

# IN THE SUPREME COURT OF TEXAS

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No. 03-0509  
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IN THE INTEREST OF A.M. AND B.M., CHILDREN

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ON PETITION FOR REVIEW FROM THE  
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS  
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**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).

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Phil Johnson  
Justice

**OPINION DELIVERED:** May 5, 2006