ORIGINAL

Supreme Court of Florida

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DANIEL LYNN OVERBEY *

Petitioner, *

v. * CASE NO. 88,370

JANET CAROL HUTCHING OVERBEY * District Court of Appeal,
n/k/a Janet Carol Tedder, * 5th District No. 95-2252

Respondent. *

* *

PETITIONER'S

REPLY BRIEF

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SUMMARY OF THE REPLY

The sole issue presented to this Court is whether the voluntary decision to further one's education can ever serve as the basis for a downward modification of child support. The Fifth District holds that the voluntary nature of the decision precludes a modification under all circumstances.[1] The Third District[2] and Fourth District[3] hold that the matter is one for judicial discretion. The First District has also permitted modification of this type,[4] except when the trial judge explicitly found that the parent was voluntarily under-employed.[5]

The Third District, in Arce v. Arce[6] and Milligan v. Addison,[7] granted downward modifications for non-custodial parents who voluntarily reduced their incomes to further their education. The Fifth District, in Overbey v. Overbey,[8] interpreted Florida Statute §61.30(2)(b) as precluding such modifications, even when, as in the instant case, the court found that the children's needs will be met with the reduced level of support. Based on this interpretation, the Fifth District certified conflict with Milligan.[9]

The Respondent argues that there is no conflict between the Third and Fifth Districts' decisions. Respondent's brief vacillates between personal attacks on the

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[1] 21 Fla. L. Weekly D1296 (Fla. 5th DCA May 31, 1996) (voluntary action cannot serve as basis for modification of child support).
[2] Milligan v. Addison, 582 So.2d 769 (Fla. 3rd DCA 1991); Arce v. Arce, 566 So.2d 1308 (Fla. 3rd DCA 1990).
[3] Ledbetter v. Bell, 658 So.2d 1146 (Fla. 4th DCA 1995).
[4] Wollschlager v. Veal, 601 So.2d 274 (Fla. 1st DCA 1992).
[5] State, Department of Revenue on Behalf of Johnson v. Thomas, 659 So.2d 1305 (Fla. 1st DCA 1995).
[6] 566 So.2d 1308 (Fla. 3rd DCA 1990).
[7] 582 So.2d 769 (Fla. 3rd DCA 1991).
[8] 21 Fla. L. Weekly D1296 (Fla. 5th DCA May 31, 1996) [hereinafter Overbey].
[9] *Id.* at 3.

Petitioner and conceding the very point which is the only issue presented to this Court. Respondent argues that the proper approach is to balance the desire of the parent to further his education with the needs of the children for support.[10] This is exactly what the trial court did in considering Petitioner's modification request. In addition, the Respondent argues that Petitioner should be able to pay for his law school and support himself and his children.[11] Petitioner agrees with this without reservation and has never sought to evade his support obligations, either while attending law school, or at any other time. Rather, Petitioner has sought to pay a reasonable amount of support, sufficient to meet his children's needs and within his ability to pay. Respondent confuses the children's need for support with her desire to continue receiving $200.00 a week from the Petitioner.[12]

The Fifth District did not find that the children needed $200.00 week in support, nor did it reverse the trial court's explicit finding that the children would be adequately supported at the reduced amount. Instead, it reversed the trial court because it disagreed with the point of law as applied by the trial judge.

Respondent's other argument appears to be a request for this Court to conduct a *de novo* review of the trial court's findings. Respondent repeatedly states that the children are suffering as a result of the father's decision to attend law school.[13] Notwithstanding that this is not supported by the record, it simply is not so.

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[10] Respondent's Answer Brief at 17. [hereinafter *Answer*].
[11] *Id.* at 2.
[12] *See* Former Wife's Memorandum of Law at 9; Additions and Corrections to Record at 2 ("[T]he *mother* and children have established a standard of living based upon the child support obligation of the former husband.")(emphasis added). [Appendix at E-2]
[13] *See e.g.*, *Answer* at 2 ("... relegating the children to hard times.").

The relevant trial court's findings are amply supported by the record. The Fifth District did not dispute these findings.[14] In both Milligan and Overbey, it was found by the court that the children would not suffer from the parents' decisions to attend law school.[15] The Fifth District implicitly approved the trial court's findings when it stated that Milligan was "directly on point in regard to the case . . . , and supports the decision of the trial court as well as the position of the [Petitioner].[16]

I. THE FLORIDA SUPREME COURT HAS JURISDICTION OVER THIS MATTER, WHICH HAS BEEN PROPERLY CERTIFIED BY THE FIFTH DISTRICT COURT OF APPEALS TO BE IN CONFLICT WITH THE DECISION OF THE THIRD DISTRICT COURT OF APPEALS IN MILLIGAN V. ADDISON.

A. The Supreme Court of Florida may exercise jurisdiction over the decision of a court of appeal which is certified to be in conflict with the decision of another district court of appeal.

Florida Rules of Appellate Procedure §9.030(a)(2)(A)(vi) permits this Court to review decisions of district courts of appeal that are certified to be in direct conflict with decisions of other district courts of appeal. This authority derives from Article V of the Constitution of the State of Florida. The Fifth District, in the instant case, expressly certified conflict with the decision of the Third District in Milligan.

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[14] The only finding disputed by the Fifth District was that law school was a logical extension of a police officer's career. Overbey at 3. [Appendix at A-3].
[15] [Appendix at C-2, M-2].
[16] Overbey at 3. [Appendix at A-3].

B. There is direct conflict between the decision of the Fifth District in Overbey v. Overbey and the decision of the Third District in Milligan v. Addison.

The Fifth District recognized that there is a conflict between the district courts of appeal as to whether a "voluntary" action may serve as a predicate for a downward modification of child support. The First District, in State, Department of Revenue v. Thomas,[17] reversed a downward modification where the trial court found that the father voluntarily removed himself from the workforce to pursue his education. The Third District, in Milligan, approved a downward modification for a father who quit his job to attend law school. The Milligan court held that furthering one's education by attending law school could not be considered a "voluntary" reduction in income where there was a finding by the trial court that the children would benefit.[18]

The Fifth District properly characterized the issue as whether "a decision by a non-custodial parent to attend law school" constitutes a valid basis for a downward modification of child support.[19] The court answered the question in the negative, but recognized that the Third District had answered the *same question* in the affirmative.

> Cases are certified to be in conflict when a
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> question of law [is] involved and determined, ... 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.[20]

Respondent cites this as authority in support of her argument that this court does not have jurisdiction over this matter. Respondent, like the petitioner in Ansin, makes her argument

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[17] 659 So.2d 1305 (Fla. 1st DCA 1995).
[18] Milligan, 582 So.2d at 770.
[19] Overbey at 1. [Appendix at A-1]

"primarily upon the merits of the decision attacked."[21] However, as this Court pointed out in Ansin , the conflict derives not from the merits of the case but from "direct conflict between the decision in question and a previous ruling 'on the same point of law.'"[22] The point of law at issue is whether a voluntary decision to further one's education can ever serve as a downward modification of child support. The Fifth District has held that it cannot, while the Third District has held that it can. This Court is asked to resolve the conflict between the districts.

The Fifth District stated that Milligan is directly on point in regard to the Petitioner's case and supports the decision of the trial court as well as the position of the Petitioner. Thus, if this Court approves Milligan, Overbey should be reversed.

Respondent attempts to distinguish Milligan because it was a paternity suit not a modification. Nothing in Milligan, its predecessors or its progeny, supports this distinction. Milligan cites with approval Arce v. Arce, in which the Third District addressed, as an issue of first impression in Florida, whether the decision to further an education could ever serve as a downward modification of child support. The Arce court cited decisions of other states, including modification actions, which had permitted such reductions.[23] This is consistent with Florida Statute §61.14(7), which was amended in 1993 to make the standard for modifying support decrees the same as for initial dissolution proceedings.[24]

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[20] Ansin v. Thurston, 101 So.2d 808, 811 (Fla. 1958).
[21] *Id.*
[22] *Id.*
[23] 566 So.2d 1308, 1310-1311. [Appendix at I-3, I-4]
[24] Fla. Stat. Ann. §61.14(7) (West 1996).

II. THE TRIAL COURT'S FINDINGS THAT WERE NOT DISTURBED BY THE APPELLATE COURT ARE PRESUMED CORRECT AND NOT THE SUBJECT OF THIS APPEAL.

The trial court made a detailed finding of fact which is "clothed with the presumption of correctness."[25] The Fifth District let stand the relevant trial court findings but reversed the trial court because it disagreed with its application of the relevant law. The subject of this appeal is the conflict between the district courts of appeal, not the re-litigation of the merits of the case.

Even if this Court should undertake a *de novo* review, the record amply supports both the findings of the trial court and the Fifth District's decision to leave the relevant findings undisturbed.

A. The Children's needs are sufficiently provided for at the reduced level of support.

Respondent repeatedly alleges that the children will suffer because the father has chosen to go to law school. Respondent cites as evidence the Former Wife's testimony at the modification hearing that she had a $1100 per month operating deficit.[26] This testimony was refuted by the Former Wife's own testimony that, since the divorce in 1991, she has taken two trips to the Caribbean, several trips to Texas, a gambling trip to Las Vegas, and a skiing trip to Colorado.[27] Respondent admitted that she and her current husband maintained joint checking accounts and that they owned four cars.[28] Respondent

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[25] Herzog v. Herzog, 346 So.2d 56,58 (Fla. 1977).
[26] *Answer* at 17. [Appendix at D-2]
[27] [Appendix at D-2, D-3 and E-1, E-2]
[28] [Appendix at E-2]

acknowledged that in the months immediately prior to the modification hearing, she spent almost $5,000 in cash wedding gifts and an income tax refund on home improvements and wedding expenses.[29] In addition, Respondent has undergone elective cosmetic surgery, made substantial capital improvements to her house and hired a personal trainer for the older daughter.[30]

The record shows that the children's needs were paramount in the trial court's decision-making process. This is evidenced not only by the testimony, but by the trial court's statement that the Petitioner had met a "heavy burden of proof" [31] to sustain his modification request and that he had made adequate provisions for the children's welfare while he was in law school.[32] There was testimony that the Petitioner would, in addition to paying reasonable child support, continue to pay for the children's health insurance, the older daughter's prepaid college fund, and the cost of transporting the children to Notre Dame for visitation.[33]

B. The Trial court properly considered the Petitioner's pension fund as income over the three years of Petitioner's educational program.

The Respondent waived all rights to the Petitioner's pension in return for all equity in the marital residence.[34] Yet, the Respondent continues to assert that the Petitioner should use this pension fund exclusively to pay $200.00 per week in child support while he

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[29] [Appendix at D-1, D-2 and E-1, E-2]
[30] [Appendix at D-1, D-2 and E-1, E-2]
[31] [Appendix at C-1] Even though Florida Statutes were amended in 1993 to make the standards the same for modifications and initial proceedings, the Respondent had argued at trial that the Petitioner had to overcome a heavier burden to warrant a modification. The trial court found that the Petitioner had met this heavier burden.
[32] [Appendix at C-2]
[33] [Appendix at D-1, D-2 and E-1, E-2]

is attending law school. Respondent argued this at length to both the trial court and the Fifth District. Like the trial court, the Fifth District dismissed this argument, observing that the former wife had already waived all claim to the fund as part of the equitable distribution of assets.[35] Likewise, contrary to the Respondent's assertion, the record reflects that the trial court properly considered the Petitioner's assets when determining the amount of child support that he could pay while in law school. Florida Statute §61.30(11)(h) allows the trial court to consider all assets in determining child support obligations.[36] Respondent would interpret this to mean that all assets should be used exclusively for paying child support.

Because the rules of the American Bar Association prevent the petitioner from working full time during law school,[37] the Petitioner offered to use his entire pension fund as income during his three years he was in law school.[38] It was this income to which the trial court applied the child support guidelines. Petitioner should not be required to dedicate his entire income to paying child support, leaving him no funds with which to support himself.

Respondent also argues that Petitioner could use his student loans as income and take out additional loans to pay $200.00 per week in child support while he attends law school. Loans are not income. Because they are debts which must be repaid, they cannot be considered in determining a parties ability to pay support obligations.[39]

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[34] Overbey at 1. [Appendix at A-1].
[35] *Id.*
[36] Fla. Stat. Ann. §61.30(11)(h) (West 1996).
[37] American Bar Association Standards for Approval of Law Schools. [Appendix at G-3]
[38] [Appendix at B-5, F-1]
[39] Milligan, 582 So.2d at 770.

C. The children will ultimately benefit from their father's decision to attend law school.

Any reliance on the older daughter's age as the dispositive factor is misplaced. The trial court found that she would ultimately benefit from the father's decision to attend law school even though she would reach the age of majority during his second year of law school. While the father may not have a legal obligation to his daughter when she turns eighteen, he certainly has a moral one. Parents do not automatically cease helping their children on their eighteenth birthday. The Petitioner's voluntary decision to provide a pre-paid college fund for his 17 year-old daughter is an example of continuing parental support. There is no reason to believe that the older child will not benefit from her father's going to law school. Even if she does not benefit financially there are countless other benefits that may accrue. Respondent's insistence that short-term economic returns are the only issue in this case ignores the obvious benefits that may result from the father's decision to further his education.

Even if the trial court had not found that the older daughter would benefit from her father's decision to attend law school, the modification was proper because the younger child was only ten years old when Petitioner sought this modification. Thus, the trial court properly found that she could benefit from her father's decision. Further, because the older daughter will reach the age of majority before the Petitioner completes his second year at Notre Dame, any effect on her will end when she reaches adulthood.

The Fifth District did not dispute these holdings. Rather, it implicitly affirmed them when it stated that the instant case was directly on point with Milligan. In Milligan,

the court found that the children would benefit from the parent's decision to go to law school.[40]

The Fifth District, in the instant case, is unequivocal that it reversed the trial court and certified conflict because it disagreed with the trial court's application of the law. Except for the ancillary finding that law school is a logical progression of police officer's career, there is no indication that the trial judge's findings of fact are reversed or disputed. This is consistent with the Fifth District's explanation of the proper application of appellate review:

> Where a trial judge fails to apply the correct legal rule ... the action is erroneous as a matter of law. This is not an abuse of discretion. The appellate court in reviewing such a situation is correcting an erroneous application of a known rule of law.[41]

In Overbey, the Fifth District held that granting a modification of child support based upon a decision to attend law school was not within the discretion of the trial court. The Third District has repeatedly held that the granting of a modification of child support based upon a decision to attend law school, or otherwise further one's education, is within the discretion of the trial court. The Fifth District has properly certified this conflict on the point of law.

III. A *PER SE* RULE THAT PREVENTS DIVORCED PARENTS WHO ARE FULL-TIME STUDENTS FROM TEMPORARILY REDUCING THEIR CHILD SUPPORT OBLIGATIONS VIOLATES DIVORCED PARENTS' RIGHT TO EQUAL PROTECTION OF THE LAWS.

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[40] Overbey at 3.
[41] Kennedy v. Kennedy, 622 So.2d 1033, 1034 (Fla. 5th DCA 1993).

Respondent summarily dismisses Petitioner's argument on this point by observing that the decision in Overbey does not prohibit divorced parents from furthering their education. Petitioner does not allege that the decision explicitly prohibits divorced parents from furthering their education. Rather, because divorced parents must continue to pay child support at the same level as when they were employed full-time, the practical effect of the decision is to deter all but wealthy divorced parents from furthering their education. Constitutional propriety is determined by natural effect, not explicit wording or proclaimed purpose.[42]

This Court has held that it is "fundamentally unfair" and violates divorced parents right to equal protection of the laws to treat them differently than married parents.[43] The Fifth District's decision in Overbey amounts to a *per se* rule which treats divorced parents differently from married parents.

Married parents regularly make career and education decisions that affect their children without the fear of state intervention. Under Overbey, divorced parents may not make educational or career decisions that will even temporarily affect the lifestyle enjoyed by their children. This is true even when the parent's decision is "well intentioned" and may ultimately benefit the children. It is this disparate treatment that violates divorced parents' right to equal protection of the laws.

There is no specific amount of support that is necessary to provide for a child. For this reason the child support statutes provide for varying amounts of support based on the income of the parents. This Court has held that children should be able to share in the

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[42] Lochner v. New York, 198 U.S. 45 (1905).
[43] Grapin v. Grapin, 450 So.2d 853 (Fla. 1984).

good fortune of their parents.[44] Respondent would interpret this to mean that children must be provided with the highest level of support that a parent can provide, regardless of the parent's current income or lifestyle. This interpretation has been examined and dismissed by the Fifth District:

> Some suggest that child support should be based on the parent's income and the standard of living which the parent could or should provide the child (as opposed to the standard of living actually enjoyed by the parent). I submit that divorced or unwed parents who are required to pay support, should, *like married parents*, be permitted to establish their own standard of living.[45]

Unquestionably, the State has an interest in seeing that divorced parents do not shirk their legal duties 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, as in the Petitioner's case, where 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 practical effect of a *per se* requirement that a parent must continue to pay support based on their prior earnings is to unduly restrict the education and career options available to divorced parents.

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[44] Miller v. Schou, 616 So.2d 436 (Fla. 1993).
[45] Sylvester v. Ryan, 623 So.2d 767 (Fla. 5th DCA, 1993) (Harris, C. J., concurring and concurring specially) (emphasis added).

CONCLUSION

This Court is asked to resolve a conflict between the district courts of appeal. The issue in conflict is whether a voluntary action, such as furthering one's education, can ever serve as a valid basis for a downward modification of child support. This Court should approve Milligan and reverse Overbey, thus giving trial courts the discretion to balance the needs of the children for support and the desires of the parents to further their education.

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 10th day of Sept., 1996.

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