michael from having possession of or access to the child and setting a date for a temporary orders hearing.

On June 7, 2016, Michael filed a petition to set aside the MSA and request for temporary orders, alleging that Gladys had failed to cooperate in obtaining a final order based on the MSA and Gladys had repeatedly violated the MSA. The parties' attorneys appeared before Judge Farr that same day and advised him that the parties had agreed to set aside the MSA. Gladys does not recall being at the June 7, 2016 hearing, and there is neither a record of the June 7, 2016 hearing nor a docket entry reflecting that the MSA was set aside. The parties never signed any document stating that they were setting aside the MSA.

The following day, on June 8, 2016, at a hearing on temporary orders before Associate Judge Eileen Gaffney, Gladys's attorney at that time, Stephanie Proffitt, advised Judge Gaffney that the parties had stipulated to set aside the MSA:

> MS. PROFFITT: I think yesterday when we were down here, it was stipulated on the record that the mediated settlement agreement that the parties entered into back in November or December is set aside.

THE COURT: Does that sound correct?

MR. PLACZEK: Yes, Your Honor.

THE COURT: And I think y'all did that in front of Judge Farr?

MR. PLACZEK: Yes, Your Honor.

At that hearing, the trial court entered "Band-Aid" temporary orders. On June 29, 2016, Gladys filed a motion to modify the Band-Aid orders based on newly discovered evidence, requesting that she be appointed sole managing conservator and Michael and his wife be denied possession of and access to the child.

On August 19, 2016, Judge Farr signed an agreed order for psychological examinations of Gladys and Michael to assist in his determination of which parent should have the exclusive right to determine the primary residence of the child. On November 22, 2016, Judge Farr signed agreed temporary orders, appointing Gladys and Michael temporary joint managing conservators and awarding Gladys the exclusive right to designate the primary residence of the child. The terms of the temporary orders were similar to those in the MSA, except that Michael's child support obligation was increased to $1,422.05 per month.

Gladys hired her current counsel on March 7, 2017, and counsel filed a motion for entry of judgment based on the MSA and also requested that all subsequent temporary orders, rule 11 agreements, and other court orders be vacated. On March 21, 2017, the trial court held a hearing on Gladys's motion for entry of judgment. At the hearing, Michael's counsel stipulated the MSA is valid and binding and

"under normal circumstances [Gladys] would have an absolute right to enforce it," but contended that the parties had agreed to set aside the MSA.

Gladys testified at the hearing that she initially believed that the MSA was a final settlement of all issues, but came to believe it was no longer a final agreement because "we continued to come to court and it was continued [sic] to be litigated." Gladys stated that she did not recall being in front of Judge Farr on June 7, 2016, but she remembered being in front of Judge Gaffney the next day. Gladys stated that she did not agree to set aside the MSA, nor did she recall Proffitt informing Judge Gaffney that the MSA had been set aside the previous day. Proffitt testified that Gladys was in court on June 7, 2016, and that Judge Farr set aside the MSA.[1]

The trial court took Gladys's motion for entry of judgment on the MSA under advisement and, on April 27, 2017, signed an order denying the motion. Gladys filed her petition for writ of mandamus, asking this court to (1) set aside the April 27, 2017 order denying her motion for judgment on the MSA; and (2) direct the trial court to render judgment consistent with the terms of the MSA.

II. MANDAMUS STANDARD OF REVIEW

Generally, to be entitled to mandamus relief, a relator must demonstrate (1) the trial court clearly abused its discretion; and (2) the relator has no adequate remedy by appeal. *In re Nat'l Lloyds Ins. Co.*, 507 S.W.3d 219, 226 (Tex. 2106)

[1] Proffitt testified on March 21, 2107, in part:

Q: On June 7th do you believe that Judge Farr had set aside the [MSA]?

A: That was his pronouncement from the bench.

(orig. proceeding) (per curiam). A trial court clearly 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 analyze the law correctly or apply the law correctly to the facts. *In re H.E.B. Grocery Co.*, 492 S.W.3d 300, 302 (Tex. 2016) (orig. proceeding) (per curiam); *In re Cerberus Capital Mgmt., L.P.*, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding) (per curiam). Mandamus relief is available when the trial court erroneously refuses to enter judgment on a MSA. *In re Lee*, 411 S.W.3d 445, 450 n.7 (Tex. 2013) (orig. proceeding).

III. ANALYSIS

A. The MSA meets the requirements of Section 153.0071(d).

Gladys's sole issue presented is whether the trial court abused its discretion and violated the Family Code by refusing to render judgment on the parties' MSA, which complied with the Code's requirements. An MSA is binding on the parties if it meets all the requirements of Section 153.0071(d) of the Texas Family Code. *See* Tex. Fam. Code Ann. § 153.0071(d) (West 2014). An MSA is binding if it (1) states in boldfaced type or capital letters or underlined letters 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. *Id.* If an MSA meets the requirements of section 153.0071(d), then a party is entitled to judgment on the MSA "notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law." *Id.* § 153.0071(e).

The MSA between Gladys and Michael provides that it is not subject to revocation:

AGREEMENT NOT SUBJECT TO REVOCATION

BY THEIR SIGNATURES BELOW, THE PARTIES HEREBY ACKNOWLEDGE THAT THE AGREEMENT REACHED IN THIS MEDIATION IS BINDING ON THE PARTIES AND IS NOT SUBJECT TO REVOCATION.

THIS AGREEMENT MEETS THE REQUIREMENTS OF SECTION 153.0071(d), TEXAS FAMILY CODE.

EACH PARTY UNDERSTANDS AND AGREES THAT THIS AGREEMENT IS NOT REVOCABLE AND THAT EACH INTENDS AND AGREES THAT EITHER PARTY SHALL BE ENTITLED TO JUDGMENT ON THIS AGREEMENT UNDER THE PROVISION OF THE LAW PURSUANT TO SECTIONS 153.0071 AND 6.602 TEXAS FAMILY CODE.

A PARTY TO THIS AGREEMENT IS ENTITLED TO JUDGMENT ON THE MEDIATED SETTLEMENT AGREEMENT.

The statement is in boldfaced type and capital letters and is underlined, and the parties and their attorneys signed the MSA. *See* Tex. Fam. Code Ann. § 153.0071(d). The MSA satisfies the requirements of section 153.0071(d) to constitute a binding MSA.

B. Section 153.0071 does not permit the parties to agree to set aside an MSA.

Michael contends that, even if an MSA complies with 153.0071, the parties, nonetheless, may agree to set aside the MSA. Resolution of this issue requires that we construe section 153.0071.

Questions of statutory construction are reviewed de novo. *Levinson Alcoser Assocs. v. El Pistolon II, Ltd.*, 513 S.W.3d 487, 493 (Tex. 2017). Our goal is to

determine and give effect to the Legislature's intent. *Pedernal Energy, LLC v. Bruington Eng'g, Ltd.*, No. 15-0123, — S.W.3d —, 2017 WL 1737920, at *4 (Tex. Apr. 28, 2017). "When statutory text is clear, we do not resort to rules of construction or extrinsic aids to construe the text because the truest measure of what the Legislature intended is what it enacted." *Melden & Hunt, Inc. v. E. Rio Hondo Water Supply Corp.*, 520 S.W.3d 887, 893 (Tex. 2017). Words in the statute are given their ordinary and plain meaning. *Marino v. Lenior*, 526 S.W.3d 403, 409 (Tex. 2017).

We construes statute so that no part is surplusage, but so that each word has meaning. *Pedernal Energy, LLC*, 2017 WL 1737920, at *4. There is a presumption that "the Legislature included each word in the statute for a purpose and that words not included were purposefully omitted." *ExxonMobil Pipeline Co. v. Coleman*, 512 S.W.3d 895, 899 (Tex. 2017) (per curiam) (internal quotations and citations omitted). "We also take statutes as we find them and refrain from rewriting text chosen by the Legislature." *Pedernal Energy, LLC*, 2017 WL 1737920, at *4.

An MSA "is binding on the parties" if it satisfies the three enumerated requirements found in section 153.0071(d), and a party is entitled to judgment on the MSA. Tex. Fam. Code Ann. § 153.0071(d), (e). The version of section 153.0071(e-1) in effect at the time the trial court denied Gladys's motion on entry of judgment provided that the trial court could deny judgment on an MSA only if (1) a party to the MSA was a victim of family violence, and that circumstance impaired the party's ability to make decisions; and (2) the MSA is not in the child's best

interest.[2] The Legislature has since amended section 153.0071(e-1) to allow the trial court to deny entry of judgment on an MSA where the MSA permits a person subject to the sex-offender registration statute or who has a history of past or present physical abuse directed at any person to reside in the same household as the child or have unsupervised access to the child and the MSA is not in the child's best interest.

The Legislature has provided no other circumstances under which the trial court may refuse to enter judgment on the MSA. If the Legislature had intended to permit the parties to agree to set aside an MSA, which meets all requirements that make the MSA binding, the Legislature could have included such an exception in section 153.0071, but chose not to do so. *See ExxonMobil Pipeline Co.*, 512 S.W.3d at 899 (presuming that the Legislature included each word in the statute for a purpose and that words not included were purposefully omitted). To allow the parties to agree to set aside an irrevocable MSA would render meaningless subsection (e), which provides that "a party is entitled to judgment on the mediated settlement agreement not withstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law." *See Pedernal Energy, LLC*, 2017 WL 1737920, at *4 (stating that the courts must construe statutes so that no part is surplusage, but so that each word has meaning).

We conclude that section 153.0071 does not allow the parties to agree to set aside the MSA.

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[2] Act of June 18, 2005, 79th Leg., R.S., ch. 916, § 7, 2005 Tex. Gen. Laws 3148, 3150, *amended by* Act of May 23, 2017, 85th Leg., R.S., ch. 99, § 2, 2017 Tex. Sess. Law Serv. 821, 821 (West).

C. Assuming disputed issues of material fact regarding whether the parties agreed or the judge pronounced from the bench that the MSA was set aside, the statute does not permit the parties to agree or the judge to set aside the MSA.

Michael asserts that there is at least a fact issue regarding whether the parties agreed to set aside the MSA, which this court cannot address in a mandamus proceeding. *See In re Angelini*, 186 S.W.3d 558 (Tex. 2006) (orig. proceeding) (stating that an appellate court may not decide disputed fact issues in an original mandamus proceeding). At the March 21, 2017 hearing, Gladys testified that she did not agree to set aside the MSA. Michael presented an excerpt of the reporter's record of the June 8, 2016 hearing conducted by Judge Gaffney where Gladys's former attorney, Stephanie Proffitt, advised Judge Gaffney the parties had agreed to set aside the MSA and that Judge Farr had, in fact, set it aside.

At the March 21, 2017 hearing and after hearing testimony and argument about whether the MSA had been set aside in 2016, Judge Farr stated,

> . . . maybe this is what was said on June 7th, but nobody knows. If the parties came in front of me and said, I want to set aside our MSA, I don't know that I would go, hunky-dunky. I would just kind of go, well, I don't have anything to say about that, you guys either ask for judgment on your MSA or you don't ask for judgment. And if you don't ask for judgment and we kick that can down the road, I'm going to continue as a judge to respond to the affirmative relief that you're asking me for in any other capacity, including temporary orders.

We need not decide disputed issues of material fact in this mandamus proceeding. Even if Michael and Gladys agreed or the judge pronounced from the bench that the MSA was set aside, as discussed above, the express language of the

statute provides that a party is entitled to judgment on an otherwise statutorily compliant MSA "notwithstanding Rule 11, Texas Rules of Civil Procedure, or another rule of law." Tex. Fam. Code Ann. § 153.0071(e). Therefore, the statute does not allow the parties to agree to revoke an MSA that satisfies the requirements of section 153.0071(d), nor does it allow a judge to set aside an MSA in accordance with the parties' agreement.

D. Gladys did not invite the trial court to make a ruling which she complains about in this original proceeding.

Michael argues that Gladys is precluded from asking the trial court to make a specific ruling and then complaining about the ruling to the appellate court. Under the invited error doctrine, a party is estopped from challenging a trial court's ruling on appeal if the complaining party requested the specific action taken by the trial court. *Tittizer v. Union Gas Corp.*, 171 S.W.3d 857, 862 (Tex. 2005); *see also Gordon v. Gordon*, 14-10-01031-CV, 2011 WL 5926723, at *7 (Tex. App.—Houston [14th Dist.] Nov. 29, 2011, no pet.).

Michael contends that the invited error doctrine applies because before Gladys asked the trial court to enforce the MSA, she agreed to set it aside in June 2016. He also argues that Gladys invited error when she filed a motion for a temporary restraining order and an emergency motion to modify, alleging changed circumstances and asking the trial court to (1) appoint her sole managing conservator; and (2) deny Michael possession of and access to the child. On May 27, 2016, the trial court issued the temporary restraining order. Therefore, Michael posits that Gladys was seeking relief inconsistent with the terms of the MSA, but

now she seeks a judgment consistent with the MSA, which would provide Michael with unsupervised possession of and access to the child.

We reject these arguments because Gladys does not complain about the court's setting aside the MSA or granting the temporary restraining order in 2016. Instead, Gladys complains about the trial court's April 27, 2017 denial of her motion for entry of judgment.

The dissent argues that the invited error doctrine is to be construed broadly, but cites no cases applying the doctrine to a ruling other than the ruling complained of by the appellant on appeal. Thus, Gladys did not invite error by asking the trial court to enter judgment on the MSA; indeed, as explained above, the court lacked the power to do otherwise. The invited error doctrine is not applicable to this case.[3]

E. *In re Lee* does not permit the parties to agree to set aside an MSA.

Michael argues that the Texas Supreme court in *In re Lee* left open the possibility that a trial court may properly refuse to enter judgment on an MSA that complies with section 153.0071. In *Lee*, the court observed that several courts of appeals had addressed the issue of whether section 153.0071 mandates entry of

[3] The dissent also argues the doctrine of quasi-estoppel bars Gladys's request for mandamus relief. The doctrine of quasi-estoppel bars a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken. *Samson Expl. LLC v. T.S. Reed Props., Inc.*, 521 S.W.3d 766, 778 (Tex. 2017); *see post*, at 8 (Frost, C.J., dissenting). Even if this un-briefed argument were before us, Michael has not shown that enforcing the MSA would be to his disadvantage. The terms of the MSA were similar to those of the November 22, 2016 temporary orders, and Michael's child support obligation was less in the MSA. The dissent may believe the May 2016 temporary restraining order that Gladys sought was unfavorable to Michael, but Gladys does not challenge that order in her petition.

judgment on a statutorily compliant MSA "under any and all circumstances," including where the MSA was "illegal," or was "procured by fraud, duress, coercion, or other dishonest means." 411 S.W.3d at 455 n.10. The court, however, declined to address that issue because it was not presented there. Therefore, we do not read *Lee* as leaving the door open to refuse to enter judgment on a statutorily compliant MSA. As in *Lee*, there are no allegations here of illegality or of facts that would preclude the formation of an agreement. *Cf. In re Kasschau*, 11 S.W.3d 305, 314 (Tex. App.—Houston [14th Dist.] 1999, orig. proceeding) (holding trial court did not abuse its discretion by refusing to render judgment on MSA requiring illegal destruction of evidence). Therefore, *Lee* does not support Michael's position.[4]

IV. CONCLUSION

Having determined that section 153.0071 does not permit the parties to an otherwise binding MSA to agree to set it aside, we conclude that the trial court abused its discretion by denying Gladys's motion to enter judgment on the MSA. Because the refusal to grant judgment on a mediated settlement is the proper subject of a mandamus proceeding, we conditionally grant Gladys's petition for writ of mandamus. We direct the trial court to vacate its April 27, 2017 order denying Gladys's motion for entry of judgment, and enter judgment in accordance with the MSA. The writ will issue only if the trial court fails to act in accordance with this opinion. We also lift our stay entered on June 2, 2017.

[4] Michael further argues that prohibiting presumably fit parents from agreeing to revoke a statutorily compliant MSA would be unconstitutional. Michael did not raise this issue in the trial court, and we do not address it here.

/s/ Martha Hill Jamison
Justice

Panel consists of Chief Justice Frost and Justices Jamison and Busby (Frost, C.J., dissenting; Busby, J., concurring).