

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

PETITIONER'S BRIEF ON THE MERITS

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

IDENTITY OF PARTIES AND COUNSEL

Petitioner: **James Derwood Iliff, *Respondent at trial/Appellant***

Represented in the Supreme Court by: **Georganna L. Simpson**
Law Offices of Georganna L. Simpson
1349 Empire Central Dr.
Woodview Tower, Suite 600
Dallas, Texas 75247
Phone: 214-905-3739 • Fax: 214-905-3799

Jeremy C. Martin
Attorney at Law
1349 Empire Central
Woodview Tower, Ste. 600
Dallas, Texas 75247
Phone: 214-341-7796 • Fax: 214-905-3799

Represented in the Supreme Court and Appellate Court by: **Thomas M. Michel**
Griffith, Jay & Michel, LLP
2200 Forest Park Blvd.
Fort Worth, Texas 76110
Phone: 817-926-2500 • Fax: 817-926-2505

Represented in the Trial Court by: **Robert Raesz, Jr.**
Law Office of Robert El Raesz, Jr.
902 Rio Grande
Austin, Texas 78701

Previously represented in the Trial Court by: **Sarah K. Brandon**
Law Offices of Sarah K. Brandon, P.C.
13062 Hwy. 290 West, Suite 206
Austin, Texas 78737

Previously represented in the Trial Court by: **Elly Del Prado Dietz**
Duvall Gruning & Dietz, PLLC
112 North LBJ Drive
San Marcos, TX 7866

Respondent:

Jerilyn Trije Iliff, *Petitioner at trial/Appellee*

**Represented in the
Appellate Court by:**

**Frank B. Suhr
Attorney at Law**
473 S. Seguin Ave., Ste. 100
New Braunfels, Texas 78130
Phone: 830-625-4345 • Fax: 830-606-4511

**Represented in the
Appellate Court and
Trial Court by:**

**Michael Scanio
Scanio & Scanio, P.C.**
144 E. San Antonio St.
San Marcos, Texas 78666
Phone: 512-396-2016 • Fax: 512-353-2984

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1. The court of appeals’ decision conflicts with the common holding of twelve other courts of appeals regarding the construction of Texas Family Code Section 154.006 and the meaning of “intentional unemployment or under-employment” **3**

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ABBREVIATIONS AND RECORD REFERENCES

Abbreviations:

1. Petitioner James Derwood Iliff shall be referred to as “**James**” or “**Petitioner.**”
2. Respondent Jerilyn Trije Iliff shall be referred to as “**Jerilyn**” or “**Appellee.**”
3. James and Jerilyn may also be referred to collectively as the “**Iliffs.**”
4. The three children of the marriage shall be referred to as the “**Children.**”

Record References:

1. The Clerk’s Record will be referred to as “CR” and will be cited by page [**CR:** ____].
2. The Reporter’s Record will be referred to as “RR” and will be cited by volume and page numbers, where applicable [**RR: __-__**]. For example, [**RR2:7-9**], would be referring to reporter’s record volume 2, pages 7-9. The Reporter’s Record of the April 22, 2008 will be referred to as “Supp. RR” and will be cited by page numbers, where applicable [**Supp. RR: __-__**].
3. Petitioner will refer to the Appendix as “App. __” with the appropriate numerical reference. [**App. __**].

STATEMENT OF THE CASE

***Parties in the
Trial Court:***

Petitioner: Jerilyn Trije Iliff (“Jerilyn”)

Respondent: James Derwood Iliff (“James”)

Nature of the Case:

This case involved a divorce with children. [**CR:2-10; 68-77**].

Trial Court:

22nd District Court, Hays County, Texas, the Honorable William Henry, Judge Presiding.

***Proceedings in
Trial Court:***

A three-day trial before the bench. [**RR:1-4, Supp. RR**].

Trial Court Disposition:

The Honorable William Henry signed the Final Decree of Divorce on May 5, 2008. The trial court appointed Jerilyn sole managing conservator and James possessory conservator of the children, denied James possession of the children until he completed a psychological evaluation, and ordered James to pay child support based upon his past earning capacity rather than his actual income. [**CR:100-126; App. 1**].

***Parties in
Court of Appeals:***

Appellant: James Derwood Iliff

Appellee: Jerilyn Trije Iliff

Court of Appeals:

Third Court of Appeals at Austin. The justices who participated in the decision were Justices Patterson, Pemberton, and Waldrop.

***Court of Appeals’
Disposition***

In an opinion by Justice Patterson, the court affirmed the trial court’s judgment. *Iliff v. Iliff*, 2009 WL 2195559 (Tex. App. – Austin July 21, 2009) (mem. op.). [**App. 3**].

STATEMENT OF JURISDICTION

Conflict jurisdiction exists because this appeal would have come out differently if it had arisen in Houston, Fort Worth, San Antonio, Dallas, Texarkana, El Paso, Beaumont, Waco, Eastland, Tyler, Corpus Christi, or Edinburg, rather than Austin.¹ See TEX. R. APP. P. 56.1(a)(2); TEX. GOV'T CODE ANN. § 22.001(a)(2). In conflict with the common holding of twelve of its sister courts of appeals and its own earlier decision in *Wiley v. Parker*, 1999 WL 274087, *2 (Tex. App.—Austin May 6, 1999, no pet.) (not designated for publication), the Third Court of Appeals erroneously held that a trial court is not required to find that a child-support obligor's intentional underemployment is for the primary purpose of avoiding child support before calculating the obligor's child support obligation based on his potential, rather than actual, income. *Iliff v. Iliff*, 2009 WL 2195559, *7 (Tex. App. – Austin July 21, 2009) (mem. op.). [**App. 3**].

Moreover, jurisdiction exists because this case involves the construction of a statute necessary to a determination of the case. TEX. GOV'T CODE ANN. § 22.001(a)(3). Specifically, this case turns upon the construction of the phrase “intentional

¹ *In re J.G.L.*, ___ S.W.3d ___, 2009 WL 2648401, *2 (Tex. App. Dallas Aug. 28, 2009, no pet. h.); *Fondren v. Fondren*, 2009 WL 2045252, *5 (Tex. App. – Beaumont July 16, 2009, no pet.) (mem. op.); *McLane v. McLane*, 263 S.W.3d 358, 362 (Tex. App. – Houston [1st Dist.] 2008, no pet.) (op. on rehrg.); *In re Marriage of Wilson*, 2008 WL 2522326, *5 (Tex. App. – Waco June 25, 2008, no pet.); *In re E.A.S.*, 123 S.W.3d 565, 570 (Tex. App. – El Paso 2003, pet. denied); *Zorilla v. Wahid*, 83 S.W.3d 247, 253 (Tex. App. – Corpus Christi 2002, no pet.); *In re P.J.H.*, 25 S.W.3d 402, 405-06 (Tex. App. – Fort Worth 2000, no pet.); *In re Davis*, 30 S.W.3d 609, 616 (Tex. App. – Texarkana 2000, no pet.); *Snell v. Snell*, 1999 WL 33747973 (Tex. App. – Eastland Nov. 4, 1999, no pet.) (not designated for publication); *DuBois v. DuBois*, 956 S.W.2d 607, 610 (Tex. App. – Tyler 1997, no pet.); *Woodall v. Woodall*, 837 S.W.2d 856, 858 (Tex. App. – Houston [14th Dist.] 1992, no writ); *Anderson v. Anderson*, 503 S.W.2d 124, 126 (Tex. Civ. App. – Corpus Christi 1973, no writ) *McSween v. McSween*, 472 S.W.2d 307, 310

unemployment or underemployment” under Texas Family Code Section 154.006, and whether—as twelve courts of appeals have already held—the statute requires a showing that a child-support obligor’s intentional underemployment is for the primary purpose of avoiding child support before calculating the obligor’s child-support obligation based on the obligor’s potential, rather than actual, income.

Finally, the decision in this case involves an error of such importance to Texas law that it requires correction by this Court. *See* TEX. GOV’T CODE § 22.001(a)(6). This scenario reoccurs on a regular basis as evidenced by the number of cases addressing this matter cited in this petition, not to mention the fact that since the filing of this Petition for Review the Third Court has again affirmed a trial court’s order under section 154.066 without requiring a showing that the parent reduced his or her income for the purpose of decreasing his or her child support payments.² Therefore, this Court should address and resolve this conflict.

(Tex. App. – San Antonio 1971, no writ).

² *See Smith v. Detrich*, No. 03-07-00726-CV, 2010 WL 143287*4 (Tex. App.—Austin, Jan. 13, 2010, no pet. h.) (“While we acknowledge that some of our sister courts have held that section 154.066 requires such intent, this Court has held that “[s]ection 154.066 does not require the court to consider whether the obligor’s ‘voluntary unemployment’ was for the primary purpose of avoiding child support.”).

ISSUE PRESENTED

Whether a trial court is required to find that an obligor's voluntary unemployment was for the primary purpose of avoiding child support before setting child support based upon the obligor's earning potential as opposed to his actual income.

PETITIONER’S BRIEF ON THE MERITS

Petitioner, James Derwood Iliff (“James”), submits his Brief on the Merits.

I.
STATEMENT OF FACTS

Pursuant to Rule 53.2(g), the court of appeals correctly stated the nature of the case, except where its opinion states that James quit his job “[w]ithout explanation.” *Iliff v. Iliff*, No. 03-08-00382, 2009 WL 2195559 *1 (Tex. App.—Austin, July 21, 2009, pet. filed) (mem. op.). [**App. 1**].

James and Jerilyn were married in 1990 and had three children. [**2RR:18, 19; CR 2-3**]. Throughout most of their marriage, James worked in the hazardous chemical industry and was the “primary bread winner” of the family. [**2RR:22-24**]. In mid-2005, James’s company, Ashland Chemicals, Inc., was sold to Air Products and Chemicals, Inc. [**2RR:22-24**]. Later that year, the stress level and demands of work at Air Products and Chemicals, Inc. became such that James began considering employment alternatives. [**Supp. RR:97**].

While the court of appeals states that James quit his job in January 2006 “[w]ithout explanation,” the record reflects that he did so due to stress and because he wanted to make a career change and start his own company. [**Supp. RR:17, 20-21, 22-23, 98**]. James was also fearful that he could be sent to prison for acts committed working in the hazardous chemical industry for twenty years. [**Supp. RR:21-22**].

On June 28, 2006, over six months after James had quit his job at Air Products and Chemicals, Inc., Jerilyn filed for divorce. [CR:2-10]. The trial court appointed Jerilyn primary managing conservator and James possessory conservator. [CR:101-06]. The trial court also found that James had become intentionally underemployed and calculated his monthly child support obligation based upon his potential monthly income rather than his actual monthly income. [CR:106, 162].

James appealed the trial court's decision on several grounds, one of which was the sufficiency of the evidence to support the trial court's finding that he was intentionally underemployed. *Iiff*, 2009 WL 2195559 *6. The court of appeals overruled James's complaint on the ground that Jerilyn was not required to show that James's intentional unemployment or underemployment was for the primary purpose of avoiding child support. *Id.* *7. In doing so, the court of appeals acknowledged that its decision conflicted with two other courts of appeals. *Id.*

II. **SUMMARY OF THE ARGUMENT**

The conflict and issue before this Court could not be more clearly defined. Twelve courts of appeals have held that before a trial court can calculate a child-support obligor's monthly child-support obligation based on the obligor's potential—rather than actual—income, there must be a showing that the obligor is intentionally unemployed or underemployed to avoid paying child support. Now, the Third Court of Appeals has specifically “declined to adopt the reasoning” of its sister courts on the ground that the plain language of section 154.006 does not require such a showing.

The Third Court fails to recognize that it has previously:

- (1) accepted the reasoning of its sister courts,
- (2) applied the prevailing interpretation of “intentional unemployment and underemployment,” and
- (3) based a holding in part on the lack of evidence that the obligor became underemployed to avoid her child support obligation.

This Court should grant this petition and clarify whether “intentional unemployment or underemployment” under section 154.006 requires a showing that the obligor is intentionally unemployed or underemployed to avoid paying child support before the obligor’s child-support obligation can be calculated based on the obligor’s potential, instead of actual, income.

III. **ARGUMENT AND AUTHORITIES**

A. ISSUE:

A trial court is required to find that an obligor’s voluntary unemployment was for the primary purpose of avoiding child support before setting child support based upon the obligor’s earning potential as opposed to his actual income.

1. The court of appeals’ decision conflicts with the common holding of twelve other courts of appeals regarding the construction of Texas Family Code Section 154.006 and the meaning of “intentional unemployment or underemployment.”

Upon a finding that a child-support obligor is intentionally unemployed or underemployed, a trial court can calculate that obligors’ child-support obligation based on the obligor’s potential, rather than actual, income:

If the actual income of the obligor is significantly less than what the obligor could earn because of intentional unemployment or underemployment, the court may apply the support guidelines to the earning potential of the obligor.

TEX. FAM. CODE ANN. § 154.066. “Intentional underemployment or unemployment” is not defined by the Texas Family Code. Therefore, the question presented by this petition is whether section 154.066 requires a showing that the obligor’s intentional unemployment or underemployment was “effectuated with a design to reduce child support payments” or, as the *Iliff* Court framed it, “for the primary purpose of avoiding child support.” *Compare Iliff*, 2009 WL 2195559 *7 with *In re Davis*, 30 S.W.3d 609, 616 (Tex. App.—Texarkana 2000, no pet.).

The Third Court of Appeals expressly acknowledged that its refusal to require a showing that the obligor’s intentional unemployment or underemployment was for the primary purpose of avoiding child support is in conflict with other courts of appeals. *Iliff*, 2009 WL 2195559 *7. However, the court of appeals characterized the conflict as one between the Third Court of Appeals and the First and Fourteenth Courts of Appeals. *Id.*

In reality, the conflict is between the Third Court of Appeals and every other court of appeals, save and except the Seventh Court of Appeals, which has not weighed in on this issue. *See supra* n.1. This issue has sufficiently percolated through the intermediate courts of appeals such that it is ripe for determination by this Court, and this petition should be granted accordingly.

2. The twelve other courts of appeals’ collective interpretation of “intentional unemployment or underemployment” is consistent with the plain language of section 154.066 and recognizes the necessity of defining the term and the consequences thereof.

The *Iloff* Court declined to adopt the reasoning of its sister courts of appeals on the sole ground that the plain language of section 154.066 does not require a showing that the obligor’s intentional unemployment or underemployment was for the primary purpose of avoiding child support. *Iloff*, 2009 WL 2195559 *7. As a threshold matter, James does not dispute that the plain language of section 154.066 does not require a showing that the obligor’s intentional unemployment or underemployment was for the primary purpose of avoiding child support. Instead, twelve of the Third Court’s sister courts of appeals have simply interpreted “intentional unemployment or underemployment”—which, again, the legislature did not define—to mean for the purpose of avoiding child support. Not only has the Third Court of Appeals previously acknowledged this interpretation of “intentional unemployment and underemployment,” but it has actually applied it. *See Wiley v. Parker*, 1999 WL 274087, *2 (Tex. App.—Austin May 6, 1999, no pet.) (not designated for publication).

In rejecting its sister courts’ interpretation of “intentional unemployment and underemployment,” the *Iloff* Court relied solely on dicta from *Hollifield v. Hollifield*, 925 S.W.2d 153, 155 (Tex. App.—Austin 1996, no writ),³ a prior decision of the court addressing the issue of voluntary unemployment in the context of modifying an existing

³ At the time it was decided 1996, *Hollifield v. Hollifield*, 925 S.W.2d 153, 155 (Tex. App.—Austin 1996, no writ), already conflicted with three other courts of appeals. *See Woodall v. Woodall*, 837 S.W.2d 856, 858 (Tex. App. – Houston [14th Dist.] 1992, no writ); *Anderson v. Anderson*, 503 S.W.2d 124, 126 (Tex. Civ. App. – Corpus Christi 1973, no writ); *McSween v. McSween*, 472 S.W.2d 307, 310 (Tex. App. – San

child-support order, as opposed to issuing an original child-support order. *Iloff*, 2009 WL 2195559 *7. In *Hollifield*, the Third Court of Appeals held that section 154.066 did not apply to modification cases like the one before it, but nevertheless commented in dicta that section 154.066 “does not require the court to consider whether the obligor’s ‘voluntary unemployment’ was for the primary purpose of avoiding child support.” *Id.*

Notably, the *Iloff* Court failed to mention its decision issued two years after *Hollifield* in *Wiley v. Parker*, 1999 WL 274087, *2 (Tex. App. – Austin May 6, 1999, no pet.) (not designated for publication). First, the Third Court of Appeals in *Wiley* specifically acknowledged the prevailing interpretation of “intentional unemployment and underemployment” then and now as follows:

Family Code Section 154.066 allows assessment of a child support obligation based on earning potential if the trial court finds that the obligor is intentionally unemployed or underemployed. However, the Code does not define “intentional underemployment.” Courts interpreting the term “intentional underemployment” have required that the obligor be found to have “an intent to avoid or reduce child support as a motivating factor in the obligor’s voluntary job change.”

Wiley, 1999 WL 274087 *2. Then, the Third Court of Appeals applied the prevailing interpretation of “intentional unemployment and underemployment,” and specifically looked to whether there had been a showing that the obligor had an intent to avoid or reduce child support as a motivating factor in the obligor’s voluntary job change: “*Wiley* presented no evidence that Parker intentionally became underemployed to avoid her child support obligation.” *Id.* at *3. So, what we have is a court of appeals vacillating from 1996 to 1999 to 2009 and ending up with a holding contrary to every other court of

Antonio 1971, no writ).

appeals to have addressed the issue.

Since the filing of this Petition for Review, the Third Court of Appeals has again affirmed a trial court order refusing to modify a father's child support obligation on the ground that he is voluntarily under- or unemployed without requiring a showing that the voluntary underemployment was for the primary purpose of avoiding child support. *See Smith v. Detrich*, No. 03-07-00726-CV, 2010 WL 143287 *4 (Tex. App.—Austin, Jan. 13, 2010, no pet. h.) (“While we acknowledge that some of our sister courts have held that section 154.066 requires such intent, this Court has held that “[s]ection 154.066 does not require the court to consider whether the obligor’s ‘voluntary unemployment’ was for the primary purpose of avoiding child support.”). The opinion demonstrates that this is an issue that arises on a regular basis and requires correction—or at least clarification—particularly in light of the fact that the Third Court’s reasoning for declining to join its sister courts is that the plain language of the statute does not require such a showing.

Again, the phrase “intentional unemployment and underemployment” is ambiguous and not defined by the legislature. The *Iloff* Court’s sister courts recognized the necessity of first establishing the meaning of “intentional unemployment and underemployment” before proceeding to determine whether a child-support obligor is intentionally unemployed or underemployed. *See In re Hecht*, 213 S.W.3d 547, 572-73 (Tex. 2006) (“We do, however, recognize the necessity of first establishing the meaning of ‘endorsing’ before we can proceed to determine whether Petitioner’s statements constitute ‘endorsing.’”).

Moreover, even if “intentional unemployment and underemployment” is unambiguous, the *Iloff* Court’s sister courts properly considered the consequences of a particular construction in reaching their collective holding that the statute requires a showing that an obligor’s voluntary underemployment or unemployment was for the primary purpose of avoiding child support. *See In re Canales*, 52 S.W.3d 698, 702 (Tex. 2001) (“Even then, however, we may consider, among other things, the statute’s objectives, its legislative history, *and the consequences of a particular construction.*” (emphasis added)). For example, under the *Iloff* Court’s interpretation of “intentional unemployment and underemployment,” if a lawyer in a lucrative private law practice opted to become a judge or a public-interest lawyer at a lower salary, that lawyer would be “underemployed,” and the lawyer’s child-support obligation would be calculated based on the lawyer’s potential income as a practicing lawyer in a lucrative private practice.

The result of the *Iloff* Court’s interpretation of section 154.066 is that a parent cannot seek a job change, a career change, or any other type of change if it results in a lower income. Parents sometimes obtain lower paying jobs because they will have to spend more time caring for children after a divorce, which time would otherwise have been shared or more efficiently utilized if the parents remained married. In any event, the terms “unemployed” or “underemployed” must have some context placed upon them. The most logical one is that the person is unemployed or underemployed because that person seeks to avoid paying child support.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Petitioner, James Derwood Iliff, respectfully requests this Court to: (1) grant his 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

/s/ Georganna L. Simpson
GEORGINNA L. SIMPSON
Texas Bar Number 18400965
JEREMY C. MARTIN
Texas Bar Number 24033611
THOMAS M. MICHEL
Texas Bar Number 14009480

**ATTORNEYS 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 Petitioner's Brief on the Merits has been forwarded to:

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

Via Certified Mail, RRR, 7008 3230 0002 6998 5286

/s/ Georganna L. Simpson

Georganna L. Simpson