SUPREME COURT OF FLORIDA

DANIEL LYNN OVERBEY Petitioner, v. JANET CAROL HUTCHING OVERBEY, Respondent.	*	CASE NO. 88,370 District Court of Appeal, 5th District - No. 95-2252

ANSWER BRIEF OF RESPONDENT

RICHARD J. D'AMICO, ESQUIRE
Attorney for Appellant
154 South Halifax Avenue
Daytona Beach, FL 32118
(904) 255-0932
Florida Bar No. 360317

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CITATION OF AUTHORITIES

SUMMARY OF THE ARGUMENT

The Court does not have jurisdiction over this matter as no conflict which exists between this case and Milligan v. Addision, 582 So. 2d 769 (Fla. 3rd DCA 1991) as the material facts of the two cases are substantially different. One of the major factors that resulted in the reversal of this matter by the Fifth District Court of Appeal was the fact that the children of the marriage were ages sixteen (16) and ten (10) at the time that Former Husband chose to attend law school. In Milligan the child was three years old when the petition was filed. Therefore, Petitioner's law school education could not result in benefit to the children. Furthermore, upon his resignation from the police force immediately before commencing law school Former Husband had a total of over $27,000 in cash which was sufficient to pay for the entire cost of child support during his tenure in law school. Mr. Milligan had no such sum. Finally this was a modification proceeding of a Final Judgment of Divorce where Former Husband had been paying the sum of $200 per week for over four years and thus the children had enjoyed a certain standard of living from which they should not be deprived. The Milligan case involved an initial determination in a paternity case.

The essence of Respondent's substantive argument is the fact that since child support has been specifically determined to be a legal right of the children that is imposed by the state, no modification may be granted unless the children are shown to benefit by a parent improving his education. The issue is not

whether Former Husband is permitted to go to law school. Of course he is permitted to go to law school. However, he must have the financial ability to attend law school, to support himself and support the children. He should not be permitted to allow the children to subsidize his law school education by paying a lesser amount of child support during his tenure at law school thus relegating the children to economic hard times. Since Former Husband argues that his financial situation will improve after he graduates from law school, he should then be able to make arrangements for funds to pay his child support obligation and then repay any obligations from his future windfall earnings. The children should not be required to suffer without possible gain in order to enhance the career of a parent who has elected to continue his education.

All of the case law that has been reported on the issue of downward modification of existing support awards for a parent that intends to seek advanced education require that the children benefit from the advanced education to be received by the parent. The children in the instant case are presently ages seventeen and eleven and Former Husband has at least two additional years of law school to complete. Thus, the older child will derive absolutely no benefit from the advanced education and the younger child may derive some speculative benefit from the advanced education. Any benefit, however, must be weighed against the tremendous sacrifices that must be made by the children during

the time that the parent is attending school. These children need support now, not an expectancy of future support.

The legislature has enacted a statute recognizing the fact that the needs of older children are greater than the needs of younger children. Thus, the needs of these older girls are increasing rather than decreasing. Under no circumstances does any of the case law apply to situations where the entire benefit will be received by the parent with none to the children. The actual result sought by Petitioner is that the children subsidize his educational enhancement.

At the time of the hearing upon the modification Former Husband had the complete and total ability to pay the full amount of child support for the entire three year projected tenure of his law school education as Former Husband had liquidated his pension account and received in excess of $27,000.00. Since Former Husband had sufficient funds with which to pay child support he should be required to continue to pay at the original Judgment amount as the statute requires that the court may look to the assets of an obligor to make a child support determination.

POINT I. THIS COURT DOES NOT HAVE JURISDICTION OVER THIS MATTER AS NO DIRECT CONFLICT EXISTS BETWEEN THE INSTANT CASE AND THE MILLIGAN CASE IRRESPECTIVE OF THE DISTRICT COURT'S FINDING OF CONFLICT.

The opinion of the Fifth District Court of Appeal found that a direct conflict existed between the instant case and the case of Milligan v. Addison, 582 So. 2d 769 (Fla. 3rd DCA 1991). In order for a direct conflict to exist, the facts of each case must be practically identical. Adopting the definition from C.J.S., the Supreme Court in Ansin v. Thurston, 101 So. 2d 808 (Fla. 1958) at p. 811 has defined a conflict as follows:

> "A conflict of decisions *** must be on a question of law involved and determined, and such that one decision would overrule the other if both were rendered by the same court; in other words, the decisions must be based practically on the same state of facts and announce antagonistic conclusions."

In accord are Kincaid v. World Ins. Co., 157 So. 2d 517 (Fla. 1963), Nielsen v. City of Sarasota, 117 So. 2d 731 (Fla. 1960), Kyle v. Kyle, 139 So. 2d 885 (Fla. 1962), Florida Power and Light v. Bell, 113 So. 2d 697 (Fla. 1959). Most matrimonial actions involve vastly different fact situations and rarely does a conflict exist. Milligan, supra, is distinguishable from the instant case because of three substantial distinguishing factors.

Foremost of the factors is the fact that the children, at the time Former Husband herein proposed to enter law school, were of the ages of sixteen (16) and ten (10) respectively while in Milligan, the child was only three (3) years old at the time the

petition was filed (R-156). The ages of the children are extremely significant in the analysis of the application of the law as every reported case that has granted a modification requires that the children ultimately benefit from the additional education to be acquired by the parent. In this case, the sixteen (16) year old will never derive any benefit and any possible benefit to the ten (10) year old will be speculative at best, and of extremely limited duration.

The second, and equally important distinguishing factor is that in the instant case, when Former Husband entered law school he had liquidated his pension and obtained a sum of cash in excess of $27,000 (R-70,71, R-147, R-151). That amount would have been sufficient to pay all child support which would have been payable for the children during the Former Husband's entire tenure in law school. At Former Husband's present child support level of $866.00 per month at the time of trial, for the twenty-three (23) months until the oldest child reaches the age of eighteen (18), Former Husband would be required to expend the sum of $19,780 from those funds. The balance of $7,220 would adequately cover support for the remaining child for an additional year without accounting for the interest that would have been earned on those funds. In the Milligan case, the father was unable to pay the ongoing support while in school.

The final distinguishing feature between the instant case and the Milligan case is the fact that this is an appeal of a modification proceeding brought subsequent to the entry of a final judgment which had been based upon a Marital Settlement Agreement. In Milligan, the appeal was from an initial support award in a paternity case. The significance of the distinction between a modification and an initial proceeding is that in a modification proceeding the children have already been raised based upon a standard of living established by the child support ordered in the initial Court Order and the prior preseparation standard for a marriage that was entered into in 1982 (R-11). In an initial proceeding, the standard has not as yet been determined. It would indeed be cruel and unfair to substantially diminish a child's standard of living after the standard had been established solely to benefit a parent's desire to improve himself educationally, especially where the children would derive little or no benefit during their minority. Children are entitled to share the good fortune of their parents. Miller v. Schou, 616 So. 2d 436 (Fla. 1993).

The fact is that the result in Milligan and the result of the Fifth District Court of Appeal in the instant case are totally consistent. In Milligan, the three year old child had a substantial and long-term potential to gain from the father's education, while in the instant case the standard of living that

the children had enjoyed for in excess of thirteen (13) years would substantially diminish with little or no benefit to the children because of their ages.

POINT II. THE PURPOSE OF CHILD SUPPORT IS TO MEET THE IMMEDIATE AND ESSENTIAL NEEDS OF THE CHILDREN. CHILD SUPPORT SHOULD NOT BE MODIFIED DOWNWARD TO SUBSIDIZE THE COST OF THE EDUCATION OF A PARENT.

The law in the State of Florida is well settled that child support is a right created for the benefit of the child and is a legal obligation imposed on the parents by the state. Armour v. Allen, 377 So. 2d 798 (Fla. 1st DCA 1979); Cronebaugh v. Van Dyke, 415 So. 2d 738 (Fla. 5th DCA 1982); Thompson v. Korupp, 440 So. 2d 68 (Fla. 1st DCA 1983); Fowhand v. Piper, 611 So. 2d 1308 (Fla. 1st DCA 1992).

In Armour v. Allen, supra at page 800, the Court reviewed the longstanding rule as enunciated by the Florida Supreme Court stating as follows:

> Child support is a right which belongs to the child. It is not a requirement imposed by one parent on the other; rather it is a dual obligation imposed on the parents by the State. The rule is stated by the Supreme Court in State ex rel. Airston v. Bollinger, 88 Fla. 123, 101 So. 282,282, (1924) and in Ciociola v. Ciociola, 302 So. 2d 462, 464 (Fla. 3rd DCA 1976), as follows:
>
> "The father owes a duty to nurture, support, educate and protect his child, and the child has the right to call on him for the discharge of this duty. These obligations and rights are imposed and conferred by the laws of nature; and public policy, for the good of society, will not permit or allow the father to irrevocably divest himself of or to abandon them at his mere will or pleasure."

Essential to the ruling of the Court is the fact that the father may not divest himself of his obligation to support at his mere will or pleasure. In the instant case, Former Husband has

elected voluntarily and unilaterally to attend law school and has further sought Court approval to substantially reduce child support which is necessary for the essential needs of the children. Reiterating the quote set forth above from Airston v. Bollinger, supra, the Court, in Fowhand v Piper further stated at page 1312:

> "We regard the obligation to support one's child as arising from something somewhat more sacrosanct than a contract."

It is no doubt admirable that Former Husband desires to improve himself educationally. However, this improvement of his education should not be at the expense of the children, nor should the children subsidize his education by being deprived of child support which is necessary for their essential and growing needs. A child support amount of $200 per week for a person making $45,000 per year is more than reasonable and is obviously necessary to support the essential needs of two girls now ages eleven (11) and seventeen (17). The previously cited cases all require Former Husband to make the necessary sacrifices to support his children and not seek court approval to deprive them of their essential needs.

The denial of Former Husband's request for modification neither violates the principal of equal protection nor essential fairness since either party would have the right to attend college, graduate school or professional school. However, the party

so electing would be responsible to provide for the essential needs of the children during the period that the parent is attending school. This applies equally to both parents. In the event that Former Wife desired to further her education the law imposes no obstacle other than that the the children must be supported during her educational process.

Since the Former Husband is now able to finance a private law school education at considerable expense, he should have funded the cost of his children's support during that educational process. Former Husband could well have treated child support like any other living expense. Even though he is attending law school, he still must defray the cost of food, clothing, shelter, tuition, books, and all other normal living expenses. Child support should have been included in his financial planning. He could easily have funded all of his expenses including child support from his existing pension funds, student loans, gifts, and Summer earnings. Former Husband's attempt at modification is merely a request to have his children pay for a portion of his law school education. By reducing the needed support to the children Former Husband has more funds available with which to pay for his education. This result is obviously indicative of Former Husband's desire to place his own personal needs ahead of those of his children.

Former Husband's argument that Florida Statute 61.30(7) in some manner supports his argument is misplaced and totally inapplicable to the instant case. That Section was enacted by the

legislature to require the obligor to contribute toward childcare while the custodial parent sought employment or education. It is not indicative of any general legislative intent to permit parents to arbitrarily substantially reduce their support obligations for their own personal educational gains.

Former Husband's argument, in fact, is incongruous. If he truly believes that by completing law school he will significantly increase his earning potential, then he should be able to borrow or otherwise obtain the funds necessary to pay the child support at the present level and then repay those funds when his income increases substantially. Otherwise, if the child support is reduced from the amount set forth in the original judgment, Former Wife will either be forced to borrow money or reduce the children's standard of living. Thus, the children would be in effect subsidizing their father's law school education, and because of their ages, never derive any further benefit whatsoever. Former Husband's desire to avoid payment of child support during his tenure at law school is a selfish act which utterly disregards the needs of the children. Such a result further violates the spirit and intent of Armour v. Allen, Supra, Cronebaugh v. Van Dyke, Supra, Thompson v. Korupp, Supra, and Fowhand v. Fowhand, Supra.

While Respondent has conceded that Former Husband has not acted in bad faith in applying to law school, the fact is that Former Husband had previously attempted a downward modification

of child support in 1993, prior to his acceptance at law school. He commenced this modification proceeding even though his income had increased since the date of the initial final judgment (R-32,33, R-152). The trial judge, of course, dismissed his petition. An award of attorney's fees to Former Wife was reversed by the 5th District Court of Appeals in Overbey v. Overbey, 664 So. 2d 351 (Fla. 5th DCA 1995). Former Wife has been in litigation with Former Husband almost without respite since the first modification proceeding was filed in 1993, and has been forced to incur attorney's fees, expenses and loss of work time to defend against Former Husband's almost fanatical rage against the payment of child support. His actions are totally self centered and ignore the essential needs and best interests of the children.

POINT III. PETITIONER'S UNILATERAL AND VOLUNTARY DECISION TO ATTEND LAW SCHOOL DOES NOT CONSTITUTE A SUBSTANTIAL CHANGE OF CIRCUMSTANCES WARRANTING A REDUCTION IN CHILD SUPPORT. THIS VOLUNTARY ELECTION WILL NOT RESULT IN ANY BENEFIT TO THE CHILDREN SINCE THEY ARE OF AN AGE WHERE THEY WILL REACH MAJORITY BEFORE FORMER HUSBAND MAY POSSIBLY DERIVE ANY APPRECIABLE ADDITIONAL INCOME AND THIS ADDITIONAL INCOME IS HIGHLY SPECULATIVE.

A. SUBSTANTIAL CHANGE OF CIRCUMSTANCES:

The amount of child support ordered by a court may be modified if a parent shows that there has been a substantial change of circumstances which warrants such a modification. A change of circumstances is substantial if it is significant, material, involuntary, and permanent, Deatherage v. Deatherage, 395 So. 2d 1169, 1170 (Fla. 5th DCA 1981) and Hirsch v. Hirsch, 642 So. 2d 20 (Fla. 5th DCA 1994). If the change of circumstances is voluntary, a reduction in the amount of child support would constitute error. In the instant case, Petitioner's decision to attend law school constitutes a voluntary decision which would not properly form the basis for a court-ordered reduction in child support.

B. VOLUNTARY ACTS BAR MODIFICATION:

In State of Florida, Department of Revenue v. Thomas, 659 So. 2d 1305 (Fla. 1st DCA 1995), the parent had left the work force to pursue his education and sought a downward modification of child support for his two minor children. The trial court found that the parent's act of leaving the workforce was a voluntary act, but that the child support should be reduced. The modification was reversed as an abuse of discretion. The Court

emphasized the fact that a voluntary reduction in income cannot form the basis for a downward modification in child support.

In the instant case, Petitioner has also voluntarily left the workplace and is now seeking a downward modification based on this self imposed change of circumstances. Since Petitioner has voluntarily left the workplace to pursue his education, like the parent in Thomas, a modification constitutes error.

A similar case, Department of Health and Rehabilitative Services v. Schwass, 622 So. 2d 578 (Fla. 5th DCA 1993), involved a parent who was denied a reduction in child support to enter a drug rehabilitation program. The Court held that drug treatment was "not a legal reason to reduce court ordered support that is necessary to financially provide for a child," Schwass, Supra at p. 579. In the instant case, the desire to attend law school is Petitioner's sole reason for requesting a reduction. Both Thomas and Schwass, supra, hold that voluntarily seeking education is not a valid reason for reducing the support required by Petitioner's children.

Ledbetter v. Ledbetter, 658 So.2d 1146 (Fla. 4th DCA 1995) sets forth criteria that the Court considered in determining voluntary underemployment. Those criteria are set forth at p. 1148:

> (1) Whether the reduction in income is in good faith and reasonably calculated to insure the future economic well-being of both the payor and the persons to whom the duty of support is owed and...

> (2) Whether participation in the program is reasonable, in view of the amount of money the supporting spouse will earn during the reduction and the effect thereof on his or her ability to meet the current support needs of the spouse or dependent children.

Based upon the facts of this case, Former Husband has failed to meet either requirement.

As to the first requirement, while Respondent agrees that Petitioner's decision to enter law school was not done in bad faith, under no circumstances was that decision reasonably calculated to insure the economic well-being of Former Husband's minor children. The fact is that the child, Donna, is seventeen (17) years of age and cannot possibly benefit from any possible increased income of Former Husband during the child's minority following Former Husband's graduation from law school. Furthermore, since Former Husband had a job paying approximately $45,000.00 per year, any possible future income increase to Former Husband would be purely speculative. His unilateral decision, if condoned by the Court, would result in the children being placed at an economic level substantially less than the standard of living that had been established since the divorce. Assuming the average income for new attorneys in the State of Florida is $30,000 per year (See The Florida Bar News, June 15, 1996, Vol. 23, No. 12, P.1), Petitioner's income after law school could possibly decrease. While it is impossible to predict

whether his income will increase or decrease, the needs of the children for current support are immediate, ongoing, and essential. Thus, Petitioner has failed to meet the first requirement set forth in the Ledbetter case and has placed Former Wife in a position of being unable to meet the support needs of the children.

Former Husband has failed to meet the second criteria set forth by the Court in Ledbetter. He asserts that he has voluntarily elected to attend law school and therefore will not have sufficient income to pay the existing amount of child support as determined by guidelines and the needs of the children. In view of the essential needs of the children, Former Husband's participation in the program constitutes a tremendous hardship to the family and therefore Former Husband's participation in the program is not reasonable.

The original support level set forth in the Final Judgment of Dissolution of Marriage dated March 25, 1991 between the parties was the sum of $200 per week. Obviously the needs of the children have not diminished by that amount since the entry of the Final Judgment of Dissolution of Marriage. Rather, as recognized by the legislature and by case law, the needs of older children must have increased since the time of the Final Dissolution, and the Court may take judicial notice of this fact. See Wanstall v. Wanstall, 427 So.2d 353 (Fla. 5th DCA 1983), F.S. 61.30(11)(e).

The record shows that the Former Wife has a monthly operating deficit to support herself and the children of approximately $1,100.00 per month. The child support payment of $200.00 per week paid by Former Husband merely allowed the family to meet expenses which include the mortgage payment on the Former marital residence of in excess of $1,000 per month (R-125, R-190). Former Husband, however, had income in excess of $45,000.00 per year in 1994 and pursuant to guidelines, was able to support the children at the level that he had been paying since the date of the original judgment. Thus, the second prong of the rule is not met as the current needs of the children cannot be met on the reduced amount.

The Court in Ledbetter summarized the reasoning behind its two-pronged rule. It stated at page 1140 as follows:

> Simply put the trial court must balance the needs and desires of the supporting parents to enhance his or her career against the current needs of the former spouse or minor children for support.

The decision of the trial court in Ledbetter was reversed in part because it failed to balance the needs and desires of the supporting parent against the needs of the minor children for support. The effect of any decision to reduce support in this case is that the children of the marriage will suffer greatly for a minimum of three (3) years during which time one of the children will have reached her majority and the other child will be

well into her teens. Former Husband's election to attend law school and resultant desire to reduce child support could not have happened at a more inopportune time in the development of the children. At their ages they are in need of increased support.

C. DISTINGUISHABLE CASES:

In initial support determination in Florida, certain courts have held that the decision to complete one's education may form a basis for a downward support modification. See, Arce v. Arce, 566 So. 2d 1308 (Fla. 3DCA 1990), Milligan v. Addison, 582 So. 2d 769 (Fla. 3DCA 1991).

In Arce, the father had been in medical school throughout the marriage and had recently completed medical school. He accepted a fellowship which paid much less than his current temporary job. The fellowship, however, was a requirement for his particular specialty. The court held that the parent was merely completing his education that had been started during the marriage and not voluntarily reducing his income as the completion of his education was contemplated by the parties during the marriage. Arce at p. 1311.

In the instant case, Petitioner is not completing his education, but is instead choosing to pursue a new career. Petitioner had been employed as a police officer for over eleven years. Now, he has decided to quit this job and attend law school. Unlike Arce where the parent desired to continue with his chosen profession, Petitioner has decided to embark upon a new career.

The Fifth District Court of Appeal determined in its opinion that the practice of law is not a logical extension of a career as a police officer. Petitioner's choice to pursue a new career more than eleven years after becoming a police officer is not a substantial change of circumstances which permits a reduction in the amount of child support.

The importance of the interests of the children was reemphasized in Milligan, supra, a paternity suit, where the trial court imputed income to the father because he voluntarily chose to attend law school. The appellate court reversed a finding that the decision to attend law school could not be considered a voluntary reduction of income because "this decision will ultimately benefit the children." Milligan at page 770. Milligan, however, concerned a child of three years of age, not children aged ten (10) and sixteen (16) (R-156). Furthermore, at the time of the hearing Mr. Milligan was in his third year of law school (R-159,160).

In both Arce and Milligan, the court viewed the decision of the parent to acquire advanced education as a decision which would result in benefit for both the parent and the children after a short time. However, the children were much younger in those cases and would certainly derive a substantially greater benefit due to their young ages. In this case, one of the children is already seventeen years of age. By the time Petitioner completes law school, the child will be over eighteen and no

longer entitled to support. They will have to sacrifice now with no real chance to share in the potential success of the future.

In deciding such cases, it seems that the courts have attempted to strike a balance between personal autonomy and the essential support needs of the children. Clarifying the Arce and Milligan opinions in Wollschlager v. Veal, 601 So.2d 274, (Fla. 1st DCA 1992), the court stated at p. 276:

> We do not read the holdings in either Milligan or Arce as supporting the proposition that one parent should be totally excused from child support obligations based on a unilateral decision to attend school. We also reject the implication that may be drawn from these cases that one parent may make a unilateral decision to pursue higher education for a period of several years and thereby put an undue financial burden on the other parent, or preclude the other parent from pursuing similar educational or other career opportunities. The requirement of sacrifices by one parent in order to gain substantial assistance in the future should not be imposed; it should be a mutual decision of the parties.

The court was rightfully concerned that the decision of one parent would place an undue burden on the other parent in supporting the children. In the instant case, Petitioner's unilateral decision to attend law school was imposed upon Respondent and the children not mutually decided. Furthermore, Respondent obviously cannot complete her education as she must work to support the family.

Petitioner's unilateral decision should not require the Respondent and the children to make substantial sacrifices. In this case, the children will receive no benefit from Petitioner's return to school and will, in fact, endure hardship. With children come substantial responsibilities to their support. Some of these responsibilities place constraints on personal freedom. The best interests of the children require continuing support.

POINT IV. PETITIONER POSSESSES SUFFICIENT ASSETS TO PAY THE ENTIRE AMOUNT OF CHILD SUPPORT DURING HIS TENURE AT LAW SCHOOL AND THEREFORE IS NOT ENTITLED TO A MODIFICATION.

At the hearing on Former Husband's modification petition Former Husband admitted that he had liquidated his pension with the City of Daytona Beach and had received the sum of $27,572.35. (R-70,71, R-147, R-151). He further admitted that he intended to place that sum in an interest bearing account and use it to make child support payments. However, he attempted to apply the guideline support statute to the amount of his pension as if it were recurring income.

The trial court is required to adjust the minimum child support award based upon the fact that Former Husband had sufficient assets with which to pay child support while attending school. Pursuant to F.S. 61.30(11)(h) the Court may adjust the minimum child support award or either or both parents' share of the minimum child support award based upon:

> "(h) total available assets of the obligee, obligor, and the child."

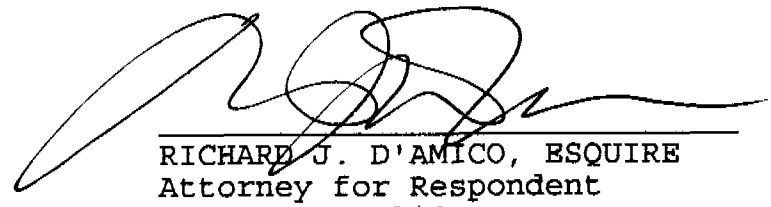
In this case Former Husband had sufficient assets with which to pay the entire amount of child support during his projected period of time in law school. He should be obligated to pay child support at the full amount as he has sufficient funds with which to pay that child support.

CONCLUSION

The Judgment of the Fifth District Court of Appeals should be affirmed and the Former Husband's Petition for Modification of Final Judgment of Dissolution of Marriage should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Respondent has been furnished to DANIEL LYNN OVERBEY, 322 East Colfax Avenue, #102, South Bend, Indiana 46617, and to LAWRENCE J. NIXON, ESQUIRE, 619 North Grandview Avenue, Daytona Beach, Florida 32118, this 23 day of August, 1996.



RICHARD J. D'AMICO, ESQUIRE
Attorney for Respondent
154 South Halifax Avenue
Daytona Beach, FL 32118-4480
(904) 255-0932
Florida Bar No. 360317