ORAL ARGUMENT – 11-15-05
03-0509
IN THE INTEREST OF A.M. AND B.M.

PRESSLEY: The divorce decree in this case appointed Ms. Chism the sole managing conservator and ordered respondent to pay child support. This status has remained unchanged throughout the children's minority. It was not modified by any court throughout the children's minority, and until emancipation had been determinative of the child support obligation of the payor of their status and has binding on the parties.

MEDINA: Can you address the standing issue as it pertains to the AG?

PRESSLEY: The standing issue only arises because of the 13th court's very novel construction of §157.008. The court construed it in a way it's never been construed before, so as to deprive the AG of standing and then said you don't have standing to litigate the construction of a statute. If the construction of the statute determines whether I have standing, I get to litigate the construction of the statute. Moreover, no matter what it is called, the action that Mullen filed is still a modification action. He alleges that the court ordered him to pay support. And then he asks for support from the sole managing conservator. So it is a modification action.

MEDINA: So he was asking for support and a setoff wasn't he?

PRESSLEY: The offset was actually asserted in the answer to the AG's pleading. It was asserted as against the AG's motion to enforce. And therefore any defense or claim that is then deposed against our claim, we of course have standing to litigate. As far as the other is concerned it's still a child support action. It's an action to establish, modify or enforce a child support obligation in a Title IV-D case. It's a Title IV-D agency providing services. It's authorized by state law. It's mandated by federal law. And that gives us standing.

Lastly, the judgment, the offset and reimbursement were not ours to litigate. The judgment by the TC should have been awarded to us. The calculation is reprinted in the CA's opinion. The TC calculated the amount due. I believe it's only the principal due under the court order and not the interest. They calculated the amount paid and it comes up in arrearage of something over $35,000. Well we never got a judgment for $35,000. The court then subtracted money for its offset. It then subtracted money for reimbursement. Then we come out with a judgment of only $2,300. So if the offset and the reimbursement is going to affect my judgment, I think I have the standing to litigate.

MEDINA: What's your position on the offset and reimbursement? Is it either/or, or is it both?

PRESSLEY: The statute specifically says that an obligor, assuming he's at access possession during a period of voluntary relinquishment and has provided actual support, is entitled to reimbursement of the actual support as either an offset or a counterclaim. There are two forms of pleading he can use. But regardless of which one he uses all he is entitled to is reimbursement of the actual support that he expended for the benefit of the child during the period covered by the defense. He is not entitled to an offset and reimbursement. He is not entitled to an offset and counterclaim. And he is certainly not entitled to what the 13th CA said in affirming the TC's judgment: a defense, an offset, and a counterclaim.

JOHNSON: Does he have to prove how much he spent?

PRESSLEY: In one way or the other. He really doesn't have to prove what the 13th CA implied that he has to prove. No case has ever held that he had to prove that and we don't ask for that.

HECHT: Doesn't have to prove what?

PRESSLEY: Some proof of actual support.

HECHT: He does not have to prove it?

PRESSLEY: He has to have some evidence of actual support, but he doesn't have to have what the 13th CA intimates. He doesn't have to have an itemized accounting. He doesn't have to show up with grocery receipts where the line just says Cherrios for the child.

HECHT: So he can say I supported the child and I don't know how much it was - several hundred dollars a month.

PRESSLEY: Well he has to have a better idea, so the court can determine how much it is. But the courts have accepted for instance a division of household expenses, a percentage of household expenses.

HECHT: Why shouldn't you just take the number that was awarded as child support?

PRESSLEY: Because that doesn't mean - the child support is based on needs of the child and it should reflect the obligor's ability to pay.

HECHT: But it's not a penalty. Just because the obligor makes a lot of money doesn't mean you raise child support more than is necessary to support the child.

PRESSLEY: Not if it's over $6,000. But the presumptive guidelines are based solely on his net resources. It's a percentage of his net resources and that is the presumptive reasonable amount in the best interest of the child. Now over a net resource is $6,000 any further support would

have to be based solely on the needs of the child. That doesn't come up to often in our cases.

HECHT: But it's supposed to be for child support, not for anything else.

PRESSLEY: It definitely is supposed to be for child support. But when the sole managing conservator is supporting a child beyond what should be happening under the statute, which is not a motion to modify and is not designed for the situation when somebody has possession of a child for 3 years, when you do a motion to modify and then you can receive support, this is designed for a rather short period of time. And its purpose is to make sure that an obligor is not paying both child support and the actual support expended.

MEDINA: Where do you gather that from reading of this statute?

PRESSLEY: Because he continued to pay child support. Child support does not terminate. There is no place that says it abates or terminates. There are other sections of the code which reaffirmed the fact that it does not terminate, it does not abate and even parental agreements would have to have court approval.

HECHT: But an obligor could well think: Well instead of hiring a lawyer and going down there and having a knock down drag out fight over motion to modify. I will just keep the kid. That's agreeable to everybody. And if I get sued, I will have a defense. What's wrong with that?

PRESSLEY: Because that's not what the statute says. The statute says he gets reimbursed for actual support.

HECHT: And the obligor is saying I'm going to get reimbursed. I owe $350, and I am going to get $350 back.

PRESSLEY: He can get reimbursed for actual support.

HECHT: I don't understand what that means. You said actual support you don't have to itemize. And it is or it is not linked to the support that was ordered. I'm not clear about that.

PRESSLEY: It's not linked to the support that he was ordered to pay. But he can calculate it as say a percentage of his household expenses. He can divide up his household expenses by the number of people in it. In one case there was a large medical expense and that could be proved. Or you can just generally testify: this child is costing about $60 a month to feed. If you're having a child for a relatively short period of time, probably in most cases you're not buying a larger house to accommodate that child. You're not buying a child a full wardrobe. You're not having major medical expenses. Generally what you're doing if you're taking a child in for a short period of time is feeding him.

HECHT: But if you're taking the child in for a year why shouldn't the support be about

what it was ordered?

PRESSLEY: If he can show that's what it cost for the child, then that's what he will get. But he will not get double that, which is what happened in this case. In this case it was conceded that he didn't pay support during this time, but he was given by the court twice as much support as he was ordered to pay. So the managing conservator gets $450 a month under the court order, and during the time he had possession of the child he doesn't pay support and gets $900 from her. That's not the way the statute works. There is no way I don't believe in interpreting the statute to require that.

WAINWRIGHT: It sounds like you're suggesting that child support since it's based upon the resources of the obligor is intended to not only pay actual expenses but maintain a certain standard of living for the child. Actual support through the offset in §157.008 doesn't incorporate a standard of living. Just the actual cost of feeding the child. Since as you termed it, it's a temporary possession period. Is that an accurate underpinning of what you're arguing?

PRESSLEY: I would agree generally with that statement. But I also think that the guidelines don't necessarily maintain a standard of living and it is not infrequent for managing conservators to find themselves in difficulty. As a matter of fact in this case, the managing conservator testified that originally the children were given to the respondent because she was having financial difficulties and went to live with her parents.

WAINWRIGHT: If the child support is based upon the resources of the obligor, then if I'm a wealthy obligor, then the child is going to get more. The child support is going to be more. If I'm a poorer obligor, the child is going to get less. So the pre-divorce standard of living is roughly sought to be maintained. Is that your point? Verses when there is an offset for actual support.

PRESSLEY: Theoretically that is true. But we have not yet heard from any obligor who was willing to say if the actual support is more than the court ordered support, I'm willing to pay that increase. So the balance, the equity that the 13th court saw and had decided that the legislature was trying to correct isn't really corrected. If we're going to pay actual support for the child and whatever the child has needed, we may be able to accept that but we're going to have to gain the agreement of the obligors to pay what the child actually needs.

WAINWRIGHT: If this §157.008 provision of actual support, the statute uses that provision and uses the term actual support at least twice, it covers temporary possession and the obligor has a home, a car, they are doing fine, they don't have the children for any extended period of time, but then there is this unusual circumstance where there is a temporary period of possession that may be a couple of months let's say, not this case. If I'm the obligor all my expenses are covered. How am I going to show my additional expenses without being fairly detailed in what extra costs I had, which probably are going to be fairly small if it's a temporary period of possession. You said generally it's going to be food, maybe some extra driving. How am I going to show that with some fairly detailed evidence?

PRESSLEY: You can show that by saying your food expenses for the past year have been $200 a week, and during these two months it has been $250 a week; and, therefore, there's been $50 extra for the children. And your gasoline bills have...

WAINWRIGHT: And I will know that by looking at my receipts, paying attention to what I am spending.

PRESSLEY: Generally. I don't know if you have to look at your receipts. People generally have some idea of what their grocery bills are running...

WAINWRIGHT: I tend to look at my receipt before I pay whatever it is I am purchasing. Do you?

PRESSLEY: That kind of testimony is good enough...

MEDINA: That to me makes no sense. That it's good enough for what?

PRESSLEY: It's good enough to prove the amount of actual support expended in order to give the offset.

MEDINA: Why in a family court setting is some evidence like that good enough and in perhaps a civil court setting you have to have more of an offer of proof for that evidence to be considered credible. I don't understand how actual doesn't mean actual. Actual means good enough.

PRESSLEY: That's what the courts have accepted as evidence of actual support.

MEDINA: And the reasoning for that is what?

PRESSLEY: That is what the courts have believed. Because I think the CAs realize that it's very difficult for somebody to keep actual receipts. And so they are accepting testimony that it's cost me this much extra or to divide or to take a percentage and they feel that's close enough to actual support to give a number to it.

MEDINA: I guess if the evidence doesn't go contested, then it's accepted.

PRESSLEY: It's been accepted. I think it's reasonable.

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OBLIGEE

CASEY: This morning as I speak, in courthouses throughout the State of Texas there are people in courts and trials that are taking default judgments. And in most of those courthouses you will see the bailiff go out and yell three times: Is so and so here? Is so and so here? Is so and

so here? And that person doesn't answer and they take a default. In my client's particular case, they didn't have to go out to the hall to find her. She was there. She was there and they asked her as a witness, and she even made some arguments in a pro se capacity and announced in a pro se capacity. But at this point in time she goes down, and what she has now has found that she was defaulted and that the pleadings that were filed by Mr. Mullin were taken as being true.

I think they're trying to use the statute as both a sword and a shield. And I think as an affirmative defense it's strictly a shield. More importantly, I think you need to think of it in the context that this was a URISA deal. Let's say that Ms. Chism was a Michigan mother who filed for enforcing a Michigan support order, or a Texas support order and she's out of state. And the State of Texas and the AG goes and files that. And the only person that's down here was Mr. Mullin. At that point in time are they in a position to call back to Michigan and say oh by the way, you're enforcement action not only didn't get you any money but you have a judgment against you. I think that completely upsets the statutory scheme.

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RESPONDENT

DANA: I think an underlying question here is whether or not the recodification of the original family code sections in 1995 brought a substantive change to those statutes? Under 14.40 and 14.41 of the pre-codification family code, there were two mechanisms by which an obligee could enforce a child support obligation. 14.40 said she could file a motion to hold him in contempt. 14.41 said she could file a motion seeking to reduce the arrearage to a judgment.

Under 14.40, the contempt statute, an affirmative defense was provided. That affirmative defense said if the obligor can show that he has had the children for periods in excess of the court ordered periods of possession he had an affirmative defense.

14.41, which provided for reducing an arrearage to judgment, did not allow for an affirmative defense. It didn't care if he had the children beyond the court ordered period of possession. In fact it used language saying it didn't care. It used the words "the underlying support obligation continues unabated."

Now when the new code was written in 1995, those two sections were merged in 157.008 in what is broadly called a section governing motions for enforcement.

WAINWRIGHT: Section 14.41 says actual support provided by an obligor may be sought through a counterclaim or offset. A counterclaim is a claim in which you seek affirmative relief. An offset is in the nature of a defense. Why are they not substantively the same as what 157.008 provides?

DANA: I think they are substantively the same.

WAINWRIGHT: So there was no substantively change then in the recodification? Not on this point.

DANA: Not on that section. I would agree with that. I think the counterclaim and the right of offset is not a substantive change from 157.008, because it was part of 14.41. However, in a suit to reduce arrearage to judgment there was no affirmative defense. That only belonged in 14.40, which was specifically related to motions for contempt. Because the legislature moved them both into one enforcement statute, 157.008, it combined them. Now there is an affirmative defense in both motions, a contempt and a motion to reduce to judgment, and there is a right of offset and counterclaim. There is no way to read 157.008 and not come away from it with the absolute conclusion that rendered a substantive change. The affirmative defense of excess periods of possession did not belong to an obligor who was defending against a motion to reduce to judgment. It was not part of the statute.

When they moved it over and made the affirmative defense of excess periods of possession part of a motion to reduce to judgment, which incidentally is what this case is about, this was not a motion for contempt, these children were adults, the 6 months had expired during which the AG could ask to hold my client in contempt. This was purely a motion to reduce to judgment.

MEDINA: Mr. Casey says you are using this as a sword and a shield. What's your response to that?

DANA: This combination of defenses?

MEDINA: That's the way I understood his comment.

DANA: I don't think it's a sword and a shield. If it is the legislature has given it to us. It is a decision the legislature made. The legislature created the affirmative defense to a motion to reduce to judgment. It's the wording of 157.008. There is no other way to read it. I draw great significance from the fact that the legislature deleted the words "the underlying support order continues unabated". Because if they didn't take that out, then there would be no affirmative defense. The fact that there is an affirmative defense exist because when the obligor has the children for excess periods of time, the child's court order does not continue unabated.

JOHNSON: What says that? We have an order directing the obligor to pay. What terminates that?

DANA: His excess periods of possession. 157.008 makes the point that when he has the children...

JOHNSON: Okay. We agree to statute. I'm saying what terminates the order? Do we not ever require...

DANA: The conduct of the parties. The voluntary relinquishment of the children.

JOHNSON: Can we have people just decide to ignore court orders. Your position has to be that if the obligor and the obligee decide to ignore the court order, the court order doesn't affect them?

DANA: The family code believe it or not gives the parties the right. I don't know if I would call it ignoring the court order, but to structure their own arrangements. The standard possession order...

JOHNSON: Just by a verbal deal?

DANA: Yes.

JOHNSON: And that's enforceable. And then the court order that is in writing is negated by a verbal deal between the two parents acting on their own outside the court?

DANA: It is negated by the conduct of the parties. The standard possession order, which says in detail when the noncustodial parent shall have visitation. It begins with the language "the parties may structure their visitation at all times as is mutually agreeable."

JOHNSON: Okay. We're talking about payment. A court order that someone pays on the first of the month X number of dollars.

DANA: The statute that provides for termination of court ordered child support, the very first language of it says that a court order for the payment of support continues unless altered by agreement in writing.

JOHNSON: That's what I am saying. Was there an agreement in writing in this case?

DANA: No.

JOHNSON: That was my question: Can a verbal deal between the mother and the father negate an existing court order telling one of them to pay $450 a month on the 5th of the month.

DANA: I think it can.

JOHNSON: Under what authority other than the statute that says you have to have it in writing? Is there any other authority you can point to?

DANA: 157.008 is the authority. It says that when a noncustodial parent has the children for excess periods of possession that constitutes and affirmative defense. Both to a motion...

JOHNSON: But it doesn't negate the order. Is's an affirmative defense.

DANA: It's an affirmative defense. The underlying order probably remains the order of the court, but it constitutes an affirmative defense.

The underlying concept here that the AG and I have a basic disagreement with is the question of does a custodial parent have a duty to support her own child? If you follow the reasoning of the AG to its logical conclusion, a custodial parent can voluntarily push the children off to the noncustodial parent and never have any duty of support. The best...

O'NEILL: But under your argument you would make the same payment automatic regardless of the obligee's ability to pay. And that can't make any sense. Isn't that a retroactive attempt to modify child support?

DANA: The CA said it was not.

O'NEILL: I understand, but that's what we're here about.

DANA: 157.008 uses two terms that are too close for rational thinking. Child support is the classic idea of a court order ordering somebody to pay child support. 157.008 says that the noncustodial parent can bring an action for support actually provided. I take that not to be child support. He has the right to say I've been supporting these kids all by myself. I would like you to provide some support back.

O'NEILL: But I don't see that anywhere in the statute. 157.008(d) says that you may request reimbursement for that support, which I read to be that support which you have been paying. Which would mean it could never result in an affirmative judgment against the obligee.

DANA: You read 157.008(d) to be referring to support that he paid while he had the children?

O'NEILL: For his past due child support. For that child support that was in arrearage that he is entitled to an offset on.

DANA: And would we be contemplating the period of time that he had the children, or are you contemplating he might have been in arrears for other periods of time?

O'NEILL: I'm contemplating the situation we have here where he was in arrears and he is seeking to get out of the obligation to pay that portion of the arrearage when he had the children in excess time. Take with me an example where based on the resources of the obligor and the obligee. The obligee has no job, doesn't work. You've got a rich obligor as J. Wainwright posed. The court says $1,000 a month child support from obligor to obligee. The way you would read it is, if obligor then takes possession of the children, the obligee then owes $1,000 in child support a

month now. And how can that possibly be?

DANA: If the obligor - there may be some discretion in the lower courts as to the amount of support. Maybe the TC has the authority not to award the full amount for which the obligor is making his request. 157.008 simply says the obligor can't get more than was court ordered. I don't read it necessarily to say that the TC has to give him all that he is requesting. Perhaps the TC in what we allow for all family court judges has this very broad area of discretion. I don't know.

O'NEILL: The CA did not allow that discretion in the TC here.

DANA: That is because the TC found that that was the amount of support that the obligor had provided. Perhaps the TC has some discretion to find a lower amount. I don't know. If there is no right to a counterclaim or an offset - in other words if the affirmative defense provides the totality of the remedy available to the obligor, it would strike me there was no necessity for the legislature to add paragraphs (d) and (e) to 157.008. And when they used the word counterclaim, we all know in common usage an offset when we use that language an offset urged against the claim of the moving party is a matter of subtraction. It's saying yes, but you owe me back up to the amount of your claim as an offset. When the statute uses the word counterclaim that's addition. That's saying yes, I may owe you, but you owe me back more. That I believe is the clear import of 157.008.

JEFFERSON: Why shouldn't we require the parties just to directly seek to modify the order by saying for example I intend, I'm the obligor, and I am now caring for the child and we need to change the amount of child support ordered previously?

DANA: I think that is the preferred mechanism. But I will tell you as a practitioner of almost 30 years, primarily in the area of family law, these fact situations happen all the time. And when Ms. Pressley told you that this is contemplating a short period of time. I will tell you family law practitioners commonly have cases where the noncustodial parent raised the kids for years.

JEFFERSON: So why don't we have a common practice of modification of orders to take that into account, so that orders are not modified by conduct but by the language of the court and it's in a new order?

DANA: That would be the better way to do it. But human conduct is such that people don't do it. People structure their own informal arrangements all the time and they do it without benefit of a court order. I think 157.008 is simply the legislature's recognition of that reality.

HECHT: By way of counterclaim, I'm a little unclear. Do you think that the obligor can recover actual support or only the support that the judge would have ordered against the obligee had there been a motion to modify?

DANA: I will tell you it's in the transcript of this case that the trial judge waived the

income of both parties during those times, and that was the figure that she calculated as being the reimbursable support to the noncustodial parent.

HECHT: Surely you would admit that the obligor can't get more under 157.008 than the obligor could get if support by the obligee was being determined in the first instance?

DANA: I'm not sure 157.008 says that. But I would agree with you that is how it ought to be applied. Surely as J. O'Neill said, you can't ask an obligee to pay support based on the income of an obligor that she can't meet. That doesn't make a realistic resolution of these issues.

WAINWRIGHT: What if the children suffered some severe medical issues and there was no insurance and the obligor paid that, and that outstripped the child support payments. You still believe that the actual support should be limited to the amount of the child support ordered?

DANA: Actually I don't in that instance.

WAINWRIGHT: So you think there are exceptions?

DANA: I think there are exceptions what the law has always referred to as necessaries. There is no question under 151 of the Family Code both parties, both parents have a duty to support their children. And if you have a child who has a devastating, catastrophic medical problem, that should land on both parents. And it shouldn't - I've never known of any case that says you don't have to pay the full _____ of your child's medical bills if you don't have enough money to do it. It's unnecessary. It is public policy. It is a duty that some commentators have written arises from natural law: the duty to care for our children. That goes back to what I complain about Ms. Pressley's position, which is that under her argument the custodial parent would never have a duty to provide support for her children.

O'NEILL: No. It's just the vehicle by which they would pursue that duty. They would then file a motion to modify as J. Jefferson queried. Why couldn't they then come in to court and do it that was as opposed to the way the CA handled it here?

DANA: I agree they could and I agree they should. But what if they don't? Then the custodial parent just never has a duty to pay support. She just...

BRISTER: Like in a quantum meruit situation. If I'm sitting on my porch, a house painter walks up and starts painting the house. I know people don't do that for free. I say nothing. I can be required to pay under quantum meruit because I know people don't do that for nothing and I expect to benefit from it. I assume the situation you're talking about is normally dad's paying $500 a month child support, dad decides to take the kids and stops paying anything. What about that situation tells mother she's expected to pay something as well? I would think the normal situation where people don't want to hire you expensive lawyers again, they just say well I will take the kids and I'm not going to pay any child support and we just leave everybody, which is in effect limiting

it to an offset. What about that situation tells mother not only am I not paying, but 5 years from now I'm going to sue you for thousands of dollars that you should have been paying for an amount that we've never tried or had a judge set? It's going to be a surprise to momma. That may be why she showed up without an attorney.

DANA: It may be a surprise to momma. But it should not be a surprise to any parent to understand they have a duty to care for and support their children. I think that's what 157.008 says. Since 1990 all states have been required if they wanted to participate in federal funding for their welfare programs to have child support guidelines. The federal government gave no instructions to the states as to how to structure them. So Texas is in a minority of states. Texas is one of 10 states that uses a percentage of obligor income model. It's based purely on the income of the obligor. The majority of states, 3/4 of them, use what is called the income sharers model in which the divorce court takes the percentage of both parents - custodial and noncustodial, and combines them and then makes some determination of how much the noncustodial parent should pay. There are 4 states that take the position - Arizona, Missouri, New Jersey and Colorado allow for child support credits in their orders for the periods of time that the noncustodial parent has the child. And one state, Minnesota, allows for orders that have cross support: when I have the child you pay support to me; when you have the child I pay support to you. All I'm saying is 157.008 moves Texas in the direction of the majority of states that seem to recognize the duties of support have something to do with shared time with the children.

O'NEILL: The TC agreed with your conclusion. The TC's judgment reflected your argument here. Correct?

DANA: Not quite as well as the CA judge.

O'NEILL: I'm not talking about amount. I'm talking about the TC entered a judgment that is precisely in accordance with what you are arguing here. That is, the TC specifically allowed for reimbursement, but used some discretion in determining how much that reimbursement should be.

DANA: I see your point, and I would agree with you.

O'NEILL: But the CA left the TC no discretion.

DANA: That was their interpretation of 157.008. I'm not sure what I'm urging as a practical solution to your dilemma is in 157.008. Maybe you will write on that in this opinion. I don't know. I'm not saying the CA was wrong either. I don't know.

JOHNSON: Are you saying that the actual support has to be proved if your client is ordered to pay $450 a month, but goes in in this hearing and only brings proof or testimony regardless of the quality. Proof of testimony is, I spent $250 a month while I had the child. Your position is that that's what he would be entitled to, not the total $450?

DANA: If he brought in evidence of a lesser amount than his court ordered child support clearly he would only be entitled to the lesser amount.

JOHNSON: And if he brings in $750 instead of $450, then he is entitled to $750, but only what he proves.

DANA: Only what he proves with a sealing being placed on what his support obligation was. And I consider that a practical solution because that's what the court found was a reasonable amount of support for him to pay. If he chooses to pay more it's on him.

WAINWRIGHT: You don't disagree that the AG is the Title IV-D agent for Texas do you?

DANA: No. Clearly he is.

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REBUTTAL

PRESSLEY: I would like to briefly remind the court that in this case the respondent filed a motion to modify custody the very first month that he had possession of the children. This litigation lingered. The TC would not change conservatorship. It refused to impose a child support obligation on Ms. Chism. And finally when the TC would not impose a child support obligation on Ms. Chism, the respondent decided I will agree to just give back the children. He abandoned his modification suit and he allowed it to be dismissed for want of prosecution. Thirteen years later basically the 13th court is not only affecting a retroactive modification, but it really is retroactively and totally out of plenary eradicating or vacating a dismissal for want of prosecution and giving Mr. Mullen the relief he requested between 1985 and 1988, which the TC then refused to give him.

JOHNSON: Was there a hearing when the TC refused to modify?

PRESSLEY: It's in the reporter's record in this case. That was the respondent's testimony. And they produced a letter from respondent saying that if she's not going to pay support - she testified that it was at the judge's order that he return the children. He testified that no, he was just willing because she wasn't willing to pay child support. He wasn't getting it. This was in court for 3 years, from 85-88. There was a temporary agreed order by the way that did not change conservatorship, did not change who pays child support. It merely reduced the amount of Mullen's child support obligation. So it was clear that by reducing his obligation the court was not placing an obligation on Ms. Chism.

O'NEILL: I understand your contest with the CA's opinion. Do you have an objection to the TC's judgment here? The TC did allow some affirmative reimbursement, I presume under the counterclaim language, but then modified it depending upon the circumstances. Do you complain of the TC's judgment here in anyway?

PRESSLEY: Yes we do. And that's why we appealed to the CA. And at the CA we got even less, but we appealed to the CA.

O'NEILL: What do you think the TC judgment should have been?

PRESSLEY: It should have been for the arrearage, the amount due, including the interest minus the amount paid. Because as respondent just said, if his obligation is $500 a month but he only shows $250 a month, then his offset would only be $250 a month. And yet if he produces no evidence of the actual support, then presumptively he gets his whole $500. And he even gets it if the children are shared, which they were in this case at one point. And that makes absolutely no sense.

MEDINA: Did you say arrears plus interest?

PRESSLEY: Yes. Interest is mandatory under the family code.

WAINWRIGHT: If there is no arrearage, then the obligor can sue for the amount of actual support during the excess possession period. Correct?

PRESSLEY: I believe so.

WAINWRIGHT: You don't have a problem with that?

PRESSLEY: No. He's not supposed to be paying both support and actual support if there is no arrearage. He should be entitled to get his actual support back.

I would like to address the policy considerations that are here. If we can impose a child support obligation on an obligee who never was ordered by the court to pay after the children are emancipated, then any state court in this country can do the same thing. When a Texas managing conservator, with a Texas support order asks a court in California, because that's where the obligor is: here's my Texas support order; I would like my arrearage please. The California court is entitled to say, Well he really should have only paid this much, we are retroactively modifying it. And maybe we won't even call it that. Maybe we will call it a novation because our judgments get no more effect in any other state than they do in our state.