

# NO. 09-0753

---

---

IN THE SUPREME COURT OF TEXAS

---

---

JAMES DERWOOD ILIFF,  
*Petitioner,*

v.

JERILYN TRIJE ILIFF,  
*Respondent.*

---

---

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

---

---

REPLY TO RESPONSE TO  
PETITIONER'S BRIEF ON THE MERTIS

---

---

Respectfully submitted by,

*GEORGANNA L. SIMPSON*  
SBN 18400965  
*JEREMY C. MARTIN*  
SBN SBN 24033611  
**SIMPSON ★ MARTIN, LLP**  
1349 Empire Central  
Woodview Tower, Ste. 600  
Dallas, Texas 75247  
Phone: 214-905-3739 • Fax: 214-905-3799

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

ATTORNEYS FOR PETITIONER

ORAL ARGUMENT REQUESTED

---

---

TABLE OF CONTENTS

---

---

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

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

**REPLY TO RESPONDENT’S BRIEF ON THE MERITS** ..... 1

1.     **The Legislature is presumed to have intended Texas Family Code Section 154.006 to have the meaning ascribed by the courts that there must be proof of a deliberate design to reduce child support.**.....2

2.     **This Court should not grant the petition to affirm the judgment.** .....4

**PRAYER**.....6

**CERTIFICATE OF SERVICE**.....7

---

---

INDEX OF AUTHORITIES

---

---

Case Law:

1.	<i>Cincinnati Life Ins. Co. v. Cates</i> .....	5
	927 S.W.2d 623 (Tex. 1996).	
2.	<i>Cropper v. Caterpillar Tractor Co</i> .....	4
	754 S.W.2d 646 (Tex. 1988).	
3.	<i>DuBois v. DuBois</i> .....	3
	956 S.W.2d 607 (Tex. App.—Tyler 1997, no pet.).	
4.	<i>Iliff v. Iliff</i> .....	3, 4
	2009 WL 2195559 (Tex. App. – Austin July 21, 2009) (mem. op.).	
5.	<i>In re Davis</i> .....	3
	30 S.W.3d 609 (Tex. App.—Texarkana 2000, no pet.).	
6.	<i>Little v. Texas Dept. of Criminal Justice</i> .....	5
	148 S.W.3d 374 (Tex. 2004).	
7.	<i>Marmon v. Mustang Aviation, Inc</i> .....	3
	430 S.W.2d 182 (Tex.1968).	
8.	<i>Segal v. Emmes Capital, L.L.C</i> .....	3
	155 S.W.3d 267 (Tex. App.—Houston [1st Dist.] 2004, pet. dism'd).	
9.	<i>Starck v. Nelson</i> .....	3
	878 S.W.2d 302 (Tex. App.—Corpus Christi 1994, no writ).	
10.	<i>Woodall v. Woodall</i> .....	3
	837 S.W.2d 856 (Tex. App.—Houston [14th Dist.] 1992, no writ).	

Statutes & Rules:

1.	TEX. FAM. CODE ANN. § 14.053(f) (repealed).....	2, 3
----	---	------

2.	TEX. FAM. CODE ANN. § 154.066.....	1, 2, 3, 4
3.	TEX. R. APP. P. 38.1 .....	5
4.	TEX. R. APP. P. 53.4 .....	1, 4, 5

---

---

**REPLY TO RESPONDENT'S BRIEF ON THE MERITS**

---

---

Petitioner, James Derwood Iliff ("James"), submits his Reply to Respondent Jerilyn Trije Iliff's ("Jerilyn's") Brief On the Merits ("Respondent's Brief").

Jerilyn's Brief On the Merits is based on two general premises:

1. The requirement of proof that the obligor is unemployed or underemployed with a deliberate design to reduce child support is "a vestige from a small number of cases" decided prior to the enactment of the "intentional unemployment or underemployment" standard in the predecessor to Texas Family Code Section 154.066 (*see* Respondent's Brief at 9-20); and
2. The trial court's judgment is "affirmable" under alternative grounds not addressed by the court of appeals (*see* Respondent's Brief at 20-24).

Because the Legislature has re-enacted without material change section 154.066's language "intentional unemployment or underemployment," and because that language has undisputedly been given a long-standing judicial interpretation to require proof of a deliberate design to reduce child support, a presumption exists that the Legislature intended the statute to have the meaning ascribed by the courts. And, because Jerilyn failed to brief her alternative grounds to affirm the judgment in the court of appeals, Texas Rule of Appellate Procedure 53.4 does not authorize this Court or the court of appeals to consider those grounds.

1. **The Legislature is presumed to have intended Texas Family Code Section 154.006 to have the meaning ascribed by the courts that there must be proof of a deliberate design to reduce child support.**

A significant portion of Jerilyn's Brief On the Merits discusses the historical development of the requirement of a deliberate design to reduce child support. See Respondent's Brief at 9-20. In her discussion, Jerilyn examines cases construing Texas Family Code Section 14.053(f)—the predecessor to section 154.066. As Jerilyn correctly explains, section 14.053(f) was enacted in 1989 and provided in pertinent part as follows:

If the actual income of the obligor is significantly less than what the obligor could earn because the obligor is *intentionally unemployed or underemployed*, the court may apply these guidelines to the earning potential of the obligor.

Act of May 5, 1989 71st Leg., R.S., ch. 617, § 6, 1989 Tex. Gen. Laws 2030, 2037, repealed by Act of April 6, 1995, 74th Leg., R.S., ch. 20, § 2(1), 1995 Tex. Gen. Laws 113, 282 (emphasis added).

Section 14.053(f) was repealed and re-enacted as section 154.066 in 1995. Acts 1995, 74th Leg., ch. 20, § 1, eff. April 20, 1995. Section 154.066 is virtually identical to section 14.053(f) and retained the "intentional unemployment or underemployment" standard:

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 (emphasis added).

Between the Legislature's enactment of the "intentional unemployment or underemployment" standard 1989 and its re-enactment of the standard in 1995, the

Thirteenth and Fourteenth Courts of Appeal specifically acknowledged that the “intentional unemployment or underemployment” standard required proof of a deliberate design to reduce child support. *See Starck v. Nelson*, 878 S.W.2d 302, 307 n.10 (Tex. App.—Corpus Christi 1994, no writ); *Woodall v. Woodall*, 837 S.W.2d 856, 858 (Tex. App.—Houston [14th Dist.] 1992, no writ). Two years after the re-enactment of the “intentional unemployment or underemployment” standard in section 154.066, the court of appeals in *Dubois* relied on *Starck* and *Woodall* in referencing the requirement of a deliberate design to reduce child support as the “traditional interpretation” of the “intentional unemployment or underemployment” standard. *DuBois v. DuBois*, 956 S.W.2d 607, 610 (Tex. App.—Tyler 1997, no pet.).

When the Legislature re-enacts without material change an ambiguous<sup>1</sup> statute that has been given a long-standing judicial interpretation, a presumption exists that the Legislature intended the statute to have the meaning ascribed by the courts. *Segal v. Emmes Capital, L.L.C.*, 155 S.W.3d 267, 294 (Tex. App.—Houston [1st Dist.] 2004, pet. dismiss’d) (citing *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182, 187 (Tex. 1968)). Here, the Legislature re-enacted without *any* change the “intentional unemployment or underemployment” standard from section 14.053(f) to section 154.066, and after that

---

<sup>1</sup> Jerilyn contends that: (1) James waived his argument that the phrase “intentional unemployment or underemployment” is ambiguous because he did not raise ambiguity in the lower courts; and (2) the phrase “intentional unemployment or underemployment” is not ambiguous. *See* Respondent’s Brief at 5-6. First, the issue of ambiguity was squarely before the Third Court of Appeals as demonstrated by its decision to decline to adopt the reasoning of its sister courts based on the “plain language” of the statute. *See Iliff*, 2009 WL 2195559 \*7. Moreover, Texas courts have made specific reference to the fact that the Legislature has not defined “intentional unemployment or underemployment,” and Jerilyn herself concedes that “intentional underemployment” is a term subject to interpretation, at least to the extent the term has been construed as “a voluntary choice by the obligor.” *See* Respondent’s Brief at 4. *See, e.g., In re Davis*, 30 S.W.3d 609, 616 (Tex. App.—Texarkana 2000, no pet.); *DuBois v. DuBois*, 956 S.W.2d 607, 610 (Tex. App.—Tyler 1997, no pet.).

standard had been given a long-standing judicial interpretation as requiring proof of a deliberate design to reduce child support. Accordingly, the Legislature is presumed to have intended section 154.066 to have that meaning, notwithstanding Jerilyn's tracing of the historical development of the requirement.

**2. This Court should not grant the petition to affirm the judgment.**

Jerilyn alternatively argues that "affirmance" is required because there is some evidence to support an inference that James was underemployed for the purpose of avoiding child support. The Third Court did not hold in the alternative that there was some evidence to support an inference that James was underemployed for the purpose of avoiding child support. *Iliff*, 2009 WL 2195559 \*7. Rather, the Third Court overruled James's complaint solely on the ground that there is no purpose requirement. *Id.*

Respectfully, to grant this petition and then affirm the judgment based on this alternative ground would require this Court to engage in a factual sufficiency determination, *i.e.*, to affirm the judgment on the ground urged by Jerilyn, this Court would have to hold that there is factually sufficient evidence that James was underemployed for the purpose of avoiding child support. This Court cannot review fact issues. *Cropper v. Caterpillar Tractor Co.*, 754 S.W.2d 646, 648 (Tex. 1988).

By that same token, the judgment cannot be affirmed based on Jerilyn's alternative allegations that: (1) there is some evidence of James' deliberate design to reduce child support; (2) James failed to provide proof of income; or (3) the trial court's calculation of James' child support obligation can be supported by evidence of his last meaningful employment. Texas Rule of Appellate Procedure 53.4 provides as follows:

To obtain a remand to the court of appeals *for consideration of issues or points briefed in that court* but not decided by that court, or to request that the Supreme Court consider such issues or points, a party may raise those issues or points in the petition, the response, the reply, any brief, or a motion for rehearing.

TEX. R. APP. P. 53.4 (emphasis added). It is undisputed that the court of appeals did not address Jerilyn's alternative grounds to affirm the judgment. And the record reflects that Jerilyn did not brief in the court of appeals the alternative grounds for affirming the judgment she raises in this Court. Accordingly, Rule 53.4 forecloses both Jerilyn's request for this Court to consider her alternative grounds, as well as her request for a remand to the court of appeals to consider her alternative grounds. See TEX. R. APP. P. 53.4.

Alternatively, if this Court concludes that Jerilyn adequately<sup>2</sup> briefed any of her alternative grounds to affirm the judgment in the court of appeals, this Court should decline to consider them. See *Little v. Texas Dept. of Criminal Justice*, 148 S.W.3d 374, 384 (Tex. 2004); *Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 626 (Tex. 1996) (“We do not have the benefit of the court of appeals’ decision on the merits of the

---

<sup>2</sup> In her appellate brief, Jerilyn contended that there was sufficient evidence to support the trial court’s finding that James was intentionally underemployed, but the extent to which she argued there was evidence of a deliberate design to reduce child support is as follows: “However, if James’ purpose for being underemployed is indeed an unwritten element required for a finding of underemployment under § 154.066, Tex.Fam.CodeAnn., then the evidence of James’ education, business and employment background, earning history and earning potential support such a finding.” See Brief of Appellee at 14. And while Jerilyn stated in her appellate brief that James failed to provide proof of income, she did not present this point as alternative ground to affirm the judgment. See Brief of Appellee at 15. Finally, the extent to which Jerilyn references evidence of James’ last meaningful employment is as follows: “Likewise, using James’ last meaningful employment as a basis to set child support is within the sound discretion of the trial court.” See Brief of Appellee at 24. Respectfully, these references do not constitute “briefing” as contemplated by Texas Rules of Appellate Procedure 38.1 and 53.4. See TEX. R. APP. P. 38.1, 53.4.

insurance companies' alternate grounds or full briefing from the parties. For that reason, we remand the case to the court of appeals.").

**PRAYER**

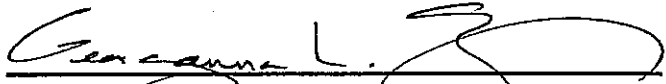
WHEREFORE, PREMISES CONSIDERED, Petitioner, James Derwood Iliff, respectfully requests this Court to: (1) grant this Petition for Review, (2) reverse the trial court's May 5, 2008 Final Decree of Divorce, and (3) remand this proceeding back to the trial court for a calculation of child support based 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 GEORGANNA 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



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

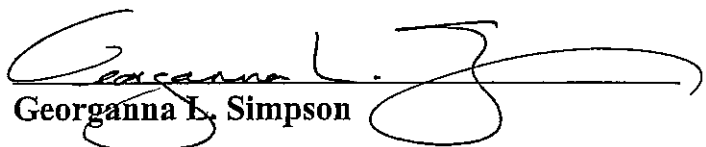
**ATTORNEY FOR PETITIONER,  
JAMES DERWOOD ILIFF**

**CERTIFICATE OF SERVICE**

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

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

**Via Certified Mail, RRR, 7008 3230 0002 6998 9956**



Georganna L. Simpson