

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

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 as “**Jerilyn**” or “**Appellee.**”
3. James and Jerilyn may also be referred to collectively as the “**Iliffs.**”
4. The three children of the marriage shall be referred to as the “**Children.**”

Record References:

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

STATEMENT OF THE CASE

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

Petitioner: Jerilyn Trije Iliff (“Jerilyn”)

Respondent: James Derwood Iliff (“James”)

Nature of the Case:

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

Trial Court:

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

***Proceedings in
Trial Court:***

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

Trial Court Disposition:

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

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

Appellant: James Derwood Iliff

Appellee: Jerilyn Trije Iliff

Court of Appeals:

Third Court of Appeals at Austin.

***Court of Appeals’
Disposition:***

In *Iliff v. Iliff*, 2009 WL 2195559 (Tex. App. – Austin July 21, 2009) (mem. op.), the court affirmed the Trial Court’s judgment. [App. 3].

STATEMENT OF JURISDICTION

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

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

¹ *In re J.G.L.*, ___ S.W.3d ___, 2009 WL 2648401, *2 (Tex. App. Dallas Aug. 28, 2009, no pet. h.); *Fondren v. Fondren*, 2009 WL 2045252, *5 (Tex. App. – Beaumont July 16, 2009, no pet.) (mem. op.); *McLane v. McLane*, 263 S.W.3d 358, 362 (Tex. App. – Houston [1st Dist.] 2008, no pet.) (op. on reh'ng.); *In re Marriage of Wilson*, 2008 WL 2522326, *5 (Tex. App. – Waco June 25, 2008, no pet.); *In re E.A.S.*, 123 S.W.3d 565, 570 (Tex. App. – El Paso 2003, pet. denied); *Zorilla v. Wahid*, 83 S.W.3d 247, 253 (Tex. App. – Corpus Christi 2002, no pet.); *In re P.J.H.*, 25 S.W.3d 402, 405-06 (Tex. App. – Fort Worth 2000, no pet.); *In re Davis*, 30 S.W.3d 609, 616 (Tex. App. – Texarkana 2000, no pet.); *Snell v. Snell*, 1999 WL 33747973 (Tex. App. – Eastland Nov. 4, 1999, no pet.) (not designated for publication); *DuBois v. DuBois*, 956 S.W.2d 607, 610 (Tex. App. – Tyler 1997, no pet.); *Woodall v. Woodall*, 837 S.W.2d 856, 858 (Tex. App. – Houston [14th Dist.] 1992, no writ); *Anderson v. Anderson*, 503 S.W.2d 124, 126 (Tex. Civ. App. – Corpus Christi 1973, no writ); *McSween v. McSween*, 472 S.W.2d 307, 310 (Tex. App. – San Antonio 1971, no writ).

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

Finally, the decision in this case involves an error of such importance to Texas law that it requires correction by this Court. *See* TEX. GOV’T CODE § 22.001(a)(6). This scenario reoccurs on a regular basis as evidenced by the number of cases addressing this matter cited in this petition; therefore, this Court should address and resolve this conflict.

ISSUE PRESENTED

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

PETITION FOR REVIEW

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

I.
STATEMENT OF FACTS

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

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

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

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

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

II.

SUMMARY OF THE ARGUMENT

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

The Third Court fails to recognize that it has previously: (1) accepted the reasoning of its sister courts, (2) applied the prevailing interpretation of “intentional unemployment and underemployment,” and (3) based a holding in part on the lack of evidence that the obligor became underemployed to avoid her child support obligation. This Court should grant this petition and clarify whether section 154.006 requires a showing that the obligor is intentionally unemployed or underemployed to avoid paying child support before the obligor’s child-support obligation can be calculated based on the obligor’s potential, instead of actual, income.

III.
ARGUMENT AND AUTHORITIES

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

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

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

TEX. FAM. CODE ANN. § 154.066. “Intentional underemployment or unemployment” is not defined by the Texas Family Code. Therefore, the question presented by this petition is whether section 154.066 requires a showing that the obligor’s intentional unemployment or underemployment was “effectuated with a design to reduce child

support payments” or, as the *Iloff* Court framed it, “for the primary purpose of avoiding child support.” *Compare Iloff*, 2009 WL 2195559 *7 with *In re Davis*, 30 S.W.3d 609, 616 (Tex. App.—Texarkana 2000, no pet.).

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

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

B. The twelve other courts of appeals’ collective interpretation of “intentional unemployment or underemployment” is not inconsistent with the plain language of section 154.066, but instead recognizes the necessity of defining the term and the consequences thereof.

The *Iloff* Court declined to adopt the reasoning of its sister courts of appeals on the sole ground that the plain language of section 154.066 does not require a showing that the obligor’s intentional unemployment or underemployment was for the primary purpose of avoiding child support. *Iloff*, 2009 WL 2195559 *7. As a threshold matter, James does not dispute that the plain language of section 154.066 does not require a showing that the obligor’s intentional unemployment or underemployment was for the primary purpose of

avoiding child support. Instead, the Third Court's twelve other sister courts of appeals have simply interpreted "intentional unemployment or underemployment"—which, again, the legislature did not define—to mean for the purpose of avoiding child support. Not only has the Third Court of Appeals previously acknowledged this interpretation of "intentional unemployment and underemployment," but it has actually applied it. See *Wiley v. Parker*, 1999 WL 274087, *2 (Tex. App.—Austin May 6, 1999, no pet.) (not designated for publication).

In rejecting its sister courts' interpretation of "intentional unemployment and underemployment," the *Iloff* Court relied solely on dicta from *Hollifield v. Hollifield*, 925 S.W.2d 153, 155 (Tex. App.—Austin 1996, no writ), a prior decision of the court addressing the issue of voluntary unemployment in the context of modifying an existing child-support order, as opposed to issuing an original child-support order. *Iloff*, 2009 WL 2195559 *7. In *Hollifield*, the Third Court of Appeals held that Section 154.066 did not apply to modification cases like the one before it, but nevertheless commented in dicta that Section 154.066 "does not require the court to consider whether the obligor's 'voluntary unemployment' was for the primary purpose of avoiding child support." *Id.*

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

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

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

In sum, the phrase “intentional unemployment and underemployment” is ambiguous and not defined by the legislature. The *Iliff* Court’s sister courts recognized the necessity of first establishing the meaning of “intentional unemployment and underemployment” before proceeding to determine whether a child-support obligor is intentionally unemployed or underemployed. See *In re Hecht*, 213 S.W.3d 547, 573 (Tex. 2006).

Moreover, even if “intentional unemployment and underemployment” is unambiguous, the *Iliff* Court’s sister courts properly considered the consequences of a particular construction in reaching their collective holding that the statute requires a showing that an obligor’s voluntary underemployment or unemployment was for the

primary purpose of avoiding child support. See *In re Canales*, 52 S.W.3d 698, 702 (Tex. 2001). For example, under the *Iiff* Court's interpretation of "intentional unemployment and underemployment," if a lawyer in a lucrative private law practice opted to become a judge at a lower salary, that lawyer would be "underemployed," and the lawyer's child-support obligation would be calculated based on the lawyer's potential income as a practicing lawyer.

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

PRAYER

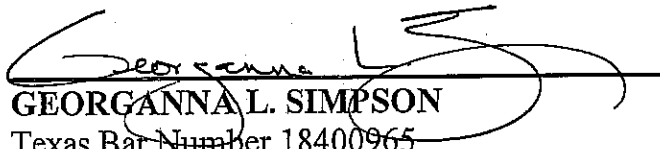
WHEREFORE, PREMISES CONSIDERED, Petitioner, James Derwood Iliff, respectfully requests this Court to: (1) grant this Petition for Review, (2) reverse the trial court's May 5, 2008 Final Decree of Divorce [CR:100; App. 3], and (3) remand this proceeding back to the trial court for a calculation of child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

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**ATTORNEY FOR PETITIONER,
JAMES DERWOOD ILIFF**

Jury

A jury was waived, and questions of fact and of law were submitted to the Court.

Divorce

IT IS ORDERED AND DECREED that JERILYN TRJE ILIFF, Petitioner, and JAMES DERWOOD ILIFF, Respondent, are divorced and that the marriage between them is dissolved.

Children of the Marriage

The Court finds that Petitioner and Respondent are the parents of the following children:

Name: COLIN JAMES ILIFF
Sex: Male
Birth date: July 14, 1993
Home state: Texas
Social Security number: 629-38-4250
Driver's license number and issuing state: N/A

Name: CAITLIN TRJE ILIFF
Sex: Female
Birth date: January 3, 1997
Home state: Texas
Social Security number: 642-56-0048

Name: CALLIE MCKENZIE ILIFF
Sex: Female
Birth date: February 10, 2001
Home state: Texas
Social Security number: 641-74-0094

The Court finds no other children of the marriage are expected.

Parenting Plan

The Court finds that the provisions in this decree relating to conservatorship, possession of and access to the children, child support, and a dispute resolution process to minimize future disputes constitute the parenting plan established by the Court.

Conservatorship

The Court, having heard the evidence presented, considered the circumstances of the parents and of the children, finds that the following orders are in the best interest of the children.

IT IS ORDERED that JERILYN TRJE ILIFF is appointed Sole Managing Conservator and JAMES DERWOOD ILIFF is appointed Possessory Conservator of the following children: COLIN

APR 4 25 16 06 26

JAMES ILIFF, CAITILIN TRIJE ILIFF and CALLIE MCKENZIE ILIFF.

IT IS ORDERED that, at all times, JERILYN TRIJE ILIFF, as a parent sole managing conservator, and JAMES DERWOOD ILIFF, as a parent possessory conservator, shall each have the following rights:

- 1. the right to receive information from any other conservator of the children concerning the health, education, and welfare of the children;**
- 2. the right to confer with the other parent to the extent possible before making a decision concerning the health, education, and welfare of the children;**
- 3. the right of access to medical, dental, psychological, and educational records of the children;**
- 4. the right to consult with a physician, dentist, or psychologist of the children;**
- 5. the right to consult with school officials concerning the children's welfare and educational status, including school activities;**
- 6. the right to attend school activities;**
- 7. the right to be designated on the children's records as a person to be notified in case of an emergency;**
- 8. the right to consent to medical, dental, and surgical treatment during an emergency involving an immediate danger to the health and safety of the children; and**
- 9. the right to manage the estates of the children to the extent the estates have been created by the parent or the parent's family.**

IT IS ORDERED that, at all times, JERILYN TRIJE ILIFF, as a parent sole managing conservator, and JAMES DERWOOD ILIFF, as a parent possessory conservator, shall each have the following duties:

- 1. the duty to inform the other conservator of the children in a timely manner of significant information concerning the health, education, and welfare of the children; and**
- 2. the duty to inform the other conservator of the children if the conservator resides with**

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for at least thirty days, marries, or intends to marry a person who the conservator knows is registered as a sex offender under chapter 62 of the Code of Criminal Procedure or is currently charged with an offense for which on conviction the person would be required to register under that chapter. IT IS ORDERED that this information shall be tendered in the form of a notice made as soon as practicable, but not later than the fortieth day after the date the conservator of the children begins to reside with the person or on the tenth day after the date the marriage occurs, as appropriate. IT IS ORDERED that the notice must include a description of the offense that is the basis of the person's requirement to register as a sex offender or of the offense with which the person is charged. **WARNING: A CONSERVATOR COMMITS AN OFFENSE PUNISHABLE AS A CLASS C MISDEMEANOR IF THE CONSERVATOR FAILS TO PROVIDE THIS NOTICE.**

IT IS ORDERED that, during their respective periods of possession, JERILYN TRUJE ILIFF, as a parent sole managing conservator, and JAMES DERWOOD ILIFF, as a parent possessory conservator, shall each have the following rights and duties:

1. the duty of care, control, protection, and reasonable discipline of the children;
2. the duty to support the children, including providing the children with clothing, food, shelter, and medical and dental care not involving an invasive procedure;
3. the right to consent for the children to medical and dental care not involving an invasive procedure; and
4. the right to direct the moral and religious training of the children.

IT IS ORDERED that JERILYN TRUJE ILIFF, as parent sole managing conservator, shall have the following exclusive rights and duty:

1. the right to designate the primary residence of the children;
2. the right to consent to medical, dental, and surgical treatment involving invasive procedures;
3. the right to consent to psychiatric and psychological treatment of the children;
4. the right to receive and give receipt for periodic payments for the support of the

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children and to hold or disburse these funds for the benefit of the children;

5. the right to represent the children in legal action and to make other decisions of substantial legal significance concerning the children;

6. the right to consent to marriage and to enlistment in the armed forces of the United States;

7. the right to make decisions concerning the children's education;

8. except as provided by section 264.0111 of the Texas Family Code, the right to the services and earnings of the children;

9. except when a guardian of the children's estates or a guardian or attorney ad litem has been appointed for the children, the right to act as an agent of the children in relation to the children's estates if the children's action is required by a state, the United States, or a foreign government; and

10. the duty to manage the estates of the children to the extent the estates have been created by community property or the joint property of the parents.

IT IS ORDERED that if a parent's consent is required for the issuance of a passport, that parent shall provide that consent in writing no later than ten (10) days after receipt of the consent documents, unless the parent has good cause for withholding that consent.

IT IS ORDERED that the following account now held by the parties for the parties' children is placed under the sole and exclusive control of JERILYN TRUJE ILIFF:

Edward Jones account #XXX-XX036-1-4.

Possession and Access

The Court finds, after hearing the evidence in this case, that the application of the Standard Texas Family Code Possession Order with regard to possession of the minor children by JAMES DERWOOD ILIFF is not in the best interest of the children. The Court finds the following orders to be in the best interest of the children:

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1. IT IS ORDERED that JAMES DERWOOD ILIFF shall schedule and complete a psychological evaluation by or at the direction of Dr. David Tucker of Austin, Texas by June 6, 2008, (which is within 45 days of April 22, 2008) and shall make the results of said evaluation available to Dr. Caryl Dalton of Austin, Texas, and the attorneys for Petitioner and Respondent herein. The cost of said psychological evaluation shall be paid by JAMES DERWOOD ILIFF.
2. IT IS FURTHER ORDERED that JAMES DERWOOD ILIFF shall have no possession of the minor children until the completion of the ordered psychological evaluation.
3. After completion of the psychological evaluation and its review by Dr. Caryl Dalton, JAMES DERWOOD ILIFF shall have possession of the minor children as recommended by Dr. Caryl Dalton to be supervised at all times by JAMES DERWOOD ILIFF's mother or sister, until further order of this Court.
4. Upon Dr. Caryl Dalton's recommendation that supervision is no longer necessary, JAMES DERWOOD ILIFF shall have possession of the children pursuant to the standard Texas Family Code possession schedule.
5. IT IS ORDERED that JAMES DERWOOD ILIFF shall have weekly telephone access of the children on Thursday evening of each week between 6:00 p.m. and 8:00 p.m.
6. IT IS ORDERED that JAMES DERWOOD ILIFF shall follow the treatment recommendations of the treating doctors and psychologists.
7. The Court reserves the right to make additional orders regarding access and possession after receiving the psychological evaluation and the recommendations of Dr. Caryl Dalton.
8. IT IS ORDERED that no firearms shall be returned to JAMES DERWOOD ILIFF by his attorney, Robert Racsz, Jr., until after completion of the court ordered

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psychological evaluation, and then ONLY by order of the Court.

Child Support

IT IS ORDERED that JAMES DERWOOD ILIFF is obligated to pay and shall pay to JERILYN TRIJE ILIFF child support of \$1,295.19 per month, with the first payment being due and payable on June 1, 2008 and a like payment being due and payable on the 1st day of each month thereafter until the first month following the date of the earliest occurrence of one of the events specified below:

1. any child reaches the age of eighteen years or graduates from high school, whichever occurs later, subject to the provisions for support beyond the age of eighteen years set out below;
2. any child marries;
3. any child dies;
4. any child's disabilities are otherwise removed for general purposes; or
5. the date on which any child begins active service as defined by 10 U.S.C. Section 101 after enlisting in the armed forces of the United States.

Thereafter, JAMES DERWOOD ILIFF is ORDERED to pay to JERILYN TRIJE ILIFF child support of \$1,112.08 per month, due and payable on the 1st day of the first month immediately following the date of the earliest occurrence of one of the events specified above for another child and a like sum of \$1,112.08 due and payable on the 1st day of each month thereafter until the next occurrence of one of the events specified above for another child.

Thereafter, JAMES DERWOOD ILIFF is ORDERED to pay to JERILYN TRIJE ILIFF child support of \$928.98 per month, due and payable on the 1st day of the first month immediately following the date of the earliest occurrence of one of the events specified above for another child and a like sum of \$928.98 due and payable on the 1st day of each month thereafter until the next occurrence of one of the events specified above for another child.

If the child is eighteen years of age and has not graduated from high school, IT IS ORDERED that JAMES DERWOOD ILIFF's obligation to pay child support to JERILYN TRIJE ILIFF shall not

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terminate but shall continue for as long as the child is enrolled-

1. under chapter 25 of the Texas Education Code in a secondary school in a program leading toward a high school diploma or under section 130.008 of the Education Code in courses for joint high school and junior college credit and is complying with the minimum attendance requirements of subchapter C of chapter 25 of the Education Code or

2. on a full-time basis in a private secondary school in a program leading toward a high school diploma and is complying with the minimum attendance requirements imposed by that school.

The child support ordered herein includes reimbursement to the sole managing conservator of the sum of \$196.56, which is found to be the monthly cost of health insurance for the children paid by the sole managing conservator.

Withholding from Earnings

IT IS ORDERED that any employer of JAMES DERWOOD ILIFF shall be ordered to withhold from earnings for child support from the disposable earnings of JAMES DERWOOD ILIFF for the support of COLIN JAMES ILIFF, CAITLIN TRUJE ILIFF and CALLIE MCKENZIE ILIFF.

IT IS FURTHER ORDERED that all amounts withheld from the disposable earnings of JAMES DERWOOD ILIFF by the employer and paid in accordance with the order to that employer shall constitute a credit against the child support obligation. Payment of the full amount of child support ordered paid by this decree through the means of withholding from earnings shall discharge the child support obligation. If the amount withheld from earnings and credited against the child support obligation is less than 100 percent of the amount ordered to be paid by this decree, the balance due remains an obligation of JAMES DERWOOD ILIFF, and it is hereby ORDERED that JAMES DERWOOD ILIFF pay the balance due directly to the state disbursement unit specified below:

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On this date the Court signed an Order to Withhold Income for Child Support.

IT IS ORDERED that all payments shall be made through the state disbursement unit at Texas Child Support Disbursement Unit, P.O. Box 659791, San Antonio, Texas 78265-9791, and thereafter promptly remitted to JERILYN TRUE ILIFF for the support of the children. IT IS ORDERED that each party shall pay, when due, all fees charged to that party by the state disbursement unit and any other agency statutorily authorized to charge a fee.

Change of Employment

IT IS FURTHER ORDERED that JAMES DERWOOD ILIFF shall notify this Court and JERILYN TRUE ILIFF by U.S. certified mail, return receipt requested, of any change of address and of any termination of employment. This notice shall be given no later than seven days after the change of address or the termination of employment. This notice or a subsequent notice shall also provide the current address of JAMES DERWOOD ILIFF and the name and address of his current employer, whenever that information becomes available.

Clerk's Duties

IT IS ORDERED that, on the request of a prosecuting attorney, the title IV-D agency, the friend of the Court, a domestic relations office, JERILYN TRUE ILIFF, JAMES DERWOOD ILIFF, or an attorney representing JERILYN TRUE ILIFF or JAMES DERWOOD ILIFF, the clerk of this Court shall cause a certified copy of the Notice to Withhold Income for Child Support to be delivered to any employer.

Health Care

1. The Court finds that the following provisions of this medical support order are intended to and do comply with the priority requirements of Texas Family Code section 154.182 as follows.

2. IT IS ORDERED that JERILYN TRUE ILIFF and JAMES DERWOOD ILIFF shall each provide medical support and health care coverage for each child as set out in this order as additional child support for as long as the Court may order JERILYN TRUE ILIFF and JAMES DERWOOD ILIFF to provide support for the child under sections 154.001 and 154.002 of the Texas

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Family Code. Beginning on the day JERILYN TRUE ILIFF and JAMES DERWOOD ILIFF's actual or potential obligation to support a child under sections 154.001 and 154.002 of the Family Code terminates, IT IS ORDERED that JERILYN TRUE ILIFF and JAMES DERWOOD ILIFF are discharged from the obligations set forth in this medical support order with respect to that child, except for any failure by a parent to fully comply with those obligations before that date.

3. Definitions -

"Health Insurance" means insurance coverage that provides basic health-care services, including usual physician services, office visits, hospitalization, and laboratory, X-ray, and emergency services, that may be provided through a health maintenance organization or other private or public organization, other than medical assistance under chapter 32 of the Texas Human Resources Code.

"Reasonable cost" means the cost of health insurance coverage for a child that does not exceed nine percent of the responsible parent's annual resources as described by the Texas Family Code section 154.062(b).

"Reasonable and necessary health-care expenses not paid by insurance and incurred by or on behalf of a child" include, without limitation, any copayments for office visits or prescription drugs, the yearly deductible, if any, and medical, surgical, prescription drug, mental health-care services, dental, eye care, ophthalmological, and orthodontic charges. These reasonable and necessary health-care expenses do not include expenses for travel to and from the health-care provider or for nonprescription medication.

"Furnish" means:

- a. to hand deliver the document by a person eighteen years or older either to the recipient or to a person who is eighteen years or older and permanently resides with the recipient;
- b. to deliver the document to the recipient by certified mail, return receipt requested, to the recipient's last known mailing or residence address; or

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- c. to deliver the document to the recipient at the recipient's last known mailing or residence address using any person or entity whose principal business is that of a courier or deliverer of papers or documents either within or outside the United States.

4. Obligations of JERILYN TRIJE ILIFF - JERILYN TRIJE ILIFF is ORDERED to include and maintain each child in JERILYN TRIJE ILIFF's health insurance currently available through Blue Cross Blue Shield no later than the date the Court signs this order.

5. Obligations of JERILYN TRIJE ILIFF - JERILYN TRIJE ILIFF is ORDERED -

- a. to furnish to each conservator of the children the following information no later than the thirtieth day after the date the notice of the rendition of this order is received:
- i. the Social Security number of the parent providing insurance;
 - ii. the name and address of the employer of the parent providing insurance;
 - iii. whether the employer is self-insured or has health insurance available;
 - iv. proof that health insurance has been provided for each child; and
 - v. the name of the health insurance carrier, the number of the policy, a copy of the policy and schedule of benefits, a health insurance membership card, claim forms, and any other information necessary to submit a claim or, if the employer is self-insured, a copy of the schedule of benefits, a membership card, claim forms, and any other information necessary to submit a claim;
- b. to furnish to each conservator of the children a copy of any renewals or changes to the health insurance policy covering a child, or any additional information regarding health insurance coverage of the child, including any

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change in the actual cost of the health insurance for the child, no later than the fifteenth day after the party providing the health insurance receives or is provided with the renewal, change, or additional information;

- c. to furnish each conservator of the children with all documentation accessible to JERILYN TRUJE ILIFF of any termination or lapse of the health insurance coverage of a child no later than the fifteenth day after the date of the termination or lapse;
- d. after termination or lapse of health insurance coverage, to furnish each conservator of the children with all documentation accessible to JERILYN TRUJE ILIFF of the availability of additional health insurance for the children no later than the fifteenth day after the date the insurance becomes available;
- e. after a termination or lapse of health insurance coverage, to furnish each conservator of the children with all documentation accessible to JERILYN TRUJE ILIFF of the availability of enrollment of the children in a government medical assistance program, government health plan, medical assistance program under chapter 32 of the Texas Human Resources Code or a state child health plan under chapter 62 of the Texas Health and Safety Code, no later than the fifteenth day after the date the enrollment in the program becomes available;
- f. to enroll the children at the next available enrollment period in a health insurance plan that is available at reasonable cost after the previous health insurance has been terminated or has lapsed; and
- g. to enroll the children in a government medical assistance program, government health plan, medical assistance program under chapter 32 of the Texas Human Resources Code or a state child health plan under chapter 62 of the Texas Health and Safety Code if the children are eligible for

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enrollment in the program and no health insurance plan is available at reasonable cost.

6. Secondary Coverage - IT IS ORDERED that nothing in this order shall prevent either party from providing secondary health insurance coverage for the children at that party's sole cost and expense. IT IS FURTHER ORDERED that if a party provides secondary health insurance coverage for the children, both parties shall cooperate fully with regard to the handling and filing of claims with the insurance carrier providing the coverage in order to maximize the benefits available to the children and to ensure that the party who pays for health-care expenses for the children is reimbursed for the payment from both carriers to the fullest extent possible.

7. Compliance with Insurance Company Requirements - Each party is ORDERED to conform to all requirements imposed by the terms and conditions of the policy of health insurance covering the children in order to assure maximum reimbursement or direct payment by the insurance company of the incurred health-care expense, including but not limited to requirements for advance notice to carrier, second opinions, and the like. Each party is ORDERED to attempt to use "preferred providers," or services within the health maintenance organization, if applicable; however, this provision shall not apply if emergency care is required. Disallowance of the bill by a health insurer shall not excuse the obligation of either party to make payment; however, if a bill is disallowed or the benefit reduced because of the failure of a party to follow procedures or requirements of the carrier, IT IS ORDERED that the party failing to follow the carrier's procedures or requirements shall be wholly responsible for the increased portion of that bill.

8. Claims - Except as provided in this paragraph, the party who is not carrying the health insurance policy covering the children is ORDERED to furnish to the party carrying the policy, within fifteen days of receiving them, any and all forms, receipts, bills, and statements reflecting the health-care expenses the party not carrying the policy incurs on behalf of the children. In accordance with section 1204.251 of the Texas Insurance Code, IT IS ORDERED that the party who is not carrying the health insurance policy covering the children may, at that party's option, file directly

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with the insurance carrier with whom coverage is provided for the benefit of the children any claims for health-care expenses, including but not limited to medical, hospitalization, and dental costs, and receive payments directly from the insurance company.

The party who is carrying the health insurance policy covering the children is ORDERED to submit all forms required by the insurance company for payment or reimbursement of health-care expenses incurred by either party on behalf of a child to the insurance carrier within fifteen days of that party's receiving any form, receipt, bill, or statement reflecting the expenses.

9. **Constructive Trust for Payments Received - IT IS ORDERED** that any insurance payments received by a party from the health insurance carrier as reimbursement for health-care expenses incurred by or on behalf of a child shall belong to the party who incurred and paid those expenses. **IT IS FURTHER ORDERED** that the party receiving the insurance payments is designated a constructive trustee to receive any insurance checks or payments for health-care expenses incurred and paid by the other party, and the party carrying the policy shall endorse and forward the checks or payments, along with any explanation of benefits received, to the other party within three days of receiving them.

10. **Health-Care Expenses Not Paid by Insurance or Cash Medical Support-** Subject to the provisions in paragraph 9. immediately above, **IT IS ORDERED** that, if health-care expenses are incurred for a child, **JERILYN TRIJE ILIFF** and **JAMES DERWOOD ILIFF** shall pay all reasonable and necessary health-care expenses not paid by insurance or covered by the amount of cash medical support ordered and incurred by or on behalf of the child in the following portions:

- a. If the health-care expenses are incurred by using a HMO or PPO plan, in an emergency, or with the written agreement of the other party, **JERILYN TRIJE ILIFF** is ORDERED to pay 50 percent and **JAMES DERWOOD ILIFF** is ORDERED to pay 50 percent.
- b. Except in an emergency or if the other parent agreed in writing, if a party incurs health-care expenses for the child by using the services of health-care

providers not employed by the HMO or approved by the PPO, the party incurring the services is ORDERED to pay 100 percent and the other party is ORDERED to pay 0 percent.

- c. If JERILYN TRIJE ILIFF provides health insurance for the child through an HMO or a PPO that does not provide coverage for the child where the child resides or have network providers in the area where the child resides, JERILYN TRIJE ILIFF is ORDERED to pay 50 percent and JAMES DERWOOD ILIFF is ORDERED to pay 50 percent.
- d. If the child is enrolled in a health-care plan that is not an HMO or a PPO, JERILYN TRIJE ILIFF is ORDERED to pay 50 percent and JAMES DERWOOD ILIFF is ORDERED to pay 50 percent.
- e. If the child was enrolled in a government medical assistance program, government health plan, medical assistance program under chapter 32 of the Texas Human Resources Code or a state child health plan under chapter 62 of the Texas Health and Safety Code and is no longer eligible for coverage in that plan or program, JERILYN TRIJE ILIFF is ORDERED to pay 50 percent and JAMES DERWOOD ILIFF is ORDERED to pay 50 percent until health insurance is provided for the child or the child is again eligible for enrollment in a government medical assistance program, government health plan, medical assistance program under chapter 32 of the Texas Human Resources Code or a state child health plan under chapter 62 of the Texas Health and Safety Code.
- f. If health care coverage is provided for the child in the form of cash medical support, JERILYN TRIJE ILIFF is ORDERED to pay 50 percent and JAMES DERWOOD ILIFF is ORDERED to pay 50 percent.

IT IS ORDERED that the party who pays for a health-care expense on behalf of a child shall

furnish to the other party, within thirty days of receiving them, all forms, receipts, bills, and explanations of benefits paid reflecting the uninsured portion of the health-care expenses the paying party incurs on behalf of the child. IT IS FURTHER ORDERED that if the paying party furnishes all of these forms, receipts, bills, and explanations of benefits to the nonpaying party within thirty days of receiving them, the nonpaying party shall pay his or her share of the uninsured portion of the health-care expenses either by paying the health-care provider directly or by reimbursing the paying party at the paying party's last known mailing or residence address for any advance payment exceeding the paying party's share of the expenses no later than thirty days after the nonpaying party receives the following documentation relating to the health-care expense:

- a. a receipt for a prescription,
- b. a receipt for a copayment for health-care services,
- c. a receipt for health-care expenses of a type not covered by the health insurance plan, or
- d. an explanation of benefits stating the benefits paid for all other health-care expenses.

If the paying party does not furnish to the nonpaying party all of the forms, receipts, bills, and explanations of benefits paid reflecting the uninsured portion of a health-care expense the paying party incurred on behalf of the child within thirty days of receiving these documents, IT IS ORDERED that the nonpaying party shall pay his or her share of the uninsured portion of the health-care expense either by paying the health-care provider directly or by reimbursing the paying party at the paying party's last known mailing or residence address for any advance payment exceeding the paying party's share of the expense no later than 120 days after the nonpaying party receives the documentation listed above in this section relating to the health-care expense.

IT IS ORDERED that reasonableness of the charges for health-care expenses shall be presumed when a party is furnished with the applicable documents for the charges and that disallowance of the bill by a health insurer shall not excuse that party's obligation to make payment

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or reimbursement as otherwise provided herein.

11. WARNING - A PARENT ORDERED TO PROVIDE HEALTH INSURANCE OR TO PAY THE OTHER PARENT ADDITIONAL CHILD SUPPORT FOR THE COST OF HEALTH INSURANCE WHO FAILS TO DO SO IS LIABLE FOR NECESSARY MEDICAL EXPENSES OF THE CHILDREN, WITHOUT REGARD TO WHETHER THE EXPENSES WOULD HAVE BEEN PAID IF HEALTH INSURANCE HAD BEEN PROVIDED, AND FOR THE COST OF HEALTH INSURANCE PREMIUMS OR CONTRIBUTIONS, IF ANY, PAID ON BEHALF OF THE CHILDREN.

Miscellaneous Child Support Provisions

No Credit for Informal Payments

IT IS ORDERED that the child support as prescribed in this decree shall be exclusively discharged in the manner ordered and that any direct payments made by JAMES DERWOOD ILIFF to JERILYN TRUJE ILIFF or any expenditures incurred by JAMES DERWOOD ILIFF during JAMES DERWOOD ILIFF's periods of possession of or access to the children, as prescribed in this decree, for food, clothing, gifts, travel, shelter, or entertainment are deemed in addition to and not in lieu of the support ordered in this decree.

Support as Obligation of Estate

IT IS ORDERED that the provisions for child support in this decree shall be an obligation of the estate of JAMES DERWOOD ILIFF, shall not terminate on the death of JAMES DERWOOD ILIFF, and the remaining unpaid balance of the child support obligation becomes payable on the date JAMES DERWOOD ILIFF dies. Payments received for the benefit of the children from the Social Security Administration, Department of Veterans Affairs, other governmental agency, or life insurance shall be a credit against this obligation.

Termination of Orders on Remarriage of Parties

The provisions of this decree relating to current child support terminate on the remarriage of JERILYN TRUJE ILIFF to JAMES DERWOOD ILIFF unless a nonparent or agency has been

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appointed conservator of the children under chapter 153 of the Texas Family Code. An obligation to pay child support under this decree does not terminate on the death of JERILYN TRIJE ILIFF but continues as an obligation to COLIN JAMES ILIFF, CAITILIN TRIJE ILIFF and CALLIE MCKENZIE ILIFF.

Mediation

IT IS ORDERED that before setting any hearing in a suit for modification or enforcement of the terms and conditions of conservatorship, possession, or support of the children, except for in an emergency, or as otherwise provided herein, the parties shall mediate the controversy in good faith. IT IS FURTHER ORDERED that the party wishing to modify or enforce the terms and conditions of conservatorship, possession or support of the children shall give written notice to the other party of a desire to mediate the controversy. If, within ten days after receipt of the written notice, the other party does not agree to attend mediation or fails without good cause to attend a scheduled mediation of the controversy, the party desiring to modification or enforcement shall be released from the obligation to mediate and shall be free to proceed with the modification or enforcement. If the parties cannot agree on a mediator within ten days after the other party's receipt of the written notice, IT IS ORDERED that the parties shall request the court with continuing, exclusive jurisdiction under chapter 155 of the Texas Family Code to adjudicate the requested modification or enforcement of the parenting plan or, if there is no such court and a suit is filed, the court in which the suit is filed to appoint a mediator, who shall then mediate the controversy. If there is no such court with continuing, exclusive jurisdiction and a suit has not been filed, IT IS ORDERED that the parties shall request that the court that rendered the order to be modified or enforced appoint a mediator, who shall then mediate the controversy. IT IS ORDERED that the compensation of the mediator shall be divided and borne equally by the parties and shall be paid in advance by the parties to the mediator. Neither party shall be required to use mediation before filing a suit to enforce a child support obligation or a possession order.

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Minimizing Disruption

IT IS ORDERED that the parties shall conduct themselves at all times in a manner that will

minimize the exposure of the children to harmful parental conflict. Each party is ORDERED not to make negative remarks about the other party or the other party's family. Each party is further ORDERED to be respectful to the other party and the other party's family in the presence of the children. The parties are ORDERED to communicate with each other in a polite, civil, and cooperative manner and to attempt to resolve disputes concerning the child with dignity and by focusing on the best interest of the children.

Changing Needs of the Children

As the children's needs change and as the children grow and mature, the parties are ORDERED to communicate with one another at either party's request to discuss the changing needs and how to address them in a manner that minimizes the need for further modification to the parenting plan.

Medical Notification

Each party is ORDERED to inform the other party within 24 hours of any medical condition of the children requiring surgical intervention, hospitalization, or both.

Information Regarding Parties

The information required for each party by section 105.006(a) of the Texas Family Code is as follows:

Name: JERILYN TRIJE ILIFF
Social Security number: 465-39-9831
Driver's license number: 10299049 Issuing state: Texas
Current residence address: 130 Elm Hollow, San Marcos, Texas 78666
Mailing address: 130 Elm Hollow, San Marcos, Texas 78666
Home telephone number: (512) 392-6899
Name of employer: CORE Health Care
Address of employment: 400 Old Highway 290, Dripping Springs, Texas 78620
Work telephone number: (512) 894-0901

Name: JAMES DERWOOD ILIFF
Social Security number: 466-15-0797
Driver's license number: 09699884 Issuing state: Texas
Current residence address: 3513 Harwen Terrace, Fort Worth, Texas 76109
Mailing address: 3513 Harwen Terrace, Fort Worth, Texas 76109
Home telephone number: cell: 512-940-0604
Name of employer: _____
Address of employment: _____
Work telephone number: _____

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EACH PERSON WHO IS A PARTY TO THIS ORDER IS ORDERED TO NOTIFY EACH OTHER PARTY, THE COURT, AND THE STATE CASE REGISTRY OF ANY CHANGE IN THE PARTY'S CURRENT RESIDENCE ADDRESS, MAILING ADDRESS, HOME TELEPHONE NUMBER, NAME OF EMPLOYER, ADDRESS OF EMPLOYMENT, DRIVER'S LICENSE NUMBER, AND WORK TELEPHONE NUMBER. THE PARTY IS ORDERED TO GIVE NOTICE OF AN INTENDED CHANGE IN ANY OF THE REQUIRED INFORMATION TO EACH OTHER PARTY, THE COURT, AND THE STATE CASE REGISTRY ON OR BEFORE THE 60TH DAY BEFORE THE INTENDED CHANGE. IF THE PARTY DOES NOT KNOW OR COULD NOT HAVE KNOWN OF THE CHANGE IN SUFFICIENT TIME TO PROVIDE 60-DAY NOTICE, THE PARTY IS ORDERED TO GIVE NOTICE OF THE CHANGE ON OR BEFORE THE FIFTH DAY AFTER THE DATE THAT THE PARTY KNOWS OF THE CHANGE.

THE DUTY TO FURNISH THIS INFORMATION TO EACH OTHER PARTY, THE COURT, AND THE STATE CASE REGISTRY CONTINUES AS LONG AS ANY PERSON, BY VIRTUE OF THIS ORDER, IS UNDER AN OBLIGATION TO PAY CHILD SUPPORT OR ENTITLED TO POSSESSION OF OR ACCESS TO A CHILD.

FAILURE BY A PARTY TO OBEY THE ORDER OF THIS COURT TO PROVIDE EACH OTHER PARTY, THE COURT, AND THE STATE CASE REGISTRY WITH THE CHANGE IN THE REQUIRED INFORMATION MAY RESULT IN FURTHER LITIGATION TO ENFORCE THE ORDER, INCLUDING CONTEMPT OF COURT. A FINDING OF CONTEMPT MAY BE PUNISHED BY CONFINEMENT IN JAIL FOR UP TO SIX MONTHS, A FINE OF UP TO \$500 FOR EACH VIOLATION, AND A MONEY JUDGMENT FOR PAYMENT OF ATTORNEY'S FEES AND COURT COSTS.

Notice shall be given to the other party by delivering a copy of the notice to the party by registered or certified mail, return receipt requested. Notice shall be given to the Court by delivering a copy of the notice either in person to the clerk of this Court or by registered or certified mail addressed to the clerk at Hays County Justice Center, 110 E. Martin Luther King Drive, San Marcos,

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Texas 78666. Notice shall be given to the state case registry by mailing a copy of the notice to State Case Registry, Contract Services Section, MC046S, P.O. Box 12017, Austin, Texas 78711-2017.

NOTICE TO ANY PEACE OFFICER OF THE STATE OF TEXAS: YOU MAY USE REASONABLE EFFORTS TO ENFORCE THE TERMS OF CHILD CUSTODY SPECIFIED IN THIS ORDER. A PEACE OFFICER WHO RELIES ON THE TERMS OF A COURT ORDER AND THE OFFICER'S AGENCY ARE ENTITLED TO THE APPLICABLE IMMUNITY AGAINST ANY CLAIM, CIVIL OR OTHERWISE, REGARDING THE OFFICER'S GOOD FAITH ACTS PERFORMED IN THE SCOPE OF THE OFFICER'S DUTIES IN ENFORCING THE TERMS OF THE ORDER THAT RELATE TO CHILD CUSTODY. ANY PERSON WHO KNOWINGLY PRESENTS FOR ENFORCEMENT AN ORDER THAT IS INVALID OR NO LONGER IN EFFECT COMMITS AN OFFENSE THAT MAY BE PUNISHABLE BY CONFINEMENT IN JAIL FOR AS LONG AS TWO YEARS AND A FINE OF AS MUCH AS \$10,000.

WARNINGS TO PARTIES: FAILURE TO OBEY A COURT ORDER FOR CHILD SUPPORT OR FOR POSSESSION OF OR ACCESS TO A CHILD MAY RESULT IN FURTHER LITIGATION TO ENFORCE THE ORDER, INCLUDING CONTEMPT OF COURT. A FINDING OF CONTEMPT MAY BE PUNISHED BY CONFINEMENT IN JAIL FOR UP TO SIX MONTHS, A FINE OF UP TO \$500 FOR EACH VIOLATION, AND A MONEY JUDGMENT FOR PAYMENT OF ATTORNEY'S FEES AND COURT COSTS.

FAILURE OF A PARTY TO MAKE A CHILD SUPPORT PAYMENT TO THE PLACE AND IN THE MANNER REQUIRED BY A COURT ORDER MAY RESULT IN THE PARTY'S NOT RECEIVING CREDIT FOR MAKING THE PAYMENT.

FAILURE OF A PARTY TO PAY CHILD SUPPORT DOES NOT JUSTIFY DENYING THAT PARTY COURT-ORDERED POSSESSION OF OR ACCESS TO A CHILD. REFUSAL BY A PARTY TO ALLOW POSSESSION OF OR ACCESS TO A CHILD DOES NOT JUSTIFY FAILURE TO PAY COURT-ORDERED CHILD SUPPORT TO THAT PARTY.

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Division of Marital Estate

The Court finds that the following is a just and right division of the parties' marital estate, having due regard for the rights of each party and the children of the marriage.

Property to Husband

IT IS ORDERED AND DECREED that the husband, JAMES DERWOOD ILIFF, is awarded the following as his sole and separate property, and the wife is divested of all right, title, interest, and claim in and to that property:

H-1. All household furniture, furnishings, fixtures, goods, art objects, collectibles, appliances, and equipment in the possession of the husband or subject to his sole control.

H-2. All clothing, jewelry, and other personal effects in the possession of the husband or subject to his sole control and the following items: husband's high school leather jacket and sky diving tapes.

H-3. All sums of cash in the possession of the husband or subject to his sole control, including funds on deposit, together with accrued but unpaid interest, in banks, savings institutions, or other financial institutions, which accounts stand in the husband's sole name or from which the husband has the sole right to withdraw funds or which are subject to the husband's sole control.

H-4. All sums, whether matured or unmatured, accrued or unaccrued, vested or otherwise, together with all increases thereof, the proceeds therefrom, and any other rights related to any profit-sharing plan, retirement plan, Keogh plan, pension plan, employee stock option plan, 401(k) plan, employee savings plan, accrued unpaid bonuses, disability plan, or other benefits existing by reason

of the husband's past, present, or future employment, including but not limited to:

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- a. the Fidelity Rollover IRA in husband's name;
- b. the Ashland LESOP in husband's name; and
- c. the Ashland Savings Plan in husband's name.

H-5. All policies of life insurance (including cash values) insuring the husband's life.

H-6. The 2001 Dodge 2500 Duramax diesel motor vehicle, together with all prepaid insurance, keys, and title documents.

H-7. The 2003 HST Kabota tractor and the 16 ft. flatbed trailer.

H-8. The sums awarded to husband from the sale of the acreage located at 501 Winding Trail, Wimberley, Texas as provided herein.

Property to Wife

IT IS ORDERED AND DECREED that the wife, JERILYN TRJE ILIFF, is awarded the following as her sole and separate property, and the husband is divested of all right, title, interest, and claim in and to that property:

W-1. The following real property, including but not limited to any escrow funds, prepaid insurance, utility deposits, keys, house plans, home security access and code, garage door opener, warranties and service contracts, and title and closing documents: all interest in the home and real property, consisting of two (2) lots, located at 130 Elm Hollow, San Marcos, Hays County, Texas and further described as follows:

Lot One (1), Resubdivision of the JOHNS TRACT, in THE SETTLEMENT IN SAN MARCOS, TEXAS, A Subdivision in Hays County, Texas, according to the map or plat of said Resubdivision, of record in Volume 5, page 262, Plat Records of Hays County, Texas; AND

Lot Two (2), Resubdivision of the JOHNS TRACT, in THE SETTLEMENT AT SAN MARCOS, TEXAS, A Subdivision in Hays County, Texas, according to the map or plat of said Resubdivision, of record in Volume 5, page 262, Plat Records of Hays County, Texas.

W-2. All household furniture, furnishings, fixtures, goods, art objects, collectibles, appliances, and equipment in the possession of the wife or subject to her sole control.

W-3. All clothing, jewelry, and other personal effects in the possession of the wife or subject to her sole control.

W-4. All sums of cash in the possession of the wife or subject to her sole control, including funds on deposit, together with accrued but unpaid interest, in banks, savings institutions, or other financial institutions, which accounts stand in the wife's sole name or from which the wife has the sole right to withdraw funds or which are subject to the wife's sole control.

W-5. All sums, whether matured or unmatured, accrued or unaccrued, vested or otherwise,

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together with all increases thereof, the proceeds therefrom, and any other rights related to any profit-sharing plan, retirement plan, Keogh plan, pension plan, employee stock option plan, 401(k) plan, employee savings plan, accrued unpaid bonuses, disability plan, or other benefits existing by reason of the wife's past, present, or future employment

W-6. All policies of life insurance (including cash values) insuring the wife's life.

W-7. The 2001 Ford Expedition motor vehicle, vehicle identification number 1FMPU16LX1LA30001, together with all prepaid insurance, keys, and title documents.

W-8. The sum awarded to wife from the sale of the acreage located at 501 Winding Trail, Wimberley, Texas as provided herein.

Division of Debt

Debts to Husband

IT IS ORDERED AND DECREED that the husband, JAMES DERWOOD ILIFF, shall pay, as a part of the division of the estate of the parties, and shall indemnify and hold the wife and her property harmless from any failure to so discharge, these items:

H-1. Any indebtedness incurred individually by husband since the separation of the parties on June 9, 2005.

H-2. Husband's attorney's fees incurred for his representation in this divorce.

H-3. All medical bills for treatment rendered to husband.

H-4. The following credit card debt: Bank of America Visa; account #XXXXXX50009807898.

H-5. Any indebtedness incurred by husband with Southwest Fence for the construction of fencing on the property located at 501 Winding Trail, Wimberley, Texas.

H-6. The cost of the psychological evaluation of husband by Dr. David Tucker ordered herein.

H-7. All encumbrances, ad valorem taxes, liens, assessments, or other charges due or to become due on the real and personal property awarded to the husband in this decree unless express provision is made in this decree to the contrary.

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Debts to Wife

IT IS ORDERED AND DECREED that the wife, JERILYN TRIJE ILIFF, shall pay, as a part of the division of the estate of the parties, and shall indemnify and hold the husband and his property harmless from any failure to so discharge, these items:

W-1. The balance due, including principal, interest, tax, and insurance escrow, on the promissory note executed by Jerilyn Trije Iliff and James Derwood Iliff, in the original principal sum of approximately \$135,000.00, dated September 1991, and currently payable to Chase Mortgage, and secured by a deed of trust on the real property awarded in this decree to the wife, which is recorded in the Deed of Trust Records of Hays County, Texas.

W-2. The balance due, including principal, interest, tax, and insurance escrow, on the promissory note executed by Jerilyn Trije Iliff and James Derwood Iliff, in the original principal sum of \$67,500.00, dated June 25, 2003, payable to Bank of America, and secured by a deed of trust on the real property awarded in this decree to the wife, which is recorded in the Deed of Trust Records of Hays County, Texas.

W-3. Any indebtedness incurred individually by wife since the separation of the parties on June 9, 2006.

W-3. All encumbrances, ad valorem taxes, liens, assessments, or other charges due or to become due on the real and personal property awarded to the wife in this decree unless express provision is made in this decree to the contrary.

W-4. Wife's attorney's fees incurred for her representation herein.

Notice

IT IS ORDERED AND DECREED that each party shall send to the other party, within three days of its receipt, a copy of any correspondence from a creditor or taxing authority concerning any potential liability of the other party.

Provisions Dealing with Sale of Real Property Acreage

IT IS ORDERED that the real property and all improvements located thereon at 501 Winding Trail, Wimberley, Hays County, Texas, consisting of approximately 6 acres, shall be listed for sale

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with a realtor recommended by Mr. Randy Posey. The property shall be listed at the price recommended by the realtor, but at a starting price of no less than \$140,000. IT IS ORDERED that JERILYN TRJE ILIFF shall have authority to list the property for sale and that both JAMES DERWOOD ILIFF and JERILYN TRJE ILIFF shall cooperate in executing any documents necessary for the listing and sale of the property.

Until the sale of said property, JAMES DERWOOD ILIFF and JERILYN TRJE ILIFF are each ORDERED to timely pay 50 percent of the mortgage on said property and 50 percent of any real property taxes.

IT IS FURTHER ORDERED that upon sale, after the payment of the outstanding mortgage and customary closing costs and fees, the net proceeds shall be distributed as follows:

1. The first \$12,992 shall be paid to JERILYN TRJE ILIFF.
2. The remaining balance of the proceeds shall be distributed as follows:
 - a. Sixty percent (60%) to JERILYN TRJE ILIFF
 - b. Forty percent (40%) to JAMES DERWOOD ILIFF

Transfer and Delivery of Property

JAMES DERWOOD ILIFF is ORDERED to appear in the law office of ROBERT RAESZ, JR., 902 Rio Grande, Austin, Texas, within fifteen (15) days of entry of the decree, to execute, have acknowledged, and deliver to MICHAEL SCANIO these instruments:

1. Special Warranty Deed with assumption clause conveying JAMES DERWOOD ILIFF's interest in that real property located at 130 Elm Hollow, San Marcos, Texas to JERILYN TRJE ILIFF.
2. Power of attorney to transfer the title of the 2001 Ford Expedition motor vehicle to the name of JERILYN TRJE ILIFF.

Court Costs

IT IS ORDERED AND DECREED that costs of court are to be borne by the party who incurred them.

Discharge from Discovery Retention Requirement

IT IS ORDERED AND DECREED that the parties and their respective attorneys are discharged from the requirement of keeping and storing the documents produced in this case in accordance with rule 191.4(d) of the Texas Rules of Civil Procedure.

Clarifying Orders

Without affecting the finality of this Final Decree of Divorce, this Court expressly reserves the right to make orders necessary to clarify and enforce this decree.

Relief Not Granted

IT IS ORDERED AND DECREED that all relief requested in this case and not expressly granted is denied. This is a final judgment, for which let execution and all writs and processes necessary to enforce this judgment issue. This judgment finally disposes of all claims and all parties and is appealable.

Date of Judgment

SIGNED on May 5, 2008.



JUDGE PRESIDING

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NO. 05-1108

IN THE MATTER OF
THE MARRIAGE OF

JERILYN TRIJE ILIFF
AND
JAMES DERWOOD ILIFF

AND IN THE INTEREST OF
COLIN JAMES ILIFF, CAITLYN TRIJE
ILIFF AND CALLIE MCKENZIE ILIFF,
CHILDREN

FILED

IN THE DISTRICT COURT

22nd JUDICIAL DISTRICT

HAYS COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In response to the request of Respondent, JAMES DERWOOD ILIFF, the Court makes and files the following as original Findings of Fact and Conclusions of Law in accordance with rules 296 and 297 of the Texas Rules of Civil Procedure and sections 6.711, 153.258, and 154.130 of the Texas Family Code.

Findings of Fact - Divorce

1. JERILYN TRIJE ILIFF, Petitioner, and JAMES DERWOOD ILIFF, Respondent, were married on April 7, 1990.
2. At the time of the filing of this suit, JERILYN TRIJE ILIFF had been a domiciliary of Texas for six months and a resident of Hays County for ninety days.
3. The marriage of Petitioner and Respondent has become insupportable because of discord or conflict of personalities that destroys the legitimate ends of the marital relationship and prevents any reasonable expectation of reconciliation.

Findings of Fact - SAPCR

4. At the time of divorce, Petitioner and Respondent were the parents of the following children under the age of eighteen years:

Name: COLIN JAMES ILIFF
Sex: Male
Birth date: July 14, 1993

Name: CAITLYN TRIJE ILIFF
Sex: Female

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Birth date: January 3, 1997

Name: CALLIE MCKENZIE ILIFF

Sex: Female

Birth date: February 10, 2001

5. It is in the best interest of the children that JERILYN TRJE ILIFF be appointed the sole managing conservator of the children with those rights and duties granted in the decree, and that JAMES DERWOOD ILIFF be appointed the possessory conservator of the children.

Findings of Fact - Regarding Possession Order

6. The periods of possession between JAMES DERWOOD ILIFF and the minor children ordered in the Final Decree vary from the Standard Possession Order for the following reasons:

1. JAMES DERWOOD ILIFF has had very infrequent physical contact with the children since the separation of the parties on June 20, 2006, and the final hearing on the divorce. He has physically visited with the children approximately four (4) times in a period of almost twenty-two (22) months between the separation and the final hearing.

2. The parties, on June 8, 2007, reached a mediated settlement agreement on temporary orders that was later reduced to an order signed by the Court on June 12, 2007. Said mediated settlement agreement and order are part of the evidence in this case. In that mediated settlement agreement and temporary order, the parties were to participate in an interview with Dr. Caryl Dalton, a psychologist in Austin, Texas. After that interview, each party was required to participate in good faith in any further evaluation or testing recommended by Dr. Dalton and pay the cost of the same. The parties were to follow the recommendations of Dr. Dalton regarding visitation between JAMES DERWOOD ILIFF and the children after any recommended evaluation until further order of the Court. Dr. Dalton made no recommendation for further evaluation of JERILYN TRJE ILIFF and recommended

further evaluation of JAMES DERWOOD ILIFF.

3. The Court finds that on August 20, 2007, Dr. Dalton made a written recommendation that is part of the evidence in this case that JAMES DERWOOD ILIFF undergo both a neuropsychological examination and a neurological evaluation.

4. The Court finds that even though JAMES DERWOOD ILIFF eventually underwent the neurological examination, he repeatedly failed to undergo the neuropsychological evaluation that had been agreed to and ordered.

5. The parties entered into a Rule 11 Agreement in open court that was reduced to writing and filed with the Court on January 30, 2008, requiring JAMES DERWOOD ILIFF again to complete the evaluations recommended by Dr. Caryl Dalton. This Rule 11 Agreement was further set out in an Agreed Order of the Court entered on February 14, 2008. Said Rule 11 Agreement and Order are part of the evidence in this case.

6. The Court finds that even after having agreed to and been ordered twice to perform the neuropsychological evaluation, JAMES DERWOOD ILIFF refused again to participate in the examination by Dr. David Tucker of Austin, Texas, and went to trial without ever complying with the court ordered neuropsychological evaluation.

7. The Court further heard testimony from Dr. Caryl Dalton at trial, which included her recommendation regarding the need for a neuropsychological evaluation of JAMES DERWOOD ILIFF, the refusal of JAMES DERWOOD ILIFF to participate, and her recommendation regarding limited contact between JAMES DERWOOD ILIFF and the children until after the evaluation had been performed.

8. The Court finds from the evidence and testimony that JAMES DERWOOD ILIFF demonstrated a history of bizarre and unusual behavior in the presence of his wife and family. This included paranoid behavior in which JAMES DERWOOD

ILIFF believed his employer was monitoring him by satellite. The testimony further showed that during a hospitalization in May 2006, JAMES DERWOOD ILIFF had to be restrained for approximately five (5) days due to delusional behavior. The evaluation of Dr. Robert Izor, neurologist, which was admitted into evidence, reflected a diagnosis of paranoia along with a diagnosis of psychogenic movement disorder. The records further reflected that Dr. Izor recommended that JAMES DERWOOD ILIFF take anti-anxiety medication, which JAMES DERWOOD ILIFF refused.

Based upon the evidence of JAMES DERWOOD ILIFF's behavior while in possession of a firearm and from the testimony of Dr. Caryl Dalton, the Court further finds that JAMES DERWOOD ILIFF should not have returned to him the firearms currently in possession of his attorney, placed there by court order, until after completing the neuropsychological evaluation and further order of the Court.

9. Given evidence of the history of JAMES DERWOOD ILIFF's behavior, his repeated failure to obey the orders of the Court for a neuropsychological evaluation and the recommendations of Dr. Caryl Dalton, it is found that the standard possession order is not appropriate and not in the best interest of the children, and that the court ordered neuropsychological evaluation of JAMES DERWOOD ILIFF and restricted access to the minor children until its completion is in the best interest of the children.

Findings of Fact - Child Support

7. The Court has already entered a Statement on Child Support Guidelines signed and entered on April 25, 2008. A true and correct copy of which is attached hereto and incorporated herein.

8. The Court further finds:

1. the amount of child support ordered by the Court is in accordance with the percentage guidelines;

2. the amount of net resources available to JAMES DERWOOD ILIFF per month is \$3,662.09. This finding is based in part upon JAMES DERWOOD ILIFF's proven earnings shortly before the filing of the divorce, his educational background, his intentional unemployment or underemployment, JAMES DERWOOD ILIFF's earning potential, and the evidence presented at trial. JAMES DERWOOD ILIFF's own testimony at trial showed that he made in excess of \$100,000 in earnings in 2005, the year immediately prior to the filing of divorce. JAMES DERWOOD ILIFF testified at trial that he had left his employment voluntarily in December of 2005. He further testified that he was not disabled or unable to work and had plans to start his own business. JAMES DERWOOD ILIFF's monthly gross earning potential is found to be no less than \$5,000.00 per month. The cost of health insurance for the children paid by obligee, JERILYN TRIJE ILIFF, is found to be \$196.56 per month;

3. the amount of net resources available to obligee, JERILYN TRIJE ILIFF, per month is \$5,107.00, prior to paying her monthly expenses;

4. the amount of child support payments per month that is computed if the percentage guidelines of section 154.129 of the Texas Family Code are applied to the first \$6,000 of JAMES DERWOOD ILIFF's net resources that do not exceed the amount provided by Section 154.125(a) of the Texas Family Code, is \$1,098.63 plus \$196.56 reimbursement to obligee, JERILYN TRIJE ILIFF, for cost of health insurance for the children for three (3) children, \$915.52 child support plus \$196.56 reimbursement for health insurance for two (2) children, and \$732.42 child support plus \$196.56 reimbursement for health insurance for one (1) child (see attached calculation);

5. the percentage applied to the first \$6,000 of JAMES DERWOOD ILIFF's net resources for child support by the actual order rendered by the Court is thirty (30) percent for three (3) children.

Findings of Fact - Division of the Marital Estate

9. During the marriage, Petitioner and Respondent acquired the following property other than by gift or inheritance with the values shown:

1. Household furniture, furnishings, fixtures, goods, art objects, collectibles, appliances, and equipment, upon which no specific value is placed.
2. Clothing, jewelry, and other personal effects, upon which no specific value is placed.
3. The following retirement savings in husband's name:
 - a. the Fidelity Rollover IRA;
 - b. the Ashland LESOP; and
 - c. the Ashland Savings Plan.

The Court finds that the above-listed accounts have been in the sole possession and control of JAMES DERWOOD ILIFF throughout the marriage until the date of divorce and JAMES DERWOOD ILIFF has been the only person to withdraw funds from these accounts.

The Court finds that these accounts had the following values on the following dates near the date of separation of the parties on June 20, 2006:

a.	Fidelity Rollover IRA	\$127,445.20	on June 6, 2006
b.	Ashland LESOP	\$ 60,976.61	on October 16, 2006
c.	Air Products Chemicals Retirement Savings Plan	\$ 13,657.96	on June 30, 2006
	TOTAL	\$202,079.77	

The Court finds that said accounts, pursuant to information provided by JAMES DERWOOD ILIFF, had been reduced to the following amounts by February 5, 2008, shortly before trial:

a.	Fidelity Rollover IRA	\$ 51,894.18
b.	Ashland LESOP	\$ 46,975.29

c. Air Products Chemicals Retirement Savings Plan \$.33

TOTAL \$ 98,869.80

The Court further finds that the total value of said account at the time of trial was \$92,760, according to evidence provided by JAMES DERWOOD ILIFF at trial.

4. The Court finds the following vehicles and equipment are in husband's possession with the following values assigned to each:

- a. 2001 Dodge 2500 Duramax Diesel 4 X 4 3/4 ton pickup (no debt) \$ 19,300
- b. 2003 HST Kabota Tractor (no debt) \$ 14,000
- c. 2003 16 Ft. Flatbed Trailer (no debt) \$ 300

5. Certain term life insurance policies making the life of each party with no cash value.

6. The following vehicle in wife's possession:

- a. 2001 Ford Expedition with over 150,000 miles: Value \$5,000 (no debt)

7. A retirement 401(k) in wife's name with a value of: \$ 8,632

8. The following real property:

The home and real property located at:

130 Elm Hollow, San Marcos, Hays County, Texas, consisting of two (2) lots, and further described as follows:

Lot One (1), Resubdivision of the JOHNS TRACT, in THE SETTLEMENT IN SAN MARCOS, TEXAS, A Subdivision in Hays County, Texas, according to the map or plat of said Resubdivision, of record in Volume 5, page 262, Plat Records of Hays County, Texas; AND

Lot Two (2), Resubdivision of the JOHNS TRACT, in THE SETTLEMENT AT SAN MARCOS, TEXAS, A Subdivision in Hays County, Texas, according to the map or plat of said Resubdivision, of record in Volume 5, page 262, Plat Records of Hays County, Texas.

Said property is found to have a value of \$247,000, before deducting the debt owed against said property.

It is found that said real property has two outstanding mortgages owed against it, to wit:

- 1) A lien note to Chase Bank with an outstanding balance of approximately \$94,526 at the time of divorce; and
- 2) A lien note owed to Bank of America with an outstanding balance of approximately \$51,629 at the time of divorce.

The equity in said property at the time of divorce is found to be \$100,845.

9. The following real property:

501 Winding Trail, Wimberley, Hays County, Texas, consisting of approximately 6 acres, and further described as:

Lot 603, River Mountain Ranch, Phase 1,
Section 6, Wimberley, Hays County, Texas

Said property is found to have a value of \$140,000 at the time of the divorce.

The outstanding balance owed on said property at the time of the divorce is found to be approximately \$18,000.

The net equity in said property at the time of the divorce is found to be approximately \$122,000.

10. The following are liabilities of the community estate:

1. Husband's attorney's fees.
2. Wife's attorney's fees.
3. Medical bills for treatment rendered to husband.
4. Bank of America VISA.
5. Indebtedness incurred by JAMES DERWOOD ILIFF to construct fences and corral on property at 501 Winding Trail, Wimberley.
6. Cost of neuropsychological evaluation of JAMES DERWOOD ILIFF.
7. Any real property taxes on the real property located at 501 Winding Trail, Wimberley, Texas and 130 Elm Hollow, San Marcos, Texas.
8. Any indebtedness incurred individually by a party since separation June 20, 2006.

Texas found to be approximately \$18,000.

Division of the Marital Estate - Factors Considered in Just and Right Division

11. The Court took into consideration the following factors in making a determination of a just and right division:

- a. fault in the breakup of the marriage;
- b. fraud on the community;
- c. benefits the innocent spouse may have derived from the continuation of the marriage;
- d. the spouse to whom conservatorship of the children is granted;
- e. needs of the children of the marriage;
- f. community indebtedness and liabilities;
- g. wasting of community assets by the Respondent;
- h. attorney's fees to be paid;
- i. increased costs in the litigation of this case resulting from Respondent's repeated violation of the orders of this Court;
- j. Respondent's violation of the standing order of this Court regarding expenditures during the pending of the divorce, including monies spent by Respondent on the construction of a fence and corral on the acreage at 501 Winding Trail, Wimberley, Texas;
- k. Respondent's failure to adequately provide for the support of the children during the pendency of the divorce; and

1. undue financial burden placed upon the Petitioner to support the family and pay necessary expenditures during the pendency of the divorce.

Findings of Fact as Conclusions of Law

12. Any finding of fact that is a conclusion of law shall be deemed a conclusion of law.

Conclusions of Law - Divorce

1. The Original Petition for Divorce filed by JERILYN TRIJE ILIFF is in due form and contains all the allegations required by law.
2. This Court has jurisdiction of the parties, of the children, and of the subject matter of this case.
3. All legal prerequisites to granting a divorce have been met.
4. The divorce is granted on the ground of insupportability.

Conclusions of Law - Conservatorship

5. JERILYN TRIJE ILIFF should be named sole managing conservator of COLIN JAMES ILIFF, CAITLYN TRIJE ILIFF, and CALLIE MCKENZIE ILIFF, and JAMES DERWOOD ILIFF should be named possessory conservator of COLIN JAMES ILIFF, CAITLYN TRIJE ILIFF, and CALLIE MCKENZIE ILIFF, with each having the rights and duties set out in the Decree of Divorce.

Conclusions of Law - Possession/Supervised Possession

6. JAMES DERWOOD ILIFF is entitled to telephone contact and supervised periods of possession with COLIN JAMES ILIFF, CAITLYN TRIJE ILIFF, and CALLIE MCKENZIE ILIFF under the terms and conditions set forth in the order. JAMES DERWOOD ILIFF is ordered to complete the neuropsychological evaluation as set forth in the Decree of Divorce.

Conclusions of Law - Child Support

7. JAMES DERWOOD ILIFF should pay child support to JERILYN TRIJE ILIFF beginning June 1, 2008 in the amount of \$1,295.19 per month when support is owed for three children, in the amount of \$1,112.08 per month when support is owed for two children, and in the

amount of \$928.98 per month when support is owed for one child. Said child support includes reimbursement to JERILYN TRIJE ILIFF of \$196.56 per month for the cost of health insurance for the minor children.

Conclusions of Law - Division of Marital Estate - Property Agreements

8. The division of the property of Petitioner and Respondent effected by the final judgment is just and right, taking into consideration the factors listed herein, having due regard for the rights of each party and the children of the marriage, irrespective of the characterization of any item of property as either community or separate.

SIGNED on June 2, 2008.



JUDGE PRESIDING

APPROVED AS TO FORM ONLY:

SCANIO & SCANIO
A Professional Corporation

BY: 

MICHAEL SCANIO
144 E. San Antonio Street
San Marcos, Texas 78666
Tel: (512) 396-2016
Fax: (512) 353-2984
State Bar No. 17702300

Attorneys for Petitioner

Not Reported in S.W.3d, 2009 WL 2195559 (Tex.App.-Austin)
(Cite as: 2009 WL 2195559 (Tex.App.-Austin))

HOnly the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND
SIGNING OF OPINIONS.

MEMORANDUM OPINION

Court of Appeals of Texas,
Austin.
James Derwood ILIFF, Appellant
v.
Jerilyn Trije ILIFF, Appellee.
No. 03-08-00382-CV.

July 21, 2009.

West KeySummary

Child Support 76E ↪88

76E Child Support

76EIII Factors Considered

76EIII(B) Factors Relating to Custodians and Obligors

76Ek86 Income

76Ek88 k. Voluntary Unemployment or Underemployment. Most Cited Cases

A trial court's findings in calculating child support in a divorce proceeding that the father's net available monthly resources were \$3,662.09 and that he was intentionally unemployed or underemployed were supported by sufficient evidence. The father, who had been diagnosed by one doctor as having paranoia and psychogenic movement disorder, but who had refused medication, testified that he was not disabled and that no doctor told him that he could not work. He further testified that he voluntarily quit his job in January 2006, which paid over \$100,000 per year. V.T.C.A., Family Code § 154.066.

From the District Court of Hays County, 22nd Judicial District No. 06-1108, William Henry, Judge Presiding, Thomas M. Michel, Griffith, Jay & Michel, LLP, Fort Worth, TX, for Appellant.

Frank B. Suhr Jr., New Braunfels, TX, for Appellee.

Before Justices PATTERSON, PEMBERTON and

WALDROP.

MEMORANDUM OPINION

IAN P. PATTERSON, Justice.

*1 Appellant James Derwood Iliff ("James") seeks review of the trial court's judgment entering a final decree of divorce from appellee Jerilyn Trije Iliff ("Jerilyn"). In three issues, James contends that the trial court abused its discretion in entering the final divorce decree by ordering child support payments in excess of the statutory guidelines, by ordering an unfair division of the marital estate, and by failing to appoint James as joint managing conservator with standard periods of unsupervised possession. Because we conclude there was no error in the trial court's judgment, we affirm.

BACKGROUND

James and Jerilyn were married on April 7, 1990. Three children were born of their marriage: C.J., a son, on July 14, 1993, C.T., a daughter, on January 3, 1997, and C.M., a daughter, on February 10, 2001. Jerilyn filed for divorce on June 28, 2006. After a trial to the bench, the trial court entered a final decree of divorce on May 5, 2008.

The district court heard evidence that throughout most of the marriage, James worked in the chemical industry and was the "primary bread winner" of the family, earning between \$90,000 to \$100,000 per year.^{FN1} From the time they were married until 1998, Jerilyn worked at various rehabilitation centers in Dallas, Houston, and Austin. In 1998, Jerilyn quit her job as a supervisor at St. David's to stay home with the children. The following year, Jerilyn returned to work part-time at St. Stephen's Episcopal School where the children attended school. Although her salary was substantially less than James's, Jerilyn received a tuition subsidy to help defray the cost of the children's attendance at St. Stephen's.

^{FN1} James held a bachelor's degree and a masters degree of business administration, and he had worked for 20 years in the chemical industry as a technical specialist, a chemical specialist, and ultimately an account manager.

Not Reported in S.W.3d, 2009 WL 2195559 (Tex.App.-Austin)
 (Cite as: 2009 WL 2195559 (Tex.App.-Austin))

In 2005, James's company, Ashland Chemicals, Inc., was sold to Air Products and Chemicals, Inc. Later that year, James began hearing voices and saying that "people were watching us, that people were intercepting faxes from our home." He began to be more verbally abusive to Jerilyn and the children. Without explanation, on January 1, 2006, James quit his job with Air Products.

When James quit his job, Jerilyn obtained additional work to help pay the family's expenses. Jerilyn testified that she began working "approximately 50 hours a week" at three more jobs. Jerilyn testified that she began working as a PRN Therapist for Deer Creek Nursing Center and Brown Carnie, and that she also worked for Wimberley Home Health Care and as the after-school coordinator at St. Stephen's School, so that she could "get a break on those costs." The record reflects that from January 1, 2006, through September 2006, James made several withdrawals from his retirement accounts totaling \$85,000 to help the family meet its expenses. The parties agree that part of this money was used to pay off the liens on Jerilyn's Ford Expedition and James's truck and the lien on a Kubota tractor; however, the record reflects that the total value of these notes was approximately \$45,000 and the remaining \$40,000 was unaccounted for by James.

*2 Jerilyn testified that, after he quit his job, James's behavior became erratic and irrational. He began talking about people listening to his telephone conversations, intercepting his faxes, and spying on him through the skylights. Jerilyn testified that James bought a .357 Magnum pistol because he thought that people were spying on him. Jerilyn averred that James's drinking became excessive and that she found empty tequila bottles in the closet. Jerilyn testified that James bought another gun and was sleeping excessively, did not bathe or change his clothes regularly, and was not brushing his teeth or "doing general hygiene." Jerilyn testified that there were occasions when she left the children at home with James to go to home health care appointments for her job and that, when she returned home, she would find James asleep in a locked office downstairs.

Jerilyn also testified that, one day in May 2006, the family was attending one of her daughter's dance lessons and that she and James got into an argument about his treatment of their son. That evening James became very ill, as if he had a stomach virus, and he was sick all night. The next day, Jerilyn came home to find him hallucinating downstairs

and saying that there was a man in a black hat. Jerilyn took him to the hospital, and he was admitted to the intensive care unit where he stayed for five days. Jerilyn testified that the hospital had to restrain James because of his paranoid behavior and that they administered anti-psychotic medication to calm him down.

Jerilyn filed for divorce in June 2006. Although Jerilyn and the children left the family home briefly so that Jerilyn could spend time with her father, who was dying of prostate cancer, the parties worked out an agreement under which James left and Jerilyn and the children returned to the family home before school started in the fall of 2006. From the time he left in the fall of 2006 until the trial in the spring of 2008, the record reflects that James saw his children only four times. The parties dispute whether James made additional attempts to see his children, but they did reach an agreement that the children would call him once a week during the hours of 6:00 p.m.-8:00 p.m. on Wednesdays. James testified that he was traveling and trying to start his business and, therefore, he was not able to see his children on a regular basis. But he also testified that he was in central Texas at his property in Wimberley approximately once a month.

The record reflects that James lived primarily with his mother in the Dallas area from the fall of 2006 until trial in 2008. The record also reflects that James was hospitalized three more times during that period of time, but that the doctors found nothing physically wrong with him other than severe dehydration.

In 2007, the parties reached a mediated settlement agreement on temporary orders that was later reduced to a signed court order requiring the parties to participate in an interview with Dr. Caryl Dalton, a psychologist in Austin, Texas. After that interview, the parties were also required to participate in any further evaluation or testing recommended by Dr. Dalton. As part of that court order, the parties were required to follow the recommendations of Dr. Dalton regarding visitation between James and the children pending further court order. After conducting the interview, Dr. Dalton made no further recommendation for evaluation of Jerilyn, but she recommended that James undergo both a neuropsychological exam and a neurological evaluation.

*3 Although James underwent the neurological evaluation, he never obtained a neuropsychological exam, despite two additional court orders that he do so. The neurological

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evaluation was conducted by Dr. Robert Izor and was admitted into evidence at trial. Dr. Izor's evaluation reflected a diagnosis of paranoia and psychogenic movement disorder and recommended treatment with an anti-depressant or anti-anxiety medication, which James refused.

Based on his erratic behavior and repeated failure to comply with court orders for a neuropsychological exam, as well as the recommendations of Dr. Dalton, the court found that the standard possession order as contemplated in the family code was not appropriate and was not in the best interest of the children. Accordingly, the court named Jerilyn as sole managing conservator with James as possessory conservator. But the court restricted James's access to the children until he completed the required neuropsychological exam.

With regard to child support, the trial court found that James was intentionally unemployed or underemployed as a result of his own choosing. Although there was testimony and evidence in the record from three doctors, including Dr. Dalton, Dr. Izor, and Dr. James Williams, who had evaluated or treated James between the time Jerilyn filed for divorce up until trial, none of these doctors testified that there was any reason that James could not obtain gainful employment. James's mother Cynthia Iliff testified that he could not stand for long periods of time because of a martial arts injury that he had suffered just prior to Jerilyn's filing for divorce and that this injury affected his gait, but none of the witnesses at trial testified that this injury would prevent James from working.

James testified that he was not disabled and that he had tried to start his own tractor business. James testified that his doctors ran extensive tests on him and found nothing wrong with his heart and that he had never been told by a doctor that he suffers from a condition that prevents him from working. He testified that his income from his tractor business was \$1,287 in 2006 and about \$1,200 in 2007. James also testified that he made about \$1,200 "in the past two years" doing business management consulting.

Although his income was minimal, the record reflects that James had been paying \$251.33 in child support for six months prior to trial. James testified that he had contracted for a fence and horse corral totaling \$6,480^{FN2} to be built

on the Wimberley property in violation of a court order. And he testified that he had been paying "[a] couple of hundred dollars a month" towards the note on the Wimberley property as well as the annual taxes of \$1,200 to \$1,500 per year. When asked where he obtained the money to pay for these expenses, James testified, "It's coming from my savings."

FN2. James testified that the estimated cost for the fence was \$4,600 and the estimated cost for the horse corral was \$1,880. He also testified that he paid \$2,300 down for the contractor to start the job.

In addition to the \$85,000 he withdrew from his retirement accounts in 2006, the record reflects that James withdrew an additional \$20,000 in 2007 to pay his lawyers. The record also reflects that the total balance of James's retirement accounts was \$202,079.77 as of June 20, 2006, and that this balance had been reduced to \$98,869.80 as of February 5, 2008, and was further reduced to \$92,760 at the time of trial. Although James testified that he was the only person with access to his retirement accounts, he provided no explanation for the approximately \$100,000 decrease in his retirement account balance from June 2006 until trial in 2008 other than to say it was based on market fluctuations.^{FN3}

FN3. This \$100,000 decrease included the \$10,000 withdrawal in September 2006 and the \$20,000 withdrawal in 2007.

*4 Based on his proven income shortly before the divorce, the trial court determined that James's gross monthly earning potential was \$5,000.00 and that his net available resources were \$3,662.09 per month. Accordingly, the trial court awarded child support of \$1,098.63, plus \$196.56 health insurance reimbursement, per month for three children; \$915.52 child support, plus \$196.56 health insurance reimbursement, per month for two children; and \$732.42 child support, plus \$196.56 health insurance reimbursement, per month for one child.

As part of its final divorce decree, the trial court also divided the marital estate. The trial court awarded the following property to Jerilyn:

\$5,000: 2001 Ford Expedition
 \$8,632: Jerilyn's 401(k) account

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- \$100,000: Net value of the residence located at 130 Elm Hollow, San Marcos, Texas
- \$12,992: Net proceeds off the top of the sale of property located at 501 Winding Trail, Wimberley, Texas
- \$65,404: 60% of the net proceeds of the sale of property located at 501 Winding Trail, Wimberley, Texas
- \$11,400: Personal property and furniture

to Jerilyn:

The final divorce decree also assigned the following debts

- \$94,526: The balance due on the first mortgage for the property located at 130 Elm Hollow, San Marcos, Texas
- \$51,629: The balance due on the second mortgage for the property located at 130 Elm Hollow, San Marcos, Texas
- \$38,148: Attorney's Fees

The trial court awarded the following property to James:

- \$98,896: James's 401(k) accounts
- \$19,300: 2001 Dodge 2500 Duramax Diesel 4X4 Truck
- \$14,000: 2003 HST Kubota Tractor
- \$300: 2003 16' flatbed trailer
- \$43,603: 40% of the net proceeds of the sale of property located at 501 Winding Trail, Wimberley, Texas

The final divorce decree also assigned the following debts

to James:

- \$3,755: Balance owing on Visa account
- \$4,070: Balance owing on fence and corral construction
- \$17,000: Balance owing on medical bills

The trial court signed and entered the final divorce decree on May 5, 2008. ^{FN4} Pursuant to James's request, the trial court entered findings of fact and conclusions of law on June 3, 2008. This appeal followed.

which was filed on April 25, 2008.

DISCUSSION

In three issues on appeal, James complains that the trial court abused its discretion when it entered the final decree

FN4. Also included in the record before us is the trial court's statement on child support guidelines,

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of divorce. First, James argues that the trial court abused its discretion by ordering him to pay child support to Jerilyn in excess of the statutory guidelines. Second, James argues that the trial court abused its discretion when it ordered an unfair division of the marital estate. Finally, James argues that the trial court abused its discretion by failing to appoint him as joint managing conservator with standard periods of unsupervised possession. Jerilyn counters that there was no abuse of discretion and urges this Court to affirm the trial court's final decree of divorce.

Standard of Review

*5 With regard to the issues of child support, division of the marital estate, and child custody, possession, and visitation raised by James on appeal, we review the trial court's decisions on such matters for abuse of discretion. See Worford v. Stamper, 801 S.W.2d 108, 109 (Tex.1990) (child support); Murff v. Murff, 615 S.W.2d 696, 698-99 (Tex.1991) (division of marital estate); Gillespie v. Gillespie, 644 S.W.2d 449, 451 (Tex.1982) (child custody, control, possession, and visitation). A trial court's order on child support will not be disturbed on appeal unless the complaining party demonstrates that the order constituted a clear abuse of the trial court's discretion. Worford, 801 S.W.2d at 109. Absent a clear abuse of discretion, an appellate court will not disturb a trial court's division of property. Murff, 615 S.W.2d at 698-99; Bell v. Bell, 513 S.W.2d 20, 22 (Tex.1974). And we give wide latitude to the trial court's determinations on custody, control, possession, and visitation. Gillespie, 644 S.W.2d at 451.

As a general rule, a trial court abuses its discretion when it acts arbitrarily or unreasonably or without reference to guiding rules and principles. Worford, 801 S.W.2d at 109; see also Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241-42 (Tex.1985). The fact that a trial court may decide a matter within its discretionary authority differently than an appellate court in similar circumstances does not demonstrate an abuse of discretion. Downer, 701 S.W.2d at 242. When reviewing matters committed to the trial court's discretion, we may not substitute our judgment for that of the trial court. Bowie Mem'l Hosp. v. Wright, 79 S.W.3d 48, 52 (Tex.2002). There is no abuse of discretion if some probative and substantive evidence supports the trial court's order. Zeifman v. Michels, 212 S.W.3d 582, 587 (Tex.App.-Austin 2006, pet. denied); McGuire v. McGuire, 4 S.W.3d 382, 384 (Tex.App.-Houston [1st Dist.] 1999, no pet.).

Under an abuse of discretion standard, legal and factual sufficiency challenges to the evidence are not independent grounds of error, but are relevant factors in assessing whether the trial court abused its discretion. Zeifman, 212 S.W.3d at 587; In re D. M., 191 S.W.3d 381, 393 (Tex.App.-Austin 2006, pet. denied); Dunn v. Dunn, 177 S.W.3d 393, 396 (Tex.App.-Houston [1st Dist.] 2005, pet. denied). Because we apply an abuse-of-discretion standard to the issues raised by James on appeal, the traditional sufficiency standards of review overlap the abuse of discretion standard, and we employ a hybrid analysis. See Zeifman, 212 S.W.3d at 587-88; see also Echols v. Olivarez, 85 S.W.3d 475, 476-77 (Tex.App.-Austin 2002, no pet.); In re D.S., 76 S.W.3d 512, 516 (Tex.App.-Houston [14th Dist.] 2002, no pet.). We engage in a two-pronged inquiry asking first, whether the trial court had sufficient information upon which to exercise its discretion, and second, whether the trial court erred in its application of discretion. Zeifman, 212 S.W.3d at 588. A traditional sufficiency review comes into play with regard to the first question, and we must then determine whether, based on the evidence, the trial court's decision was reasonable. *Id.*

*6 In an appeal after a bench trial in which the trial court entered findings of fact and conclusions of law, the trial court's findings have the same weight as a jury verdict. In re K.R.P., 80 S.W.3d 669, 673 (Tex.App.-Houston [1st Dist.] 2002, pet. denied). When challenged, we review the trial court's findings for legal and factual sufficiency. *Id.*

We will sustain a legal sufficiency challenge when (1) the record discloses a complete absence of evidence of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a mere scintilla; or (4) the evidence establishes conclusively the opposite of a vital fact. Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 334 (Tex.1998). In determining whether there is legally sufficient evidence to support the finding under review, we examine the record for evidence and inferences that support the challenged finding, considering evidence favorable to the finding if a reasonable factfinder could, and disregarding evidence contrary to the finding unless a reasonable factfinder could not. City of Keller v. Wilson, 168 S.W.3d 802, 827-28 (Tex.2005). We will not substitute our judgment for that of the factfinder if the evidence falls in the zone of reasonable disagreement. *Id.* at 822. If there is any evidence of probative force to support the finding-i.e., more than a scintilla-we will uphold the finding and overrule the legal sufficiency challenge. Wal-Mart

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Stores, Inc. v. Miller, 102 S.W.3d 706, 709 (Tex.2003) (per curiam).

In determining a question of factual sufficiency, we weigh and consider all of the evidence in the record. See Cain v. Bain, 709 S.W.2d 175, 176 (Tex.1986). We will sustain a factual sufficiency challenge and “set aside the verdict only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust.” See *id.*

In a case tried to the bench, the trial court is the “sole judge of the credibility of the witnesses and the weight to be given their testimony.” McGalliard v. Kuhlmann, 722 S.W.2d 694, 696 (Tex.1986). The trial court may believe one witness, disbelieve others, and resolve inconsistencies in any witness's testimony. *Id.* at 697.

Child Support

In his first issue, James complains that the trial court abused its discretion by awarding child support in excess of the statutory guidelines. James complains that there is no evidence to support the trial court's findings that his net available monthly resources were \$3,662.09 and that he was intentionally unemployed or underemployed.

The evidence at trial showed that James had a bachelor's degree and a master's degree in business administration, that he had worked for almost twenty years in the chemical industry, and that he quit his job that paid \$102,000 a year at the end of January 2006. With regard to his ability to work, James testified that he was not disabled and that no doctor had told him that he could not work. He further testified that, after quitting his job, he tried to start his own tractor business and that he received about \$1,287 in 2006 and about \$1,200 in 2007. He also testified that he received about \$1,200 “in the past two years” from business management consulting. Based on this evidence, the trial court entered the following findings of fact with regard to child support:

*77. The Court has already entered a Statement on Child Support Guidelines signed and entered on April 25, 2008. A true and correct copy of which is attached hereto and incorporated herein.

8. The Court further finds:

1. [T]he amount of child support ordered by the court is in

accordance with the percentage guidelines;

2. [T]he amount of net resources available to JAMES DERWOOD ILIFF per month is \$3,662.09. This finding is based in part upon JAMES DERWOOD ILIFF's proven earnings shortly before the filing of the divorce, his educational background, his intentional unemployment or underemployment, JAMES DERWOOD ILIFF's earning potential, and the evidence presented at trial. JAMES DERWOOD ILIFF's own testimony at trial showed that he made in excess of \$100,000 in earnings in 2005, the year immediately prior to the filing of divorce. JAMES DERWOOD ILIFF testified at trial that he had left his employment voluntarily in December of 2005. He further testified that he was not disabled or unable to work and plans to start his own business. JAMES DERWOOD ILIFF's monthly gross earning potential is found to be no less than \$5,000 per month....

The paramount principle guiding our review of the trial court's determination on child support is the best interest of the child. See Rodriguez v. Rodriguez, 860 S.W.2d 414, 417 n. 3 (Tex.1993); Hollifield v. Hollifield, 925 S.W.2d 153, 155 (Tex.App.-Austin 1996, no writ). The trial court's determination on child support is governed by chapter 154 of the family code. See Tex. Fam.Code Ann. §§ 154.001-.309 (West 2008). Particularly applicable in this case, section 154.066 of the family code allows a trial court to apply the child support percentage guidelines based upon earning potential if the actual income of the obligor is significantly less than what the obligor could earn because of intentional unemployment or underemployment. *Id.* § 154.066; ^{FN5} In re Striegler, 915 S.W.2d 629, 638 (Tex.App.-Amarillo 1996, writ denied). A parent with the ability to find gainful employment cannot evade his support obligation by voluntarily remaining unemployed or underemployed. McLane v. McLane, 263 S.W.3d 358, 362 (Tex.App.-Houston [1st Dist.] 2008, pet. denied); Tenery v. Tenery, 955 S.W.2d 337, 340 (Tex.App.-San Antonio 1997, no pet.).

FN5. 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 to the earning potential of the obligor.

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Tex. Fam.Code Ann. § 154.066 (West 2008).

The 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 per month. James testified that he was not disabled and that he voluntarily quit his job in January 2006, which paid over \$100,000 per year. We conclude there was no abuse of discretion in the trial court's decision to apply the percentage guidelines based on James's earning potential. See Tex. Fam.Code Ann. § 154.066; see also McLane, 263 S.W.3d at 362; Tenery, 955 S.W.2d at 340.

We likewise reject James's argument that the trial court was required to find that his voluntary unemployment was for the primary purpose of avoiding child support before setting child support based upon his earning potential as opposed to his actual income. In support of this argument, James relies on the holdings of our sister courts of appeals in McLane, 263 S.W.3d at 362, and In re P.J.H., 25 S.W.3d 402, 405-06 (Tex.App.-Fort Worth 2000, no pet.). But this Court has declined to adopt the reasoning of our sister courts. In Hollifield v. Hollifield, finding that unemployment was but one of myriad factors a court could consider when exercising its broad discretion to determine child support obligations, this Court held that "[s]ection 154.066 does not require the court to consider whether the obligor's 'voluntary unemployment' was for the primary purpose of avoiding child support." 925 S.W.2d at 156. This Court's holding in Hollifield is consistent with the plain language of section 154.066, and we decline to revisit that holding here. We overrule James's first issue.

Division of Marital Estate

*8 In his second issue, James complains that the trial court abused its discretion in making an unjust division of the marital estate. James's complaint that the trial court's division was unjust is based primarily upon the trial court's use of the appraised value provided by Jerilyn's expert, Stephen Flynn, for the property located at 130 Elm Hollow, San Marcos, Texas—the parties' primary residence before the divorce. In contrast to the appraised value provided by Mr. Flynn, James presented the testimony of his own expert witness, Randy Posey, who appraised the property in question at a higher value than Mr. Flynn.

Mr. Flynn testified at trial that he conducted an appraisal of the property located at 130 Elm Hollow and that, as of November 3, 2006, the property value was \$247,000. He

further testified that the values of properties in that area had appreciated approximately 5% between the date of his original appraisal and the trial in 2008. In addition to Mr. Flynn's testimony, Mr. Posey testified that he conducted an appraisal of the same property and that the value as of December 8, 2006, was \$275,000. Mr. Posey also testified that he updated his appraisal just before trial and, at that time, the value would have been \$285,000 based upon more recent comparable sales. Mr. Posey testified that the increase in value from 2006 to 2008 was approximately 3.6%. He further testified that the difference between his appraised value and that of Mr. Flynn was based primarily on the difference in their original appraisals in 2006, and not the appreciation between 2006 and 2008.

A trial court is obligated to make a just and right division of the marital estate in rendering a final decree of divorce. See Tex. Fam.Code Ann. § 7.001 (West 2008); ^{FN6} O'Carolan v. Hopper, 71 S.W.3d 529, 532 (Tex.App.-Austin 2002, no pet.). A just and right division must have due regard for the rights of each party and their children. See Tex. Fam.Code Ann. § 7.001; Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 139 & nn. 1-2 (Tex.1977). Although a trial court need not divide the community estate equally, its division must be equitable. O'Carolan, 71 S.W.3d at 532; Schuster v. Schuster, 690 S.W.2d 644, 645 (Tex.App.-Austin 1985, no writ).

FN6. Section 7.001 of the family code states:

In a decree of divorce or annulment, the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.

Tex. Fam.Code Ann. § 7.001 (West 2008).

Based on the evidence in the record, we conclude there was no abuse of discretion in the trial court's division of the marital estate. The evidence showed that in 2006 James withdrew \$85,000 from his retirement accounts, which were part of the community estate, but that he could only account for approximately \$45,000 of these withdrawals even though he testified that he was the only person with access to his retirement accounts.^{FN7} In addition to the failure to account for the full amount of these withdrawals, James provided no explanation for the approximate \$100,000 decrease in the balance of his retirement accounts from June 2006 until the time of trial in 2008 other

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than to say that it was based on market fluctuations.^{FN8} The trial court was free to consider all of this evidence, or the lack thereof, in making a just and right division of the marital estate. *See* Tex. Fam.Code Ann. § 7.001.

FN7. Jerilyn testified that \$45,000 of the \$85,000 in withdrawals was used to pay off the liens on James's vehicle, Jerilyn's vehicle, and the Kubota tractor awarded to James in the final divorce decree. In contrast, James testified that the total value of these three liens was \$28,000 and that he used the remaining \$60,000 to pay bills, living expenses, property taxes, and income taxes. Regardless of whether the trial court accepted Jerilyn's or James's testimony on the value of these liens, there remains a substantial portion of the withdrawals that was unaccounted for.

FN8. The trial court found that the total balance in James's three retirement accounts was \$202,097.77 on June 20, 2006, and that the value of those same accounts had been reduced to \$98,869.80 on February 5, 2008, shortly before trial. Of this \$100,000 decrease, James testified only to his \$10,000 withdrawal in September 2006 and his \$20,000 withdrawal in 2007. There was no evidence or explanation beyond James's statement of "market fluctuations" to account for the remaining decrease.

*9 In making its determination of a just and right division, the trial court stated that it took the following factors into account:

- a. fault in the breakup of the marriage;
- b. fraud on the community;
- c. benefits the innocent spouse may have derived from the continuation of the marriage;
- d. the spouse to whom conservatorship of the children is granted;
- e. needs of the children of the marriage;
- f. community indebtedness and liabilities;
- g. wasting of community assets by [James];

- h. attorney's fees to be paid;
- i. increased costs of the litigation of this case resulting from [James]'s repeated violation of the orders of this Court;
- j. [James]'s violation of the standing order of this Court regarding expenditures during the pending of the divorce, including monies spent by [James] on the construction of a fence and corral on the acreage at 501 Winding Trail, Wimberley, Texas;
- k. [James]'s failure to adequately provide for the support of the children during the pendency of the divorce; and
- l. undue financial burden placed upon [Jerilyn] to support the family and pay necessary expenditures during the pendency of the divorce.^{FN9}

FN9. To the extent James argues that the trial court's consideration of these factors was irrelevant, or that there was no evidence in the record to support the trial court's consideration of these factors, we find his argument to be without merit. The record reflects that James voluntarily quit his six-figure job and that this unilateral decision led to the break-up of the marriage. The record further reflects that James's decision placed an undue financial burden on Jerilyn's ability to support the family and pay expenses during the pending divorce. James testified that he was not disabled or unable to work and that he spent \$40,000 of the community funds in his retirement accounts to pay his attorney's fees. The evidence in the record also reflects that James repeatedly violated the trial court's orders, withdrew and spent community funds without accounting for such expenditures, and thereby failed to adequately provide for the support of his children during the pending divorce. We therefore conclude that the record supports the trial court's consideration of the enumerated factors in making a just and right division of the marital estate.

In making its determination of a just and right division of the marital estate, the trial court was the sole judge of the witness's credibility and the weight to be given that testimony. *McGalliard*, 722 S.W.2d at 696. And the trial court was free to accept or reject the testimony of each witness in

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whole or in part and to resolve any inconsistencies in the testimony. *Id.* at 697. The trial court thus acted within its discretion to accept the testimony of Mr. Flynn and reject the testimony of Mr. Posey when making a just and right division of the marital estate. Because there is probative and substantive evidence in the record that supports the trial court's order, we conclude there was no abuse of discretion in the trial court's division of the marital estate. See *Zeifman*, 212 S.W.3d at 587; *McGuire*, 4 S.W.3d at 384. We overrule James's second issue.

Child Custody and Possession

In his third and final issue, James complains that the trial court abused its discretion in failing to appoint him as joint managing conservator with periods of standard unsupervised possession. James's argument is based primarily upon the rebuttable presumption in section 153.131 of the family code that the appointment of both parents as joint managing conservators is in the best interest of the children. See Tex. Fam.Code Ann. § 153.131(b) (West 2008).

The trial court entered the following findings of fact with regard to possession and conservatorship:

5. It is in the best interest of the children that JERILYN TRIJE ILIFF be appointed the sole managing conservator of the children with those rights and duties granted in the decree, and that JAMES DERWOOD ILIFF be appointed the possessory conservator of the children.

* * *

6. The periods of possession between JAMES DERWOOD ILIFF and the minor children ordered in the Final Decree vary from the Standard Possession Order for the following reasons:

*10 1. JAMES DERWOOD ILIFF has had very infrequent physical contact with the children since the separation of the parties on June 20, 2006, and the final hearing on the divorce. He has physically visited with the children approximately four (4) times in a period of almost twenty-two (22) months between the separation and the final hearing.

2. The parties on June 8, 2007, reached a mediated settlement agreement on temporary orders that was later reduced to an order signed by the Court on June 12,

2007. Said mediated settlement agreement and order are part of the evidence in this case. In that mediated settlement agreement and temporary order, the parties were to participate in an interview with Dr. Caryl Dalton, a psychologist in Austin, Texas. After that interview, each party was required to participate in good faith in any further evaluation or testing recommended by Dr. Dalton and pay the cost of the same. The parties were to follow the recommendations of Dr. Dalton regarding visitation between JAMES DERWOOD ILIFF and the children after any recommended evaluation until further order of the Court. Dr. Dalton made no recommendation for further evaluation of JERILYN TRIJE ILIFF and recommended further evaluation of JAMES DERWOOD ILIFF.

3. The Court finds that on August 20, 2007, Dr. Dalton made a written recommendation that is part of the evidence in this case that JAMES DERWOOD ILIFF undergo both a neuropsychological examination and a neurological evaluation.

4. The Court finds that even though JAMES DERWOOD ILIFF eventually underwent the neurological examination, he repeatedly failed to undergo the neuropsychological evaluation that had been agreed to and ordered.

5. The parties entered into a Rule 11 Agreement in open court that was reduced to writing and filed with the Court on January 30, 2008, requiring JAMES DERWOOD ILIFF again to complete the evaluations recommended by Dr. Caryl Dalton. This Rule 11 Agreement was further set out in an Agreed Order of the Court entered on February 14, 2008. Said Rule 11 Agreement and Order are part of the evidence in this case.

6. The Court finds that even after having agreed to and been ordered twice to perform the neuropsychological evaluation, JAMES DERWOOD ILIFF refused again to participate in the examination by Dr. David Tucker of Austin, Texas, and went to trial without ever complying with the court ordered neuropsychological evaluation.

7. The Court further heard testimony from Dr. Caryl Dalton at trial, which included her recommendation regarding the need for a neuropsychological evaluation of JAMES DERWOOD ILIFF, the refusal of JAMES DERWOOD ILIFF to participate, and her recommendation regarding limited contact between JAMES DERWOOD ILIFF and the children until after the

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evaluation had been performed.

8. The Court finds from the evidence and testimony that JAMES DERWOOD ILIFF demonstrated a history of bizarre and unusual behavior in the presence of his wife and family. This included paranoid behavior in which JAMES DERWOOD ILIFF believed his employer was monitoring him by satellite. The testimony further showed that during a hospitalization in May 2006, JAMES DERWOOD ILIFF had to be restrained for approximately five (5) days due to delusional behavior. The evaluation of Dr. Robert Izor, neurologist, which was admitted into evidence, reflected a diagnosis of paranoia along with a diagnosis of psychogenic movement disorder. The record further reflected that Dr. Izor recommended that JAMES DERWOOD ILIFF take anti-anxiety medication, which JAMES DERWOOD ILIFF refused....

*11 9. Given evidence of the history of JAMES DERWOOD ILIFF's behavior, his repeated failure to obey the orders of the Court for a neuropsychological evaluation and the recommendations of Dr. Caryl Dalton, it is found that the standard possession order is not appropriate and not in the best interest of the children, and that the court ordered neuropsychological evaluation of JAMES DERWOOD ILIFF and restricted access to the minor children until its completion is in the best interest of the children.

Section 153.131(a) of the family code provides for the appointment of a child's parents as joint managing conservators, unless the court finds the appointment would not be in the best interest of the child because it would significantly impair the child's physical health or emotional development. Tex. Fam.Code Ann. § 153.131(a). The trial court expressly found that it would not be in the best interest of the children to appoint James as joint managing conservator and that his visitation with the children should be restricted until after he completed the court ordered neuropsychological exam recommended by Dr. Dalton. The trial court's findings were based on James's history of bizarre and unusual behavior.

The evidence at trial supports the trial court's findings. Jerilyn testified that James believed that people were reading his faxes and monitoring the family cell phones and all company equipment. Jerilyn also testified that James thought people were spying on him through skylights and that he believed Jerilyn's attorney had hired

people to watch him. The evidence at trial confirmed that James had repeatedly violated the trial court's orders to undergo a neuropsychological exam as recommended by Dr. Dalton and that he did not complete this evaluation before trial. Dr. Dalton also testified that the children had fears regarding their visits with James and that she could not recommend either overnight visitation or visitation outside the local San Marcos area.

James testified that although he requested the standard possession order, he did not know if this would be possible given his travel schedule. The record showed that James lived in the Dallas area with his mother and that he was traveling to central Texas about once a month to work on the property in Wimberley. James also proposed that a "mutually agreed to third party" serve as the method of communication between himself and Jerilyn regarding the children. When asked if he could use e-mail to communicate directly with Jerilyn, James stated, "I don't know ... [t]he only two that I've received from her in the last two years were not positive and not cordial or civil." Dr. Dalton confirmed that the relationship between James and Jerilyn was tense when she testified that James told her he never wanted to be in the same room with Jerilyn or see her again. The evidence further showed that in the two-and-a-half years between the separation and the final hearing, the parties had one "second and a half" phone call and one voice mail message.

*12 A trial court has broad discretion in deciding child custody issues. Gillespie, 644 S.W.2d at 451; In re J.R.D., 169 S.W.3d 740, 742-43 (Tex.App.-Austin 2005, pet. denied). The best interest of the child is always the primary consideration when determining issues of conservatorship and possession. Tex. Fam.Code Ann. § 153.002 (West 2008); Brook v. Brook, 881 S.W.2d 297, 298 (Tex.1994). The determination of conservatorship issues is "intensely fact driven," see Lenz v. Lenz, 79 S.W.3d 10, 19 (Tex.2002), and we will not disturb the trial court's child-custody decision unless the record as a whole shows the trial court abused its discretion, see In re J.R.D., 169 S.W.3d at 743.

Although there is a rebuttable presumption that both parents should be appointed joint managing conservators, on this record, we cannot say that the trial court abused its discretion in appointing Jerilyn as sole managing conservator with James as possessory conservator. See Lenz, 79 S.W.3d at 19; Gillespie, 644 S.W.2d at 450-51. Nor can we say that the trial court abused its discretion in restricting

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James's visitation with the children until after he completed the court-ordered neuropsychological evaluation recommended by Dr. Dalton. *See Lenz*, 79 S.W.3d at 19; *Gillespie*, 644 S.W.2d at 450-51. There is sufficient probative and substantive evidence in the record to support the trial court's determinations of custody and possession. *See Gillespie*, 644 S.W.2d at 451. We overrule James's third issue.

CONCLUSION

Having considered and overruled James's issues on appeal, we affirm the trial court's judgment.

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