

SUPREME COURT OF TEXAS

In the Interest of A.M. and B.M., Children

No. 03-0509 · No. No. 03-0509 · Decided May 5, 2006

SUMMARY

This is a concurring-in-part and dissenting-in-part opinion by Justice Phil Johnson of the Supreme Court of Texas in a child-support enforcement case. The opinion addresses the obligor's burden under Texas Family Code section 157.008 to prove the amount of actual support provided and disputes applying an inference or presumption equal to the obligor's monthly child-support obligation.

CASE DETAILS

COURT	Supreme Court of Texas
WRITING FOR THE COURT	Phil Johnson
JURISDICTION	Texas
DECIDED	May 5, 2006
DOCKET	No. 03-0509
DISPOSITION	other
PROCEDURAL POSTURE	Petition for review from the Court of Appeals for the Thirteenth District of Texas.
STANDARD OF REVIEW	The concurrence states that the amount of actual support proved and found is subject to proper appellate review, but does not identify a specific standard of review.
PRECEDENTIAL VALUE	Published Texas Supreme Court opinion; the extracted text is a partial concurrence and dissent and is not itself controlling to the extent it disagrees with the majority.

TOPICS

child support family law procedure statutory interpretation appellate procedure equitable relief

PRACTICE AREAS

family law child support appellate procedure statutory interpretation remedies

QUESTIONS PRESENTED

1. Whether an obligor seeking reimbursement or an offset under Texas Family Code section 157.008(d) must prove the amount of actual support provided.
2. Whether an inference that an obligor provided some actual support permits a further presumption that the obligor provided support equal to the amount of the monthly child support obligation.

HOLDINGS

1. In Justice Johnson's view, an obligor is entitled to reimbursement or an offset only for the amount of actual support that the obligor proves and the trial court finds; the statutory scheme does not create a presumption that the amount equals the obligor's monthly child support obligation.

KEY QUOTATIONS

“A vital fact may not be established by piling inference upon inference.”

“Mullen was statutorily obligated to prove the amount of support he provided in order to receive an offset or reimbursement.”

FACTUAL BACKGROUND

Mullen had possession of the children during a period for which an affirmative defense under Texas Family Code section 157.008 was asserted. The record apparently lacked evidence that Chism or anyone other than Mullen provided support during that period. The dispute concerned whether Mullen could offset or obtain reimbursement for actual support and, if so, whether the amount could be presumed to equal his monthly child support obligation.

PROCEDURAL HISTORY

The case reached the Supreme Court of Texas on petition for review from the Thirteenth Court of Appeals. Justice Johnson concurred in part and dissented in part, disagreeing with the majority's method for calculating reimbursement or offset for actual child support provided during a period of excess possession.

DISPOSITION

other

CASES CITED

- Curtis v. Curtis, 11 S.W.3d 466, 473 (Tex. App.—Tyler 2000, no pet.)
- Buzbee v. Buzbee, 870 S.W.2d 335, 339-40 (Tex. App.—Waco 1994, no writ)
- Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp., 435 S.W.2d 854, 858 (Tex. 1968)

OPINION

in the Interest of A.M. and B.M., Children

PER CURIAM.

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===== On
Petition for Review from the Court of Appeals for the Thirteenth District of Texas
=====

Argued November 15, 2005 Justice Johnson filed an opinion concurring in part and dissenting in part. I agree with the Court's opinion except as to the portion of Part III that specifies how to calculate the amount of reimbursement or offset to which an obligor is entitled under Texas Family Code § 157.008(d), which provides: An obligor who has provided actual support to the child during a time subject to an affirmative defense under this section may request reimbursement for that support as a counterclaim or offset against the claim of the obligee. Tex. Fam. Code § 157.008(d). The burden of proof as to the affirmative defense provided by section 157.008 is on the obligor. See *id.* § 157.006. Thus, an obligor such as Mullen has the burden to prove that he provided "actual support" during a time of excess possession. The obligor can request reimbursement as a counterclaim or offset of "that support" against the claim of the obligee. The Family Code does not prescribe the quality of proof an obligor must provide as to support provided. See *Curtis v. Curtis*, 11 S.W.3d 466, 473 (Tex. App.—Tyler 2000, no pet.) (evaluating evidence of canceled checks and documentary evidence as well as testimony of an obligor as to amount of support provided), and cases cited therein; *Buzbee v. Buzbee*, 870 S.W.2d 335, 339-40 (Tex. App.—Waco 1994, no writ) (holding that the testimony of an obligor as to amount of payments was sufficient evidence to support findings of actual support paid). The Code does, however, plainly provide that the actual support be proved by a preponderance of the evidence. Tex. Fam. Code § 157.006(b). I agree with the court of appeals' conclusion that the absence of evidence that Chism or anyone other than Mullen provided support for the children during the time that Mullen had possession of them would allow an inference that Mullen provided some level of actual support for that period of time. I do not agree, as the majority concludes, that the inference of some support allows a second inference, labeled as a presumption, that Mullen provided actual support in the specific amount of his monthly child support obligation. See *Schlumberger Well Surveying Corp. v. Nortex Oil & Gas Corp.*, 435 S.W.2d 854, 858 (Tex. 1968) ("[A] vital fact may not be established by piling inference upon inference."). Nor do section 157.008 and related sections of the Family Code contain any type of presumption similar to that provided for use in rendering the child support order. Compare Tex. Fam. Code § 157.008 (providing no presumption as to the amount of support) with § 154.125(b) ("If the obligor's monthly net resources are \$6,000 or less, the court shall presumptively apply the [statutory] schedule in rendering the child support order."). Mullen was statutorily obligated to prove the amount of support he provided in order to receive an offset or reimbursement. In my view, Mullen is entitled to offset only the amount of actual support he proved and the trial court found, subject

to proper appellate review and limited as provided by statute. See Tex. Fam. Code § 157.008(d).

Phil Johnson Justice OPINION DELIVERED:
May 5, 2006

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