

# NO. 09-0753

---

---

IN THE SUPREME COURT OF TEXAS

---

---

**JAMES DERWOOD ILIFF,**  
*Petitioner,*

v.

**JERILYN TRIJE ILIFF,**  
*Respondent.*

---

---

On Petition for Review from the  
Third Court of Appeals at Austin, Texas  
Case No. 03-08-00382-CV

---

---

**REPLY TO RESPONSE TO PETITION FOR REVIEW**

---

---

Respectfully submitted by,

**GEORGANNA L. SIMPSON**  
SBN 18400965  
**LAW OFFICES OF**  
**GEORGANNA L. SIMPSON**  
1349 Empire Central  
Woodview Tower, Ste. 600  
Dallas, Texas 75247  
Phone: 214-905-3739  
Fax: 214-905-3799

**JEREMY C. MARTIN**  
SBN 24033611  
**JEREMY C. MARTIN,**  
**ATTORNEY AT LAW**  
1349 Empire Central  
Woodview Tower, Ste. 600  
Dallas, Texas 75247  
Phone: 972-556-2241  
Fax: 214-905-3799

**THOMAS M. MICHEL**  
SBN 14009480  
**GRIFFITH, JAY &**  
**MICHEL, LLP**  
2200 Forest Park Blvd.  
Fort Worth, Texas 76110  
Phone: 817-926-2500  
Fax: 817-926-2505

**ATTORNEYS FOR PETITIONER**

**ORAL ARGUMENT REQUESTED**

---

---

**TABLE OF CONTENTS**

---

---

*Table of Contents* ..... *i*

*Index of Authorities* ..... *ii*

**REPLY TO RESPONSE TO PETITION FOR REVIEW** ..... 1

**I. The purpose requirement conflict undisputedly exists** ..... 1

**II. To deny the petition on the grounds urged by Jerilyn would require  
this  
Court to engage in an impermissible factual sufficiency review** ..... 3

**III. The issue is one of statutory interpretation** ..... 4

**PRAYER** ..... 5

**CERTIFICATE OF SERVICE** ..... 6

---

---

**INDEX OF AUTHORITIES**

---

---

**Case Law:**

1.	<i>Barrand, Inc. v. Whataburger, Inc.</i> .....	4
	214 S.W.3d 122 (Tex. App.—Corpus Christi 2006, pet. denied).	
2.	<i>Burke v. State</i> , 28 S.W.3d 545 (Tex. Crim. App. 2000).....	4
3.	<i>Cropper v. Caterpillar Tractor Co.</i> , 754 S.W.2d 646 (Tex. 1988).....	3
4.	<i>Crown Life Ins. Co. v. Casteel</i> , 22 S.W.3d 378 (Tex. 2000) .....	4
5.	<i>Ex parte Ellis</i> .....	4
	279 S.W.3d 1 (Tex. App.—Austin 2008, pet. granted August 19, 2009).	
6.	<i>Iliff v. Iliff</i> .....	1, 3
	No. 03-08-00382, 2009 WL 2195559	
	(Tex. App.—Austin, July 21, 2009, pet. filed) (mem. op.).	
7.	<i>In re Davis</i> , 30 S.W.3d 609 (Tex. App.—Texarkana 2000, no pet.).....	2
8.	<i>In re Striegler</i> , 915 S.W.2d 629 (Tex. App.—Amarillo 1996, writ denied) .....	1, 2

---

---

**REPLY TO RESPONSE TO PETITION FOR REVIEW**

---

---

Petitioner, James Derwood Iliff (“James”), submits his Reply to Response to Petition for Review.

**I. The purpose requirement conflict undisputedly exists.**

Jerilyn repeatedly concedes that conflict jurisdiction exists. *See* Response to Petition for Review at viii, 4, 6, 8. However, Jerilyn contends that James has “overstated” the conflict. *See* Response to Petition for Review at 4.

Jerilyn first criticizes James for not addressing *In re Striegler*, 915 S.W.2d 629 (Tex. App.—Amarillo 1996, writ denied), which she contends the Third Court relied upon and which “d[oes] not cite or discuss the purpose element.” *See* Response to Petition for Review at 5. The Third Court cited *Striegler* solely as authority (in addition to the statute) for the unremarkable proposition that:

section 154.066 of the family code allows a trial court to apply the child support percentage guidelines based upon earning potential if the actual income of the obligor is significantly less than what the obligor could earn because of intentional unemployment or underemployment.

*Iliff v. Iliff*, No. 03-08-00382, 2009 WL 2195559 \*7 (Tex. App.—Austin, July 21, 2009, pet. filed) (mem. op.). The Third Court did not cite or rely upon *Striegler* in support of its decision to decline to adopt the reasoning of its sister courts regarding the purpose element.

Moreover, the *Striegler* Court specifically noted that there was some evidence that the father in that case had become intentionally underemployed to provide a justification for decreasing his child support obligation:

In this case, viewed in the light in which we must view it, there is evidence upon which the trial court could reasonably have concluded that Allan was “intentionally underemployed” by engaging in investments and enterprises that provided an illusion of decreased income, thereby providing a justification for decreasing his child support.

*Streigler*, 915 S.W.2d 640. Because the *Striegler* Court was addressing section 14.053, the predecessor to section 154.066, James did not include the Seventh Court of Appeals in his conflict analysis. However, even the *Streigler* Court specifically noted that the father had intentionally created an “illusion” of decreased income as a justification for decreasing his child support obligation. *See id.*

Jerilyn then attempts to distinguish *In re Davis*, 30 S.W.3d 609 (Tex. App.—Texarkana 2000, no pet.), on the ground that the Sixth Court of Appeals treats the purpose consideration as a factor to be considered rather than a “but for” standard. *See* Response to Petition for Review at 5. Under Jerilyn’s analysis, *Davis* simply represents a secondary conflict—that is, assuming the majority of intermediate appellate courts is correct that the purpose of under- or unemployment must be considered, the issue arises similar to employment discrimination cases as to whether:

- (1) the purpose is a consideration; versus
- (2) “but for” the purpose of decreasing child support, the parent would not have become under- or unemployed.

Regardless, the bottom line is that Jerilyn specifically concedes the purpose requirement conflict. *See* Response to Petition for Review at 6. This Court should grant the petition and resolve this conflict.

**II. To deny the petition on the grounds urged by Jerilyn would require this Court to engage in an impermissible factual sufficiency review.**

Jerilyn's second response point is that "affirmance" is required because there is some evidence to support an inference that James was underemployed for the purpose of avoiding child support. *See* Response to Petition for Review at 8. The Third Court did not hold in the alternative that there was some evidence to support an inference that James was underemployed for the purpose of avoiding child support. *Iloff*, 2009 WL 2195559 \*7. Rather, the Third Court overruled James's complaint solely on the ground that there is no purpose requirement. *Id.*

Respectfully, to deny this petition based on James's "affirmance" response point would require this Court to engage in a factual sufficiency determination, *i.e.*, to deny the petition on the ground urged by Jerilyn, this Court would have to hold that there is factually sufficient evidence that James was underemployed for the purpose of avoiding child support. This Court cannot review fact issues. *Cropper v. Caterpillar Tractor Co.*, 754 S.W.2d 646, 648 (Tex. 1988). Therefore, whether there is some evidence to support an inference that James was underemployed for the purpose of avoiding child support cannot serve as a basis for denial of this petition.

### **III. The issue is one of statutory interpretation.**

Finally, Jerilyn contests James's characterization of the purpose requirement as an issue of statutory interpretation. *See* Response to Petition for Review at 11-13. Under Jerilyn's analysis, the issue fails to be one of statutory interpretation once one goes beyond the plain language of the statute. *See* Response to Petition for Review at 11-13. This position is contrary to the well-settled tenet that "[t]he primary rule in statutory interpretation is that a court must give effect to legislative intent." *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 383 (Tex. 2000). When determining legislative intent, courts look to the language of the statute, *as well as its legislative history, the objective sought, and the consequences that would flow from alternate constructions.* *Id.* Jerilyn's position is also contrary to centuries-old canons of statutory interpretation, including the doctrine of last antecedent, the *in pari materia* doctrine, and the presumption of a change when an amendment alters a statute rather than a clarification. *See, e.g., Ex parte Ellis*, 279 S.W.3d 1, 29 (Tex. App.—Austin 2008, pet. granted August 19, 2009); *Barrand, Inc. v. Whataburger, Inc.*, 214 S.W.3d 122, 133 n.2 (Tex. App.—Corpus Christi 2006, pet. denied); *Burke v. State*, 28 S.W.3d 545, 546 (Tex. Crim. App. 2000).

Jerilyn also criticizes James for allegedly failing to explain the ambiguity of the statute, but she does not contend that the statute is unambiguous. The ambiguity is illustrated by the undisputed conflict in the intermediate appellate courts, *i.e.*, whether the phrase "intentional unemployment and underemployment" means for the purpose of avoiding child support. This Court should grant this Petition for Review to resolve this conflict in statutory interpretation.

**PRAYER**

WHEREFORE, PREMISES CONSIDERED, Petitioner, James Derwood Iliff, respectfully requests this Court to: (1) grant this Petition for Review, (2) reverse the trial court's May 5, 2008 Final Decree of Divorce [**CR:100; App. 3**], and (3) remand this proceeding back to the trial court for a calculation of child support based upon Petitioner's actual income. Petitioner further requests such other relief, both general and special, at law or in equity, to which Petitioner may show himself to be justly entitled.

Respectfully submitted,

**LAW OFFICES OF GEORGINNA L. SIMPSON**  
1349 Empire Central Drive  
Woodview Tower, Suite 600  
Dallas, Texas 75247-4042  
Phone: 214-905-3739 · Fax: 214-905-3799

**JEREMY C. MARTIN, ATTORNEY AT LAW**  
1349 Empire Central Drive  
Woodview Tower, Suite 600  
Dallas, Texas 75247-4042  
Phone: 972-556-2241 • Fax: 214-905-3799

**GRIFFITH, JAY & MICHEL, LLP**  
2200 Forest Park Blvd.  
Fort Worth, Texas 76110  
Phone: 817-926-2500 • Fax: 817-926-2505

---

**GEORGINNA L. SIMPSON**  
Texas Bar Number 18400965  
**JEREMY C. MARTIN**  
Texas Bar Number 24033611  
**THOMAS M. MICHEL**  
Texas Bar Number 14009480

**ATTORNEY FOR PETITIONER,  
JAMES DERWOOD ILIFF**

**CERTIFICATE OF SERVICE**

This is to certify that, pursuant to rule 6.3 of the Texas Rules of Appellate Procedure, a true and correct copy of the foregoing Reply to Response to Petition for Review has been forwarded to:

Frank B. Suhr  
473 S. Seguin Ave., Ste. 100  
New Braunfels, Texas 78130

**Via Certified Mail, RRR, 7005 0390 0000 5132 2285**

---

**Georganna L. Simpson**