ORAL ARGUMENT - 4/18/96
95-1292
BRUNI V. BRUNI

ORSINGER: May it please the court. The matter before you this morning involves an enforceability of a promise to pay child support. It was a promise that was made both contractual and decreedly. And under the existing case law because the promise requires the making of payments after the children obtain majority, the promise is not enforceable decreedly after the children obtain majority. It would only be enforceable contractually if enforceable at all. So the question before the court this morning is whether the promise that was made is enforceable contractually?

`There is no dispute in this case as to what the promise was. There is no dispute as to whether the parties understood it. There is no dispute as to whether the parties abide by that promise up to a certain point. The only dispute is whether a certain legal argument exists that means that my client is not entitled to a performance of her benefit under the contract after she has done everything that she was required to do under the contract.

Now I believe it is undisputed and the TC would not give me a finding on this, but I believe it is undisputed from the evidence that if our claim is contractually enforceable we are entitled to a judgment for $110,000. Instead we received a judgment for $18,000, which was only the portion of what was due that was unpaid but came due before the children obtained the majority. So while we presented a claim for $110,000 we collected only $18,000 of it, the balance of that is what we were deprived of because the TC determined that we had no contractual enforceability of our agreement.

ENOCH: If the '75 agreement is found enforceable as a contract, but not the '81 amendments to the agreement, is the record clear as to what the judgment would otherwise be?

ORSINGER: I believe it is your honor. That would definitely change the number of 110, because the contractual amounts switch from 300 a month to 900 a month per child. But that's determinable from the record. And I think this court could render judgment to that effect without having to remand for a new trial to determine those damages.

Now the Family Code provides how interest is to be calculated on past-due child support, and the conclusion of law No. 7 states the court's reasoning on how the interest was calculated. And I believe that that's a correct statement of the law. But it was just applied to the wrong amount. It was applied to $18,000 instead of $110,000. So we stand before the court today asking the court to reverse and render judgment for $110,000 plus recalculated interest according to the provisions of the family code, and to remand on the issue of the recoverability of attorney's fees. Because the TC in denying most of our relief award my client only $10,000 in attorney's fees and since that time we have had to appeal this case to the SC. And if we are successful here we would ask the court to remand the question of attorney's fees to the TC to determine what a reasonable fee has been for this successful litigation.

PHILLIPS: Did the TC make a finding on the appellate court fees?

ORSINGER: No your honor they didn't. The TC only made a finding on $10,000 worth of fees out of the requested $35,000. However, if we are in a reversal posture, then I believe that the fact that we don't have a finding for attorney's fees now is a matter that is properly back before the TC. Because the court awarded $10,000 in fees on the basis of a recovery of $18,000 out of $110,000 sought. And we believe that if the TC knew that we were successful in 100% of our claim, that we would have had a greater award of attorney's fees than the $10,000. So we are asking the court to remand...

PHILLIPS: Was the $10,000 based on some type of percentage of the contingency or was it hourly?

ORSINGER: The court didn't articulate why the testimony was $35,000 in reasonable fees, the finding of fact was $10,000. If you read the statement of facts the court says I am not going to give you all of that, but I will give you $10,000, and the court didn't say why he was picking 10,000 as opposed to 15,000 or 20,000.

I will grant you your honor that we do not have findings on what a fee would be in the event we are successful on appeal. But then I believe if you reverse and render as we are proposing that you do, that you should remand on the attorney's fees issue because the TC made its decision on the award of fees on the theory that we were mostly unsuccessful. Only for a part of our claim were we successful.

Now to move into this issue about the contractual enforceability of the agreement it brings two matters together. One is §14.06 of the Texas Family Code, which is no longer 14.06 of the Family Code, but at the time this was the law and this is the law that this case would be decided under. Section 14.06 of the Family Code provides for agreements in conservatorship proceedings. And it provides that the parties can settle parent/child suits, and that they can bring these agreements to the court, and that the court should approve the agreement unless the court finds the agreement is not in the children's best interest. If the court finds the agreement is not in the children's best interest, the court can reject the agreement, and tell the parties to come back with a different agreement or the court can try the case. If the court finds the agreement is in the best interest of the children, then under 14.06 the terms of the agreement are to be set forth in the decree, and the parties are ordered to perform it. Then 14.06(d) says: terms of the agreement set forth in the decree may be enforced by all remedies available for enforcement of the judgment, including contempt, but are not enforceable as contract terms unless the agreement so provides. So the family code says that if you bring an agreement in a suit affecting the child/parent relationship, and the court thinks it's in the best interest, they should put those terms in the decree. But it is not enforceable as a contract unless the parties provide.

BAKER: You said a legal argument has been made for not enforcing the '75 agreement. Is that the problem with the condition preceding?

ORSINGER: No, your honor, that was not what I was referring to. I was referring to the Elfeldt case. But I will address that condition precedent argument which the CA mentioned in its opinion. Now insofar as this idea of whether the agreement will survive the entry of the decree and be enforceable as a contract, Professor Sampson from UT commented in the Texas Tech Law Review: subsection (d) ensures that the agreed terms of conservatorship ratified by the court will not constitute a contract unless that is the intent of the parties. It is simple contract law. If the parties intended for it to be enforceable as a contract they should say so in their contract. Otherwise, the law is going to say that it is not enforceable. Well our contract does say that it is enforceable. And it provides: this agreement upon approval by the court and incorporated that grammar in the court's judgment shall survive the judgment and thereafter be binding on the parties, their heirs and representatives.

BAKER: What part of that grammar?

ORSINGER: Upon approval by the court and incorporated in the court's judgment.

BAKER: What is the import of that clause?

ORSINGER: I don't think that that makes any difference except when you get to the CA's

argument that because this was not incorporated in the judgment, therefore, the contract never went into effect. And I will address that in just a moment if you will permit, because I want to bring into _____ position what I believe is the collision between the family code and this court's previous opinion in the case of Elfeldt v. Elfeldt, which is what I have reference to in my opening comment.

Now in 1987 this court decided a per curiam opinion Elfeldt v. Elfeldt in which the parties had a child support agreement on the modification order and it was an agreed decree that was signed by the court. And the court went along in its per curiam opinion; it was doing just fine until it gets to the very last paragraph and it says, (I am quoting now your opinion): Section 14.06(d) clearly requires that the parties to an agreement concerning the support of a non-disabled child over 18 must expressly provide in the order incorporating the agreement that its terms are enforceable as contract terms for the remedy to be available.

Now I read you the Family Code language that says that it will not be enforceable as a contract unless the agreement so provides. Per Curiam opinion in Elfeldt comes along and says it will not be enforceable as an agreement unless the decree so provides.

BAKER: You think that's what _____ _____ type decision was?

ORSINGER: In the Elfeldt case the holding was correct and the judgment was correct in my view, because in Elfeldt there was no separate agreement and then later a decree. There was just an agreed decree. And in Elfeldt the agreement and the decree were the same document. So it is true to say that the decree did not provide for contractual survivability and therefore it's not enforceable as a contract. But that's the same thing as saying that the agreement did not provide for contractual enforceability and therefore it didn't survive the decree.

The holding in Elfeldt is correct, because the agreement and the decree were the same thing, the agreement did not provide survivability, and therefore, it's not enforceable as a contract. And those post-18 obligations under the family code 14.06, the holding in Elfeldt is correct. There is one word in Elfeldt that's wrong. It's that the parties to an agreement must expressly provide in the order incorporating the agreement. That is not what the family code says, that is not what Professor Sampson points out. The purpose of the section was that it will not constitute a contract unless that's the intent of the parties. In the present case the parties clearly intended that this agreement would be enforceable as a contract after the decree was signed. They complied with 14.06 of the family code. This decree was 1975. This family code provision became effective in 1974. Elfeldt was decided in 1987. So we are talking 12 years later the SC in a per curiam opinion says: no matter what the family code says we are going to say that it is required that the order provide survivability regardless of the agreement. And I believe that that is an incorrect wordage. I don't think the holding in Elfeldt was wrong, but I think the use of the word that must expressly provide in the order is wrong. The family code says it must be expressly provided in the agreement.

Now to get to Justice Baker's point: what about this condition precedent? The CA said that this agreement upon approval by the court and incorporated in the court's judgment shall survive. And the CA said: Well, we are going to follow Elfeldt. The same thing the TC said. It's not our position as a trial judge or as the CA to tell the SC that their decisions are wrong. We are going to follow Elfeldt. Your decree doesn't say anything about survivability, only your agreement does. And your agreement would ordinarily be enforceable under 14.06(d) except that it says: upon approval by the court and incorporated in the court's judgment, then it survives. And the CA said: it was not expressly approved in the decree. This separate agreement incident to divorce was not expressly approved in the decree, and it was not expressly incorporated in the decree of divorce. And since it was not expressly approved and not expressly incorporated, therefore, this agreement never survives the entry of the judgment, because it

wasn't expressly approved or incorporated.

Now we believe that this is wrong. We believe this is not correct that the court actually specifically approved and incorporated certain language in the agreement and then took the terms of the agreement and put them in the decree. They match the amounts, the dates, the cut-off dates, all of that is the same. The court did what it says under the family code to do, that if it finds the agreement is in the best interest of the children it should set out: its terms shall be set forth in the decree.

BAKER: Is it correct as stated by the respondent that the decree approves the property settlement...

ORSINGER: Expressly.

BAKER: But your next point it also incorporates the child support payments?

ORSINGER: Yes.

BAKER: It does not expressly approve it?

ORSINGER: It does not expressly approve it and it does not expressly approve...it only expressly approves the agreement of the parties that the father will pay no child support for their adoptive child. It expressly says: the court agrees with and approves this idea that the father will not pay for the adoptive child, but will pay for the natural children until age 21. But it doesn't expressly approves the part that says that the natural children will be supported to age 21.

BAKER: Are there other parts of this agreement that expressly approves or incorporates?

ORSINGER: Yes, sir. The entirety of this agreement is reflected in the decree which in my view is implied approval by the court. If you read the family code it says: that if the court finds the agreement is in the best interest it shall set forth the terms in the decree; and they will order the parties to perform it. The number of months payment, the amount to be paid, medical care, all of these other terms that were in the agreement show up in the decree but they are not expressly approved. Well we believe that that's a distinction without a difference. If the court has a choice of either rejecting the agreement in toto, and sending the parties out to negotiate and come back with a new agreement or else try the case on the merits, neither one of those things happened in this case. The agreement was brought in, it was marked as joint Ex. 1, the terms of it were partially expressly approved, but they were also set out in the agreement the very same terms, the very same dates, amounts, children's names and everything are in the decree. That is implied approval of those terms. That is following the direction of 14.06 to set those terms out and order the parties to perform them.

We believe it's an overly legalistic view to say that the language upon approval by the court and incorporated in the court's judgment...

BAKER: You earlier said that the party's intent was clear, that they wanted this agreement to survive the decree. Do you also agree that they were clear in their intent that the agreement had to be approved by the court and incorporated into the judgment?

ORSINGER: We believe that it was clear, that was clear that the parties wanted that and because the decree was signed that incorporated those terms impliedly, that that condition was met.

BAKER: You're not saying that what they said there is _____, but your argument is

by the nature of the decree actually entered that by implication the court did approve judicata?

ORSINGER: That's exactly what we're saying. Thank you very much.

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RESPONDENT

PINCKNEY: May it please the court. It's basically my client's position that if you really look at this case I think the review was improvidently granted. Because if you look at the issue that has been raised here of trying to distinguish Elfeldt and 14.06(d) as it was in place at the time he's saying Elfeldt's alright. If Elfeldt's alright, then you've got to affirm. I think you've got to either if you are going to do anything other than affirm you've got to change Elfeldt, you've got to reverse it or you've got to modify it because it says that it's got to be in the order. But irrespective of whether it's in the order or not, it was not in the agreements and the TC made factual findings to that effect, which were upheld by the 4th Court. As to the 1975 agreement they found that that agreement because it was not approved by the court in its decree was not enforceable as a contract. And you've got to look at it, if you look at back at Judge Enoch's opinion in Hill you see that distinction that you've got separate causes of action here: one before the divorce court, an enforcement of a child support obligation, and 2) a contract, and particularly in this case as well as Elfeldt you're talking about a contractual obligation for children nondisabled over age 18. So even if the court set that forth in its decree in 1975 it couldn't enforce it as a divorce court - over 18 for a nondisabled child. The guy comes in and doesn't pay for a nondisabled child over 18, and the court having ordered it. In otherwise let's say take the agreement away, just look at the decree in 1975. The court is ordering child support to be paid for nondisabled children over 18. Can't do it.

GONZALEZ: You mean the parties in Texas do not have the power to make a contract?

PINCKNEY: They have the power to make a contract. I am drawing a distinction.

GONZALEZ: To support a nondisabled child beyond the age of 18 they either have that power or they do not?

PINCKNEY: I say they do.

GONZALEZ: Isn't that what was done in this case?

PINCKNEY: Well that's what was done in this case. But in order for that to be enforceable, and you can see because I mean what you're really trying to get around is the issue of sort of alimony. But to say the parties agree that they are going to pay child support to the child who reached 30 years of age and going to pay it to the mother. I mean that's the policy issue over 18, the third party beneficiary issue of the child.

CORNYN: Aren't agreements like this sometimes used as part of the property settlement generally irrespective of alimony?

PINCKNEY: There may be but there isn't any evidence of that of any consideration for that in this case.

CORNYN: I guess what concerns me Mr. Pinckney is why is this so incredibly complicated? It seems like the parties ought to be able to reach an agreement or if it's not their argument to make that plain as well and then it is thought not to be in doubt.

PINCKNEY: Because of this question that I just raised. If you didn't have an agreement, and the court...let's say the court just set forth that it was going to order child support for a nondisabled child over 18, that divorce court cannot enforce that. That's why you say if you're going to make an agreement you are going to make it agreeing to it as enforceable in contract terms. And you look at the code construction act, and you look at the SC cases I don't see how this court can change this decision of factual findings down there. Following the statutes of clear construction it says: the contract agreement has to indicate that it's enforceable by contract terms. The legislature even mucked it up more the last time around. They actually put 2 new sections into the new family code of this even as to support. One says conservatorship; the other says support, changes it a little bit but stays with the contract terms.

ENOCH: But for the TC not expressly approving the agreement in 1975 it would otherwise be enforceable as a contract? The terms of the contract itself would be enforceable as a contract. But the whole issue here is that the TC did not approve it in its judgment?

PINCKNEY: Well not only that, because it was written a little bit different. It said: This agreement upon approval by the court, a condition precedent that Justice Baker I think was referring to, upon approval by the court and incorporated into the court's judgment shall survive the judgment. So you have a condition precedent to this agreement being...

ENOCH: That's my point. You're point is if the decree had approved this agreement it would be enforceable as a contract in your view?

PINCKNEY: Yes. Under the 1975 you draw the distinction also of 1981. The 1981 agreement provided no provision that it's going to be enforceable as a contract. And that's the one that increases the amount.

BAKER: Are you in agreement that the 1981 document was an amendment to the 1975?

PINCKNEY: No question.

BAKER: Does not the _____ supersede or otherwise...

PINCKNEY: I agree.

BAKER: So if you read them together where does your argument that you are trying to make now go?

PINCKNEY: Well I'm saying I have to hinge it back. But I am saying at least it didn't say in it either that it was enforceable as an agreement. But if you're saying you go back to the 1975 and find that it was enforceable as an agreement, then the amendment I suppose you put them altogether.

BAKER: So again in answer to Justice Enoch's question, the crust of your argument is the condition precedent situation?

PINCKNEY: No question about it, that that's what it provided. But I say he can't have his cake and eat it to. He says Elfeldt's correct, but it shouldn't have this deal as to the finding. What I say with reference to Elfeldt if you followed that, that's what the TC followed, that's what the 4th court followed, they made the factual findings that are there, that you can't get away from, finding that the 1975 agreement was not enforceable as a contract.

OWEN: Were the facts in conflict on that issue? The facts remain simply from reviewing

the orders in the document?

PINCKNEY: Sure. That goes back to the attorney's fees issue, which was raised by someone here by _____ them. They gave them $10,000. They didn't ask for any appellate review. They didn't ask for any appellate review in the intermediate court or this court, and that's why that issue _____. But they mucked around with 5 or 6 causes of action so that issue would have to go back, a conservatorship, an injunction. I mean it was all sorts of mucking around in the case. This was the only issue at all in this case. Put it in on the jury docket only because if you don't and I didn't address it as to a summary judgment because I was afraid to, because it's something the courts don't like, and so I go before a trial judge, I get a good trial judge. I say to the other side let's waive the jury. He says okay. We go to a good trial judge, we follow this court's opinion, we take it up. That was the only issue. This was a $5,000 attorney fee case at the most.

SPECTOR: What in the judgment do you think shows that the court disapproved the agreement?

PINCKNEY: If you look at it it mentions only on page 3 of the judgment, of the decree, the court finds that the parties entered into an agreement for the division of their community property. The agreement provides for his head injury. The title of it is Property Settlement Agreement and Agreement as to Custody, Support and Rights of Visitation. But the decree specifically found: the court finds that the first _____ agreement for the division of community property, and both parties advanced the court to approve the agreement, which the court finds to be fair and reasonable. And the court further finds that the agreement to provide for the support of Jacqueline Bruni the adoptive child made by the family of Mary Ann Smuthers Bruni is just and equitable; and having been agreed to by her father who has appeared here is in all things bindings on all parties hereto. So clearly if you look at the facts, which are uncontroverted, there isn't any approval in that decree of that portion of the agreement.

SPECTOR: My question was what's the disapprove?

PINCKNEY: I don't think it disapproved it. I didn't say it. We never made...I am sorry I didn't understand you.

SPECTOR: It would appear to have incorporated the agreement.

PINCKNEY: Well it's got to approve it. And it didn't incorporate it because it simply said: finds that the parties have entered into an agreement. It didn't find that it incorporated the agreement.

ENOCH: If this decree has set out verbatim the settlement agreement within the decree there would have been no need to incorporate the agreement...

PINCKNEY: If it set it forth verbatim.

ENOCH: So if the only thing the decree has to incorporate is the provisions dealing with child support, if the decree itself pulls out just those paragraphs and put in the decree wouldn't that be incorporation?

PINCKNEY: In this particular one you're saying then?

ENOCH: Yes, sir.

PINCKNEY: In this particular case yes. If you didn't have this last provision in the 1975

agreement, that would not be true. Because if you simply had that, and you didn't have that it was going to be enforceable as a contract you need those terms of art because then you go into a common law cause of action.

ENOCH: My question is the incorporation in the decree which is a mechanical fact, if the decree didn't say it incorporates the agreement, but simply sets forth verbatim the agreement with the decree, you'd have no problem that it was incorporated would you? I mean incorporation is just mechanically putting it in the decree?

PINCKNEY: Without articulating though that this was an agreement by the parties?

ENOCH: I'm not talking about 14.06 at this point. I'm just simply talking about the incorporation issue.

PINCKNEY: Well but I'm saying I think you would have to have some indication that it's incorporating an agreement of the parties. If it just says: the parties agreed to pay X number, and it orders X number. In that sense of incorporating...

ENOCH: So in your view if the decree merely tracked the language of the agreement, that wouldn't be sufficient for an incorporation?

PINCKNEY: I don't think so. I think you've got to have this...and you handled it in a footnote in the Hill opinion that you do not address the 14.06(d) requirement because in that case on the Hill situation, Hill simply recognized that there was alternative cause of action. And in that case you found that you could increase the child support. You would still have the agreement separate apart from that, but you could go back and increase the child support for a minor child, and this agreement wouldn't prohibit it. You see that's where you get into the problem. I agree on child support that I'm only going to pay $100, and I put it in as an agreement. Then there's a change of conditions and you come in and modify it. And in Hills case you say hey you can modify it, but only on a divorce court cause of action. You're going to still have your common law cause of action. Because if you go the other way you see if you are going to enforce agreements and recognize them, and they are going to always be binding and there isn't going to be anything else, husband and wife agree that I'm going to pay $100 month; we agree, make it enforceable as a contract, then she comes in for a modification later on and wants to raise it to $300. Nope, you can't do that. We've got a contract. You see. Because you've got these separation of common law court and divorce court, and you upheld in that case that yes, that contracts still enforceable, but it doesn't vitiate the authority of the divorce court to increase that child support agreement.

See that guy there was saying I want to enforce that contract. We agreed that I would pay only $100 a month. I am using some other arbitrary figure. But your court said: No, No, No, irrespective of the fact that it was enforceable as a contract, the divorce court separate and apart. That's the distinction in this case is that we've got nondisabled children over 18 and when you're going to do that you've got to dot the Is, and cross the Ts, and meet the statutory requirement which wasn't met in this case as to either agreement irrespective of Elfeldt. And we've got the factual findings for that. We've got the factual findings and the conclusions of law that that 1975 agreement did not provide that it was enforceable as a contract. We've got that the 1975 agreement was not enforceable as a contract. The 1975 decree was not enforceable as a contract. The 1981 agreement was not enforceable. Neither one of them. We've got those factual findings and even if you say that Elfeldt isn't particularly applicable, we still meet the statutory, the 14.06(d) requirement irrespective.

And that's basically our position. We believe that if you read 14.06(d) and the Code Construction Act and the factual findings that were made by the TC, you can't do anything but affirm.

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REBUTTAL

ORSINGER: Your honors if I may reply to some of the questions that you raised. To begin with Justice Cornyn's question: why is this so incredibly complicated? I think that's because of the process of legal advocacy.

GONZALEZ: Was it not really because of sloppy language by our court in the per curiam opinion in Elfeldt?

ORSINGER: That provided the tool for the advocacy in this case. The advocacy is you're standing at the edge of a forest and everybody can see that it's a forest. And Mr. Bruni comes in and said: I promised to pay support till these kids were 21 what am I going to do, I don't want to do it anymore. You can't sit back and say there's a forest there you lose. If you are going to advocate Mr. Bruni's position you say what's the forest made up of? It's made up of trees. What's this tree? This is the Elfeldt tree. What's this tree? This is poor language in the agreement. What's this tree? This is the argument that there is a condition precedent that if it's not expressly incorporated that therefore it's somehow impliedly rejected. And I think I can go into court, I'm not putting words into Mr. Pinckney's mouth, I'm an advocate just like he is, but we can go into court and argue about trees and we are going to forget that we're at the edge of a forest.

What have we done here? The family code says that if you make a deal you can come in and you can tell that deal to the court and if the court thinks it's in the best interest of the kids, then they should approve it, include it in the decree and order the parties to perform it. Now that's what we did. We had a deal. We don't argue on whether we had a deal. We're not arguing over what the deal was. We had a deal.

ENOCH: On the condition precedent to the enforceability of this agreement which is one of the issues approves and incorporated assuming that you can incorporate an agreement by just setting it out in the decree, which is one of your arguments, how much liberality should we consider when you use the same amount of money and the same amount of time but it's really not a verbatim resuscitation _____ the provision? I mean how far do we go saying well this is close enough to be incorporation?

ORSINGER: To me your honor it follows necessarily if there is an agreed decree entered based on an agreement that you have incorporation as a matter of law and you don't have to get down and start comparing word for word. The family code gives the trial judge 2 choices: you can either approve the agreement and put it in the decree; or you can reject the agreement. And if you reject the agreement you either tell them go bring me another agreement or let's try this case. This trial judge did not reject this agreement. There is no implied disapproval as Justice Spector was inquiring about. This judge did not reject, did not send the parties away, did not set the case for trial or the merits, this judge took the agreement and signed the decree based on the agreement. Now to me that constitutes incorporating the agreement into the decree where the terms are the same, or largely the same.

Now think about the word incorporate. I haven't studied Latin since the 8th grade. Incorporate means put in the body, in the body, corpus. If the terms of the agreement show up in the body of the decree why does it matter if you use the words, the magic words "I hereby incorporate" instead of taking the terms of the agreement and actually physically putting them in the body of the decree? To me if you cut away the argument over tree verses tree, and we get down to the simple issues here, the question is is implied approval and implied incorporation good enough to meet the family code requirement? If the TC's implied approval and implied incorporation is good enough, then we are not hurt by the conditional precedent clause that Justice Baker inquired about.

The only other thing that would hurt me is the Elfeldt opinion. And I think I've said and I want to make this clear. I'm not saying that the Elfeldt language is right. I am saying that the holding in Elfeldt was right because the agreement and the decree were the same thing. There's a word in Elfeldt that's wrong, and that is that the decree must provide. The family code says the agreement must provide. If this court believes that implied approval and implied incorporation is sufficient to meet the family code requirement and that one word in Elfeldt is wrong, and you should say that in your opinion so that we don't have this problem in all this courts all over this state, then we win. We've got $110,000 and we would ask the court for a remand on the attorney's fees.