Supreme Court of Florida

DANIEL LYNN OVERBEY Petitioner, v. JANET CAROL HUTCHING OVERBEY n/k/a Janet Carol Tedder, Respondent.	*	CASE NO. 88,370 District Court of Appeal, 5th District - No. 95-2252

* *

PETITIONER'S

INTIAL BRIEF

DANIEL L. OVERBEY
322 E. Colfax Avenue, #102
South Bend, Indiana 46617
(219)233-1689
Petitioner pro-se.

LAWRENCE J. NIXON, Esquire
Florida Bar #138403
619 North Grandview Avenue
Daytona Beach, FL 32118
(904) 258-0286
Attorney/Co-Counsel for Petitioner.

Table of Contents

TABLE OF CITATIONS

Florida Statutes

Constitutions

Other Sources

INTRODUCTION

The Petitioner, Daniel Overbey, was the Former Husband in the child support modification proceedings below. The Respondent, Janet Tedder, was the Former Wife. The Petitioner will be referred to herein as "Daniel" or "the Petitioner" and the Respondent will be referred to as "Janet" or "the Respondent."

References to the Appendix are enclosed in brackets indicating the section and page number(s).

STATEMENT OF THE CASE AND FACTS

The parties were married on December 22, 1982, and the marriage was dissolved by Judgment of the Court dated March 8, 1991. Pursuant to the incorporated Marital Settlement Agreement Daniel agreed to pay Janet the sum of $200.00 per week for the support of the two (2) children, Donna Overbey (f/k/a Donna Haas) born to Janet May 3, 1979, and adopted by Daniel on February 14, 1989, and Danielle Overbey born on February 21, 1985.

In 1991, Daniel applied for admission to the University of Florida College of Law. On April 12, 1991 Daniel was denied admission.

Daniel applied to the University of Notre Dame Law School on December 16, 1994, and was accepted for admission to the Fall 1995 entering class. Daniel's current wife was also accepted for admission to the Fall 1995 entering class at Notre Dame Law School. At the time of acceptance to Notre Dame Law School, Daniel was employed full time as a Police Officer with the City of Daytona Beach.[1]

---

[1] [Appendix at D-1, D-2]

In May of 1995, Daniel commenced this proceeding to modify his child support obligation during his attendance at Notre Dame Law School. Daniel did *not* seek to be completely *excused* from his child support obligation. Rather, Daniel sought only to have his child support obligation modified downward to reflect his reduced income while in law school.[2] At the Modification Hearing, Daniel presented evidence and testimony detailing his reasons and motivations for attending law school and the preparations that he had made to provide for the children while he was there.[3]

Daniel supported his complaint for modification with Arce v. Arce[4] and Milligan v. Addison,[5] which hold that a downward modification of child support is permissible when the party owing support suffers a temporary reduction in income to pursue education when such action is taken in good faith and likely to benefit those to whom support is owed.

The trial court entered an Order Amending Final Judgment of Dissolution of Marriage on July 28, 1995,[6] adopting the Child Support Guideline Worksheet submitted by Daniel[7] and modifying Daniel's support obligation to $223.72 per month until the

---

[2] [Appendix at B-1]

[3] Specifically, Daniel submitted to the court documentation of a Prepaid College Fund that he had established for the older daughter along with evidence that he had arranged to continue to pay for the children's health insurance and that his decision was economically sound. [Appendix at D-1, D-2]

[4] 566 So.2d 1308 (Fla. 3rd DCA 1990). [Appendix at I-1]

[5] 582 So.2d 769 (Fla. 3rd DCA 1991). [Appendix at M-1]

[6] [Appendix at C-1]

[7] Although Janet waived any claim to Daniel's pension at the time of the divorce in return for all the equity in the marital home, Daniel offered to impute his entire pension, both principal and interest, as income during his attendance in law school. Daniel's child support obligation was calculated by dividing his pension fund of approximately $27,000 into equal monthly amounts for the 36 months that he would be in school. [Appendix at F-1, F-2]

oldest child reaches majority, and then to $166.95 per month until Daniel completed law school.[8] Circuit Judge Julianne Piggotte found that:

1. Daniel's decision to attend law school was not a "voluntarily" reduction in his income sufficient to impute income to him for child support purposes based on his earnings history;
2. Daniel met the "heavy burden" of proof to sustain his Supplemental Complaint for Modification and the modification of child support to further his education and attend law school at Notre Dame;
3. Daniel's decision to attend law school is a logical extension of his career based on his previous employment as a police officer.
4. The Supplemental Complaint was filed in good faith and was not an attempt by Daniel to avoid child support;
5. Daniel had taken appropriate steps to provide for the welfare of the minor children while he is attending law school; and
6. The minor children would ultimately benefit from Daniel's actions, even though the older child would reach the age of majority while Daniel is attending law school.[9]

There is no transcript of the proceeding because no court reporter was present. There is a "Statement of Proceedings Held as recorded by the Clerk of the Court"[10] and "Former

[8] Although not specifically addressed in the Order, it was stipulated that Janet would be eligible for an increase as soon as Daniel's income increased after law school. She would not need to show increased need, only that his income had increased. *See* Arce, 566 So.2d at 1312. [Appendix at I-5]

[9] [Appendix at C-1]

[10] [Appendix at D-1]

Husband's Additions and Corrections."[11] Both documents were approved by the trial court on January 16, 1996.[12]

Janet appealed the trial court's decision to the Fifth District Court of Appeal alleging that the trial court erred in modifying Daniel's support obligation to reflect his reduced income while he was attending law school. On May 31, 1996, the Fifth District reversed the trial court in a two-to-one panel decision.[13]

The Fifth District characterized the issue as whether a non-custodial parent's decision to attend law school, with a consequent significant loss of income, constitutes a valid basis for a downward modification of child support. The Fifth District found an apparent conflict between decisions of the First District in State, Department of Revenue on Behalf of Johnson v. Thomas,[14] and Wollschlager v. Veal,[15] and the Third District's decisions in Arce v. Arce[16] and Milligan v. Addison[17].

The Fifth District held that Milligan, where the appellant left his prior employment to attend law school, was "directly on point in regard to the [instant case], and supports the decision of the trial court as well as the position of the [Petitioner]."[18] At the same time, the Fifth District distinguished Arce on the grounds that it dealt with an "education that was ongoing during the marriage."[19]

---

[11] [Appendix at E-1]
[12] [Appendix at E-4]
[13] [Appendix at A-1]
[14] 659 So.2d 1305 (Fla. 1st DCA 1995). [Appendix at P-1]
[15] 601 So.2d 274 (Fla. 1st DCA 1992). [Appendix at S-1]
[16] 566 So.2d 1308 (Fla. 3rd DCA 1990). [Appendix at I-1]
[17] 582 So.2d 769 (Fla. 3rd DCA 1991). [Appendix at M-1]
[18] Overbey v. Overbey, 21 Fla. L. Weekly D1296 at 3 (Fla. 5th DCA May 31, 1996). [Appendix at A-3]
[19] *Id.*

The Fifth District did not dispute any of the findings made by the trial court except the ancillary finding that law school is a logical progression of Daniel's career as a police officer.

The Fifth District interpreted the First District's position as being that a parent's voluntary act in relinquishing income, even when the parent's motives and goals are "admirable," cannot serve as justification for a modification of child support. Adopting this approach, the Fifth District certified conflict with Milligan.

SUMMARY OF THE ARGUMENT

This case presents the Court with the issue whether a divorced parent who suffers a temporary reduction in income while completing or furthering his education may have his child support obligation temporarily modified to reflect his reduced earnings.[20] Neither this case nor the cases which precede and support it suggests that a divorced parent should be completely relieved of contributing to his children's support, only that he should have that support obligation temporarily modified to reflect his reduced income.

In 1991, the Third District addressed as an issue of first impression in Florida whether and how income should be imputed to a parent paying support who reduced his income to further his education.[21] The Third District noted that courts of other states had approved such temporary reductions of child support. The court held that a spouse who

---

[20] The use of the male pronoun is not meant to suggest that the issue presented will only affect non-custodial fathers. In actuality, this issue equally affects custodial and non-custodial parents who seek modifications to assist or enable them to further their education. *See infra* page 24.

[21] Arce v. Arce, 566 So.2d 1308 (Fla. 3rd DCA 1990). [Appendix at I-4]

suffers a temporary reduction in income to complete his education has not voluntarily reduced his income and may be *temporarily* excused from having attributed to him the income which he is capable of earning but is not currently earning.

The Third District reaffirmed its position in Milligan v. Addison, holding that a father's decision to better himself financially in the future by attending law school could not be considered a voluntary reduction in income sufficient to impute income to him for child support purposes based on his earnings history.[22] The Fifth District found that Milligan is directly on point with the Petitioner's case and supports the Petitioner's position and the decision of the trial court.[23]

The courts' holdings in Arce and Milligan are consistent with other courts' interpretations of F.S. 61.30(2)(b), which gives a court the discretion to impute income to an under-employed or unemployed spouse when such under-employment or unemployment is found to be voluntary.[24] Recent interpretations of the statute include not imputing income to a spouse who participated in a legal strike;[25] imputing income to a dental student based only on his part-time earnings during school rather than his previous earnings;[26] basing a child support obligation on a spouse's actual salary during training rather than imputing additional income;[27] and balancing the needs and desires of the

---

[22] 582 So.2d 769 (Fla. 3rd DCA 1991). [Appendix at M-2]
[23] Overbey v. Overbey, 21 Fla. L. Weekly D1296 at 3 (Fla. 5th DCA May 31, 1996). [Appendix at A-3]
[24] Fla. Stat. Ann. §61.30(2)(b) (West Supp. 1996). [Appendix at U-1]
[25] Reep v. Reep, 565 So.2d 814 (Fla. 3rd DCA 1990).
[26] Wollschlager v. Veal, 601 So.2d 274 (Fla. 1st DCA 1992). [Appendix at S-1]
[27] Sotnick v. Sotnick, 650 So.2d 157 (Fla. 3rd DCA 1995). [Appendix at N-1]

supporting parent to enhance his or her career against the current needs of the children for support.[28]

The cases cited by the Fifth District; State, Department of Revenue v. Thomas,[29] and Department of Health and Rehabilitative Services v. Schwass,[30] are clearly distinguishable from Arce, Milligan, and Overbey. The First District, in Thomas, reversed a reduction for a spouse to pursue his education because the trial court specifically found that the spouse's actions were voluntary. The Third and Fourth Districts, however, have approved such reductions upon a finding by the trial judge that the spouse seeking the reduction was *not* voluntarily unemployed or under-employed within the meaning of the statute.[31]

Schwass, which was decided without appearance by the appellee, is distinguishable because it dealt with a spouse who voluntarily checked himself into a drug treatment program and who was determined to be financially capable of paying child support at the higher amount. Moreover, the court in Schwass found that the children's needs would *not* be met at the lower amount of child support that the spouse was requesting. In contrast, in Milligan and Overbey there were findings that the children's needs *would* be met at the lower amount.

---

[28] Ledbetter v. Bell, 658 So.2d 1147 (Fla. 4th DCA 1992). [Appendix at L-1]

[29] State, Department of Revenue v. Thomas, 659 So. 2d 1305 (Fla. 1st DCA 1995). [Appendix at P-1]

[30] Department of Health and Rehabilitative Services v. Schwass, 622 So.2d 578 (Fla. 5th DCA 1993). [Appendix at O-1]

[31] Arce, 566 So.2d at 1311 [Appendix at I-4]; Milligan, 582 So.2d at 770 [Appendix at M-2]; Ledbetter, 658 So.2d at 1148 [Appendix at L-4].

The Third District's decision in Milligan and the trial court's decision in Overbey are also consistent with Florida Statue §61.13(1)(a), which gives courts the continuing jurisdiction to modify child support when there is a substantial change in circumstances,[32] and §61.30(1)(a), which permits a trier of fact to deviate from the guidelines upon a finding justifying why ordering payment of the guideline amount would be inappropriate.[33]

The intent of the statutes, the decisions in other cases, and public policy all support approving Milligan. In addition the approach advocated by the Fifth District violates Article One of the Florida Constitution because it treats divorced parents differently than married parents. The Florida Supreme Court held in Grapin v. Grapin that treating divorced parents differently than married parents is "fundamentally unfair" and violates divorced parents' rights to equal protection of the laws.[34] Divorced parents should be able to make the same changes in their lifestyles and careers that married parents can make, to the extent that such changes are not made to avoid paying support.

Milligan gives courts the discretion to balance the needs and desires of the supporting parent to enhance his education against the current needs of the children for support. Thus, it affords divorced parents equal protection of the laws while protecting the State's interests in ensuring that children of divorced parents are adequately supported by both of their parents.

---

[32] Fla. Stat. Ann. §61.13(1)(a) (West Supp. 1996). [Appendix at T-1]
[33] Fla. Stat. Ann. §61.30(1)(a) (West Supp. 1996). [Appendix at U-1]
[34] Grapin v. Grapin, 450 So.2d 853 (Fla. 1984) [Appendix at J-1]

Education is especially important for divorced parents. Divorce often leads to economic hardship for all concerned and, as a result, the State is often called upon to make up the difference.[35] The approach advocated in Milligan encourages parents to better themselves and ultimately the lives of their children. The Fifth District's approach has the opposite effect, making it difficult or impossible for divorced parents to pursue or continue an education, even when, as in Overbey, the trial court finds that the children will benefit from the parent's decision to further his education.[36]

ARGUMENT

I. MILLIGAN IS CONSISTENT WITH THE LEGISLATIVE INTENT OF THE CHILD SUPPORT STATUTES, WHICH INDICATES THAT MODIFICATIONS IN CHILD SUPPORT TO FURTHER EDUCATION WERE BOTH ANTICIPATED AND PROVIDED FOR.

Florida Statutes §61.13 and §61.30 govern how child support is calculated and under what conditions it may be modified. Both the legislative intent and the explicit wording of the statutes provide for judicial intervention as needed to obtain just results. The Fifth District, however, has interpreted §61.30(2)(b) as a *per se* rule which prevents modifications of child support for parents who experience voluntary reductions in income to further their education, even when the parents' actions, as in the Petitioner's case, are determined to be in good faith and likely to benefit the children.

A. The Legislature intended that child support awards be modified to accommodate spouses who further their education.

---

[35] The economic impact of divorce is discussed *infra* at section III.

[36] [Appendix at C-1]

In 1993, the Legislature revised Florida Statute §61.30(7) to provide for custodial parents who wished to participate in an educational program "calculated to result in employment or to enhance income of current employment."[37] This revision allows custodial parents to receive a temporary increase in support while they are pursuing their education. No distinction was made between "voluntary" and "involuntary" decisions. Although this section makes provisions for custodial spouses, it indicates that the legislature recognized that divorced spouses would desire to further their education and would not be able to maintain the same level of contribution to the children's support while in school.

B. The Legislature intended that courts have the discretion to modify child support obligations above or below the guidelines in certain circumstances.

The legislature provided for deviation from the guidelines based on "specified considerations."[38] Florida Statute §61.30(1)(a) and §61.30(11)(k) codified the legislative intent to allow judicial discretion to achieve just results. Deviation from the guidelines is permitted when there is a finding that the guideline amount would be "unjust or inappropriate." Likewise, §61.30(11)(k) allows a court to adjust *either* parents' contribution as "needed to obtain an equitable result."[39] Nothing in the legislative comments suggests that the court should deviate only when the "unjust or inappropriate"

---

[37] FINAL BILL ANALYSIS & ECONOMIC IMPACT STATEMENT OF THE HOUSE OF REPRESENTATIVES COMMITTEE ON JUDICIARY TO CS/HB 707, at 4 (1993) (Ch. 93-208 §5, Laws of Florida (eff. July 1, 1993) added to §61.30(7) "or education calculated to result in employment or to enhance income of current employment."). [Appendix at H-4]

[38] *Id.*

[39] Fla. Stat. Ann. §61.30(11)(k) (West Supp. 1996). [Appendix at U-4]

results are the result of an involuntary act. Rather, the legislature clearly anticipated and provided for parents who make voluntary, good faith decisions to improve their lives.

C. Legislative intent takes precedence over strict interpretation of a statute.

The Florida Supreme Court has stated that "[l]egislative intent must be given effect even though it may contradict the strict letter of the statute."[40]

The legislative intent of the child support statutes was to permit triers of fact the discretion to make modifications in child support obligations when the circumstances, as in the Petitioner's case, so warrant. Fla. Statute §61.30(2)(b), which speaks only to a method by which income may be calculated, should not be read as to defeat the obvious legislative intent of the entire section.

II. PERMITTING A NON-CUSTODIAL PARENT, WHO EXPERIENCES A TEMPORARY REDUCTION IN INCOME WHILE COMPLETING OR FURTHERING AN EDUCATION, TO BE TEMPORARILY RELIEVED OF HAVING INCOME IMPUTED TO HIM BASED ON HIS EARNINGS HISTORY IS CONSISTENT WITH FLORIDA STATUTES AND PRIOR COURT DECISIONS.

A. Milligan is consistent with prior decisions of the District Courts of Appeal.

ARCE V. ARCE[41]

In 1991, the Third District addressed as an issue of first impression in Florida, whether and how income could be imputed to parents paying support who reduced their

---

[40] Vildibill v Johnson, 492 So.2d 1047 (Fla. 1986) (citing State v. Webb, 398 So.2d 820 (Fla. 1981)).

[41] 566 So.2d 1308 (Fla. 3rd DCA 1990). [Appendix at I-1]

income to further their education. The Third District based its decision on the finding that the long term benefit to all concerned outweighed any short term inconvenience caused by giving the father a temporary reduction in his support obligations. The Third District distinguished prior cases that had denied downward modifications to under-employed and unemployed spouses because they dealt with spouses who would not be meeting the needs of their children at the reduced level nor reasonably ensuring their children's future well-being.[42]

Roberto and Hortensia Arce were divorced after 11 years of marriage. Roberto, like the Petitioner here, had pursued his undergraduate degree during the marriage. At the time of the divorce he was employed as an emergency room physician earning over $100,000 per year. He sought and received a fellowship in cardiology which would pay only $36,000 per year while he was in training. At the final hearing on the wife's petition for dissolution of marriage, Roberto Arce submitted his financial affidavit listing as income the $36,000 that he would receive during his training. Although acknowledging that Roberto's actual income during training would only be $36,000 per year, the trial court imputed to him the $100,000 that he had been earning, finding that he had voluntarily reduced his income.

On appeal, the Third District reversed, citing numerous decisions from other states holding that a spouse who suffers a temporary reduction in income to complete his education has not voluntarily reduced his income.[43] The court held that:

> A spouse who demonstrates his good faith, and whose conduct is reasonably calculated to ensure the future economic well-being of the

[42] *Id.* at 1311. [Appendix at I-4]
[43] *Id. See infra* section II-D, Decisions of Other States and accompanying text.

> persons to whom he owes support, may be *temporarily* excused from having attributed to him the income which he is capable of earning, but which he is not currently earning.[44]

Contrary to the Fifth District's characterization, Arce is not distinguishable from Overbey, as both dealt with an education that was ongoing during the marriage. The Arce court recognized that there was conflicting testimony at the trial as to whether the Arces had ever agreed on, or even discussed, Roberto's desire to further his education.[45] Like Roberto Arce, the Petitioner pursued and finished his undergraduate degree during the marriage. Both the Petitioner and Roberto Arce were employed full-time when they were divorced and both had been out of college several years before seeking to return to enhance their education.

MILLIGAN V. ADDISON[46]

Emphasizing the long term benefits of a father's decision to go to law school, the Third District reaffirmed Arce in Milligan v. Addison. The Third District, like the trial court in Overbey, held that the father's decision to better himself financially by attending law school should not be considered a voluntary reduction in income sufficient to impute income to him for child support purposes based on his earnings history because his decision would ultimately benefit his child. The Third District directed the trial court to base his child support obligation on his actual or potential earnings while working part time during law school.

---

[44] Arce, 566 So.2d at 1311 (emphasis in original). [Appendix at I-4]
[45] Arce, 566 So.2d at 1309 n.1. [Appendix at I-2]
[46] 582 So.2d 769 (Fla. 3rd DCA 1991). [Appendix at M-1]

LEDBETTER V. BELL[47]

The Fourth District also recognized the importance of looking at the long term benefits. In Ledbetter, the court expressed agreement with Arce and Milligan, and held that when a former spouse decides to forgo a present higher salary to pursue career enhancing training and education at a lower salary, the trial court must decide whether the payor is "voluntarily under-employed," within the meaning of Florida Statute §61.30(2)(b). Although the court, in dicta, expressed concern for the unilateralness of the former spouse's decision,[48] it stated that:

> [T]he privilege of participating in a career enhancement program without the imputation of income is not absolute and the trial court must exercise its discretion in light of the unique facts of each case. . . . Simply put, the trial court must balance the needs and desires of the supporting parent to enhance his career against the current needs of the former spouse or minor children for support.[49]

This is consistent with the trial court's decision in Overbey, in which the trial court found that the children's needs were properly considered and would be met at the reduced level of support.[50]

WOLLSCHLAGER V. VEAL[51]

The First District has also held that the long term benefits should be weighed against any short term detriments when considering downward modifications for spouses who desire to further their education. In Wollschlager, the father sought to be relieved of paying *all* child support while he attended dental school. Citing Arce and Milligan, the

---

[47] 658 So.2d 1146 (Fla. 4th DCA 1995). [Appendix at L-1]
[48] *See* discussion of "unilateral decisions" *infra* section II-E, page 20.
[49] 658 So.2d at 1148. [Appendix at L-3]
[50] [Appendix at C-1]
[51] 601 So.2d 274 (Fla. 1st DCA 1992). [Appendix at S-1]

First District held that a non-custodial parent should not be completely relieved of child support obligations, and remanded the case to the trial court with an instruction to impute income to the father based on his actual earnings or earnings potential while working *part time* during school.

Like Milligan and Ledbetter, Wollschlager supports the Petitioner's position that the issue is properly one of judicial discretion. A *per se* rule permitting or denying such modifications is not appropriate. Rather, each case should be decided on its unique facts, "allow[ing] a trial court to fashion a schedule of payments that will take into account the needs of the family."[52]

SYLVESTER V. RYAN[53]

Notwithstanding their holding in Overbey, the Fifth District has also advocated judicial discretion in determining child support. In reversing an award of child support that exceeded the needs of the child, Chief Judge Harris expounded on the need for comparable fairness, citing judicial discretion as one method of meeting this need. He emphasized that a parent's earning ability should not be the sole consideration when making support awards.

> I submit that divorced parents should, like married parents, be permitted to establish their own standard of living. . . . I agree with Justice McDonald's statement in [Miller v. Schou]: "Children have no right to the property of their parents. Their only right is to be supported. . . . The trial judge has *great discretion* in setting the level of support."[54]

---

[52] Wollschlager, 601 So.2d at 276 (quoting Arce v. Arce, 566 So.2d 1308 at 1311 (Fla. 3rd DCA 1990)). [Appendix at S-3] *See also* Sotnick v. Sotnick, 650 So.2d 157 (Fla. 3rd DCA 1995) (spouse participating in education program should pay child support based on spouses' reduced earnings, not earnings history). [Appendix at N-1]

[53] 623 So.2d 767 (Fla. 5th DCA 1993). [Appendix at Q-1]

[54] Sylvester, 623 So.2d at 769-770 (emphasis added) (quoting Miller v. Schou, 616 So.2d 436 (Fla. 1993) (McDonald, J. concurring)). [Appendix at Q-3, Q-4]

This is consistent with Milligan and Ledbetter, which recognize that a non-custodial parent should be permitted to make lifestyle decisions that may temporarily reduce their support obligations, at least to the extent that, as in the Petitioner's case, the trial judge finds that the children's needs will still be met.

B. Milligan is distinguishable from the cases relied upon by the Fifth District Court of Appeals.

In reversing the trial court's decision in Overbey, the Fifth District certified conflict with Milligan, finding the First and Third Districts to be in conflict regarding the interpretation of Florida Statute §61.30(2)(b), which requires judges to impute income to a voluntarily unemployed or under-employed spouse. In addition to Wollschlager v. Veal, which is consistent with Milligan,[55] the Fifth District cited State v. Thomas and Dept. of Health and Rehabilitative Services v. Schwass. They are clearly distinguishable from Milligan yet do not conflict with its rationale.

STATE V. THOMAS[56]

The First District, in Thomas, reversed a reduction in child support given to a spouse to pursue his education. However, unlike Milligan and Overbey, the trial court in Thomas had found that the spouse had "voluntarily and unilaterally" taken himself out of

[55] Wollschlager and Milligan both hold that a spouse must pay some child support while furthering or continuing an education, but the amount should be based on the *reduced* earnings during school. Milligan, 582 So.2d at 770 [Appendix at M-2]; Wollschlager, 601 So.2d at 276. [Appendix at S-3]

[56] State, Department of Revenue v. Thomas, 659 So.2d 1305 (Fla. 1st DCA 1995). [Appendix at P-1]

the full work force to pursue his education.[57] This finding is the only rationale cited by the First District for reversing the trial court. The First District did not address, as it did in Wollschlager, the issue of whether a reduction may be granted when the court finds that that the spouse seeking the reduction has *not* voluntarily reduced his income within the intent of Florida Statute §61.30(2)(b). Further, the First District, in Thomas, remanded to the trial court for a determination of whether the support obligation should be temporarily reduced until he reestablished himself, presumably after he completed his education.[58] Thus, Thomas cannot be read as disapproving Wollschlager or as conflicting with Milligan.

DEPT. OF HEALTH AND REHABILITATIVE SERVICES V. SCHWASS[59]

Schwass, which was decided by the Fifth District without appearance by the appellee, is distinguishable on its facts from both Milligan and Overbey. In Schwass, the court did not find, as in Milligan and Overbey, that the parents' actions were in good faith or that the children were likely to benefit in the future. In Schwass, the trial court deviated from the guidelines to lower the appellee's child support while he attended a drug rehabilitation program. The trial judge justified the deviation "because of unrealistic net income."[60] Neither Milligan nor Overbey dealt with a deviation from the child

---

[57] Thomas, 659 So.2d at 1306. [Appendix at P-2] *See also*, Hirsch v. Hirsch, 642 So.2d 20 (Fla. 5th DCA 1994) (spouse who voluntarily reduced income is eligible for temporary reduction in child support obligation upon a finding that he has acted in good faith).
[58] 659 So.2d at 1306. [Appendix at P-2]
[59] Department of Health and Rehabilitative Services v. Schwass, 622 So.2d 578 (Fla. 5th DCA 1993). [Appendix at O-1]
[60] Schwass, 622 So.2d at 579. [Appendix at 0-2]

support guidelines. Rather, in both cases, the child support was calculated by applying the guidelines to the spouse's actual, albeit reduced, earnings while in school.

Most importantly, in Schwass the court found that the children's needs would *not* be met at the lower amount the appellee had sought, while in both Milligan and Overbey the courts found that the children's needs *would* be met at the lower amount.

C. Milligan is consistent with Florida statutes.

Florida Statute §61.30(1)(a) permits a trier of fact to deviate from the guidelines when, after considering all relevant factors, the trier of fact determines that applying the guidelines would result in an inappropriate award of child support. This deviation must be supported by a specific finding on the record or in writing.[61] Notwithstanding that they were argued on other grounds, the outcomes of Milligan and Overbey are consistent with this statute because they were supported by appropriate findings indicating that the trial courts had considered "all relevant factors including the needs of the child or children."[62]

Florida Statute §61.30(2)(b) requires a trier of fact to impute income to a spouse only when the spouse is found to be voluntarily unemployed or under-employed. Neither the Third District in Milligan, nor the trial court in Overbey, found that the spouse was voluntarily unemployed or under-employed, thus, the child support awards were properly modified to reflect the spouse's reduced earnings while in school.

---

[61] Fla. Stat. Ann. §61.30(1)(a) (West Supp. 1996). [Appendix at U-1]
[62] *Id.*

D. Milligan is consistent with the decisions of other states.

A number of states have recently addressed the issue of support modifications for divorced parents who voluntarily reduce their incomes for educational and career purposes. Illinois and other states have looked to the parent's good faith, defined as not acting intentionally to avoid paying support, as the dispositive factor.[63] Maine is among those that require that the children benefit, or at least not suffer, from the parents' decisions.[64] Like the Arce court, several have recognized that modifications should be equally available to custodial and non-custodial parents.[65]

---

[63] In re Marriage of Horn, 650 N.E.2d 1103, 1106 (Ill. Ct. App. 1995) (key question in determining whether to grant reduction to voluntarily unemployed spouse is whether the payor acted in good faith). *See also* In re Marriage of Meegan, 13 Cal. Rptr. 2d 799 (Cal. Ct. App. 1992) (husband who quit job in good faith was entitled to have support based on actual earnings, not earning ability); Lizza v. Lizza, 1991 WL 32701 (Conn. Super. 1991) (basing child support on actual income of spouse in law school, not imputed earnings ability); Coons v. Wilder, 416 N.E.2d 785 (Ill. Ct. App. 1981) (well established that a spouse's voluntary change in occupation made in good faith may constitute a substantial change in circumstances sufficient to warrant a downward modification of child support); Schuler v. Schuler, 416 N.E.2d 197 (Mass. 1981) (good faith career change resulting in lowered income may warrant a reduction of child support payments); Giesner v. Giesner, 319 N.W.2d 718 (Minn. 1982) (modification of child support is appropriate where career change was made in good faith; child and separated spouse should share in the hardship as they would have had the family remained together); Amyx v. Collins, 914 S.W.2d 370 (Mo. Ct. App. 1996) (imputing income to under-employed spouse is within judge's discretion, but is not mandatory); Fogel v. Fogel, 168 N.W.2d 275 (Neb. 1969) (good faith career change resulting in lowered income may warrant a reduction of child support payments).

[64] Harvey v. Robinson, 665 A.2d 215 (Me. 1995) (good faith decision of parent to be under-employed by attending school should be balanced against effect on interests of the children). *See also* Nass v. Seaton, 904 P.2d 412 (Alaska 1995) (when deciding whether or not to impute income to a non-custodial parent who reduces their income the judge may consider the nature of the changes and the reason for the changes); Moncanda v. Moncanda, 328 N.W. 2d 365 (Mich. App. 1978) (absent bad faith or willful disregard for the children's interest, a voluntary reduction of income is not an adequate reason for a refusal to modify a support order); Bencivenga v. Bencivenga, 603 A.2d 531 (N.J. Super. Ct. App. Div. 1992) (disapproving of a *per se* approach that would grant or deny a modification based on parent's decision to leave gainful employment, requiring court to

E. Milligan does not advocate allowing divorced parents to make unilateral decisions that may adversely affect the children they support.

Any concern that Milligan advocates allowing divorced parent's to make "unilateral" decisions is misplaced. When parents with children divorce, it is unrealistic to think that they will continue to make bilateral decisions about their personal lives, even though these decisions could potentially affect the children. Instead, the State, through mediation and family law courts, steps in and becomes the other half in the divorced parent's decision-making process. Neither Milligan nor the Petitioner made a unilateral decision to go to law school. Rather, each subjected his desire to improve his future economic well-being to the intense scrutiny of the adversarial judicial system. Only after a court weighed each parent's desire against the welfare of *all involved* and considered all relevant facts, were both given modifications to pursue their goals. The desires and decisions of both Milligan and the Petitioner were subjected to greater scrutiny than would be expected in decisions made by harmoniously married couples.

---

evaluate case in light of all facts including possibility of part-time income). *But see* In the Matter of the Marriage of Jonas, 788 P.2d 12 (Wash. App. 1990) (error not to impute income based on earnings history to unemployed father attending school and unemployed mother staying home with children);

[65] 566 So.2d at 1311, n. 2. [Appendix at I-4] *See also* Fischell v. Rosenberg, 368 S.E.2d 11 (N.C. Ct. App. 1988) (finding error in the trial court's failure to consider custodial parent's reduction in income while attending school as ground for modification; applies to both custodial and non-custodial parents); Kennedy v. Kennedy, 421 S.E.2d 795 (N.C. Ct. App. 1992) (even if court determines that a parent is voluntarily unemployed or under-employed, the court is vested with the discretion regarding whether or not to impute income; applies equally to custodial and non-custodial child support).

III. DENYING DIVORCED PARENTS A MODIFICATION IN CHILD SUPPORT WHILE THEY PURSUE THEIR EDUCATION IS UNCONSTITUTIONAL BECAUSE IT VIOLATES DIVORCED PARENTS' RIGHTS TO EQUAL PROTECTION OF THE LAWS.

Both the United States Constitution[66] and the Constitution of the State of Florida[67] guarantee the right to equal protection of the laws. Marriage, family relationships, and the rearing and educating of children have been recognized by the United States Supreme Court and the Supreme Court of Florida as "fundamental rights,"[68] which may be abridged only when there is a compelling state interest, and then, only when the least intrusive method is used to protect the state's interest. In a recent child custody case, MMMA v. Jonely,[69] the Fifth District emphasized this position when it quoted the Tennessee Supreme Court stating that ". . . when no substantial harm threatens a child's welfare, the state lacks a sufficiently compelling justification for the infringement on the fundamental right of parents to raise their children as they see fit."[70] At least one commentator has observed that state interference with parental decision-making may have long term detrimental effects on the children.[71] The right to raise a child as the parents see fit includes the right to make decisions about the parents' education and careers that

---

[66] U.S. CONST. amend. XIV, § 1.
[67] Art. 1, §2, Fla. Const.
[68] *See* City of North Miami v. Kurtz, 653 So.2d 1025 (Fla. 1995) (citing Carey v. Population Serv. Int'l., 431 U.S. 678 (1977)).
[69] 21 Fla. L. Weekly D1507 (Fla. 5th DCA June 28, 1996). [Appendix at A-1]
[70] *Id.* at 3. [Appendix at A-3]
[71] *See* Robin Paul Malloy, *Market Philosophy in the Legal Tension Between Children's Autonomy and Parental Authority*, 21 IND. L. REV. 889, 898 (1989) (characterizing state interference with parental authority as imposing state's values and customs over those of the parents).

may affect the children. This right should apply equally to married and divorced parents, especially where, as in the Petitioner's case, there was no "harm," either physical or financial which threatened the children.[72]

A. The Florida Supreme Court has held that it is unconstitutional to treat divorced parents differently than married parents.

In 1984, in Grapin v. Grapin, the Florida Supreme Court held that requiring divorced parents to contribute to the post-majority education expenses of their children violated the rights of divorced parents to equal protection of the laws. The Court characterized it as "fundamentally unfair" to compel divorced parents to pay for the college education of their adult children while "[married] parents may do as they choose."[73]

B. The Fifth District's decision in Overbey denies divorced parents equal protection of the laws.

The Fifth District held in Overbey that a divorced spouse's decision to attend law school, thereby enhancing his future economic opportunities, could not serve as a basis for a downward modification in child support, "however well-intentioned."[74] This was notwithstanding the undisturbed finding by the trial judge that the spouse's actions were in good faith, not intended to avoid child support, likely to benefit the children, and that the children's needs would be met at the lower level.

---

[72] The trial court in Overbey found that the children would ultimately benefit and that their needs would be met while the father attended law school. [Appendix at C-1,C-2]
[73] Grapin v. Grapin, 450 So.2d 853 (Fla. 1984). [Appendix at J-1]
[74] Overbey, 21 Fla. L. Weekly D1507 at 3. [Appendix at A-3]

The Fifth District's decision amounts to a *per se* rule which treats divorced parents differently from married parents. Unquestionably, the State has an interest in seeing that divorced parents do not shirk their legal duty to support their children. This interest is well served by preventing parents from intentionally or deliberately avoiding support obligations under the guise of going to school. There is, however, neither a rational basis nor a compelling state interest that justifies deterring divorced parents from furthering their education or pursuing a career of their choice. This is especially so, where, as in the Petitioner's case, the trial court makes detailed findings that the children will ultimately benefit from the parent's choice and that their needs will be met at the reduced level of support.

"The fact that domestic whirlwinds cause a severance of the marriage does not enhance the rights of children nor alter the obligations of the parents."[75] Even if there was uncontroverted evidence that the children's lifestyle would decrease, no court would entertain the argument that married parents could not forgo income to further their education. In fact, it was the Fifth District which stated that "a divorced parent does not have a greater legal obligation to his child than does a parent who has not been divorced."[76]

---

[75] Krogen v. Krogen, 320 So.2d 483 (Fla. 3rd DCA 1975) (amending award of child support to cease when child turned 18) (cited with approval in Grapin v. Grapin, 450 So.2d 853 (Fla. 1984)).

[76] Thomas v. Thomas, 427 So.2d 259 (Fla. 5th DCA 1983) (reversing child support award that extended beyond youngest child reaching age of majority on grounds that divorced parents should not be treated differently than married parents). [Appendix at R-1]

C. Milligan should be approved because it protects the State's interests without depriving divorced parents of their constitutional rights to equal protection of the laws.

When married couples with children divorce, the state becomes involved as an interested party, seeking to arrive at the proper measure of support for the children. Decisions that normally would be left to the family, such as the proper allocation of resources and necessary expenses, become a matter of state and judicial concern.[77] Legitimate state interests and judicial concern do not, however, justify or require a *per se* rule. Milligan accommodates the state's concerns by balancing the desire of the parent to better himself financially by furthering his education with the needs of the children for support.

IV. PUBLIC POLICY REQUIRES THAT PARENTS BE ENCOURAGED TO BETTER THEMSELVES BY PURSUING THEIR EDUCATION.

A. The Fifth District's decision in Overbey discourages parents from furthering their education.

According to the Fifth District, a parent's decision to further his or her education cannot serve as the basis for a downward modification in child support, even when, as in Overbey, the trial court finds that the children's needs will be met at the reduced level. While the Fifth District did not state outright that non-custodial parents could not further their education, requiring them to continue to pay child support based on their prior earnings history reduces, if it does not eliminate, the likelihood that they will do so.

---

[77] Terrance A. Kline, Note, *Clifford Trusts and the Parental Duty to Provide a College Education:* Braun v. Commissioner, 46 U. PITT. L. REV. 537, 552 (1985).

Although some educational programs can be completed while maintaining a full-time job, many cannot. In the Petitioner's case, the standards of the American Bar Association prevent him from working full-time during law school.[78]

Nearly one-quarter of the nation's children live in single parent homes.[79] The vast majority of these are single mothers, [80] many of whom receive little or no support from the biological father.[81] This is due in part to the young age and minimal earning power of both parents.[82] Under the Fifth District's *per se* approach, a non-custodial parent who recently graduated from high school and is making minimum wage in a fast-food restaurant will not be able to reduce his or her support obligation temporarily to attend community college, a state university, or even a short-term job training program. This is likely to cause uneducated and under-educated parents to remain so, unable to improve their own lives and the lives of their children.

A less obvious, but even more ominous, ramification of the Fifth District's decision is its potential to affect the career decisions of divorced *custodial* parents. Florida's child support guidelines use both parents' incomes in calculating child support. Under the Fifth District's *per se* rule prohibiting child support modifications, a custodial

---

[78] American Bar Association Standards for Approval of Law Schools. [Appendix at G-1] *See also* Sotnick v. Sotnick, 650 So.2d 157 at 159 (Fla. 3rd DCA 1995) (finding that outside employment was not feasible while spouse was in training program). [Appendix at N-3]

[79] 21.2%; U.S. Bureau of the Census, *Statistical Abstract, 1984*, p. 53.

[80] 97% of single parent households are headed by women. U.S. Bureau of the Census, *Current Population Reports*, p60-188 (1994).

[81] In 1991 23% of mothers owed support received no payments from the child's father, with a nearly equal number receiving less than they were owed. U.S. Bureau of the Census, *Statistical Brief*, August 1995.

[82] 35% of female head of households lived below the federal poverty level. U.S. Bureau of the Census, *Statistical Brief*, December 1994.

mother seeking a temporary *increase* in support to allow her to attend school would be denied this increase, and possibly even estopped from reducing her contribution to the children's support by working fewer hours. Thus, the custodial mother is locked into the educational status she had at the time of the divorce, unless she has the independent financial means to pursue her education without reducing her contribution to the children's support.

Over one-third of custodial mothers live below the federal poverty level.[83] It is they who will bear the brunt of this harsh *per se* rule. Likewise, it is they who will benefit the most from the judicial discretion advocated by Milligan.

B. Milligan promotes the public policy interest in encouraging education while protecting the equally important public policy interest in seeing that parents support their children.

Milligan does not force a choice between the important public policy interests in encouraging education and providing for the support of children of divorced parents. Instead, it balances these important interests by permitting a modification when the parent's decision to enhance his or her education is made in good faith and will not have a detrimental effect on the children.

Permitting parents the opportunity to further their education by allowing temporary modifications in their child support obligations is good public policy. It allows parents to serve as role models for their children and in many cases will eliminate the

[83] *Id.*

State's economic burden by providing parents with the means to gain financial independence from public assistance.

As the following examples illustrate, the short-term reduction in support that a custodial parent will incur may be greatly outweighed by the long-term benefit to all concerned.

Example I illustrates the effects on the custodial mother's income when a non-custodial father making minimum wage is allowed to reduce his support obligation temporarily while he attends a two year nursing program.

EXAMPLE I[84]

Non-custodial father works part-time while attending a two-year nursing program

	Mother's Earnings	Child Support Received	Total Income
Initial Figures	11,000	2,400	13,400
While Pursuing Education	11,000	1,202	12,202
Post-Education	11,000	5,363	16,363

Although the mother will experience a temporary annual reduction of $1198.00 while the father completes his training, after two years she will receive a permanent annual increase of $4161.00, nearly *four times* the amount of the reduction.

EXAMPLE II

Example II demonstrates the potential results of allowing a custodial mother to receive an *increase* in child support payments from the non-custodial parent while she attends a two year nursing program. Although the mother's contribution to the children's

[84] Child support calculated from 1996 guidelines. Fla. Stat. Ann. §61.30(6) (West Supp. 1996). For simplicity, income taxes and other deductions are not considered. [Appendix at U-1]
Income figures obtained from 1990 Census for Orlando, Florida metropolitan area. U.S. Bureau of the Census, *Statistical Abstract* (1991). [Appendix at V-1]

support will decrease for two years, after she completes her education her income, and thus her ability to provide for her children, will more than double.

Custodial Mother works part-time while attending two-year nursing program

	Mother's Earnings	Child Support Received	Total Income
Initial Figures	11,000	2,400	13,400
While Pursuing Education	5,641	2,459	8,100
Post-Education	29,022	2,313	31,335

Obviously not all modifications will have such dramatic results, but many will. For this reason alone, the decision in Milligan--permitting trial courts the discretion to make modifications when the evidence supports that the outcome will be in the best interest of all concerned--should be approved.

CONCLUSION

The Fifth District's decision in Overbey is inconsistent with the decisions of the Florida Supreme Court, Florida's other district courts of appeal, Florida Statutes, and the decisions of other states. It is unconstitutional because it deprives divorced parents of their right to equal protection of the laws. Further, it is contrary to public policy because it discourages divorced parents from furthering their education, even when their children will ultimately benefit.

The Third District's decision in Milligan is consistent with previous decisions of the Florida Supreme Court, Florida's other district courts of appeal, the decisions of other states and, most importantly, the legislative intent of the child support statutes. Because it takes into consideration the needs of children for support and the desire of parents to further their education, it does not deny divorced parents equal protection of the laws. Milligan promotes the public policy interests that are served by encouraging parents to

further their education while protecting the equally important public policy interest in seeing that children are supported by their parents.

> **[F]ollowing dissolution of marriage, the custodial parent and children cannot be allowed to freeze out the other parent in his employment or otherwise preclude him from seeking economic improvement for himself and his family. So long as his employment, educational or investment decisions are undertaken in good faith and not deliberately designed to avoid responsibility for those dependent upon him, he should be permitted to enhance his economic fortunes without penalty.**[85]

Milligan v. Addison should be approved and Overbey v. Overbey should be reversed.

---

[85] Arce v. Arce, 566 So.2d 1308, 1310 (Fla. 3rd. DCA 1990) (quoting and citing with approval Coons v. Wilder, 416 N.E.2d 785, 791 (Ill. App. Ct. 1981)). [Appendix at I-3]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Mr. Richard J. D'Amico, attorney for Respondent, 154 South Halifax Avenue, Daytona Beach, Florida 32118-4480, this 1st day of August 1996.

DANIEL L. OVERBEY
322 E. Colfax Avenue, #102
South Bend, Indiana 46617
(219) 233-1689
Petitioner pro-se

LAWRENCE J. NIXON, Esquire
Florida Bar #138403
619 North Grandview Avenue
Daytona Beach, FL 32118
(904) 258-0286
Attorney/Co-Counsel for Petitioner