

NO. 09-0753

IN THE
SUPREME COURT
OF TEXAS

JAMES DERWOOD ILIFF,
Petitioner;

VS.

JERILYN TRIJE ILIFF,
Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF CONTENTS.. ii

INDEX OF AUTHORITIES. iv

ABBREVIATIONS AND RECORD REFERENCES. viii

STATEMENT OF FACTS. 1

SUMMARY OF THE ARGUMENT. 3

ARGUMENT AND AUTHORITY..... 4

REPLY TO ISSUE PRESENTED NUMBER ONE:.. . . . 4

THE COURT OF APPEALS DID NOT ERR IN DECLINING TO REQUIRE PROOF THAT JAMES’ PURPOSE IN BEING INTENTIONALLY UNEMPLOYED OR UNDEREMPLOYED WAS TO AVOID CHILD SUPPORT.

A. The Austin Court of Appeals Correctly Found that §154.066 Does Not Require Oblige to Prove Obligor’s Primary Purpose for His or Her Intentional Unemployment or Underemployment was to Avoid Child Support... 5

B. The Issue Presented Does not Involve Construction of a Statute, but Rather a Request to Impermissibly Insert a Non-Statutory Requirement Into §154.066.. . . . 6

C. Development of the Alleged Element Requiring Oblige to Prove That the Purpose of Obligor’s Intentional Unemployment or Underemployment Was to Avoid Child Support... 9

1, Discussion of Cases Pre-codification of Intentional Unemployment or Underemployment Provisions in the Texas Family Code. 9

2. Case Law Post-1989 Enactment of Statutory Authority for Basing Child Support on the Earning Potential of an

	<u>Obligor Upon a Finding of Intentional Unemployment or Underemployment.</u>	14
D.	The Issue of Proving the Obligor’s Purpose to Avoid Child Support is not Dispositive as There are Three Independent Grounds for Affirmance.	20
1.	<u>There is Sufficient Evidence in the Record of James’ Purpose to Avoid Child Support so as to Mandate an Affirmance Whether or Not Such Proof is Required. Alternatively, Such Proof Constitutes Ground that Establish Jerilyn’s Right to a Judgment More Favorable than James is Requesting.</u>	20
2.	<u>James’ Failure to Produce Income Information is an Additional Ground for Affirmance of the Courts Below.</u>	22
3.	<u>It Is Not an Abuse of Discretion for the Trial Court to Look to the Obligor’s Last Meaningful Employment to Determine Earning Potential.</u>	23
	CONCLUSION.	24
	PRAYER.	25
	CERTIFICATE OF SERVICE.	26

INDEX OF AUTHORITIES

Case Law:

<i>Anderson v. Anderson</i> , 503 S.W.2d 124 (Tex.Civ.App.–Corpus Christi 1973, no writ).....	11-12, 17-18
<i>Baucom v. Crews</i> , 819 S.W.2d 628 (Tex.App.–Waco 1991, no writ).....	15
<i>Baughman v. Baughman</i> , 65 S.W.3d 309 (Tex.App.–Waco 2001, pet. denied).	13
<i>Cameron v. Terrell & Garrett, Inc.</i> , 618 S.W.2d 535 (Tex. 1981).	8
<i>Cameron v. Cameron</i> , 158 S.W.3d 680 (Tex.App.–Dallas 2005, pet. denied).	15
<i>Casterline v. Burden</i> , 560 S.W.2d 499 (Tex.Civ.App.–Dallas 1977, no writ). 12-13, 15-17	
<i>Curtis v. Curtis</i> , 448 S.W.2d 242 (Tex.Civ.App.–Austin 1969, no writ).	10, 13, 17
<i>Dubois v. Dubois</i> , 956 S.W.2d 607 (Tex.App.–Tyler 1997, no pet.).	8, 14-20
<i>Eggemeyer v. Eggemeyer</i> , 535 S.W.2d 425 (Tex.Civ.App.– Austin 1976), <i>aff'd on other grounds</i> , 554 S.W.2d 137 (1977).	12, 17
<i>Finch v. Finch</i> , 825 S.W.2d 218 (Tex.App.–Houston [1st Dist] 1992, no writ).....	10, 13-14
<i>Fleming Foods of Texas, Inc v. Rylander</i> , 6 S.W.3d 278 (Tex. 1999).	7
<i>Fondren v. Fondren</i> , 09-08-00187-CV, 2009 WL 2045252 (Tex.App.–Beaumont July 16, 2009, no pet.)(mem. op.).	19
<i>Friermood v. Friermood</i> , 25 S.W.3d 758 (Tex.App.–Houston [14 th Dist.] 2000, no pet.).....	15
<i>Garner v. Garner</i> , 200 S.W.3d 303 (Tex.App.–Dallas 2006, no pet.).	19, 21-23
<i>Gaxiola v. Garcia</i> , 169 S.W.3d 426 (Tex.App.–El Paso 2005, no pet.).	19
<i>Giangross v. Crosley</i> , 840 S.W.2d 765 (Tex.App.–Houston [1 st Dist.] 1992, no writ)...	14

Hardin v. Hardin, 161 S.W.3d 14 (Tex.App.–Houston [14th Dist.] 2004, no pet.) 19

Hollifield v. Hollifield, 925 S.W.2d 153 (Tex.App.–Austin 1996, no writ). 5, 15, 19

Iloff v. Iloff, 2009 WL 219559 (Tex.App.–Austin July 21, 2009, pet. granted) (mem. op.). 2, 5, 13, 15, 19

In re A.B.A.T.W., 266 S.W.3d 580 (Tex.App.–Dallas 2008, no pet.). 21

In Re Bell, 91 S.W.3d 784 (Tex. 2002). 8

In re D.G.R., 04-05-00439-CV, 2006 WL 3611156 (Tex.App. –San Antonio Dec. 13, 2006, no pet.) (mem. op.). 19

In re D.S., 76 S.W.3d 512 (Tex.App.– Houston [14th Dist.] 2002, no pet.) 4, 15

In re Davis, 30 S.W.3d 609 (Tex.App.–Texarkana 2000, no pet.). 18

In re G.L.S., No. 12-06-00315-CV, 2007 WL 3087685 (Tex.App.–Tyler Oct. 24, 2007, no pet.) (mem. op.). 15

In re Marriage of Anderson, 10-06-00361-CV, 2007 WL 3409294 (Tex.App.–Waco Nov. 14, 2007, no pet.) (mem. op.) 19

In re Marriage of Perkins, 07-02-0419-CV, 2004 WL 112598 (Tex.App.–Amarillo Jan. 23, 2004, no pet.) 19

In re Marriage of Wilson, 10-07-00159-CV, 2008 WL 2522326 (Tex.App.–Waco June 25, 2008) (mem. op.) 23

In re P.J.H., 25 S.W.3d 402 (Tex.App.–Fort Worth 2000, no pet.). 18, 20

In re S.B.C., 952 S.W.2d 15 (Tex.App.–San Antonio 1997, no writ). 15

In re Striegler, 915 S.W.2d 629 (Tex.App.–Amarillo 1996, writ denied) 15, 19

Kish v. Kole, 874 S.W.2d 835 (Tex.App.–Beaumont 1994, no writ). 15

Laidlaw Waste Systems v. City of Wilmer, 904 S.W.2d 656 (Tex. 1995). 8

LeBlanc v. LeBlanc, 761 S.W.2d 450 (Tex.App.–Corpus Christi 1988). 12, 17-18

Matter of Marriage of Hamer, 906 S.W.2d 263 (Tex.App.–Amarillo 1995, no writ).. 15, 19

McGuire v. McGuire, 4 S.W.3d 382 (Tex.App –Houston [14th Dist.] 1999, no pet.). . . . 15

McLane v. McLane, 263 S.W.3d 358 (Tex.App.–Houston [1st Dist.] 2008, pet. denied).. 4, 19, 21

McSween v. McSween, 472 S.W.2d 307 (Tex.Civ App.–San Antonio 1971, no writ).. 10-11, 16-17

Pharo v. Trice, 711 S.W.2d 282 (Tex.App.–Dallas 1986, no writ).. 12, 17

Powell v. Powell, 721 S.W.2d 394 (Tex.App.–Corpus Christi 1986, no writ). . . 12, 17-18

Roark v. Stallworth Oil & Gas, Inc., 813 S.W.2d 492 (Tex. 1991).. 6

Rodriguez v. Rodriguez, 860 S.W.2d 414 (Tex. 1993). 9

Roosth v. Roosth, 889 S.W.2d 445 (Tex.App.–Houston [14th Dist.] 1994, writ denied). 15

Schaban-Maurer v. Maurer-Schaban, 238 S.W.3d 815 (Tex.App.–Fort Worth 2007, no pet.). 20-21, 23

Siddiqui v. Siddiqui, 14-07-00235-CV, 2009 WL 508260 (Tex.App.–Houston [14th Dist.] March 3, 2009, pet. denied)(mem. op.). 24

Smith v. Dietrich, 03-07-00726-CV, 2010 WL 143287 (Tex.App.–Austin Jan. 13, 2010, no pet.)(mem. op.). 5, 15, 19

Snell v. Snell, 11-98-0126-CV, 1999 WL 33747973 (Tex.App.–Eastland Nov. 4, 1999, no pet.). 18

Starck v. Nelson, 878 S.W.2d 302 (Tex.App.–Corpus Christi 1994, no writ).. 16-17

Stocker v. Magera, 807 S.W.2d 753 (Tex.App.–Texarkana 1990, writ denied).. 15

Swaab v. Swaab, 282 S.W.3d 519 (Tex.App.–Houston [14th Dist.] 2008,
 pet. dism'd w.o.j.). 24

Tenery v. Tenery, 955 S.W.2d 337 (Tex.App.–San Antonio 1997, no pet.). 4, 15

Terry v. Terry, 920 S.W.2d 423 (Tex.App.–Houston [1st Dist.] 1996, no writ). 14

Wiley v. Parker, 03-98-00146-CV, 1999 WL 33747973 (Tex.App.–
 Austin May 6, 1999, no pet.). 5

Woodall v. Woodall, 837 S.W.2d 856 (Tex.App.–Houston [14th Dist.] 1992, no
 writ). 15-16

Zorilla v. Wahid, 83 S.W.3d 247 (Tex.App.–Corpus Christi 2002, no pet.). 18

Statutes and Rules

Tex. Fam. Code Ann. §14.053(f). 8-9, 12-16

Tex. Fam. Code Ann. §14.054(1). 9, 14

Tex. Fam. Code Ann. §154.061(b), §154.062(a), (b), (c).. 4

Tex. Fam. Code Ann. §154.063. 21-22

Tex. Fam. Code Ann. §154.066. 4-9, 13, 16-18, 20

Tex.R.App.P. Rul 33.1. 6

Tex. R. App. P. Rule 55.2(I). 6

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 “Respondent.”
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. For example, (RR II,7-9)], would be referring to the reporter’s record Volume 2, Pages 7-9. The Reporter’s Record of the April 22, 2008 will be referred to as “Supp. RR.”

References to Petition for Review:

1. Petitioner’s Petition for Review will be referred to as (Pet. Rev. __).
2. Petitioner’s Reply to Response to Petition for Review will be referred to as (Rep. Pet. Rev. __).
3. Petitioner’s Brief on the Merits will be referred to as (Pet. Br. Merits __).
4. Respondent’s Brief on the Merits will be referred to as (Res. Br. Merits __).

NO. 09-0753

JAMES DERWOOD ILIFF, Petitioner
VS.
JERILYN TRIJE ILIFF, Respondent.

RESPONDENT’S BRIEF ON THE MERITS

TO THE HONORABLE SUPREME COURT OF TEXAS:

COMES NOW JERILYN TRIJE ILIFF, Respondent, (hereinafter “Jerilyn”) and submits this Brief on the Merits requesting this Court overrule Petitioner’s issue presented, affirm the judgment of the courts below, and grant Respondent judgment for costs. Alternatively, should this Court find Petitioner’s issue presented to be meritorious, this case should be remanded to the Austin Court of Appeals to determine the sufficiency of the evidence to support the element of proof of an obligor’s purpose to avoid child support in remaining intentionally unemployed or underemployed that Petitioner seeks to have this Court add to §154.066, Texas Family Code Ann¹.

STATEMENT OF FACTS

Jerilyn believes the Court of Appeals correctly stated the facts of the case. However, Jerilyn asserts that James’ statement of facts abandons the requirement of the standard of review to view facts in the light most favorable to the trial court’s judgment. Thus, Jerilyn presents the following to contradict some of the facts set forth by James and to supplement

¹ All citations to §154.066 in this brief are to the Texas Family Code Ann.

the facts set forth in the opinion of the court below.

James started in the chemical industry as a technical specialist, became a chemical specialist, and ultimately an account manager where he earned \$102,000 in 2005. (Supp RR 95-96). In January of 2006, James surprised Jerilyn by unilaterally deciding to quit his job. (*Id.*, 17; RR II 21-22, 24-25). Even though James has a bachelor's degree, a Masters of Business Administration and about twenty years experience working in the chemical industry (Supp RR 21-22), when he quit his job his plan was to do ranch work with his tractor. (*Id.*, 22-23). James testified that he earned roughly \$100.00 a month in 2006 and 2007 from his tractor operating business and claimed his consulting business brought in about \$1,200.00 total during those same two years. (*Id.*, 22-25); *See also Iliff v. Iliff*, 03-08-00382-CV, 2009 WL 219559, 3 (Tex.App.--Austin July 21, 2009, pet. granted)(mem. op.).

Dr. Williams, James' counselor, conceded that James is able to work. (RR II 188). Additionally, Dr. Izor preformed a neurological evaluation on James and could not find anything wrong with him. (Supp RR 69, RR II 151). James' sister, Lori, testified she does not believe James suffers from any psychological impairment and is not aware of anything that would render her brother incompetent and incapacitated, but she cannot explain why her brother does not work. (RR III 286, 292, 303). When she sees him, he is usually watching television. (*Id.*, 303). She believes James is okay and he seems to be the same as he has been over the last seventeen years. (*Id.*, 314). Likewise, James' mother does not know why he does not go out and earn money, but she has not asked him why he does not do so in the 20

months he has lived with her. (*Id.*, 336). She is not aware of any psychiatric problems that James may have (*Id.*, 341) and does not believe that he has any mental problems (*Id.*, 345, 349, 359-360). James' routine at his mother's house is to get up, get dressed, read, and watch television. (*Id.*, 335). He does not work around the house. *Id.*

SUMMARY OF THE ARGUMENT

James quit a job earning \$102,000 a year to start a tractor service and consulting business he claims earned \$3,600 over the previous two years. (Supp RR 23-4). The trial court found James to be intentionally unemployed or underemployed, but only deemed his earning potential to be \$5,000 per month, some \$40,000 a year less than the job he quit.

The statutory authority for a trial court utilizing an obligor's earning potential, as opposed to actual income, to set child support is §154.066. The Court of Appeals below held that proof of the obligor's purpose to avoid child support was not a requirement supported by the plain language of §154.066, and thus declined to follow the cases which require proof thereof to establish intentional unemployment or underemployment. This Court should likewise reject James' invitation to legislate a requirement into §154.066 that is absent from the statute.

Even if such proof is required, there are three independent grounds for affirmance: namely, sufficient proof of such purpose exists in the record; James failed to provide the court with proof of income; and, the court was free to utilize James' income from his last meaningful job which utilized his education and experience.

ARGUMENT AND AUTHORITY

REPLY TO ISSUE PRESENTED NUMBER ONE:

THE COURT OF APPEALS DID NOT ERR IN DECLINING TO REQUIRE PROOF THAT JAMES' PURPOSE IN BEING INTENTIONALLY UNEMPLOYED OR UNDEREMPLOYED WAS TO AVOID CHILD SUPPORT.

A trial court's determination of child support is governed by Chapter 154 of the Texas Family Code. The first step in determining the amount of the child support obligation is to determine the obligor's resources and then deduct taxes, social security, and other deductions from gross resources. *See* §154.061(b), §154.062(a), (b), (c), Tex.Fam. Code Ann. Upon the determination of the obligor's net resources, "the trial court must decide whether to apply the child support guidelines or whether application of the guidelines would be unjust or inappropriate." *McLane v. McLane*, 263 S.W.3d 358, 362 (Tex.App.–Houston [1st Dist.] 2008, pet. denied)[citations omitted].

A parent that has the ability to find employment cannot evade his support obligation by voluntarily remaining unemployed or underemployed. §154.066, *See also, McLane*, at 362; *Tenery v. Tenery*, 955 S.W.2d 337, 340 (Tex.App.–San Antonio 1997, no pet.). Rather under §154.066, a trial court may order a parent to pay child support not on his or her actual income, but on the basis of what the parent could potentially earn but for their intentional choice not to do so. *McLane*, at 362. "Intentional underemployment has been construed to mean a 'voluntary choice by the obligor.'" *In re D.S.*, 76 S.W.3d 512, 520 (Tex.App.–Houston [14th Dist.] 2002, no pet.).

A. The Austin Court of Appeals Correctly Found that §154.066 Does Not Require Obligee to Prove Obligor’s Primary Purpose for His or Her Intentional Unemployment or Underemployment was to Avoid Child Support.

The sole issue in this case on review is whether §154.066 requires proof that James’ unemployment or underemployment was done for the purpose of avoiding child support although the plain wording of §154.066 does not have such a requirement. Specifically, §154.066 states: “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.” The court below resolved this question by holding: “[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.” *Iliff*, at 7. James concedes this statement is accurate². The Austin Court has previously so held in *Hollifield v. Hollifield*, 925 S.W.2d 153, 156 (Tex.App.–Austin 1996, no writ) and has subsequently so held in *Smith v. Dietrich*, 03-07-00726-CV, 2010 WL 143287, 4-6 (Tex.App.–Austin Jan. 13, 2010, no pet.)(mem. op.).³

James raises an issue as to whether the operative phrase of “intentionally unemployed or underemployed” in §154.066 is ambiguous. (Pet. Rev. 6; Rep. Pet Rev. 4; Pet. Br. Merits

² Petitioner states: “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 purpose of avoiding child support.” (Pet. Rev. 4-5; Pet. Br. Merits 5).

³ James claims the Austin Court of Appeals in *Wiley v. Parker*, 03-98-00146-CV, 1999 WL 33747973 (Tex.App.– Austin May 6, 1999, no pet.)(not designated for publication) actually applied the purpose requirement. (Pet. Br. Merits 5-6). However, James fails to recognize that this discussion was dicta as the holding was based on the trial court’s finding of fact that the obligor was not intentionally underemployed. *Wiley*, at 2.

7). First, this issue is impermissibly raised for the first time in this Court as it was not raised in either the trial court or the court below. *See* Tex.R.App.P. 33.1; *See generally Roark v. Stallworth Oil & Gas, Inc.*, 813 S.W.2d 492, 495 (Tex. 1991)(cannot raise deficiency for the first time on appeal.). Secondly, James fails to provide argument as to why and how there is an ambiguity, thus this claim is waived. Tex.R.App.P., Rule 55.2(i). James does complain that Jerilyn never argues the statute is not ambiguous. (Rep. to Pet. for Rev. 4). To the extent necessary, Jerilyn hereby asserts that §154.066 is not ambiguous, but rather its meaning can clearly be determined from the plain wording of the statute.

Because a plain reading of §154.066, does not require proof that James' purpose in remaining intentionally unemployed or underemployed was to avoid child support, the court below did not err in holding that such requirement need not be considered in setting child support on the basis of James' earning potential under §154.066. Accordingly, James' issue presented should be denied and the holdings of the courts below affirmed.

B. The Issue Presented Does not Involve Construction of a Statute, but Rather a Request to Impermissibly Insert a Non-Statutory Requirement Into §154.066.

James further argues the courts which require proof of an obligor's purpose to avoid child support are interpreting the phrase "intentional unemployment or underemployment" and seeks to invoke this Court's jurisdiction by arguing that undefined phrase is a matter of construction of a statute. The common meaning of intentional unemployment is that a person chooses to not have a job. The common meaning of intentionally underemployed is that a person chooses to not work to their ability. However, there is nothing in these words that

hints at the added requirement that obligee must prove obligor's purpose is to avoid child support. Such a reading does not interpret this phrase, it adds to it.

James asserts that in spite of §154.066 being wholly silent as to an obligee being required to prove the obligor's purpose to his or her intentional unemployment or under-employment to be avoiding child support, this Court should re-write §154.066 to add that phrase as shown below in italics: "If the actual income of the obligor is significantly less than what the obligor could earn because of intentional unemployment or under-employment, the court may apply the support guidelines to the earning potential of the obligor", *if and only if the obligee proves that the obligor's purpose in remaining intentionally unemployed or underemployed is to avoid his or her child support obligation*. This is a lot to ask the Court to add to §154.066 and constitutes a request for this Court to legislate. Conversely, it would not be too much to ask the Legislature to do if the Legislature believes protecting parents who wish to shirk their legal and moral duties to support their children is a priority.

This Court has held that the specific import of the Legislature's words as written must be given effect "... and should not be construed by a court to mean something other than the plain words say unless there is an obvious error such as a typographical one that resulted in the omission of a word ... or application of the literal language of a legislative enactment would produce an absurd result." *Fleming Foods of Texas, Inc v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999)[other citations omitted]. What James is really asking for is the insertion of a term that he concedes is not contained in the plain wording of the statute and not a

definition of that term. This Court has held “that courts should not insert words in a statute except to give effect to clear legislative intent.” *In Re Bell*, 91 S.W.3d 784, 790 (Tex. 2002) *citing Laidlaw Waste Systems v. City of Wilmer*, 904 S.W.2d 656, 659 (Tex. 1995) [other citations omitted]. James has provided this Court no legislative history to support his requested addition to §154.066. Thus, this Court is without authority to grant James’ request to insert the phrase “with the purpose of avoiding child support” into §154.066.

The lead case supporting James’ argument is *Dubois v. Dubois*, 956 S.W.2d 607 (Tex. App.–Tyler 1997, no pet.)(discussed at length, *infra* at 16-18) which asserts that the historical approach of determining intentional unemployment or underemployment required proof of an obligor’s purpose to avoid child support. *Id.*, at 310. This “historical approach” examined cases which predates the enactment of §154.066 and its predecessor statute, §14.053(f). Assuming, without conceding, if in fact that was the law prior to the Legislature enacting these statutes⁴, then the Legislature’s choice to omit these words in its enactment is significant. This Court has held “every word excluded from a statute must also be presumed to have been excluded for a purpose.” *Laidlaw*, at 659, *citing Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535 (Tex. 1981). In this case, the words excluded by the Legislature from the “historical approach” in enacting §154.066 and its predecessor statute, are the very words James is trying to have this Court impermissibly add back to the statute.

James argues that the holding of the court below means that a parent cannot seek a job

⁴ As is argued below at 12-13, there is more authority that proof of the obligor’s purpose to avoid child support was not historically a requirement prior to the 1989 enactment of §14.053(f).

or career change if it results in a lower income. (PR 7). That is not the case. First, §154.066 requires a significant lowering of income, so many job changes would not invoke the use of the obligor's earning potential to set child support. Secondly, the overriding principle in child support determinations is always the best interest of the child. *Rodriguez v. Rodriguez*, 860 S.W.2d 414, 417 n. 3 (Tex. 1993). Thus, even a significant income reduction could be justified if the reasons therefor are in the child's best interest such as an obligor moving closer to the child or changing jobs to have better hours so that more time may be spent with the child. Conversely, a parent's choice to quit work, move in with their mother, watch television, read and not look for work more lucrative than \$1,800 per year running a tractor and consulting would probably not be in the best interest of the child.

Because this issue presented does not really require statutory construction, but rather the rewriting of §154.066, this issue presented should be denied and the holdings of the courts below affirmed.

C. Development of the Alleged Element Requiring Oblige to Prove That the Purpose of Obligor's Intentional Unemployment or Underemployment Was to Avoid Child Support.

1. Discussion of Cases Pre-codification of Intentional Unemployment or Underemployment Provisions in the Texas Family Code.

The Family Code provisions relating to child support were enacted by the Legislature in 1973, however, the Legislature did not codify the intentional unemployment or underemployment statute §14.053(f), now found in §154.066, until 1989. Act of May 12, 1989, 71st Leg., R.S., ch. 617, § 6, secs. 14.053(f), 14.054(1), 1989 Tex. Gen. Laws, 2030, 2036;

See also, Finch v. Finch, 825 S.W.2d 218, 225 (Tex.App.–Houston [1st Dist] 1992, no writ)(§14.053 was not the law until September 1, 1989). The cases pre-dating §14.053(f) will be discussed to provide a historical review of this area of the law.

The earliest opinion the undersigned counsel has found that addresses the issue of an obligor’s voluntary unemployment or underemployment did not actually use this term. *Curtis v. Curtis*, 448 S.W.2d 242 (Tex.Civ.App.–Austin 1969, no writ). In that case, the obligor voluntarily left his job and, after spending almost a year without a job traveling around the country with his new wife, he became a student at the University of New Mexico. *Id.*, at 243-244. He had done nothing to find another job, even though he was in “excellent physical and mental health.” *Id.* There was no indication that he became or remained unemployed for the purpose of avoiding child support, nor was this element mentioned by the court. *Id.* The court of appeals concluded, “We do not underestimate the value of an education, but in this day of priorities we have no hesitancy in holding, under this record, that the first priority for appellant is to take care of his progeny.” *Id.* at 245. The reviewing court therefore affirmed the trial court’s order denying Mr. Curtis’s motion to reduce the amount of his child support payments, noting its agreement with the trial court which had stated “I think it is time to go to work, Mr. Curtis.” *Id.*

The first opinion to discuss proof that the obligor was voluntarily unemployed or underemployed in order to reduce his support obligation is *McSween v. McSween*, 472 S.W.2d 307 (Tex.Civ App.–San Antonio 1971, no writ). In *McSween*, the obligor left his

long standing employment with IBM because they wanted him to transfer to a different city, something the obligor did not want to do. *Id.*, at 309. The obligor voluntarily left a second job after a short time because the job did not work out. *Id.* In finding the trial court did not abuse its discretion in lowering the obligor's child support, the court stated:

While it is true that Mr. McSween voluntarily left two previous employments which netted him more income, there is nothing to suggest that he did so with any 'design' to reduce the child support payments. We cannot say that the trial court abused its discretion in refusing to find that Mr. McSween deliberately reduced his annual earnings \$27,600.00 in furtherance of a sinister scheme to reduce his child support payments. . . .

McSween, 472 S.W.2d at 310. Importantly, the court cited absolutely no authority for the proposition that there must be a deliberate design to reduce child support.

In *Anderson v. Anderson*, 503 S.W.2d 124 (Tex.Civ.App.–Corpus Christi 1973, no writ), the court was called upon to decide whether the trial court's order reducing the obligor's child support was an abuse of discretion as the obligor claimed the reduction was insufficient. *Id.*, at 125. The court noted, again without any citation to authority, that "[w]hile appellant voluntarily left his employment in the agricultural industry for work as a real estate salesman, there is no suggestion that he did so with any design to purposely bring about a reduction of child support payments." *Id.* at 126. However, the court also noted:

There is no showing that appellant was indolent or that he lived in a manner out of keeping with his income, or reasonable expectation of income. There is no indication that either the reduction of income or the exhaustion of assets was brought about by appellant's remarriage to the extent that the economic changes militated against his dependent children. No charge is made that appellant's present living expenses are unreasonable.

Id. Apparently, a design to reduce child support by taking a lower-paying job was, in the *Anderson* court's view, only one fact that might defeat the obligor's motion to reduce support. The motion might also be defeated by proof that the obligor was "indolent."

After the enactment of the child support provisions of the Family Code in 1973 up until the enactment of § 14.053(f), the intentional unemployment or underemployment statute, in 1989, most appellate opinions discussing intentional unemployment or underemployment in child support cases did not apply or even mention a requirement that there be proof that the obligor became or remained unemployed or underemployed for the purpose of avoiding child support. *See, Eggemeyer v. Eggemeyer*, 535 S.W.2d 425, 427-428 (Tex.Civ.App.—Austin 1976), *aff'd on other grounds*, 554 S.W.2d 137 (1977); *Pharo v. Trice*, 711 S.W.2d 282, 284 (Tex.App.—Dallas 1986, no writ)(despite the court's previous decision in *Casterline*, *supra*); *Powell v. Powell*, 721 S.W.2d 394, 394-96 (Tex.App.—Corpus Christi 1986, no writ) and *LeBlanc v. LeBlanc*, 761 S.W.2d 450, 454 (Tex.App.—Corpus Christi 1988), *writ denied per curiam on other grounds*, 778 S.W.2d 865 (Tex.1989)(despite the court's previous decision in *Anderson*, 503 S.W.2d at 126); and, *Anderson v. Anderson*, 767 S.W.2d 163, 165 (Tex.App.—Houston [14th Dist.] 1988, no writ).

Some of these opinions did state that a parent could not "evade his or her support obligations by voluntarily remaining unemployed." *Powell*, 721 S.W.2d at 396 *citing Eggemeyer*, 535 S.W.2d at 427-428; *See also, Anderson*, 767 S.W.2d at 165. However, this is not the same as requiring proof of an intent to evade child support obligations, and these

opinions did not discuss any such proof. Saying that a parent cannot evade his or her support obligations by voluntarily becoming or remaining unemployed or underemployed is roughly equivalent to saying that “unemployment or underemployment, if voluntary, is not a valid excuse for the failure to pay child support.” *Baughman v. Baughman*, 65 S.W.3d 309, 316 n.4 (Tex.App.–Waco 2001, pet. denied).

During this time, there was one additional case which held that there must be proof that the purpose of obligor’s income reduction was to reduce child support. In *Casterline v. Burden*, 560 S.W.2d 499 (Tex.Civ.App.–Dallas 1977, no writ), the court held, “[s]ince there is no evidence that the income reduction was the product of a design to reduce the child support payments, it is immaterial that Burden’s problems may have been voluntarily incurred.” *Id.*, at 501. The court distinguished *Curtis*, *supra*, by saying:

The present case is distinguishable from *Curtis v. Curtis* . . . for in that case, the father voluntarily left his job and made no effort to secure other employment. In this case, however, Burden attempted to secure other employment and later accepted a new job, although at a lower salary. The circumstances of this case do not approach the total disregard of responsibility exemplified in *Curtis*.

Id. Thus, *Casterline* seemed to recognize an exception to its requirement of proof of an intent to avoid paying support where, as in the *Curtis* case, the obligor made no effort to secure other employment. In the case on review, James likewise has made little to no effort to secure employment other than tractor work and business consulting that generates, according to James, approximately \$1,800 per year. (Supp RR 22-25, 113); *Iliff*, at 3.

In 1989 the Legislature enacted §14.053(f), the predecessor statute to §154.066, which

provided statutory authority for a court to base child support on the earning potential of an obligor upon a finding of intentional unemployment or underemployment. Act of May 12, 1989, 71st Leg., R.S., ch. 617, § 6, secs. 14.053(f), 14.054(1), 1989 Tex. Gen. Laws, 2030, 2036; *See also, Finch*, 825 S.W.2d at 225 (§14.053 was not the law until September 1, 1989). The Legislature in enacting this statute did not include any wording about the necessity of proving the obligor's purpose was to avoid child support in remaining unemployed or underemployed.

Most of the pre-14.053(f) cases did not require proof of the obligor's purpose to avoid child support. The Legislature did not include such wording in enacting the statute authorizing a trial court to base child support off of an obligor's earning potential upon a finding of intentional unemployment or underemployment. So, where did this purpose requirement come from? How can the court in *Dubois* less than a decade later state that the historical approach was to the contrary? A review of the cases which sent the law down this errant trail is in order.

2. Case Law Post-1989 Enactment of Statutory Authority for Basing Child Support on the Earning Potential of an Obligor Upon a Finding of Intentional Unemployment or Underemployment.

The following are court of appeals opinions after the enactment of §14.053(f) that did not apply or mention a requirement of proof of the obligor's purpose to avoid child support.

First Court: *Finch*, 825 S.W.2d at 225; *Giangross v. Crosley*, 840 S.W.2d 765, 769-70 (Tex.App.–Houston [1st Dist.] 1992, no writ); *Terry v. Terry*, 920 S.W.2d 423, 426-27 (Tex.

App.–Houston [1st Dist.] 1996, no writ); **Third Court:** *Hollifield*, 925 S.W.2d at 156; *Illiff*, 2009 WL 2195559, 6-7; *Smith*, 2010 WL 143287, 4-6; **Fourth Court:** *In re S.B.C.*, 952 S.W.2d 15, 18 (Tex.App.–San Antonio 1997, no writ)(despite the court’s decision in *McSween, supra*); *Tenery*, 955 S.W.2d at 339; **Fifth Court:** *Cameron v. Cameron*, 158 S.W.3d 680, 683 (Tex.App.–Dallas 2005, pet. denied) (despite the court’s previous decision in *Casterline, supra*); **Sixth Court:** *Stocker v. Magera*, 807 S.W.2d 753, 753-55 (Tex. App.–Texarkana 1990, writ denied); **Seventh Court:** *Matter of Marriage of Hamer*, 906 S.W.2d 263, 266-68 (Tex.App.–Amarillo 1995, no writ); *In re Striegler*, 915 S.W.2d 629, 639 (Tex.App.–Amarillo 1996, writ denied); **Ninth Court:** *Kish v. Kole*, 874 S.W.2d 835, 838 (Tex.App.–Beaumont 1994, no writ); **Tenth Court:** *Baucom v. Crews*, 819 S.W.2d 628, 633-34 (Tex.App.–Waco 1991, no writ); **Twelfth Court:** *In re G.L.S.*, No. 12-06-00315-CV, 2007 WL 3087685, 5-6 (Tex.App.–Tyler Oct. 24, 2007, no pet.)(mem. op.)(despite the court’s previous decision in *Dubois*, 956 S.W.2d at 610); **Fourteenth Court:** *Roosth v. Roosth*, 889 S.W.2d 445, 454 (Tex.App.–Houston [14th Dist.] 1994, writ denied); *McGuire v. McGuire*, 4 S.W.3d 382, 388 (Tex.App.–Houston [14th Dist.] 1999, no pet.); *Frierhood v. Frierhood*, 25 S.W.3d 758, 761 (Tex.App.–Houston [14th Dist.] 2000, no pet.); and, *In re D.S.*, 76 S.W.3d at 520.

The first post-§14.053(f) case that cited the need for evidence of obligor’s purpose to avoid child support was *Woodall v. Woodall*, 837 S.W.2d 856 (Tex.App.–Houston [14th Dist.] 1992, no writ). which held, “[s]ince there was no evidence appellee’s income reduction was

designed to obtain a decrease in his child support obligation, the voluntary nature of the decision is not determinative.” *Id.*, 858. The opinion cited *Casterline*, but did not cite §14.053(f) dealing with intentional unemployment and underemployment which contained no such requirement. As noted above, the majority of courts were not requiring proof of the purpose to avoid child support requirement, but rather followed the statutory authority.

In 1997, the Tyler Court of Appeals considered the issue of proof of an obligor’s purpose to evade child support in his or her intentional unemployment or underemployment in *Dubois*, 956 S.W.2d at 610. The court cited §154.066, but stated:

The Family Code fails to define “intentional underemployment or unemployment,” and there is an absence of caselaw illuminating the utilization of § 154.066. The traditional interpretation, however, requires a finding that the reduction in income must have been effectuated with a design to reduce the child support payments.

Dubois, 956 S.W.2d at 610 citing *Woodall*, 837 S.W.2d at 858; *Starck v. Nelson*, 878 S.W.2d 302, 307 n.10 (Tex.App.–Corpus Christi 1994, no writ), *Casterline*, 560 S.W2d at 501, and *McSween*, 472 S.W.2d at 310.

Casterline and *McSween* are pre-§14.053(f) cases and (as is discussed above at page 10-11, 13) should have limited value in determining the meaning of the later enacted statute. Although *Woodall* is a post-§14.053(f) case, it deals with interest income and merely cited *Casterline*, but did not cite §14.053(f) or mention unemployment or underemployment. *Woodall*, 837 S.W.2d at 858. The court’s citation to *Starck* is curious as although *Starck* noted cases pre-dating §14.053(f) seemed to “require an intent to avoid or reduce child

support” as a factor (*Starck*, 878 S.W.2d at 307 n. 10 [other citations omitted]), *Starck* did not impose the purpose requirement, rather it held that there was no evidence that obligor was underemployed by his own voluntary choice. *Starck*, at 307. Thus, the discussion of the purpose requirement seems, at best, to be dicta. Moreover, two of the cases *Starck* cited for the requirement of a intent to avoid child support do not actually apply such a requirement. See *Powell*, 721 S.W.2d at 394-396; *LeBlanc*, 761 S.W.2d at 453-454. The last authority cited by the *Dubois* court is *Casterline* which stands for the proposition that an exception exists to the purpose requirement where there is disregard for responsibility shown by not seeking employment. *Casterline*, 560 S.W.2d at 501.

Apparently the *Dubois* court ignored the many cases cited above (Res. Br. Merits 15-16) which interpreted §154.066 and its statutory predecessors and had not required proof of an intent to avoid child support. *Dubois* was also incorrect in saying that the “traditional” (presumably, pre-Family Code) interpretation required such proof. As shown above, one pre-Family Code opinion (*Curtis*) clearly had not required such proof, and two others (*McSween* and *Anderson*), while relying at least in part on the absence of proof of an intent to reduce support, had not laid down a hard and fast rule that a court could not assess support on the obligor’s earning potential without such proof. If the *Dubois* court meant to include all cases pre-codification of the statutory authority for a finding of intentional unemployment or underemployment in 1989, then there are many more cases that do not require proof of the obligor’s purpose to evade child support. See, *Eggemeyer*, 535 S.W.2d at 427-428; *Pharo*,

711 S.W.2d at 284; *Powell*, 721 S.W.2d at 394-96; *LeBlanc*, 761 S.W.2d at 454; and, *Anderson*, 767 S.W.2d at 165.

Nevertheless, the *Dubois* court went on to hold, “[t]hus, in order for a court to find that a parent is intentionally underemployed or unemployed under TEX. FAM. CODE §154.066, there must be evidence that the parent reduced his income for the purpose of decreasing child support payments.” *Dubois*, 956 S.W.2d at 610. Thus, a non-statutory requirement was born in spite of absolutely no statutory authority for such a holding in the plain wording of §154.066 and significant case law to the contrary.

The *Dubois* opinion was followed by a cascade of opinions from other courts of appeals which cited this purpose to avoid child support requirement. The following list of cases contains the first⁵ opinions from the twelve courts of appeals citing the *Dubois* requirement: *Snell v. Snell*, 11-98-0126-CV, 1999 WL 33747973, 2 (Tex.App.–Eastland Nov. 4, 1999, no pet.)(not designated for publication); *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, 616-17 (Tex.App.–Texarkana 2000, no pet.);⁶ *Zorilla v. Wahid*, 83 S.W.3d 247, 253 (Tex.App.–Corpus Christi

⁵ This list is not a complete list of all opinions which cite the *Dubois* requirement, only the first case from each court that the undersigned counsel was able to find.

⁶ Although *Davis* cited this requirement, the opinion noted that the cases cited by *Dubois* in support of the rule “do not hold that proof that the obligor reduced his or her income ‘with a design to reduce the child support payments’ is a requirement in determining whether or not the obligor is intentionally underemployed or unemployed. These cases do suggest that such proof is an important factor that the court should consider.” *Davis*, 30 S.W.3d at 617 n.4. The *Davis* opinion also noted a number of other cases that found “proof of intentional unemployment without mention of any intent to avoid payment of child support.” *Id.*, at 617 n.5.

2002, no pet.); *Hardin v. Hardin*, 161 S.W.3d 14, 22 (Tex.App.–Houston [14th Dist.] 2004, no pet.); *Gaxiola v. Garcia*, 169 S.W.3d 426, 431-32 (Tex.App.–El Paso 2005, no pet.); *Garner v. Garner*, 200 S.W.3d 303, 306-07 (Tex.App.–Dallas 2006, no pet.); *In re D.G.R.*, 04-05-00439-CV, 2006 WL 3611156, 2 (Tex.App. –San Antonio Dec. 13, 2006, no pet.) (mem. op.); *In re Marriage of Anderson*, 10-06-00361-CV, 2007 WL 3409294, 3 (Tex.App.–Waco Nov. 14, 2007, no pet.) (mem. op.); *McLane v. McLane*, 263 S.W.3d 358, 362 (Tex. App.–Houston [1st Dist.] 2008, pet. denied); *Fondren v. Fondren*, 09-08-00187-CV, 2009 WL 2045252, 5 (Tex.App.–Beaumont July 16, 2009, no pet.) (mem. op.).

The Amarillo Court of Appeals has not yet taken a position on the *Dubois* requirement, although two Amarillo opinions previously found voluntary underemployment without requiring any proof that the obligor was underemployed in order to reduce his child support obligation. *Striegler*, 915 S.W.2d at 639; *Hamer*, 906 S.W.2d at 266-68. In all candor, one Amarillo case noted the obligor raised the *Dubois* purpose requirement but the court evaded the issue by finding that the trial court did not find the obligor to be intentionally unemployed or underemployed, but rather averaged the last several years of income to arrive at obligor’s annual income. *In re Marriage of Perkins*, 07-02-0419-CV, 2004 WL 112598, 6 (Tex.App.–Amarillo Jan. 23, 2004, no pet.) (not designated for publication). The Austin Court of Appeals has, of course, explicitly rejected the *Dubois* purpose requirement twice in *Iliff*, 2009 WL 2195559, 6-7 and *Smith*, 2010 WL 143287, 4-6 and had earlier rejected the requirement in *Hollifield*, 925 S.W.2d at 156.

The holding in the *Dubois* line of cases is in the face of the very wording of the statute that does not require proof of obligor's purpose for being unemployed or underemployed. *See* §154.066. This judicially imposed requirement has no support in the current Texas Family Code, but rather seems to be, at best, a vestige from a small number of cases before the Legislature amended the Family Code to provide statutory authority for a finding of intentional unemployment or underemployment.

For the foregoing reasons, Jerilyn asserts that the plain wording of the statute should carry the day and this Court should deny James' issue presented and affirm the judgments of the courts below.

D. The Issue of Proving the Obligor's Purpose to Avoid Child Support is not Dispositive as There are Three Independent Grounds for Affirmance.

1. There is Sufficient Evidence in the Record of James' Purpose to Avoid Child Support so as to Mandate an Affirmance Whether or Not Such Proof is Required. Alternatively, Such Proof Constitutes Ground that Establish Jerilyn's Right to a Judgment More Favorable than James is Requesting.

Whether or not an obligee must prove an obligor's purpose to avoid child support in order to establish intentional unemployment or underemployment, this Court should still affirm or deny the petition due to independent grounds for affirmance. Courts that require proof of purpose to avoid child support have held it "may be inferred from such circumstances as the parent's education, economic adversities and business reversals, business background, and earning potential." *Dubois*, 956 S.W.2d at 610; *See also Schaban-Maurer v. Maurer-Schaban*, 238 S.W.3d 815, 826 (Tex.App.–Fort Worth 2007, no pet.); *In*

re P.J.H., 25 S.W.3d at 406.

In the case on review, Petitioner has a bachelor's degree and a Masters of Business Administration. (Supp RR 21-22). Further, Petitioner has twenty years of business background working in the chemical industry. (Supp RR 21-23, 95-96). Lastly, Petitioner has an established earning capacity of making over \$100,000 a year before he voluntarily quit to do tractor work and engage in "consulting" making around \$3,600 in the two years combined before the divorce. (Supp RR 22-25). His job search has been virtually non-existent. James did not document any attempts to obtain gainful employment and in fact only testified to one interview without providing any details about the job sought or expected pay.⁷ (Supp RR 113). On the strength of this evidence from which to infer James' purpose to avoid child support, the cases cited by Petitioner would support the affirmance of the court below. *See eg. McLane*, 263 S.W.3d at 365 (obligor who was a lawyer underemployed as his "education and expertise enable him to obtain more lucrative employment if he wanted to do so"); *In re A.B.A.T.W.*, 266 S.W.3d 580, 585 (Tex.App.--Dallas 2008, no pet.)(purpose element shown by father's economics degree and M.B.A. combined with failure to offer evidence of job search); *Schaban-Maurer*, 238 S.W.3d at 819, 827-828 (upholding setting child support based on obligor's last job 8 years prior who remained unemployed despite having a bachelor's and master's degree in architecture and who failed to present income

⁷ James remained unemployed/underemployed from January, 2006 through the time of trial, a period of 27 months. The trial court, as sole judge of the credibility of the witnesses could have found that, at the time of trial James was intentionally underemployed.

evidence). For all the above stated reasons, this Court should affirm the judgments of the courts below or pursuant to Rule 56.1(b) deny or dismiss the petition.

Alternatively, should this Court sustain James; issue presented but decline to review the factual basis supporting proof of James' purpose to avoid child support, then the proper relief is to remand this case to the Austin Court of Appeals to review the sufficiency of the evidence in the record to establish James' purpose to avoid child support in remaining unemployed or underemployed.

2. James' Failure to Produce Income Information is an Additional Ground for Affirmance of the Courts Below.

Another ground for affirmance is James' refusal to provide documentation of his income as required. §154.063, Tex.Fam. Code Ann., *See also Garner*, 200 S.W.3d at 306 ("Each party is required to furnish information sufficient to identify the party's net resources and ability to pay support, such as production of copies of income tax returns, financial statements, and pay"). At trial, James did not provide his tax returns, financial statement, current pay stubs and other information sufficient to accurately identify his net resources as required, even though he was subpoenaed to bring such to trial. (Px28, Supp RR 8-9). James did explain that he worked on a cash basis. (Supp RR 9). Further, although James was subpoenaed to bring proof of how he spent \$105,000 he withdrew from his retirement accounts as well as documents showing how his retirement accounts lost another \$89,000 (Px 28), he failed to bring any such proof to court. (Supp RR 10-11).

In *Garner*, the court found the trial court had the discretion to not accept obligor's

income testimony which was not supported by the financial information required by the family code. *Garner*, 200 S.W.3d at 307-308. The court further found the obligor “could have obtained employment that would pay him a salary similar to the one he received from his prior employer” two years ago. *Garner*, at 308; *See also Schaban-Maurer*, 238 S.W.3d at 819, 827-828 (Tex.App.–Fort Worth 2007, no pet) (upholding setting child support based on obligor’s last job 8 years ago who remained unemployed despite having a bachelor’s and master’s degree in architecture and who failed to present income evidence).

The trial court did not abuse its discretion in finding James’ earning potential to be \$5,000 per month in the face of his refusal to provide the court the documentation he was required to provide. Further, it cannot be said the trial court abused its discretion in finding that James could have found work at 60% of his old salary sometime in the last two years. For this reason, the courts below should be affirmed or the petition denied or dismissed.

3. It Is Not an Abuse of Discretion for the Trial Court to Look to the Obligor’s Last Meaningful Employment to Determine Earning Potential.

An additional ground for affirmance of the courts below is that it is not an abuse of discretion to look back to the obligor’s last meaningful employment which utilized his education, background, and experience. Several courts have held it permissible to consider past income. *Garner*, at 308 (court looked back two years to obligor’s last job); *Schaban-Maurer*, at 819, 827-828 (court looked back to obligor’s last job 8 years ago); *In re Marriage of Wilson*, 10-07-00159-CV, 2008 WL 2522326, 4-5 (Tex.App.–Waco June 25, 2008)(mem. op.)(rejected obligor’s unsubstantiated testimony that he made under \$200 between February

and September, 2006 and set child support based on two previous jobs at \$16.00 per hour); *Swaab v. Swaab*, 282 S.W.3d 519, 526 (Tex.App.–Houston [14th Dist.] 2008, pet. dism'd w.o.j.) (averaged 9 years of income to justify child support); *See also Siddiqui v. Siddiqui*, 14-07-00235-CV, 2009 WL 508260, 4 (Tex.App.–Houston [14th Dist.] March 3, 2009, pet. denied)(mem. op.)(allowed trial court to look back 4 years and set child support on the basis of obligor's last meaningful job).

Thus, there is authority for the proposition that James' child support obligation could have been set based off of his income from his last meaningful employment which utilized his education, background, and experience where he made \$102,000 or \$8,500 per month. As the court only based child support on an earning potential of \$5,000 per month, its holding is not an abuse of discretion. Therefor, this Court should affirm the judgments of the courts below or deny or dismiss this petition.

CONCLUSION

The Austin Court of Appeals did not err in refusing to require proof of the non-statutory requirement of James' purpose to avoid child support in remaining intentionally unemployed or underemployed. To construe §154.066 otherwise would ignore the plain wording of the statute and impermissibly insert a phrase into §154.066 which the Legislature left out. This Court should likewise decline James' request to legislate such a requirement into §154.066.

Alternatively, there are three separate grounds for affirmance that, should this court

agree with Petitioner as to the necessity of proof of obligor's purpose to avoid child support, the end result will not change as the courts below will be affirmed. Specifically, there is sufficient proof in the record to establish James' purpose to avoid child support. Moreover, James' failure to produce income information in violation of the Family Code is an independent ground of affirmance. Lastly, it is not error to use income data from obligor's last meaningful employment in setting child support.

For the above reasons, Petitioner's issue presented should be denied and the judgment of the court of appeals and the trial court should be affirmed.

Alternatively, should this Court sustain the issue presented and require proof of James' purpose to avoid child support, this case should be remanded to the Austin Court of Appeals for a determination of the sufficiency of the evidence to support this element.

PRAYER

Respondent prays that this Honorable Court overrule the issue presented by Petitioner and affirm the judgment of the court of appeals and the trial court in all respects.

Alternatively, Respondent prays that should this Court sustain the issue presented and require proof of James' purpose to avoid child support, this case should be remanded to the Austin Court of Appeals for a determination of the sufficiency of the evidence to support this element.

Respondent prays for costs.

Respondent prays for such other relief as she may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of the above Brief on the Merits was served on Ms. Georganna L. Simpson, attorney for James Derwood Iliff, Appellant via Certified Mail, Return Receipt Requested #7009 2250 0002 2606 5019 to 1349 Empire Central Drive, Woodview Tower, Suite 600, Dallas, Texas 75247-4042 and the Clerk of The Supreme Court of Texas to Mr. Blake A. Hawthorne, via Certified Mail, Return Receipt Requested #7009 2250 0002 2606 5002 to P.O. Box 12248, Austin, Texas 78711 as well as a searchable .pdf file emailed to scebriefts@courts.state.tx.us in accordance with the Texas Rules of Appellate Procedure on April 5, 2010.

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