

NO. 09-0753

IN THE
SUPREME COURT
OF TEXAS

JAMES DERWOOD ILIFF,
Petitioner;

VS.

JERILYN TRIJE ILIFF,
Respondent.

RESPONSE TO PETITION FOR REVIEW

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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 “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, (RRII: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 (PR __).

STATEMENT OF THE CASE

Respondent generally agrees with Petitioner's statement of the procedural history of the case. However, Petitioner neglected to include the statements required by Rule 53.2(d)(7), Tex.R.App.P., and the Respondent will add that information and will further elaborate on the disposition by the Court of Appeals.

The Opinion of the Panel. The panel that decided the case was comprised of Justices Patterson, Pemberton and Waldrop. The Court of Appeals rendered its judgment and issued a memorandum opinion authored by Justice Jan P. Patterson on July 21, 2009 which can be found at *Iloff v. Iloff*, 2009 WL 219559 (Tex.App.--Austin July 21, 2009)(Mem. Op.). Petitioner did not file a Motion for Rehearing in the Court of Appeals.

The Judgment of the Court of Appeals. The Court of Appeals affirmed the judgment of the trial court. As it pertains to the sole issue raised in this petition, the Court of Appeals held that (1) "[t]he evidence in the record supports the trial court's finding that James was intentionally unemployed or underemployed and that his earning potential was no less than \$5,000.00 per month" and (2) "[s]ection 154.066 [Tex. Fam. Code, Ann] does not require the court to consider whether the obligor's voluntary unemployment' was for the primary purpose of avoiding child support."

REPLY TO ISSUES PRESENTED

REPLY TO ISSUE PRESENTED NUMBER ONE:

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SETTING CHILD SUPPORT BASED ON JAMES' EARNING POTENTIAL UPON A FINDING OF INTENTIONAL UNEMPLOYMENT OR UNDEREMPLOYMENT.

A. Although the Decision of the Court Below Conflicts With Some of its Sister Courts, the Issue of Proving the Obligor's Purpose to Avoid Child Support Is Not Dispositive as There are Three Independent Grounds for Affirmance.

1. The Conflict in the Courts of Appeals as to the Requirement to Prove the Obligor's Purpose to Avoid Child Support.
2. Petitioner Fails to Acknowledge That There is Sufficient Evidence in the Record of James' Purpose so as to Mandate an Affirmance Whether or Not Proof of Obligor's Purpose to Avoid Child Support Is Required.
3. Petitioner's Failure to Produce Income Information is an Additional Ground for Affirmance of the Courts Below.
4. It Is Not an Abuse of Discretion for the Trial Court to Look to the Obligor's Last Meaningful Employment to Determine Earning Potential.

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

NO. 09-0753

JAMES DERWOOD ILIFF,
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RESPONSE TO PETITION FOR REVIEW

TO THE HONORABLE SUPREME COURT OF TEXAS:

COMES NOW JERILYN TRIJE ILIFF, Respondent, and submits this Response to Petition for Review requesting this Court overrule Petitioner's issue presented, affirm the judgment of the courts below, and grant Respondent judgment for costs.

STATEMENT OF FACTS

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 supplement 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, 2006, James surprised Jerilyn by unilaterally deciding to quit his job. (RR II 21-22, 24-25; Supp RR 17). Even though James has a bachelor's degree and a Masters of Business Administration with vast experience working in the chemical industry

for about twenty years (Supp RR 21-22), when he quit his job his plan was to do ranch work with his tractor. (Supp RR 22-23). James testified that he earned roughly \$100.00 a month in 2006 and 2007 from his tractor operating business. (Supp RR 22-24) *see also Iliff v. Iliff*, 2009 WL 219559, p. 3 (Tex.App.--Austin July 21, 2009)(Mem. Op.). Additionally, James claimed his consulting business brought in about \$1,200.00 during those same two years. (Supp RR 24-25), *see also Iliff*, at 3.

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 neurologically wrong with him. (Supp RR 69, RR II 151).

James' sister, Lori, testified that 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. (RR III 303). She believes James is okay and he seems to be the same as he has been over the last seventeen years. (RR III 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. (RR III 336). She is not aware of any psychiatric problems that James may have (RR III 341) and does not believe that he has any mental problems (RR III 345, 349, 359-360). James' routine at his mother's house is to get up, get dressed, read, and watch television. (RR III 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.

Section 154.066, Tex. Fam. Code, is the statutory authority for a trial court utilizing an obligor's earning potential, as opposed to actual income, to set child support. This statute does not require proof the child support obligor's primary purpose for being intentionally unemployed or underemployed was to avoid child support. The alleged purpose requirement is a vestige from the law prior to the enactment of section 154.066 (or its predecessor statute, section 14.053(f)) that has survived in the face of the Legislature declining to include the requirement in the statute. The Court of Appeals below held that the obligor's purpose to avoid child support requirement was not supported by the plain language of section 154.066, and thus declined to follow the cases which still require proof thereof.

The court below correctly held that proof of purpose to avoid child support is not required under the statute in order to obtain a finding of intentionally un-employment or underemployment. 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 TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SETTING CHILD SUPPORT BASED ON JAMES' EARNING POTENTIAL UPON A FINDING OF INTENTIONAL UNEMPLOYMENT OR UNDEREMPLOYMENT.

The conflict between the courts of appeal on the issue of the requirement of proof of an obligor's purpose to avoid child support in order to find intentional unemployment or underemployment, although real, is overstated by Petitioner. The twelve opinions from different courts of appeal cited by Petitioner (PR ix), when examined, are not as overwhelming as Petitioner makes them out to be.

Further, even if James is correct as to the necessity of proof of the obligor's purpose to avoid child support in intentionally being unemployed or underemployed, the record is replete with evidence sufficient to establish James' purpose to avoid child support and affirm the trial court on the authority of the cases cited by Petitioner. Moreover, this case may be affirmed on the basis of James' refusal to provide financial records and proof as to his income, as well as proof that he has sought employment. Lastly, it was permissible for the court to use the income data from James' last meaningful employment which utilized his education and experience.

Thus, Respondent asserts that had this appeal arisen in one of twelve other courts of appeals, the end result of affirmance of the trial court would have been the same.

A. Although the Decision of the Court Below Conflicts With Some of its Sister Courts, the Issue of Proving the Obligor’s Purpose to Avoid Child Support is not Dispositive as There are Three Independent Grounds for Affirmance.

1. The Conflict in the Courts of Appeals as to the Requirement to Prove the Obligor’s Purpose to Avoid Child Support.

With respect to Petitioner’s assertion that twelve courts of appeals support his position and only the Austin court stands alone in refusing to require proof of an obligor’s purpose to avoid child support, Petitioner did not cite the Amarillo case of *In the Interest of Striegler*, 915 S.W.2d 629 (Tex.App.– Amarillo 1996, writ denied) when that case was relied on by the court below. *See Iliff*, at 6. The *Striegler* court did not cite or discuss the purpose element in finding the obligor was intentionally underemployed. *Striegler*, at 640. Additionally, Petitioner (PR. ix) cited *In re Davis*, 30 S.W.3d 609 (Tex.App.–Texarkana 2000, no pet.) as requiring proof of the obligor’s purpose when in fact that opinion states that proof that the reduction in income was for the purpose of reducing child support is not an requirement, but rather “an important factor that the court should consider.” *Id.*, at 616, ft 4.

Moreover, with regard to Petitioner’s citations to *Anderson v. Anderson*, 503 S.W.2d 124, 126 (Tex.Civ.App.–Corpus Christi 1973, no writ) and *McSween v. McSween*, 472 S.W.2d 307, 310 (Tex.Civ.App.–San Antonio 1971, no writ), these two cases are not predicated on section 154.066, Tex. Fam. Code Ann., or its predecessor statute, section 14.053(f), as 14.053 was not the law until September 1, 1989. *See Finch v. Finch*, 825 S.W.2d 218, 225 (Tex.App.–Houston [1st Dist] 1992, no writ). Reliance on cases that pre-date the Legislature enacting the statutory authority for the trial court’s action is even more

dubious when each of those courts subsequently held otherwise.

Specifically, *Starck v. Nelson*, 878 S.W.2d 302, 307 n. 10, (Tex.App.--Corpus Christi 1994, no writ) held: "Cases pre-dating § 14.053(f) recognize voluntary unemployment and underemployment. Those cases seem to require an intent to avoid or reduce child support as a motivating factor in the obligor's voluntary job change or rejection of suitable employment." *Starck*, 878 S.W.2d at 307 n. 10 [other citations omitted]. However, the court in *Starck* did not impose the purpose requirement advocated by Petitioner perhaps because the court found no intentional unemployment or underemployment. *Starck*, at 307.

In *Tenery v Tenery*, 955 S.W.2d 337 (Tex.App.--San Antonio 1997, no writ) the San Antonio court did not mention the purpose element in upholding a trial court's finding of intentional unemployment or underemployment. *Tenery*, at 340; *see also In re S.B.C.*, 952 S.W.2d 15, 18 (Tex.App.-- San Antonio 1997, no writ). Likewise, the purpose requirement is not mentioned in *Roosth v. Roosth*, 889 S.W.2d 445 (Tex.App.--Houston [14th Dist.] 1994, writ denied); *Giangrosso v. Crosley*, 840 S.W.2d 765 (Tex.App.--Houston [1st Dist.] 1992, no writ); and *Baucom v. Crews*, 819 S.W.2d 628, 633 (Tex.App.--Waco 1991, no writ). In other cases cited by Petitioner, the courts cite to the purpose requirement and then seemingly ignore it in their analysis. *See In re E.A.S.*, 123 S.W.3d 565, 570 (Tex.App.--El Paso 2003, pet. denied) and *In re P.J.H.*, 25 S.W.3d 402, 405-06 (Tex.App.--Fort Worth 2000, no pet.).

That is not to say that there are no cases that require proof of the purpose for a finding of the intentional unemployment or underemployment. This line of cases generally cites

DuBois v. DuBois, 956 S.W.2d 607 (Tex.App.–Tyler 1997, no pet.) which found that the “traditional interpretation” required proof of the additional element of the obligor’s purpose in remaining intentionally unemployed or underemployed. *DuBois*, at 610, *citing Starck*, 878 S.W.2d at 307 n. 10; *Woodall v. Woodall*, 837 S.W.2d 856, 858 (Tex.App.--Houston [14th Dist.] 1992, no writ); *Casterline v. Burden*, 560 S.W.2d 499, 501 (Tex.Civ.App.--Dallas 1977, no writ); *McSween*, 472 S.W.2d at 310.

The last two cases relied upon by *DuBois*, are pre-14.053(f) cases. *Finch*, 825 S.W.2d at 225. Although *Woodall* is a post-14.053(f) case, it deals with interest income and merely cited *Casterline*, but does not cite 14.053(f) or mention unemployment or underemployment. *Woodall*, 837 S.W.2d at 858. The *Dubois* court’s citation to *Starck* is even more curious as *Starck*, as was discussed above *supra* at p. 5, noted that cases pre-dating section 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]. However, *Starck* did not impose the purpose requirement in its analysis of the facts of that case. *Starck*, at 307.

Moreover, 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 Tex.Fam.Code Ann. This judicially imposed requirement has no support in the current Texas Family Code, but rather seems to be a vestige from before the Legislature amended the Family Code to provide statutory authority for a finding of intentional unemployment or underemployment.

2. Petitioner Fails to Acknowledge That There is Sufficient Evidence in the Record of James' Purpose so as to Mandate an Affirmance Whether or Not Proof of Obligor's Purpose to Avoid Child Support Is Required.

Though there is a split in the courts of appeal whether an obligee must prove an obligor's purpose to avoid child support in order to establish intentional unemployment or underemployment, this Court should still deny the petition due to independent grounds for affirmance. The courts that require this proof have held that such purpose "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.

In the instant 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 before the divorce. (Supp RR 22-25). On the strength of this evidence from which to infer James' purpose, the cases cited by Petitioner would support the affirmance of the court below. *See eg. McLane v. McLane*, 263 S.W.3d 358, 365 (Tex.App.–Houston [1st Dist.] 2008, pet. denied)(lawyer underemployed as his "education and expertise enable him to obtain more lucrative employment if he wanted to do so"); *See also 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).

3. Petitioner's Failure to Produce Income Information is an Additional Ground for Affirmance of the Courts Below.

Another independent ground for affirmance in this case is James' refusal to provide documentation of his income as required. §154.063, Tex.Fam. Code Ann., *See also Garner v. Garner*, 200 S.W.3d 303, 306 (Tex.App.–Dallas 2006, no. pet.) (“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. Additionally, in spite of the fact James was subpoenaed to bring proof of income and tax returns to trial, he brought no such documentation to court. (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). Nor did James 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. (Supp RR 113).

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*, 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 v. Maurer-Schaban*, 238 S.W.3d 815, 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).

In short, 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 that 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.

4. 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, Slip Op. 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. dismiss’d w.o.j.) (averaged 9 years of income to justify child support).

Thus, there is authority for the proposition that James' child support obligation could have been set 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.

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

The Supreme Court does not have jurisdiction over this appeal because the case does not involve the construction of a statute necessary to the determination of the case. Tex. Gov't Code §22.001(a)(3). Section 154.066, Tex.Fam. Code Ann¹. (Vernon 2009), is the statutory authority for setting child support based on an obligor's earning potential. The court below correctly held "[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." *Iloff*, at 7. James agrees with this statement² because the statute does not require an obligee to prove the obligor's purpose to avoid child support.

James impermissibly attempts to argue for the first time that the operative phrase of "intentionally unemployed or underemployed" is ambiguous (PR 6) but does not provide

¹ Section 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 tot he earning potential of the obligor."

² Petitioner concedes the court of appeals is correct by stating "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." (PR 4-5).

argument as to why and how there is an ambiguity. James further argues the courts which require proof of an obligor's purpose 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. There is nothing in these words individually or together that hints at the added requirement that obligee must prove obligor's purpose is to avoid child support and such a reading does not interpret this phrase, it adds to it.

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 those words or 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]. Thus, this court is without authority to insert the phrase "with the purpose of avoiding child support" into section 154.066, Tex. Fam. Code. Ann.

Additionally, the historical approach discussed in *DuBois* which required proof of an obligor's purpose to avoid child support by intentional unemployment or underemployment

predates section 154.066, Tex.Fam. Code Ann. and its predecessor statute, section 14.053(f). If that was the law prior to the Legislature enacting this statute, 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 are the very words Petitioner is trying to add back to the statute.

James argues that the holding of the court below means that a parent cannot seek a job or career change if it results in a lower income. (PR 7). That is not the case. First, section 154.066 requires a significant lowering of income, so many job changes would not invoke the use of the obligor's earning potential. 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.

CONCLUSION

The trial court properly found James to be underemployed and set child support based on \$5,000 per month earning potential; significantly lower than what he was making at his last meaningful job. There are at least three separate grounds for affirmance that, should this court agree with Petitioner as to the issue of 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.

Lastly, § 154.066, Tex. Fam. Code Ann., cannot be construed in the manner which Petitioner asserts because to do so would ignore the plain wording of the statute, and impermissibly insert a phrase into the statute which the Legislature left out.

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.

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.

Respondent prays for costs.

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

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the above was served on Ms. Georganna L. Simpson, attorney for James Derwood Iliff, Appellant via Certified Mail, Return Receipt Requested #7009 2250 0002 2607 3908 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 Federal Express, Airbill # 8684 4281 7996 to 201 W. 14th Street, Room 104, Austin, Texas 78711 in accordance with the Texas Rules of Appellate Procedure on December 28th, 2009.

Frank B. Suhr, Attorney for JERILYN
TRIJE ILIFF, Respondent

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