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Retroactive Child Support:

The trial court did abuse its discretion in ordering Frank to pay \$50,000 in retroactive child support.

A parent is responsible for support of his children. Paternity may be established for a father with evidence that the father was aware of the child's existence and has substantially supported the child as though the child was his own. In a suit for child support, a court may, in its discretion, order retroactive support for payments the father should have made that were not. There is a presumption that such award should not exceed what the father would have owed in support for the previous four years before the award of retroactive support. A court may deviate from this principle certain exigent circumstances warrant deviation, but in no case should an award for retroactive support operate as an undue burden on the parent.

Frank does not contest paternity. Furthermore, he has provided support for the child as though she were his own and has been aware of the child's existence. Frank's paternity, then, is established.

The court determined that Frank should have paid a total of \$75,000 during Brandi's lifetime. Brandi is roughly 15 years old. Apportioning the award over 15 years, the award comes to roughly \$5,000 per year. A lump sum of \$50,000 is substantially higher than the amount Frank would have been obligated to pay over the previous four years of Brandi's life. That total would come to \$20,000. Therefore the court ordered Frank pay a lump sum over twice as high as the amount he would've been obligated to pay over the previous four years.

This lump sum would constitute an undue burden on Frank. While Frank has failed to provide for Brandi over the previous 6 years, he has provided substantially for her care, with payments totaling \$25,000 over the course of her life. Furthermore, Frank has been completing his undergraduate studies and law school, so his income has likely not been high lately. Furthermore, Amber never attempted to get a court order of child support against Frank until 15 years after Brandi was born.

There was little reason for the court to impose such a high obligation upon Frank. Frank has not appeared to intentionally avoid supporting Brandi. Nor are there other circumstances warranting such a high obligation. Furthermore, even if the total figure is not an abuse of discretion, ordering Frank to pay a

lump sum of \$50,000 is. It would be a substantially undue burden on Frank to come up with \$50,000 immediately, when he has very little current income, rather than paying the amount off over time.

Because the court ordered a retroactive award that works as an undue burden on Frank, the court abused its discretion.

Intentional Underemployment:

Yes, the court abused its discretion in finding that Frank was intentionally underemployed.

In ordering support, the court should adhere to the Guidelines provided for child support awards. Deviations from the guidelines are allowed under certain circumstances, taking into consideration several factors, including a parent's income and the financial needs of the child. A court may also make a determination that a parent is intentionally underemployed for the purpose of reducing his child support obligation. In such situations, the court may award child support on the basis of the parent's earning capacity, rather than his actual income.

Frank does not appear to be intentionally underemployed. It is not fraudulent or bad faith to leave a higher paying job for the purpose of pursuing a graduate degree and a different career. Frank appears to be sincere regarding his pursuit of a law license, having completed undergraduate and graduate work and studying for the bar exam. Leaving the Army and moving to reserve status does not appear to be for the purpose of lowering his child support obligation. Rather, it was for the purpose of pursuing a career. It is improper for a court to find intentional underemployment based solely on the fact that an individual makes less now than he did at a former job. This is what the court appears to have done in this situation.

As such, it was abuse of discretion for the court to find Frank is intentionally underemployed.

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1. The issue is whether the court order for \$50,000 in retroactive child support was an abuse of discretion. A court may order payment of retroactive child support if the party has not previously been ordered to pay child support. The award of retroactive child support is presumptively reasonable if it is not greater than the amount of child support that would have been payable over the past four years. In calculating retroactive child support, the court must consider the party's income and circumstances at the time period during which the child support would have been due. The presumption of reasonableness may be rebutted by evidence that the party knew or should have known of the child's existence and was intentionally avoiding payment of child support. The court should not award an order for retroactive child support if it finds that the order would create an undue hardship on the party or the party's family, considering whether the party has any other children to support. Here, Frank has not previously been ordered to pay child support, so the award of retroactive child support may properly be made. To determine the amount that would have been payable over the past four years, with one child, determine what 20% of Frank's monthly net income was and multiply that by 48 (12 monthly payments per year for 4 years). That number would be a presumptively reasonable award. In considering whether the presumption has been rebutted, the court should consider the testimony that Frank knew of Brandi's existence, claimed her as a dependant, and visited her sporadically. However, while this shows Frank knew of Brandi's existence, it does not show that he was attempting to intentionally avoid child support. In fact, Frank paid at least \$25,000 in child support voluntarily. Further, there is no evidence that Amber ever tried to collect child support before, even though she knew who the father was and where to find him. The presumption has not been rebutted. Additionally, there is evidence that the award of retroactive child support would place an undue burden on Frank. The court may consider that evidence in determining the award to make. We are not given facts about what Frank's monthly net income is, but knowing that his income was higher during the early years of Brandi's life than recently and that the total amount of child support Frank would have owed over the 17 years of Brandi's life is \$75,000, it is reasonable to assume that \$50,000 is much more than the amount of child support that would have been owed over the last four years. Since the presumption of reasonableness has not been rebutted, and in light of the evidence of undue hardship, the trial court probably abused its discretion in the award of \$50,000 in retroactive child support.

2. The issue is whether the court's finding of intentional underemployment was an abuse of discretion. The child support guidelines base the determination of the amount of child support owed by a party on a percentage of the party's monthly net income. Where a party is intentionally underemployed, and thus

earning a lower monthly net income than they would otherwise be earning, the court may consider this in making the child support determination and base the order on a percentage of the amount the party reasonably could be earning but for the intentional underemployment, rather than on the net income the party is actually earning. Here, Amber has testified that she believes Frank is intentionally underemployed. The facts show that he was earning a significantly higher income while deployed in the Army than he is currently earning. However, the facts also show that the reason Frank took reserve status was to complete his undergraduate and law school education, which will likely increase his earning potential over the long term. Further, the evidence does not show that even if Frank had not left active duty status that he would have continued to receive the higher deployment pay as opposed to regular active duty pay. Frank is actively an education in order to increase his job prospects and earning capacity. The evidence does not indicate a lack of effort or an intentional decision to avoid work or to chose a low-paying over a high-paying job. It was an abuse of discretion for the trial court to find that Frank was intentionally underemployed.



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1. Yes, the trial court abused its discretion in ordering Frank to pay \$50,000 in retroactive child support.

Under the Texas Family Code, there is a presumption of paternity if (i) the child is born of the marriage or within 300 days after the marriage or attempted marriage (ii) the father marries the child's mother after the child is born and acknowledges paternity in a signed sworn affidavit filed with the Bureau of Vital Statistics or is voluntarily named in the child's birth certificate or (iii) the child resides with the father for the first 2 years of the child's life and the father holds the child out as his own or (iv) signs a sworn affidavit acknowledging paternity. A presumption of paternity under the Texas Family Code may only be rebutted by genetic testing. If a child has a presumed father under the Texas Family Code, there is a 4 year statute of limitation period to bring a suit for paternity. If the child does not have a presumed father then there is no limit as to when to bring a suit for paternity.

Here, Amber and Frank were never married and never lived together and it is not clear from the facts whether Amber was married to another man when Brandi was born or if she and Brandi resided with another man during the first 2 years of Brandi's life. Assuming she was neither married nor resided with another man during the first 2 years of Brandi's life, it does not appear Frank was Brandi's presumed father. Though he did provide support and sporadically visited Brandi over the years, he did not sign a sworn affidavit acknowledging paternity. Therefore, the fact that Amber waited until Brandi was 15 years old (2009) to file suit for child support is of no consequence because the 4 years statute of limitations does not apply in this case.

Under the Texas Family Code, a parent may be ordered to pay child support until a child turns 18 or graduates from high school, whichever is later. The calculation of child support is based on statutory guidelines that are presumed to be in the best interest of the child (based on obligor's net resources and number of children). For one child, the amount is calculated based on 20% of the obligor's net resources. The guidelines are based on net resources maxed at \$7,500 with a maximum child support obligation for one child being \$1,500. A court may not deviate from the guidelines to increase a child support obligation unless it is proven the increase is warranted based on special needs of the child. Even if the increase in support is proven, the court must provide a written explanation of its deviation from the guidelines in the court order or the court has abused its discretion in ordering the obligor to pay the increased amount. Further, under the Texas Family Code, there is a presumption that 4 years of retroactive child support is in the best interest of the child. However, this presumption may be rebutted

by a showing that the father knew or should have known he was the father and sought to avoid obligation. Here, Frank paid over \$25,000 in child support over Brandi's life which indicates he did not seek to avoid obligation.

Here, the facts are silent as to the net resources of Frank. However, the evidence indicates Frank should have paid a total of \$75,000 in child support since Brandi's birth. The facts are silent to Frank's net resources so the following analysis is assuming the \$1,500 maximum month child support obligation for one child based on \$7,500 a month of net resources for the obligor. Following the presumption that 4 years of retroactive child support is in the best interest of the child at most Brandi would be entitled to \$72,000 for 4 years of support ($\$1,500 * 12 * 4$). Deducting the \$25,000 for the support Frank provided Brandi during her life leaves \$47,000. Frank and Brandi both testified and agreed that \$25,000 in support was provided during the years so the court is justified in deducting that amount. However, the court awarded Frank to pay \$50,000 in back child support which exceeds the \$47,000 ordered by the court. Additionally, Amber has presented no evidence of any special needs of Brandi to warrant an increase in the obligation.

2. Yes, the trial court abused its discretion by finding that Frank was intentionally underemployed.

Under the Texas Family Code, an obligor's net resources are determined by his earning potential. Voluntary or intentional underemployment is no justification for a decrease in child support obligation. Here, Frank is able to have more income when he is on active duty with the Army than when he is on Army Reserve (which is the case now). However, it doesn't appear Frank is intentionally underemploying himself in order to avoid an increase in his child support obligation. Frank chose the military reserve in order to complete his undergraduate studies and law school and is currently studying to take the bar exam. This indicates Frank is actually in the process of becoming employed as an attorney which will likely increase his income compared to the amount he is likely receiving on military reserve. Amber only testified that "she believed Frank was intentionally underemployed." She provided no specific evidence to support her contentions aside from the facts that his income on his last deployment with the Army was significantly higher than it is now. However, this hardly shows Frank was intentionally underemployed especially when coupled with the fact that Frank went on reserve to further his education and pursue a career as an attorney. If Frank passes the bar exam and does not actively seek work as an attorney or go back active with the military, this may evidence intentional underemployment but that is hardly the case now. Therefore, the trial court abused its discretion by finding that Frank was intentionally underemployed.

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