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Supreme Court of Texas.
James Derwood Iliff
v.
Jerilyn Trije Iliff.
No. 09-0753.

October 13, 2010.

Appearances:

Jeremy C. Martin of Simpson Martin, LLP, for petitioner.
Frank B. Suhr of the Law Office of Frank B. Suhr, for respondent.

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.

CONTENTS

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 09- 0753, Iliff v. Illiff.

MARSHAL: May it please the Court. Mr. Martin will be presenting argument for the petitioner today. Mr. Martin has reserved five minutes for rebuttal.

ORAL ARGUMENT OF JEREMY C. MARTIN ON BEHALF OF THE PETITIONER

ATTORNEY JEREMY C. MARTIN: May it please the Court. This case touches on two interests. The first interest is the state's interest in making sure that parents support their minor children and the other interest is an individual's constitutional right to seek the employment of his or her choice. Now the statute that is before the Court for interpretation today, Section 154.066 of the Family Code, applies in situations where those interests are intention or possibly even conflict. Based on the briefs before the Court there are arguably three interpretations. It's my contention here today that the attorney general's and the respondent's interpretations are substantially similar, but what I'd like to do this morning is sort of clarify the petitioner's interpretation of that statute, which, up until now, has been construed by 12 of the 14 intermediate courts as requiring proof or evidence that the obligor has an intention to avoid his child support obligation.

JUSTICE DEBRA H. LEHRMANN: Can I ask you, if that's what you think the statute means, why didn't the legislature just put that in the statute?

ATTORNEY JEREMY C. MARTIN: Well, I think it's a very good question, Your Honor, and I think that they did through choosing of the word intentional. I think that the reason that we're here today is because of the con fusion between the words intentional and voluntary. The statute specifically says intentional underemployment or unemployment and that becomes important once you look at the legislative history. In my supplemental authority that I filed yesterday with the Court, the legislative history reflects that when the statute was originally promulgated by the Texas Supreme Court's committee, the language was voluntary underemployment or unem ployment and when the statute was presented the senator, Harris, explained on the record that the legislature had decided to enact the statute using the word intentional rather than voluntary. Now in [inaudible], the Court, there was no further discussion about the difference between those words or why the legislature did that, but we do know for a fact that the legislature substituted the term intentional for voluntary so then we have to look at what is the difference between intentional and voluntary. Well, intentional goes to a result. It goes to a goal, whereas voluntary goes more to an act or conduct. This is supported, I think primarily in the context of criminal law. For instance, in the situation where there's an offense of intentional murder. There are two separate ele ments. The state must show both that the defendant voluntarily committed an act, such as pulling a trigger, but also that the defendant intended the murder, intended the death of the victim. Those are two different elements, two different aspects of proof that need to be met before a defendant can be convicted. It's also supported by an additional supplemental authority that I filed yesterday. This would be Bryan Garner's Dictionary of Modern Legal Usage where he says exactly this--that voluntary goes to conduct, intentional goes to a result. So based on the distinction between those two words, what the legislature has done is require proof of an intent to be under employed.

JUSTICE DAVID M. MEDINA: So how would uh, assume you're correct, how would a trial judge go and make that determination when, for example, you have somebody that's well educated, has an MBA, makes over $100,000 a year and then, for whatever reason, decides to go drive a tractor and then he says, well, this is what I want to do. I choose to do something different. It seems to be very vague. You could give any reason to why you choose to do something different. What would be avoiding your obligation to take care of your child?

ATTORNEY JEREMY C. MARTIN: Which is absolutely a very, very important interest, but the problem with the interpretation of the statute given by the Attorney General and respondent is that it gives absolutely no credit to the individual's interest to pursue employment that they choose. To answer the Justice's question, I think that there are some factors and some considerations that you can look at in determining whether an individual is intending to make less money. One of those is, for instance, the reasons given by the individual for making whatever the employment decision was. If those reasons are unreasonable or if they are subsequently proven to be false as happens in some cases, then I think there in those situations, the Court would have some evidence upon which, yes, Your Honor.

JUSTICE EVA M. GUZMAN: The statute also contains the word "may", suggesting, obviously, that even if you're intentionally unemployed or underemployed, the trial court could choose not to assess support according to the guidelines because your underlying reasons might be valid, illness or otherwise, so why should we impose this additional requirement that the movant proved that it was for the purpose of avoiding child support? It's already written into the statute. The trial court doesn't have to do this.

ATTORNEY JEREMY C. MARTIN: Absolutely. The answer to that question is because we don't want to make people who should not be subject to the statute at all have to defend their interests. I might ultimately win, the trial court might ultimately decline to calculate my child support obligation based on my potential income, but I'm going to be subject to the statute and have to defend and fight this and try this issue.

JUSTICE EVA M. GUZMAN: Your policy argument that you have a right to go sailing instead of working to

support your children, there must be some sort of balancing that the trial court does and that's why the word 'may' is in there.

ATTORNEY JEREMY C. MARTIN: Actually, Your Honor, and, respectfully, I would not propose to the Court that going sailing as opposed to working is a valid public policy consideration to protect an individual's right to go sailing. I don't believe that at all.

JUSTICE EVA M. GUZMAN: Does someone have to prove that you went sailing for the purpose of avoiding child support? What if you just wanted a change in lifestyle and that's what you chose to do instead of supporting your children?

ATTORNEY JEREMY C. MARTIN: Well, what I'm trying to do today is to clarify that standard that Your Honor just mentioned, the standard of having to have proof that it was for the purpose of avoiding child support. My contention is that that's not quite right. I know the 12 of the 14 courts have held that and I know that that is the argument that is made in the briefs, but my contention here his morning is that the standard is a little bit different than that. The standard requires proof not necessarily of an intention to reduce your child support, but an intent to make less money because that's what intentional underemployment means. What does underemployment mean--

JUSTICE NATHAN L. HECHT: Of course, you intended to make less money. If you're working for X and this job has half X and you take it you're intending to work for less money.

ATTORNEY JEREMY C. MARTIN: Respectfully, Your Honor, I disagree because of the difference between intentional and voluntary. Intentional means I want. Voluntary means I will accept.

JUSTICE NATHAN L. HECHT: Well, but it explains reality to say I'm going to take this job that only pays half. I don't want only half. I would like for it to pay twice as much, but it doesn't. It seems to me that you made that choice.

ATTORNEY JEREMY C. MARTIN: You have made that choice, Your Honor, and I think to some extent, you have to take into account your right to make that choice.

JUSTICE NATHAN L. HECHT: Well, your judge example is a good one, especially for this Court, but there is another half of the story, which is that judges leave the bench all the time to support their kids and so how does a trial court decide whether a lawyer's decision to go from a lucrative practice, to take your example, to the bench or back when some judges have done that, some lawyers have, there's no clear-cut pattern, how would a trial judge make sense of all that?

ATTORNEY JEREMY C. MARTIN: Well, first of all, I think the trial judge would have to look at the right evidence that fits into the statute and fits into the standard, which again is not necessarily an intent to avoid child support. It is an intent to make less money.

JUSTICE DEBRA H. LEHRMANN: So what are you suggesting that the payee was specifically need to prove in order to get to this point?

ATTORNEY JEREMY C. MARTIN: The obligee would have to present legally and factually sufficient evidence, and just a quick oral footnote, the Attorney General references smoking gun evidence, I think it's clear in light of the standard of review in these cases, you don't have to have smoking gun evidence. This is legal and factual. So this is the evidence. That the legal and factually sufficient evidence that the obligor intends to make less money, is trying to make less money because such an intent, we can't support that. There's no public policy consideration that would support and obligor's intent to make less money. It's fishy, it's suspicious and once there's evidence of that, it justifies the state coming in and asking questions about that. The legislature should be

able to come in and say, why are you doing this?

JUSTICE DEBRA H. LEHRMANN: But as Justice Hecht said, I mean isn't any time you take a job where you're making less money, wouldn't that satisfy that?

ATTORNEY JEREMY C. MARTIN: No, Your Honor, because of the difference, once again, between voluntary and intentional.

JUSTICE DEBRA H. LEHRMANN: Well explain that more fully.

ATTORNEY JEREMY C. MARTIN: Absolutely, Your Honor. Voluntary ...

JUSTICE DEBRA H. LEHRMANN: What would and what would not?

ATTORNEY JEREMY C. MARTIN: An intent to make less money is, that is my end goal. My end goal is not to take a job that I would prefer to have and I'm willing to accept as a result of that change to make less money. It's, I am choosing an employment strategy, I am choosing a series of employment decisions with the end goal to be to make less money.

JUSTICE: For what purpose?

ATTORNEY JEREMY C. MARTIN: That's exactly right, Your Honor. That's the number one questions that ...

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there legitimate reasons?

ATTORNEY JEREMY C. MARTIN: If there are legitimate reasons then I think that the obligor doesn't even come under the statute.

CHIEF JUSTICE WALLACE B. JEFFERSON: And what would those be? I'm just curious?

ATTORNEY JEREMY C. MARTIN: A legitimate reason would be, for instance--

CHIEF JUSTICE WALLACE B. JEFFERSON: Tax avoidance?

ATTORNEY JEREMY C. MARTIN: I'm sorry, are you talking about illegitimate reasons?

CHIEF JUSTICE WALLACE B. JEFFERSON: What-- No, no. Tax avoidance is a legitimate, you intend to make less money because you want to come under this floor. Would that be one? What are some others?

ATTORNEY JEREMY C. MARTIN: I'm not sure about that one because I think the reason that you would make a decision like that for tax reasons would be to ultimately make more money. At the end of the day, you would end up keeping more money so I'm not sure that's exactly the right example.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, there's alternative minimum tax and all that if you're above a certain salary so you might want to be just below it, but I'm just saying how is a trial court to evaluate what you say is intent versus voluntary? The intent to make less money, is that always to avoid child support or what other purposes would that--

ATTORNEY JEREMY C. MARTIN: No, Your Honor, and let me answer your question first of all no it's not just this class of persons who are making employment decisions to avoid their child support obligation. It's actually a little bit broader than that. It would certainly encompass that class of people, but it also would include a class of people, for instance who are choosing to not make money because they are a judgment debtor and they

do not want to enable the judgment creditor to be able to collect that debt. Separate and apart from child support that would be another example of an individual who is making decisions with the sole purpose, well sole or primary purpose to make less money.

JUSTICE DEBRA H. LEHRMANN: Wouldn't that be very difficult for the payee to prove?

ATTORNEY JEREMY C. MARTIN: I don't think it would be unreasonably difficult, especially again in light of the fact that it would only need to be legally and factually sufficient evidence. That would be the standard they would have to show, but that having been said, I do think that there are definitely some aspects or some questions or some factors that the Court could use. Number one, would be, which is applied in a lot of these intentional underemployment cases where the requiring proof be for the purpose of avoiding child support, the reasons given. If the reasons don't make sense, if two plus two doesn't equal four, if the credibility of the obligor is shot then in those cases the trial court would not be abusing its discretion to calculate based on potential rather than actual. Some other factors that the Court might take into consideration would be a situation where the obligor has a history of missing child support payments, a large child support arrearage, perhaps even proof that the obligor has sort of a nest egg from which he or she could be making those payments, but they're choosing not to, all sorts of reasons like that and I understand that a lot of this goes towards an intent to avoid paying child support, but again the clarification I want to make today is that the standard that would require proof of an intent to make less money would include that class of persons whose trying to avoid child support in addition to possibly others.

JUSTICE DALE WAINWRIGHT: So are you saying then that the trial court would have the discretion to award child support based on potential earning if there's any indication after the spouse takes a lower paying job that is for the purpose of reducing child support, any indication of that means the trial court gets the discretion to award based on potential earnings? Is that your position?

ATTORNEY JEREMY C. MARTIN: I would agree with that position, but I would go one further and say there wouldn't necessarily need to be proof of an intent to avoid a child support obligation. It could also be any other type of proof of an intent to make less money.

JUSTICE DALE WAINWRIGHT: What if, the problem I have with, it may be a problem with just balancing the policies behind the statute either way, if you take two families similarly situated, both with two kids, both uh one nonworking spouse, one working spouse, one is going through a divorce and one of the spouse, the spouse that's the breadwinner takes a lower paying job during the process of going through the divorce or right afterwards and the other situation there's no divorce coming up. They're happy. The breadwinning spouse takes the same lower paying job. Those two families get treated differently. The children in those two families get treated differently. In the one where there's no divorce context the breadwinning spouse may have decided my job takes me away from home too much. I need to be home. I want to coach the baseball team. I want to see them grow up so I'm not going to take the high-paying job and I'm going to stay home and take the lower-paying job, but in the family that's in a divorce context, those very same reasons could result in a penalty for doing the very same things for the purpose of being with the children, but an additional purpose that can probably be shown is that the spouse knew he or she was taking a lower paying job. Same families, treated differently even though the reasons for the breadwinning spouse in both situations in my hypothetical is to be with the children and spend more time with them. That's my problem. Do you have a solution?

ATTORNEY JEREMY C. MARTIN: I'm not sure, I do have a solution, but I have two responses to that first. I think that Your Honor is pointing out a very real problem with the Attorney General and the response interpretation. It treats married parents differently from divorcing or divorced parents and the response to that is when you choose to become divorced you invite the Court into your private life. You invite the Court in to make judgments with regard to your status, your marital status, with regard to your conservatorship--

JUSTICE DALE WAINWRIGHT: And even more to the point with regard to the standard of living of the

children. If you're not in a divorce context the family makes, the parents make that decision entirely; who is going to work, how much they're going to work, how much they're going to earn, but in a divorce context you're right, then the state comes in and has an interest looking out for the children and determining their standard of living rather than it being solely the parents making that decision.

ATTORNEY JEREMY C. MARTIN: But the problem with the approach of the Attorney General and the respondent is that their approach is if they're different at all, give absolutely no consideration to that parent's, what is a constitutional right to choose their vocation, none. None at all. As soon as they show that you have voluntarily, and I guess that's the best way to explain this, the way that the Attorney General and the respondent are construing the statute is if it were to say, if the obligors, excuse me if the obligor's actual income has been significantly reduced as a result of voluntary under or unemployment I think that the Attorney General's and the respondent's interpretation would be a lot more closer to the mark, but it's not. It's intentional underemployment, which means I want not I will accept. Voluntary is I will accept less money for this job that I would rather have.

JUSTICE DALE WAINWRIGHT: And I hear your point there although tort laws replete with cases that discuss the difference between intending the conduct versus intending the result so I'm not sure if we can just assume that your definition of intent is the one that applies here.

ATTORNEY JEREMY C. MARTIN: Well, that's--

CHIEF JUSTICE WALLACE B. JEFFERSON: Counsel, if you will hold that response for rebuttal and the Court is now ready to hear argument from the respondent.

ATTORNEY JEREMY C. MARTIN: Thank you.

MARSHAL: May it please the Court. Mr. Suhr will present argument for the respondent and Mr. Morales will present argument for the Amicus. Mr. Suhr will open with the first 15 minutes.

ORAL ARGUMENT OF FRANK B. SUHR ON BEHALF OF THE RESPONDENT

ATTORNEY FRANK B. SUHR: May it please the Court. I'll start right off where it was kind of left off there and I believe Justice Wainwright, you said there's a difference between intending the conduct and intending the result.

JUSTICE DALE WAINWRIGHT: There can be.

ATTORNEY FRANK B. SUHR: And there is, and particularly in the criminal law that he spoke of, my opponent spoke of earlier, that's what I actually do and the definition in the penal code of intent is you intend the conduct that causes the result, but if you look at the court of criminal appeals cases on intent in injury to a child cases and others, they say you use a different definition, you have to intend the result. There is no voluntary distinction that I'm aware of in the criminal law. It's either intentional, knowing or reckless. Now there is like one or two voluntary statutes, but there's two different definitions of intent. One you intend the result. One you intend the conduct. They bring this up for the first time today and I'm not real sure how to react to it other than I don't know that it makes a difference. They say you have to intend to make less money today. They've never briefed that before, but if you have $100,000 a year job and you ride a tractor for $1800 a year, what else could your intent be than to make less money? That doesn't maka a lot--

JUSTICE PHIL JOHNSON: That could be intending to start a business.

ATTORNEY FRANK B. SUHR: It could be and in this particular case that business floundered for two and a half to three years and was still making $1800.

JUSTICE PHIL JOHNSON: But there are reasons where you would take a lower paying job ...

ATTORNEY FRANK B. SUHR: Many.

JUSTICE PHIL JOHNSON: I mean ...

ATTORNEY FRANK B. SUHR: Your health, spend more time with the kids as Justice Wainwright said, to be nearer to the kids. I could envision a situation where if a wife picked up and moved to Dalhart that you might choose to follow to spend more time with your children and maybe the Dalhart job market isn't quite what it is in Austin, Texas and I think that a court, the trial is finder of fact in their discretion using the word 'may' that's exactly what they're there for and when Justice Wainwright was talking about, you know it's different treating married families different. Yes, but the difference is in a married family when I tell my wife that she's going to raise my four kids while I go ride a tractor--

JUSTICE DALE WAINWRIGHT: After you duck her left hook when you give her that instruction.

ATTORNEY FRANK B. SUHR: We're going to have a conversation about that. She has a choice in whether I quit the practice of law and go ride a tractor. I love to fish. I've got to tell you something, I'd love to fish and hunt for a living. It's just not going to happen.

JUSTICE EVA M. GUZMAN: And isn't the paramount principle though, when you're reviewing a trial court's decision or determination of child support the best interest of the child so when you're weighing these factors that weighs pretty heavy.

ATTORNEY FRANK B. SUHR: That's the number one, overriding legislative intent for anything in the family code relating to a child, number one.

CHIEF JUSTICE WALLACE B. JEFFERSON: And in that regard, can't the trial court say okay you could be making a million dollars at this job, but you're choosing to make $100,000 or $25,000 over here. The best interest of the children would be for you to do this and why shouldn't the trial court be able to take that into consideration? It's not demanding or commanding that you take that job, but there's going to be some kind of penalty.

ATTORNEY FRANK B. SUHR: Right. I mean if you have a trust fund and you're making a lot of money, you can choose not to work, but your children still need to be taken care of. You have the constitutional right to life, liberty and the pursuit of happiness, but when you have children and you decide you're going to work on a tractor and let my tax dollars fund those kids, you're giving up a little bit of those rights.

JUSTICE DAVID M. MEDINA: What if, it's not, what if the choice is not that drastic? I mean shouldn't a divorced parent be able to do whatever he or she wants to do to take care of their children and that's all subjective, whether a child lives in a 5000 square foot home or a two-bedroom shack, I mean what's, I mean why do you have to make that determination? Why does a trial court have to force a parent to take a job that provides more material wealth to a child as opposed to more love and affection?

ATTORNEY FRANK B. SUHR: Well, there's two, other than best interest of the child, there's two important words in the statute and one of them is a significant reduction so most reductions like in the petitioner's brief they go, you know respondent says that any reduction whatsoever is prohibited. No. It has to be first be significant. I would argue that, you know moving from 30,000 to 29,000 to even 25,000 is probably not going to be significant enough to invoke that particular statute. Then of course, the word "may", which is discretion, which all those other factors go in. They can't force everybody to go out and be a millionaire and there's a third reason and this applies to the judge's, the judge hypo, I understand that if you leave a prominent law firm and come to work at the Court that you're more than likely going to have a substantial, significant, in the words of the sta-

tute, reduction, but this statute doesn't apply to you all and the reason it doesn't apply to you is child support is set at the first $7500 of income and as underpaid as you all may be, you are all making $7500 a month so whether you work at Fulbright and Jaworski for $1 million a year or if you work at the court, the court of appeals, a district court judge, child support, except in unusual cases, is going to be set at the first $7500 a year and that unusual case is if your children have demonstrated a specific need. Well, if you've got handicapped children or something that's probably going to play into your decision to run, but in any event the best interest of the child is important [inaudible].

JUSTICE EVA M. GUZMAN: And the trial court is vested with broad discretion and has been for years and years and years to make these determinations and unless they're an abuse of discretion they're going to survive that review on appeal. Can you comment on that aspect of this argument?

ATTORNEY FRANK B. SUHR: That is exactly right. The abuse of discretion standard vest the trial courts with the authority who they're hearing the evidence, they can judge the credibility of the witnesses, they hear everything and then they can decide, you know what, he shouldn't be able to quit to ride a tractor.

JUSTICE EVA M. GUZMAN: Because it's not in the best interest of the children in that case.

ATTORNEY FRANK B. SUHR: In that case. And it's going to be case specific where there's only so broad lined we're going to get, but remember it's a significant reduction in income. I would say that, were I ever at trial court and somebody came to me and said I didn't take the promotion that made me $2000 a year or $5000 a year more because I'm my kid's scoutmaster, soccer coach and I teach Sunday School.

JUSTICE NATHAN L. HECHT: But the trial court could disagree with that and it would still not be an abuse of discretion.

ATTORNEY FRANK B. SUHR: That's correct. Because [inaudible]

JUSTICE NATHAN L. HECHT: And it just worries me that the trial court can do one thing or the opposite of that and it's still within their discretion.

ATTORNEY FRANK B. SUHR: And that is the beauty or ill of the abuse of discretion standard and it's not just ...

JUSTICE NATHAN L. HECHT: In family law.

ATTORNEY FRANK B. SUHR: In family law specifically and if even one judge thinks it's reasonable, you're not supposed to flip it and you know with a lot of people with a lot of different views in family law you've either got to change the standard of review for family law--

JUSTICE EVA M. GUZMAN: Well, part of that though is the credibility and what happens in a live trial. It is one thing to review that testimony from a cold record and quite another to sit in that courtroom and evaluate what sometimes is a very long history. Some of these folks come in four or five times until the children turn 18 so how did that impact the trial court's discretion, if you will, in setting child support?

ATTORNEY FRANK B. SUHR: That's on a modification and that's slightly different when you modify and the burdens are a little bit different, but they do come in. There's a case out of the Houston Court of Appeals where a man filed a motion to revoke, excuse me motion to modify two months after the divorce and it happens frequently. It's as soon as one loses the next one files. It's one of the beauties of family--

JUSTICE EVA M. GUZMAN: And I guess my point is the trial court lives with these cases for a long time and has the benefit of that live testimony and everything that that entails.

ATTORNEY FRANK B. SUHR: Yes and that's, and who better than them? And if we can't trust the district judges, I mean who else can do it? There's really nobody else to do it and I don't think we can change the standard of review.

JUSTICE DALE WAINWRIGHT: The, you eluded to this, the modification grounds under 156401 and 156402 say that there are a number of factors to be considered so intentional unemployment could be a factor to be considered in a modification. If you have the very similar scenarios and there's an attempt to change or adjust the amount of child support, one in the original divorce proceeding where we're talking about 154.066 and then similar intentional or change in employment income under a modification proceeding, are the standards going to be different for those two?

ATTORNEY FRANK B. SUHR: Not according to the Austin Court of Appeals because Hollifield and Dietrich, the recent ones, were modifications.

JUSTICE DALE WAINWRIGHT: Hollifield was a modification case.

ATTORNEY FRANK B. SUHR: Yes.

JUSTICE DALE WAINWRIGHT: This is an original divorce case. DuBois was an original divorce case.

ATTORNEY FRANK B. SUHR: And I believe Dietrich is a modification, although I could stand corrected on that. It's the one they ruled on after Iliff.

JUSTICE DALE WAINWRIGHT: And I'm saying you can distinguish the cases and, in fact, Hollifield talks about how modification is different from the original divorce.

ATTORNEY FRANK B. SUHR: Right.

JUSTICE DALE WAINWRIGHT: So are you arguing that there are two different standards for viewing intentional unemployment--

ATTORNEY FRANK B. SUHR: No.

JUSTICE DALE WAINWRIGHT: --where it's a modification proceeding or an original divorce proceeding because the statutes are worded differently?

ATTORNEY FRANK B. SUHR: The main difference in the modification is having to prove material change in circumstance, okay? Once you get past that you get to each statute and the statute that's on appeal, of course, is the 15406, 066, excuse me. I don't, there really shouldn't be a significant difference other than the material change in circumstances which is outside of that particular statute. That's on how you get to modify in the first place. You can't just run into court and get a modification unless you first establish the threshold of a material change in circumstance.

JUSTICE DALE WAINWRIGHT: So you think in practice the two standards will work out to be very similar or the same?

ATTORNEY FRANK B. SUHR: I would hope.

JUSTICE DALE WAINWRIGHT: If we start with the wording they're fairly far apart though, the wording of the statutes. Modification versus an original divorce, aren't they?

ATTORNEY FRANK B. SUHR: Which, are you--

JUSTICE DALE WAINWRIGHT: I mean the modification provisions are worded much differently than 154.066. You're saying they'll work out similar in practice, but if you start with just the words of the two statutes, the words are very different.

ATTORNEY FRANK B. SUHR: And I don't have the modification statute that you're referring to in front of me and so if you have it?

JUSTICE DALE WAINWRIGHT: At 156042, I'll just read a relevant part, subsection B, the Court may modify the order to substantially conform with the guidelines if the modification is in the best interest of the child. A court may consider other relevant evidence in addition to the factors listed in the guidelines. 154.066 just talks about intentional unemployment that results in significantly less income. Then talk about considering other factors and other evidence.

ATTORNEY FRANK B. SUHR: Well, but if you look further before the 154.066, there are other factors. You can always deviate from the guidelines subject to abuse of discretion standard. There's, I guess lots of reasons that you could deviate from it. It's the one that's presumed, just like the standard possession order is presumed to be what every court enters, but there are special cases. There could be more you could, a trial court could in their discretion exceed the child support guidelines and probably do.

JUSTICE EVA M. GUZMAN: And when 154.066 says the court may apply the support guidelines, that's pretty broad. That's not just the tables. That is, you know every aspect of income or obligation that the court could consider so even at 154.066 is pretty broad, is it not?

ATTORNEY FRANK B. SUHR: I think so.

JUSTICE NATHAN L. HECHT: What difference does it make? I mean you can't get blood out of a stone so if this fella is only make $1800 a year and that's all he's ever going to make finding that he could make $3700 a month is immaterial, isn't it at some point?

ATTORNEY FRANK B. SUHR: Not really when he's got an MBA and all he does is sit on the couch. I mean that's the evidence at trial. He's got an MBA. Some of these cases are incredible. There's a lawyer who appeals a case in Houston because the judge won't lower his child support to $300 a month to support his child. There's a guy with an advanced architect degree, there are all these MBAs and people with advanced degrees that are out there making nothing and sitting on the couch and as fun as that may be that's not their duty. Their duty is to their children.

JUSTICE EVA M. GUZMAN: Well, you could--

JUSTICE DALE WAINWRIGHT: If the facts are that clear-cut, then the trial court's exercise of discretion is going to be one that everybody is going to say yeah that's right.

ATTORNEY FRANK B. SUHR: Like this case.

JUSTICE DALE WAINWRIGHT: We're talking about the hard cases.

ATTORNEY FRANK B. SUHR: Yes.

JUSTICE DALE WAINWRIGHT: We've got to fashion a rule that applies to the easy ones and the hard ones. That's why the questions are about the hard areas.

ATTORNEY FRANK B. SUHR: Right and the facts of this case may be further away from that line and it's hard to figure out where that line may be and being familiar with the facts from the court of appeals, I don't think this case is close no matter what you all rule and that's why the remedy that petitioner asked for is wrong. They say that this should be reversed and remanded to the trial court and then they want child support set, but at the court of appeals we go on for pages in our brief about why, even if Hollifield wasn't the law or the prior case from Austin and DuBois is, that there is proof in the record to support the finding of intentional unemployment so I think it should be remanded to the court of appeals for--

JUSTICE DALE WAINWRIGHT: Which, well as I read your brief, the evidence about why your client wins and even under the stricter standard with the design to avoid child support obligations are that one, James failed to provide the Court with proof of income, just his word, no documentation. Two, the trial court was free to utilize James' income from his last meaningful job and three, he had no meaningful job search having a bachelor's degree and an MBA. I think he went to one interview, I think was what was in your brief. Do you think that is some evidence of intent to avoid child support?

ATTORNEY FRANK B. SUHR: Yes and I'll answer it because even DuBois says that, and a tons of cases say that if there is no direct evidence you can still establish saying by circumstantial evidence--

JUSTICE DALE WAINWRIGHT: I understand this is circumstantial evidence.

ATTORNEY FRANK B. SUHR: Yeah of level of education, work history, work setbacks and those are the things that all those cases cite and if you look at the way they apply those, in this particular case we're not close. There's plenty of evidence. Now your other question of where do you draw the line, that's a harder question.

JUSTICE DALE WAINWRIGHT: Let me ask you another question about the sufficiency of this evidence though. What if a different guy, John, did the same three things as you list of evidence of proof that you win, but he did it to start a business, but the same three things would apply. He didn't provide proof of income. He didn't get involved in a meaningful job search and he had high income from his prior job, but he left all of that to start a new job. That's not proof of intent to avoid child support, is it?

ATTORNEY FRANK B. SUHR: If and only if the trial court as the judge of the credibility of the witnesses and all the facts agrees with your statement. If so, yes. If not, no. If the judge says, yeah, he's saying he's doing a job, but he's been on the tractor for two and a half years, now there are fact patterns who start your own job being self-employed you can legitimately prove that, but at some point just because you want to go out and be happy doesn't mean you can abandon your kids to do so and $1800 a year, again it's the extreme example of this case, but I think, have I already been stopped?

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you. The Court is ready to argument from the Attorney General.

ATTORNEY DAVID S. MORALES: May it please the Court. Mr. Chief Justice, the Attorney General urges this Court to reject the DuBois rule, which improperly requires proof of intent to avoid or reduce child support payments prior to a trial court finding a child support obligor is intentionally unemployed or underemployed under the family code. Sitting listening to the petitioner's argument and reading through petitioner's brief on the merits, as well as the PFR causes concern to the Attorney General in many regards, but here's the paramount one, nowhere in there do you hear about the best interest of the child. You hear a lot about well a parent certainly has a right to choose their own profession and in that regard that certainly is true, but the family code itself, 066 by being a permissive statute saying that the trial court may apply the guidelines to potential income, as well as section 154.123, which whether it's an original proceeding or whether it's a modification allows the trial court to take into consideration any other reason consistent with the best interest of the child.

JUSTICE NATHAN L. HECHT: Is the best interest of the child in maximizing support?

ATTORNEY DAVID S. MORALES: Generally yes.

JUSTICE NATHAN L. HECHT: And that's what bothers me about the position because it just seems to me that trumps everything else and that's why I take the AG's position, but it seems like it forecloses everything else.

ATTORNEY DAVID S. MORALES: Well, and I've used the word generally and I certainly stress that because in many cases it may not be the, that may not be the case. Going back--

JUSTICE NATHAN L. HECHT: But you're hard pressed to think of any and when I get to the end of the Attorney General's brief I'm thinking, well, I wonder if any of the examples I could think of would actually be ones that you would agree with?

ATTORNEY DAVID S. MORALES: We can beat the drum of the Supreme Court, someone from a private law firm coming down and the loss of income is half a million to a million dollars, let's say that per annum.

JUSTICE DALE WAINWRIGHT: Do you have to remind us?

ATTORNEY DAVID S. MORALES: In that particular case, I would think the trial court could take into consideration that a parent sitting on the high court of the state of Texas is in the best interest of the child even though that income is not there, that model that the parent supplies to the child as far as public service and the like, could outweigh. That certainly is an equitable interest that the Court can and should consider.

JUSTICE DEBRA LERHMANN: What about going to school to improve your education?

ATTORNEY DAVID S. MORALES: That very well could be too and I think that's the beauty of 066 is that it's a permissive statute. I think that's something that's lost. Certainly petitioner's argument would have more traction if that was shall. The trial court shall take into consideration.

JUSTICE EVA M. GUZMAN: And also, when you're setting child support in excess of the guidelines, isn't that a requirement for proven needs of the child just because someone could make a million dollars doesn't necessarily mean the trial court would be within its discretion to force them to do so because it has to be proven needs of the child.

ATTORNEY DAVID S. MORALES: I think that's exactly right and I do think that the concerns the petitioner sets forth as far as stifling the parent's creativity or their ability to do what they want to do is one thing, but I do think that the family code addresses that in many regards and gives the trial court ample discretion to consider all of that. The--

JUSTICE DALE WAINWRIGHT: Do you think that your position is going to mean that for original proceedings and modification proceedings they're going to be very similar? They're not going to have widely divergent outcomes depending on where in the process it comes up are we?

ATTORNEY DAVID S. MORALES: No. I think it would be the same standard. One thing that should be of concern to this court is certainly we came here and the petition was granted with regard to this DuBois rule and its progeny; everything that's happened since that Tyler Court of Appeals' opinion. We're sitting here today and petitioner is arguing a new standard, something that is outside of that. Well, it's not really whether or not your intent is to avoid child support. It's whether or not your intent is to earn less and I think that's the danger in getting away from the text of the statute. I think if you just take a look at 066 it actually is the model of clarity. There's nothing ambiguous about intentionally underemployed or unemployed.

JUSTICE NATHAN L. HECHT: Well, except that you don't know what under means as compared to what? I

mean if we're looking at highest and best use, most of us are underemployed, but we could find something else that would make a little more money, but that may not be the standard. It's hard to tell.

ATTORNEY DAVID S. MORALES: That's true and that's why, again, since it's a permissive statute I think the trial court takes into consideration all of the facts, takes a look at any particular situation on a fact by fact basis as it should be because it's not one size fits all with children and with families and that is where the discretion under the statute lies and that's where it should stay. We have articulated in our brief a standard that we believe works much better than the DuBois rule and one that is consistent with the text of the statute and in essence it is the best interest of the child standard. The statute itself says that if the court finds that there's an intentional underemployment or unemployment then the trial court, unless the obligor comes forth and says, look here's why this is in the best interest of the child. This is why sitting on the high court or an intermediate court or even being an assistant attorney general is in the best interest of my child. The Court can and will take that into consideration and as in this case, it's my understanding that they didn't peg Mr. Iliff at the highest level that he could have, but they kept it at $5000. The trial court has that discretion to listen to that and truly if there is, in any particular case, an exceptional circumstance where equity demands that it be set at actual income or even less than that, the trial court can do that, but again I would just respectfully urge the court to instead of focusing on this dichotomy or this clash, I think the way the petitioner said is that there are two interests at stake; the state's interest in collecting child support and the parent's interest in their right to choose their given profession. This is not a constitutional challenge to 066 I don't believe. What this is, is the Court is taking a look at the family code, the plain text of it, the plain text the Court can decide in and of itself and we would respectfully say that the standard that we set forth, which incorporates the paramount interest of the child standard is the way to go.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Morales. Any further questions?

JUSTICE DALE WAINWRIGHT: Chief, may I? I know it's after the time.

CHIEF JUSTICE WALLACE B. JEFFERSON? Yes, Justice Wainwright.

JUSTICE DALE WAINWRIGHT: Mr. Morales, you're employed by the government. Given your experience you're probably significantly underemployed versus what you might make in the private sector at a large law firm. Would you be comfortable under the standard that you've offered going to a trial court, any trial court, flip a coin, and just relying on their discretion in determining whether you, if you were in a divorce situation paying $300 a month or $10,000 a month depending on what that judge is going to decide on that given day knowing that a different judge could reach the opposite result and it still be supportable on appeal?

ATTORNEY DAVID S. MORALES: Personally, I would and the reason being, decisions that I make concerning my profession are well thought out and are always done in the best interest of my children so I know that whatever profession I choose, that's always going to come first and I can certainly explain that to the Court. Conversely, what I heard from petitioner today was the standard that they want is for the obligee is essentially for the children, the custodial parent to prove that I was, to have the burden of proof. I think the burden of proof, if I choose my own profession, I need to stand or fall on that decision and so it should be my burden to show, I believe, that that is not equitable for me to be paying my, the income that I could be making not the child or the obligee's burden to prove that so the answer is yes I would.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The Court will hear a rebuttal.

REBUTTAL ARGUMENT OF JEREMY C. MARTIN ON BEHALF OF PETITIONER

JUSTICE EVA M. GUZMAN: Could you begin, and I'm sorry I didn't take as copious notes as I wanted to, tell me again what the standard is now that instead of what you asserted in your brief, tell me what you want us to

articulate?

ATTORNEY JEREMY C. MARTIN: And I want to be real clear on this, I understand that there is a different standard that I'm advocating today, but it's only a slight difference. It's a clarification, which I believe is much more in line with the plain language of the statute than the interpretation that the Attorney General and the respondent are advocating. The standard that I am articulating today is that the obligee must show that there is some intention on the part of the obligor to make less money. That's as simply as I can put it. Not that the obligor agreed to accept less money in exchange for an employment decision, but that the purpose of the employment decision was to make less money.

JUSTICE EVA M. GUZMAN: Versus to avoid child support.

ATTORNEY JEREMY C. MARTIN: That's true, Your Honor, but let me also clarify and at the risk of saying the same thing too many times, I think that this standard would also include individuals who are making employment decisions for the purpose of avoiding child support. I think that the end is the same. You're trying to make less money, but I think the Court, and it comes as no surprise that I believe that Justice Wainwright has come right to the point, which is this concern about the discretion of the trial court. I understand that we have this issue where there's a cap of $7500, that's the cap and once you go above that it doesn't really matter, but take for instance I have a certification in secondary school English so I can either teach secondary school, I can teach freshman English like I did at one point, but I also have a law degree. Theoretically practicing law would be more lucrative and I would make significantly, which is the word of the statute, more money as a practicing lawyer than I would as a teacher. Under the interpretation that the Attorney General and the respondent are advocating, I am subject to the mercy, I guess is one word, the other word is the discretion, of the trial court, which is a very scary proposition in reality.

CHIEF JUSTICE WALLACE B. JEFFERSON: But a trial court is also, occasionally in these matters there is an evident intent to spite your spouse or even your children and the standard that you're proposing seems to me would make it easier to hide that sort of ugly intent with pure motive so the ex-spouse says I think the intent is to make less money. The obligor says no, I just want to spend more time with my family, I mean all these things that are very hard to get to the root of so why shouldn't the policy, the sort of failsafe policy be the one that enhances the resources of the children?

ATTORNEY JEREMY C. MARTIN: Because it does not fairly, not even fairly, it doesn't give any consideration at all to my right to choose what I want to do for a living. Not at all.

JUSTICE DEBRA H. LEHRMANN: Well let me ask you, if we're going to create a standard whereby we're going to take a little bit of discretion away and we're going to make this mandatory then why wouldn't that burden be on the obligor rather than the obligee? Because isn't that the person is in the shoes of really being able to prove that?

ATTORNEY JEREMY C. MARTIN: Well, and I think in reality it really wouldn't work out any differently. I think that the obligee would make an allegation that the obligor was intentionally underemployed and that the evidence would essentially work out the same because again, one of the main considerations is the reason given by the obligor for the employment decision.

JUSTICE DEBRA H. LEHRMANN: So you're saying if th Court were to accept your request and set this forth as something that would do away somewhat with the discretion that the burden being on the obligor would be okay with you?

ATTORNEY JEREMY C. MARTIN: That would be okay with me. The real purpose behind my interpretation is to keep an obligor from being subject to the whim, i.e. discretion of a trial court without at least a preliminary threshold showing of an impure motive, some sort of animus on the part of the obligor and I think absent some

sort of showing or some sort of evidence of that, the interpretation that's being championed by the Attorney General and the respondent is, I mean I understand that maybe constitutionality isn't specifically or expressly before the Court, but this Court knows that it interprets statutes constitutionally if it can and my contention would be that if this court interprets this statute to hold someone subject to a court's discretion without any showing of any sort of improper motive or intent, I think you've got a constitutional problem there in light of the fact that we have a constitutional right to choose what we do for a living. Now, are there limits on that? Sure. If my decisions result in some sort of neglect or abuse of my child, the family code has vehicles and mechanisms in place to deal with that, but short of that I really feel like this Court needs to be mindful of whether there needs to be some sort of initial showing of an improper motive. And my time is up. If there are no further questions?

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The cause is submitted and the Court will take a brief recess.

MARSHAL: All rise.

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