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Supreme Court of Texas.
In re the Office of the Attorney General.
No. 11-0255.

February 27, 2012.

Appearances:

Jessica Hall Janicek of KoonsFuller, P.C., for Relator Kristofer S. Monson of Office of the Attorney General, for Relator.

Thomas M. Michel of Griffith, Jay & Michel, LLP, for Real Party.

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

ORAL ARGUMENT OF JESSICA HALL JANICEK ON BEHALF OF THE RELATOR
ORAL ARGUMENT OF THOMAS M. MICHEL ON BEHALF OF THE REAL PARTY IN INTEREST
REBUTTAL ARGUMENT OF KRISTOFER S. MONSON ON BEHALF OF PETITIONER

CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 11- 0255 In re the Office of the Attorney General.

MARSHAL: May it please the Court, Ms. Janicek and Mr. Monson will present argument for the Relators. Relators have reserved three minutes for rebuttal. Ms. Janicek will open with the first nine minutes. Mr. Monson will present the rebuttal.

ORAL ARGUMENT OF JESSICA HALL JANICEK ON BEHALF OF THE RELATOR

ATTORNEY JESSICA HALL JANICEK: May it please the Court, I'm here today to actually talk about Section 157.162(d) of the Texas Family Code and how its interpretation by the Second Court of Appeals has effectively created a mechanism for obligors to avoid contempt proceedings if they pay a part of their child support before the enforcement hearing. With this interpretation, Section 157.162(d) has been rendered unconstitutional. It opens the door for obligors to effectively wait until they're even sued to pay their child support and, on top of that, it violates the Texas Public Policy for obligees to having a quick and speedy resolution of child support matters as those are in the best interest of the children and to put it in the words of the dissenting opinion in this case, the interpretation and result of the majority opinion is nonsensical and, for these reasons, we're asking to grand mandamus relief. Now, first I want to talk to you about the unconstitutional nature of the interpretation by the Second Court of Appeals and how it actually violates the separation of Powers Doctrine.

JUSTICE PHIL JOHNSON: Well, as I understand their opinion, they said why should we consider that because it's not been raised.

ATTORNEY JESSICA HALL JANICEK: Absolutely, Your Honor. It's a great point, but actually what they talked about was that the case of *Rabb v. State*, which deals with an appeal, but this is actually an original proceeding and in an original proceeding, you can actually bring that issue before the court and, clearly, in the case of *In re AIU Insurance Company*, that case says it's the better practice to bring claims to the appellate court, but the failure to do so is not the failure to preserve error and that case was actually an original proceeding as well. So that actually kind of addresses the waiver issues on the separation of powers claim. To get to the merit of the claim, in Texas the power to hold a party in contempt for not actually following the court's orders, especially child support orders, is an inherent right in the trial court system. That's inherent from the common law. It is not statutorily created. Now, the Texas Family Code in Chapter 157 actually does create sort of a procedural framework for contempt. 157.002 sort of has a set of procedures for filing the motions. However, it does not actually create the power of contempt.

CHIEF JUSTICE WALLACE B. JEFFERSON: But can you hold a party in contempt prospectively, in other words have an order that says if you don't take this action next year, one year from now, then you will be held in contempt without having another hearing?

ATTORNEY JESSICA HALL JANICEK: I believe, well, I believe how that would apply maybe to this case is Section 157.002, you can for future violations of an order, okay? And 157.002(e) actually specifically addresses that and in this case, that's exactly what we had here is we had some future violation issues.

JUSTICE DEBRA H. LEHRMANN: But isn't it true that the court found the Respondent in contempt not for failure to pay the future payments, but rather for failure to make the payments that were pled in the motion?

ATTORNEY JESSICA HALL JANICEK: And you're absolutely right, but just because the court didn't find-

JUSTICE EVA M. GUZMAN: But what basis did the court have to use to find this Respondent in contempt because he had paid the payments, made the basis of the motion, correct?

ATTORNEY JESSICA HALL JANICEK: He did.

JUSTICE EVA M. GUZMAN: So where did the court have to look to find him in contempt? Where did it go?

ATTORNEY JESSICA HALL JANICEK: The court actually looked at the timely payments, okay? Because under-

JUSTICE EVA M. GUZMAN: Which timely payments?

ATTORNEY JESSICA HALL JANICEK: The timely payments of the March, the June, the March, April and the June 2008 payments.

JUSTICE EVA M. GUZMAN: Were those payments the subject of the motion for contempt?

ATTORNEY JESSICA HALL JANICEK: They were the subject, absolutely the subject of the motion.

JUSTICE EVA M. GUZMAN: And were those payments current at the time of the hearing?

ATTORNEY JESSICA HALL JANICEK: They were current at the, yes, they were current at the time of the hearing.

JUSTICE EVA M. GUZMAN: And what was not current at the time of the hearing?

ATTORNEY JESSICA HALL JANICEK: What was not current at the time of the hearing was what was accu-

mulated between the time the motion for enforcement was filed and the time of the actual hearing.

JUSTICE EVA M. GUZMAN: And did the Respondent have an opportunity to assert any defenses to what was not current. I lost my job. You left the kids with me.

ATTORNEY JESSICA HALL JANICEK: Absolutely. In fact-

JUSTICE EVA M. GUZMAN: And when would he have asserted those if he wasn't served with notice?

ATTORNEY JESSICA HALL JANICEK: Well, what he would have done, well, let me address that. What he would have asserted those is actually that the notice issue is taken care of in 157.002 (e) and that actually addresses the future violations and it says that you can plead future violations of the child support order and that's covered because the legislature knew this was going to be a problem and then legislature knew that otherwise the obligee's going to have to consistently amend over and over and over.

JUSTICE DEBRA H. LEHRMANN: Let's back up. I think that the motion alleged failed payments.

ATTORNEY JESSICA HALL JANICEK: Yes.

JUSTICE DEBRA H. LEHRMANN: That were back in, what, March, April, May, June.

ATTORNEY JESSICA HALL JANICEK: Yes.

JUSTICE DEBRA H. LEHRMANN: Now then what needed to be proved as far as proving punitive contempt, it didn't matter that he paid those payments. It was whether or not he was able to make those payments when they were due as pled. Isn't that the issue? It doesn't matter whether or not he was able to make payments in the future.

ATTORNEY JESSICA HALL JANICEK: Well, I think what matters here is is not necessarily if the trial court could or couldn't hold him in contempt. What matters, I'm sorry, let me rephrase that. It's the discretion of the trial court to decide whether or not there was evidence, the evidence was sufficient to hold him in contempt of that, but I think what the issue is 157.162(d) specifically doesn't refer to a motion. It refers to the order at the time of the enforcement hearing and it specifically says at the time of the hearing, you've got to be current in all your child support payments or you're barred.

JUSTICE DEBRA H. LEHRMANN: But that's an order to avoid the general contempt powers of the court that you were talking about earlier.

ATTORNEY JESSICA HALL JANICEK: Absolutely.

JUSTICE DEBRA H. LEHRMANN: Which are to find somebody in contempt for failure to make payments that were pled and what you look at as a defense is whether or not the person was able to make those payments then when they were due, when pled, and this other section is simply a free pass from jail basically.

ATTORNEY JESSICA HALL JANICEK: Essentially, that's exactly what it is. It's a free pass from jail if you show up and maybe you've been direct paying the obligee. Maybe that's exactly what you've been doing and the child support record doesn't show that and so then what you can do is you can show up at the hearing and show your bank statements or show your checks and say, here's where I've actually been direct paying so this would bar contempt and that's exactly what it does.

JUSTICE DALE WAINWRIGHT: So as long as you're current under this provision on the date of the hearing, you're fine, even if you are three months later according to the order?

ATTORNEY JESSICA HALL JANICEK: Well under our argument, absolutely not, because what section (d) actually says is that you have to be current as ordered by the court and the court's order has more than just you have to pay \$5400 a month in child support. It has to say where you're going to pay it. It says when you're going to pay it and if you can just essentially pay up your child support at any time that you want to and that's considered being current, then the order itself sort of becomes ineffectual. What's the point of having a time to actually pay your child support every single month? There's no real reason to do it because-

JUSTICE NATHAN L. HECHT: But if you paid all your support when it was due, the motion fails.

ATTORNEY JESSICA HALL JANICEK: Absolutely correct.

JUSTICE NATHAN L. HECHT: So what's the point of (d)?

ATTORNEY JESSICA HALL JANICEK: And then there's no point in filing a motion for enforcement. That's exactly it.

JUSTICE NATHAN L. HECHT: No, no, what's the point of (d)? If you pay all your support when it's due, the motion to enforce is going to fail.

ATTORNEY JESSICA HALL JANICEK: The point of (d) is actually to say if you can, it's sort of like an incentive. It's an incentive for the obligor to say contempt is barred. If you bring proof that you have paid all of your child support.

JUSTICE NATHAN L. HECHT: When it was due.

ATTORNEY JESSICA HALL JANICEK: When it was due. Our argument is when it was due as per the order.

JUSTICE NATHAN L. HECHT: In other words, if you bring proof that you didn't violate the order, you can't be held in contempt.

ATTORNEY JESSICA HALL JANICEK: Absolutely.

JUSTICE NATHAN L. HECHT: But that's true anyway.

ATTORNEY JESSICA HALL JANICEK: And you're right, it is true anyway, but on the other opposite end of the argument, let's say just for argument sake that what (d) really means is it doesn't matter if you timely pay. What matters is if you're just, what really matters is if you paid up everything that was in the motion and you get to the actual hearing, well the Second Court of Appeals' opinion still fails because he showed up, [inaudible] as you call him actually, showed up to the hearing with an almost \$30,000 arrearage, about \$28,000.

CHIEF JUSTICE WALLACE B. JEFFERSON: What prevents, but what prevents another motion for contempt with respect to those payments? Not the ones that were paid in accordance with the order, but for those that were not paid when he appears? You hand him a motion saying, judge, we think he's in contempt. Let's set a hearing for 30 days from now and then defenses can be presented. What stops that?

ATTORNEY JESSICA HALL JANICEK: There's absolutely nothing that stops that, Your Honor, except for the fact that you're going to have to essentially. It's now the burden's on the obligee to actually follow up and file a new motion and now obviously the obligor probably knows that he's in contempt and is going to try to avoid service and then you're going to have to try to get into court and probably have to reset the hearing date so every month, you're going to be re-amending, re-serving because in enforcement, you have to personally serve for any chance of contempt to happen. So now you're going to be consistently doing that over and over. It's like

a spiraling process where there's never going to be any end to it.

JUSTICE PHIL JOHNSON: I know your time, your split's up. Could I ask two questions briefly?

ATTORNEY JESSICA HALL JANICEK: Sure.

JUSTICE PHIL JOHNSON: Under your theory, if someone comes in and they pay late, but at the time of the hearing, they paid everything they owe up to that point of that hearing, they're current. Does (d) get them out from under the contempt for having paid late?

ATTORNEY JESSICA HALL JANICEK: Under our argument, no, because you're right, they're current, but they're not current as ordered by the court.

JUSTICE PHIL JOHNSON: And that's under your argument it does not. They still could be held in contempt. Now, secondly, subsection (e), is there anyway for court costs and attorney's fees to be awarded absent subsection (e) in a proceeding like this where your client would prevail and hold the other party in contempt?

ATTORNEY JESSICA HALL JANICEK: I'm not sure I understand your question.

JUSTICE PHIL JOHNSON: If subsection (e) says that the court may award the Petitioner the cost of court and attorney's fees if you find that at the date the motion was then filed, Respondent was not current and they did make the payments afterwards, okay. Now, let's assume you did not have subsection (e). You bring a suit for contempt for late payment as was brought here and you come to court and the court finds that they've paid up, but can the court still award attorney's fees and costs absent subsection (e)?

ATTORNEY JESSICA HALL JANICEK: Absolutely.

JUSTICE PHIL JOHNSON: Okay.

ATTORNEY JESSICA HALL JANICEK: Absolutely.

JUSTICE PHIL JOHNSON: Thank you.

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

MARSHAL: May it please the Court, Mr. Monson will present the remaining eight minutes.

CHIEF JUSTICE WALLACE B. JEFFERSON: Oh, I'm sorry. Mr. Monson.

MARSHAL: Of course.

ATTORNEY KRISTOFER S. MONSON: May it please the Court. I would like to focus on the text of (d) before talking about how (d) and (e) work together. The text of (d) resolves this case. It's in the present tense. It says the obligor goes to the hearing with evidence that he is current and that if he is current with the court's order.

JUSTICE PHIL JOHNSON: Up to that point?

ATTORNEY KRISTOFER S. MONSON: Up to that point, then that's the point. It's up to the hearing.

JUSTICE EVA M. GUZMAN: Current on what you've pled or current on everything that would otherwise be

due under an order subject to any defenses that might arise to those obligations, current on what?

ATTORNEY KRISTOFER S. MONSON: Everything that would be under the order because that's what the text of the order, of (d) says. It says that you have to comply with the order. It doesn't say, make any mention of the contents of the motion.

JUSTICE EVA M. GUZMAN: So you can work hard, run into some hard times, then you borrow the money to pay everything up, you've lost your job, you're in the hospital, but you're going to get thrown in jail under your version because you're not current on things that have not been adjudicated yet?

ATTORNEY KRISTOFER S. MONSON: Well, no, no. I think that that makes an important distinction. You're not being thrown in jail for anything that has to do with the, in addition to this factor let's focus on this case. Dr. Ezukanma was not held in contempt for the interim payments that he missed after the motion.

JUSTICE EVA M. GUZMAN: But that's what made him not current, correct?

ATTORNEY KRISTOFER S. MONSON: Which made him not able to invoke-

JUSTICE EVA M. GUZMAN: Is that what made him not current?

ATTORNEY KRISTOFER S. MONSON: Yes, that's what made him not current to invoke the bar.

JUSTICE EVA M. GUZMAN: Even though there are potential defenses that he could assert to those payments, which would never subject him to [inaudible].

ATTORNEY KRISTOFER S. MONSON: But to be clear, say he got a reduction in the amount of the obligation that it was noticed, which he can from the date that he files his, at least from the date that he files his motion to modify the amount. If the order is modified and he is current on the modified amount that he had to pay, then that would also invoke (d). What matters is that at the time of the hearing, there isn't any outstanding obligation to pay child support under what exists, the current monthly support obligation.

JUSTICE PHIL JOHNSON: It seems like that just simply is basically a get out of jail free card even if you've missed some before and you were late and you violated the order, when you come to the court, you've paid it all up. The trial court cannot hold you in contempt for having been late earlier. It's just a protection of the obligor so to speak.

ATTORNEY KRISTOFER S. MONSON: It's also an incentive to the obligor to pay up before the date of hearing because the legislature's intent is to get support to the children who need it.

JUSTICE EVA M. GUZMAN: Wasn't what was happening is for whatever reason obligations were not made. They were paid up and then they were thrown in jail, couldn't go back to work and so the children went without support anyway. Wasn't that sort of what led up to (d) and then eventually (e) to discourage this habitual late payment without potential attorney's fees?

ATTORNEY KRISTOFER S. MONSON: Well, yeah, (d) is supposed to avoid this habitual late payment problem. Let's talk about how (e) and (d) work together because I think the court of appeals' opinion confuses this a little bit. You can't get attorney's fees if contempt is imposed against the-

JUSTICE PHIL JOHNSON: Can or cannot?

ATTORNEY KRISTOFER S. MONSON: You can under 167 says, in fact, it makes attorney's fees automatic and then gives the judge discretion not to award the fees unless they're above a certain amount and we have cer-

tain requirements. So there would be fees there if contempt were imposed. (d) gives you a situation in which you can avoid contempt entirely so (e) comes back and says even if the obligor is relieved of the possibility of contempt by the statutory requirement, the custodial parent can still get the attorney's fees even if (d) is invoked so it all works together to make sense.

JUSTICE NATHAN L. HECHT: I understood the mother's counsel to argue that even if you're paid up at the time of the hearing, if payments were late, you could still be held in contempt and I understood your answer to Justice Johnson's question that that's not your position.

ATTORNEY KRISTOFER S. MONSON: That is not our position because (d) says you have to be current under the order at the time of the hearing.

JUSTICE NATHAN L. HECHT: But she argues that as ordered by the court imports timeliness.

ATTORNEY KRISTOFER S. MONSON: I don't think that it does because I think and this also goes to reading 157.162 as a whole to make sense. It's the proof provision that tells you who's going to prove what facts at the hearing and it comes right after (c). (c) says that the parties who can enforce the obligation gets to bring the payment record and then say here's where we are as of the date of this hearing and that could be a little bit earlier, but they could bring the report payment from the morning of the hearing and say here's where we are. It doesn't make any sense to treat (d) as talking about something completely different from (c) if what we're going to have the factual fight about is where are we on our payments on the date of the hearing.

JUSTICE DALE WAINWRIGHT: But it also doesn't make any sense to ignore the court's order for months and then when you do pay it, you have not made the other side whole because you've deprived them of that money for months and the absence of any interest on it.

ATTORNEY KRISTOFER S. MONSON: No, there's automatic statutory interest on each missed payment compliant with federal law, Texas makes each monthly child support obligation a final enforceable judgment that begins to accrue 6% simple interest.

JUSTICE DALE WAINWRIGHT: And with interest, would you hold it until the hearing and if it's reset for six months later and then for three months later, you can ignore the order and the date in the order for the entire time.

ATTORNEY KRISTOFER S. MONSON: The legislature made that balance that the 6% simple interest is sufficient to make the enforcing party whole. This is all--

JUSTICE DALE WAINWRIGHT: Notwithstanding what a trial court may have ordered after a hearing with evidence, do you think the legislature can change those?

ATTORNEY KRISTOFER S. MONSON: I think that the legislature can create the conditions precedent for the enforcement of a trial court's order. That's the only way to think of the attachment requirements, the lien requirements, the various ways that you enforce judgments. If the legislature is completely powerless to put parameters on the nature of the court's ability to enforce its orders, it doesn't have any statutory power to say how you enforce the law at all.

JUSTICE DALE WAINWRIGHT: Well here's the issue. Party appears in the trial court and a number of us have been trial court judges. You have the hearing. You look them in the eye, what are we going to do. This is what we're going to do. So rendered. Prepare an order. Order comes in, you sign it. Person ignores it for months. The legislature says you can't hold them in contempt for what they look you in the eye and told you they were going to do and you ordered as the judge. That's the issue. One issue.

ATTORNEY KRISTOFER S. MONSON: That is an issue, but there's 75, 100 years of precedent saying that the family code or its predecessor statutes can set precedent requirements and can circumscribe the scope of contempt. I don't see how this limitation's any different in kind and it ends up cancelling out, right, even though it lets you get out of criminal contempt for filing the payments late. At least it gets the payments to the enforcing party before the date of the hearing so it gets to them earlier in time and if you are completely current at the date of the hearing, there wouldn't be a basis for civil contempt so you don't even have a problem with interfering with the court's power of civil contempt because if you read the statute to require them to be current as of the date of the hearing, there wouldn't be a basis for civil contempt anyway.

JUSTICE DALE WAINWRIGHT: Do you think the legislature would have the authority to make similar changes in any other area of the law where contempt arises. What if it were an oil and gas case or a breach of contract case or something other than family law?

ATTORNEY KRISTOFER S. MONSON: Well I don't know that we know what the test would look like. I think that the test would have to be something akin to the open court's test for whether a statute forecloses a common law cause of action and I think that you'd have to perform a balancing to test to see if whether in effect it precluded there being any enforcement at all or completely ousted the courts of their power to vindicate their own judgments, but I think there's a lot of things that the legislature can do short of completely ousting enforcement power that doesn't implicate the separation of powers because the legislature has the authority to say how, what statutory judgments mean and how they're enforced.

JUSTICE EVA M. GUZMAN: What was the interest it was trying to balance here when it passed (d) and then (e) a couple of years later?

ATTORNEY KRISTOFER S. MONSON: Well, I think it was trying to first of all give, create an incentive for the obligor to pay up and without waiting to the hearing, right, because this definitely gives the obligor incentive to pay up so that you can show up at the hearing real quick and say everything's over and we don't need the continuance, for example, and then I think (e) comes along and says, hey, you're creating a situation where the party seeking to enforce the support has to go to court. They have to hire a lawyer to file the motion to enforce and now the party who has to pay can get out of this. They should be able to get their attorney's fees for being the catalyst for the payment so (e) and (d) work together that way and make a lot of sense.

JUSTICE EVA M. GUZMAN: Can we look at (e) now in construing what the term "current" means even though it was passed, I guess, after the a-

ATTORNEY KRISTOFER S. MONSON: I think the safest way to do that is just to say (e) is an example of how the legislature might have written other parts of Section 157.162 so it at the very least shows us that had the legislature intended to place the point of time in the enforcement process where you had to be current somewhere else, it would have written (d) to look like (e)(1), which says current at the time of the motion to enforce is filed because it didn't, the word "current" in (d) should be like everything else in Section 157.162 and refer to the status of the facts at the time of the hearing.

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

MARSHAL: May it please the court, Mr. Michel will present argument for the real party in interest.

ORAL ARGUMENT OF THOMAS M. MICHEL ON BEHALF OF THE REAL PARTY IN INTEREST

ATTORNEY THOMAS M. MICHEL: May it please the Court.

JUSTICE DEBRA H. LEHRMANN: Mr. Michel, may I ask you now.

ATTORNEY THOMAS M. MICHEL: Yes, Your Honor.

JUSTICE DEBRA H. LEHRMANN: You know basic contempt law.

ATTORNEY THOMAS M. MICHEL: Yes.

JUSTICE DEBRA H. LEHRMANN: The court can find someone in contempt for payments that were pled in a motion and any defense that may be raised has to do with their ability, the payor's ability to make those payments when they were due as pled and this statute is basically an exception to that basic contempt law. It's just a get out of jail free pass, right, to encourage people to make those payments and become current and they can do that by coming and showing a pay record at trial? Isn't that true? Isn't that what this is all about?

ATTORNEY THOMAS M. MICHEL: Well, I think yes and no. I think, yes, we found some conflict in the case law, which I will supplement in the brief on whether or not you can hold a party in contempt, for example, if they pay one day late, but secondarily and I think more to the point with regard to subsection (d), it was absolutely a decision to balance the interest across the citizens of the state of Texas who I think this is not a perfect world and getting child support, the evolution that the state has gone through to try to get child support payment and really is trying to get dollars into parents' hands. That's really the goal. We want child support from parent A to go to parent B and they want to do it in the most cost-effective means they possibly can do it. It doesn't benefit anyone if that parent is then put in jail for six months. Their ability to then pay the child support will then deprive the very effort that they were seeking to accomplish. That's why the legislature struck this balance. Is it perfect? No. Is it a get out of jail free card? Perhaps, Justice Wainwright, but I think it furthers the goal of what is to get money into the pockets of the parent who has primary care of the child. They try to address that consideration by making sure that the obligee is as whole as possible.

JUSTICE EVA M. GUZMAN: Well what do the words current in the payment of child support as ordered by the court? When I think about ordered by the court, I think about those child support orders I used to sign on the bench. That's what I ordered. You need to be current and why I ordered. Why doesn't that plain language mean that?

ATTORNEY THOMAS M. MICHEL: Right. Very good question. I don't think it does. It says--

JUSTICE EVA M. GUZMAN: I know.

ATTORNEY THOMAS M. MICHEL: It says the payment of child support, it says the payment. My client made the payment of child support. If you look at the Attorney General's language throughout their brief, they want to engraft language into that language and they want to convert it and translate and not use a true textualist approach. Rather they want to engraft and legislate with something the legislature didn't say. They insert the word "all payments" and all past due child support payments at the time of the hearing.

JUSTICE DEBRA H. LEHRMANN: But, Mr. Michel, if they intended that by paying them amounts that were pled rather than becoming current, then why didn't the legislature just say that?

ATTORNEY THOMAS M. MICHEL: I think they clearly could have said that, Your Honor. First of all, it--

JUSTICE DEBRA H. LEHRMANN: They didn't.

ATTORNEY THOMAS M. MICHEL: No they didn't, but they didn't say you have to pay all past due child support payment. If you look at the dissent, basically neither of the--

JUSTICE EVA M. GUZMAN: It's not past due until someone says it's past due because if they drop the kids off

at your house, then it would have been due but subject to that defense and, therefore, not-

ATTORNEY THOMAS M. MICHEL: Right. And also the AG, Attorney General, in his brief cannot make its logically argument under the actual test of the provision without inserting the word all past due amounts. Lawreta in her petition to this court transmutes the language of the statute to say all past due. Justice Livingston in her dissent after arguing that she thinks it's completely clear ends up by saying inserting the word all and it doesn't, Justice Lehrmann. It says the payment. It's a definitive article. It uses the word "the." It does not use the word "all" and I will refer the Court to Section 102.004, the Texas Family Code, where it talks about where certain individuals can confer standing to file a suit if they're a grandparent or within a third-degree of consanguinity. There, the legislature used the terms both parents can confer standing plus a guardian or the managing conservator. As the court's well aware, there's more than one managing conservator, but it says "the" managing conservator.

JUSTICE DEBRA H. LEHRMANN: The language said the court may not find a Respondent in contempt for failure to pay if the Respondent appears at the hearing.

ATTORNEY THOMAS M. MICHEL: Correct.

JUSTICE DEBRA H. LEHRMANN: Showing that he's current.

ATTORNEY THOMAS M. MICHEL: No, no, no, no, showing that the Respondent is current in the payment. My client was payment in the payment of child support, but they want to come in and argue saying-

JUSTICE PHIL JOHNSON: Whoa, whoa, whoa, what payment? What payment was he current on?

ATTORNEY THOMAS M. MICHEL: That is in part my-

JUSTICE PHIL JOHNSON: The payment is, which one are you choosing there?

ATTORNEY THOMAS M. MICHEL: That's partly my point, Justice Johnson. It's unclear. This statute or the ability to hold in contempt may be too vague and under the court's recent decision-making about how to construe this statute, I think that's why the court should look at the rest of the statute. Look at what was proposed in the amendment to Section (d), which was the exact contention that the Petitioners wanted to say, saying regardless of the payments being made, they could be held in contempt. That was not passed by the legislature.

JUSTICE PHIL JOHNSON: But if you want us to use the literal language and says the payment, that means only one payment?

ATTORNEY THOMAS M. MICHEL: That's what it says, Your Honor.

JUSTICE PHIL JOHNSON: He's charged with three payments.

ATTORNEY THOMAS M. MICHEL: That's correct.

JUSTICE PHIL JOHNSON: So you just get to pick one and this one wouldn't even apply then to anyone who was late or behind or had not paid more than one payment.

ATTORNEY THOMAS M. MICHEL: It is a problem with the statute, Your Honor, because it does not say what the Petitioners want it to say.

JUSTICE PHIL JOHNSON: Well, no, but it seems to me like the legislature then has written a statute under your interpretation if we read it literally that would limit itself to a situation of only one late payment and would

ignore all the others? That would be a little nonsensical.

ATTORNEY THOMAS M. MICHEL: Possibly, but that's what the statute says.

JUSTICE DEBRA H. LEHRMANN: Well isn't it that we can't read a statute in such a way that would lead to absurd results.

ATTORNEY THOMAS M. MICHEL: I agree.

JUSTICE DEBRA H. LEHRMANN: And that certainly is an absurd result whereas you can read this to say the payment of child support as ordered by the court means the payment generally. It doesn't mean one payment. It means the pay-

ATTORNEY THOMAS M. MICHEL: With all due respect, Justice Lehrmann, what you're doing is now interpreting what this language means so we're now if the statute is somewhat ambiguous, we have to look at other tools that we want to look at.

JUSTICE DEBRA H. LEHRMANN: Such as not resulting, having a result that's absurd.

ATTORNEY THOMAS M. MICHEL: Correct. But it doesn't say all payments, Your Honor. If they wanted to really make it that simple, if they wanted to take the contention asserted by the Petitioner, it's very simple. All three sides have done it. The dissent did it and both the Petitioners have done it, say current in all past due child support at the time of the hearing. Couldn't be simpler. This legislature did not use it. Another rule of statutory construction is you're going to come back and use the words that they did use and not the ones they didn't use. They did not use the word "all."

CHIEF JUSTICE WALLACE B. JEFFERSON: Why didn't your client just pay all the money, the past due and the-

ATTORNEY THOMAS M. MICHEL: He absolutely was unable to, Your Honor. Obviously, I was very disappointed. I have lost the motion to modify on appeal to reduce the child support, but the time, he was making a doctor was making \$400,000 a year and agreed to \$5400 a month, which is approximately \$100,000 gross income a year and an amazing amount of child support. He--

JUSTICE EVA M. GUZMAN: How many children were there?

ATTORNEY THOMAS M. MICHEL: There were six children.

JUSTICE EVA M. GUZMAN: Six children at \$5400?

ATTORNEY THOMAS M. MICHEL: Yes.

JUSTICE EVA M. GUZMAN: Well.

ATTORNEY THOMAS M. MICHEL: He was making over \$400,000 a year as a doctor at the time. He and four other of his associate doctors were let go by his doctor's practice so his income went from over \$400,000 year to about \$48,000 a year. Now I lost that on appeal and this Court [inaudible] denied hearing that case, but to answer your question on why the payments weren't made, he absolutely was not able to make them and that would have been a defense obviously would have been raised if they had been properly noticed in the motion and possibilities, lack of ability to pay that amount. It's a tremendous amount of money to try to make and he had to start over from scratch to make a new living.

JUSTICE EVA M. GUZMAN: I wonder what it cost to put a roof over the head of those six children and feed them and buy school supplies. It might be a lot more than \$5400 wouldn't it?

ATTORNEY THOMAS M. MICHEL: That'd be a lot of money, Your Honor, \$5400 a month post tax dollars is a lot of money to live on and also he also was willing and wanted the children himself to raise them.

JUSTICE PHIL JOHNSON: Won't digress too much here, but did you not at the hearing at the contempt hearing, were you not able to prove up the fact that your doctor had had a significant reduction and he simply could not have made those three payments timely?

ATTORNEY THOMAS M. MICHEL: The issue of the other future payments past the payments that were made-

JUSTICE PHIL JOHNSON: No, I'm talking about he was held in contempt for three payments as I recall.

ATTORNEY THOMAS M. MICHEL: Yes, Your Honor.

JUSTICE PHIL JOHNSON: That's all he was held in contempt for.

ATTORNEY THOMAS M. MICHEL: Correct.

JUSTICE PHIL JOHNSON: And my question was did you not have the opportunity to prove at the hearing the reason he was late on those payments that he could not make it because of this change in income that you just talked about?

ATTORNEY THOMAS M. MICHEL: The motion to modify and the motion for enforcement were tried at the same time.

JUSTICE PHIL JOHNSON: Did you have a chance to prove the reason he didn't make the payments on time? What I'm wondering is this. You lost the motion to modify, but the trial court held him in contempt for being late on those payments and it looks like that that would have been a trial court decision based on the evidence and we're not, that's not what we're here about as I understand, not the evidence. We're here about construing the statute.

ATTORNEY THOMAS M. MICHEL: Correct, yeah, as to those three payments, that's correct. Yeah, [inaudible]--

JUSTICE PHIL JOHNSON: So the trial court did hear the evidence about your client having a reduction in income?

ATTORNEY THOMAS M. MICHEL: Yes.

JUSTICE PHIL JOHNSON: And I'm sure you blamed the lateness of the payments on that in part?

ATTORNEY THOMAS M. MICHEL: There certainly they were all tried together, yes. So, but and I wasn't trying to be evasive about your question, it was just that whether the issue as to the future payments was actually tried. That's what I was picking up on. I didn't know if you were going to the futures that were noted. The payments that were missed that weren't noticed in the motion is what I thought you were trying to get at and I apologize.

JUSTICE EVA M. GUZMAN: The future payments become relevant only if we determine that current means current not only on what was pled, but on what's potentially due through the time of the hearing.

ATTORNEY THOMAS M. MICHEL: Correct.

JUSTICE DALE WAINWRIGHT: To follow up on Justice Johnson's point, the trial court doesn't have to find a person in contempt. I mean the order was put in place. They hear the evidence. There's some discretion there. Without interpreting the statute as requiring some equity, requiring leave or some grace, if you will, the trial court still has that discretion. It just decided not to exercise it. I don't know that we need to interpret the statute to require grace when the statute, when the trial court has that discretion.

ATTORNEY THOMAS M. MICHEL: Well the statute says the court cannot hold the Respondent so I think that takes that discretion away about the ability-

JUSTICE DALE WAINWRIGHT: Your interpretation does and I'm saying I don't.

ATTORNEY THOMAS M. MICHEL: Right. Yeah, I believe the code section itself expressly says the trial court cannot. With regard to that now, the issue as well as construing the ability to hold in contempt and Justice Guzman, you stated in Reese that obviously contempt is to be exercised with caution and contempt is a strong medicine and should only be used as a last resort.

JUSTICE EVA M. GUZMAN: But the trial court's discretion is not necessarily at play here because the statute says the court may not find the Respondent in contempt.

ATTORNEY THOMAS M. MICHEL: Correct.

JUSTICE EVA M. GUZMAN: So we don't even get there. It is a strong remedy and it's appropriate in many cases, but the issue here is when the statute says current as ordered by the court, current in what you were past due or current in anything that through the time of the hearing so I don't know where we get into this discretion.

ATTORNEY THOMAS M. MICHEL: Well, the reason why is if the court were to find that the statute's ambiguous and then the court were to go on and look to other factors in trying to interpret it such as well whether even if the court doesn't find ambiguous, what the legislature proposed was Section (d) to modify the language and then rejected it and then instead proposed and amended the statute, implemented subsection (e). I think those are relevant.

JUSTICE DEBRA H. LEHRMANN: Mr. Michel, wouldn't your construction allow a payor to just systematically avoid ever being found in contempt. All they would have to do is make the payments that were pled, then fall behind, then the person who has the responsibility of having the child in their care still having to pay the rent, still having to pay the groceries, still having to do everything that has to be done to care for a child and not have that money to make those payments, then go back, get a new motion filed, then the payor would come do the same thing, make those payments and this could go on and on forever. Isn't that correct?

ATTORNEY THOMAS M. MICHEL: It's possible. I think it's highly unlikely, but that's exactly the balance the legislature struck, Your Honor, and I think it promotes the policy of getting dollars into the mother's hands or once again or the father's hands. Once again, it's balancing a myriad of issues. Is that scenario going to happen? I mean it's got to be unbelievably unlikely. What did the legislature do to address that? They implemented subsection (e). They wanted to get specific attorney's fees, costs, statutory interest, but to say that a person is going to come in here and intentionally do that-

JUSTICE DEBRA H. LEHRMANN: Unfortunately, during my many years as a trial judge, I saw it happen many, many times.

ATTORNEY THOMAS M. MICHEL: I understand, but the goal was accomplished that the legislature struck the balance and, once again, is the goal, if somebody was going to be that to take the example from 1 to 18

years, if somebody was going to do that, they will pay a tremendous amount of attorney's fees, court costs and fees. Also, I think realistically, this legislature balanced those proposals and realized that they are getting court-ordered child support. They're getting the money into the hands and they balanced the benefit of actually getting someone to pay child support because the consequence then is you do throw that person in jail.

JUSTICE DEBRA H. LEHRMANN: I think the balance was to get payments made rather than to keep the payor out of jail.

ATTORNEY THOMAS M. MICHEL: I think that is also a realistic, as I said, opened up with this is not a perfect world. We're dealing with where payments have been missed, payments have not been made, but balancing that interest and exactly, you put the obligor in jail, what's their ability to pay? Certainly not \$5400 a month.

JUSTICE PHIL JOHNSON: Well in your obligor's case though, he went back and said if you put me in jail I can't pay. Then the trial court said okay, just serve it on the weekends and that was apparently fine with him so the trial court did, in fact, try to work with. The trial court's not trying to deprive anybody of liberty it seems like other than as necessary to enforce its orders and get the children paid for.

ATTORNEY THOMAS M. MICHEL: Well, I disagree, I think the court was, in this case, trying to deprive him of liberty, but at the time the court realized that if you take a doctor and put him in jail-

JUSTICE PHIL JOHNSON: Except as necessary. That's what I said. You don't, apparently the court was trying to coerce this fellow to pay.

ATTORNEY THOMAS M. MICHEL: There actually was a motion brought by my client by the trial court's counsel to alternate and allow that to happen and the court realized, but you're right, Justice Johnson, what you're seeing is the realities of the down side of contempt and jail time and as Justice Lehrmann knows personally, I've been handling family law cases for a number of years that it does not promote when the person goes to jail and really it is a punishment to really get the obligor to pay. It's the-

JUSTICE EVA M. GUZMAN: And with this notion that you might go to jail usually, in many cases, when there is an ability to pay results in those payments being made pretty quickly.

ATTORNEY THOMAS M. MICHEL: That's exactly right. I think by far the rule and Justice Lehrmann's example is, by far, the exception, because once again we're dealing with a policy across the state and was the court trying to develop a policy statewide. Yes, there's exceptions way over and way over here, but, yes, when you go down to stare a judge in the court where Justice Wainwright when they're looking you in the eye trying to make those payments, a lot of times they are scared to death and a lot of times they will do everything they can to make those payments. The reality of the situation is by the time you get to court and somebody's not making the payments, that person is probably in somewhat pretty dire straits.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there still payments that are outstanding now?

ATTORNEY THOMAS M. MICHEL: Yes.

CHIEF JUSTICE WALLACE B. JEFFERSON: As we speak?

ATTORNEY THOMAS M. MICHEL: Yes. Yes there are.

CHIEF JUSTICE WALLACE B. JEFFERSON: And what's the incentive for your client to make the payments other than contempt?

ATTORNEY THOMAS M. MICHEL: He's got to pay the payments.

CHIEF JUSTICE WALLACE B. JEFFERSON: There's going to be another motion for contempt. Are you saying that your client just won't be able to pay and then is going to go to jail?

ATTORNEY THOMAS M. MICHEL: He can't pay what he can't pay, Your Honor. At a \$1000 gross amount a year when he once was at a good practice making over \$400,000 a year, that's why when his income went down to about \$48,000 and the motion to modify failed, those are the realities. Yes, I made my argument during oral argument. This is essentially debtor's prison. He will not get himself out of this mess. It's an extraordinary amount of money to do it. If you're successful in practice and it was an amount, Justice Guzman, way above guidelines when it was initially entered.

JUSTICE EVA M. GUZMAN: Did his income exceed the guidelines?

ATTORNEY THOMAS M. MICHEL: Oh, yes, obviously, yes, but his income did, but it was above the statutory caps and there were no exceptional as an argument I raised at the court of appeals. None of these statutory reasons for going above guidelines was asserted or argued so any basis that the kids needed additional money as far as special needs or anything like that were not present in that case.

JUSTICE DAVID M. MEDINA: This probably goes way beyond the scope of the inquiry, but on what conditions would allow somebody with that type of advanced degree not to work. I mean, there's not any intention on this doctor to not work so that he can circumvent this.

ATTORNEY THOMAS M. MICHEL: Absolutely not. Here was the problem. He was under a covenant not to compete so his patients were excluded from where he was. He goes out. All he can do basically is start up with Medicaid patients. He's rebuilding his practice from scratch. I think if any of us were practicing lawyers and we got kicked out of our old law firm, you might be able to take a lot of your clients with you, but under a covenant not to compete, you couldn't even do that.

JUSTICE EVA M. GUZMAN: Well this doctor-

ATTORNEY THOMAS M. MICHEL: They argue, but there's no evidence in the case to argue well go get a job at the local county hospital and make \$85,000 a year, then we get child support reduced again.

JUSTICE EVA M. GUZMAN: Let me ask though. We have to write a rule that applies across the state and in many, many different cases. This doctor may not have the ability to pay. Under your view of the statute, there really is no deterrent other than money to keep someone who can pay from purposely withholding payments catching up the date of the hearing completely and then doing it all over again and so what is the deterrent or is that just part of the balance and I realize the deterrent would be (d) (e) attorney's fees, but for some people that doesn't matter.

ATTORNEY THOMAS M. MICHEL: Yes, I think, and once again, we're going to I think the absolute most extreme example of this. If somebody wanted to do that and voluntarily pay attorney's fees, both his own attorney's fees and the other side's attorney's fees and court costs and statutorily imposed interest, I suppose that is a possible scenario to happen, but by far the incentive is if you go down there and you pay, what happens is, Justice Guzman, nine times out of ten, that person's not paying either maybe they got the money or they're hiding it and they don't want to, but then they're facing jail time and what do they do? They cough up the money. That's the recalcitrant one, right? The gavel's about to come down. You're about to go to jail. The recalcitrant person who has the money is going to save himself from going to jail and cough up the money. Once again, as stated, I think even as Justice Gardner pointed out, that promotes the policy of getting the dollars into and help promote, it's not perfect. Child support rarely is perfect. The costs incurred in all of these avenues are expensive. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. The Court will hear rebuttal.

REBUTTAL ARGUMENT OF KRISTOFER S. MONSON ON BEHALF OF PETITIONER

ATTORNEY KRISTOFER S. MONSON: May it please the Court, Chief Justice Jefferson, I think your question touches on something that's really important and wrong with the court of appeals' interpretation of (d). When you have one of these cases, let's just assume we're only talking about criminal contempt for payments in this before the motion to enforce is filed. 157.002 says you can and must notice all the interim payments and then we know that part of your remedy is to be able to get accumulative money judgment accumulating all the arrearages into one pot. Under their reading of the statute, just because you went back in time and got yourself out of criminal contempt, you'd also be insulated from civil contempt because (d) only says you're out of contempt all the way and we know that from that the next couple provisions in 157, 166, says you can have civil or criminal contempt. It really doesn't make any sense to say hey this is a special thing to get out of past criminal contempt and oh by the way, it get you out of any potential future contempt for all time, for all the money damages that are accumulated in this single judgment. That's the only thing that the court of appeals' order in this case can mean. Other than that, unless the court has no further questions, I will yield the remainder.

CHIEF JUSTICE WALLACE B. JEFFERSON: No further questions. Thank you, Mr. Monson and Counsel. The cause is submitted. That concludes the arguments for this morning and the Marshal will adjourn the Court.

MARSHAL: All rise.

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