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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

SUSAN KAY STEELE, RESPONDENT

v.

DAVID J. STEELE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman

No. 11-3-00640-8

AMENDED BRIEF OF APPELLANT

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A. APPELLANT'S ASSIGNMENTS OF ERROR.

1. The trial court erred when it imputed income to David at \$1906.70 per month when there is no substantial evidence in the record that he was capable and qualified of earning this amount in light of his disability.

2. The trial court erred when it included David's disability income but excluded Susan's disability income, for purposes of calculating child support.

3. The trial court erred when it failed to require Susan to verify her income as required by RCW 26.19.071(2).

4. The trial court erred when it considered evidence on revision that was not before the Commissioner at the hearing on David's Motion to Modify Child Support.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err when it imputed income to David without substantial evidence that post separation from the military, and with a 70% disability rating, based on his work history, education, health and age that he capable and qualified of earning

the income imputed to him (Assignment of Error No. 1).

2. Did the trial court abused its discretion when it favored Susan, by including David's disability income in the child support worksheets and excluding Susan's? (Assignment of Error No. 2).

3. Did the trial court abuse its discretion when modified child support, guessed at Susan's income and failed to require her to file the statutorily required documentation mandated by RCW 26.19.071(2)? (Assignment of Error No. 3).

4. Did the trial court err when it relied on new evidence on revision, that was not before the Commissioner? (Assignment of Error No. 4).

C. STATEMENT OF THE CASE.

1. Procedure

On February 18, 2011 Susan¹ filed a Petition for Dissolution. CP 4-13. Substitute service of the summons and "complaint" was accomplished by substitute service on David's uncle in California. CP 14. Susan subsequently obtained an order to serve David child support worksheets and a proposed parenting plan by mail to the same address. CP

¹ First names are used for clarity only, no disrespect is intended.

20-21. Susan mailed David a proposed parenting plan, a proposed child support order, proposed child support worksheets, and notice of a hearing on July 22, 2011. CP 25-28, 29-32. The proposed child support worksheets and proposed parenting plan mailed to David were not filed in the court file. A Motion and Declaration for Default was filed on July 22, 2011. CP 35-40. An order of default was entered the same date. CP 41-43. Final orders dissolving the parties' marriage, dividing debts and assets, setting child support and setting out residential time were entered on that date. CP 44-54, 55-76, 77-86, 87-94.

On January 23, 2015, David filed a Motion to Vacate the final orders, based on among other things, fraud and lack of proper notice. CP 105-114. He also filed a Petition to Modify Child Support. CP 101-104. On May 15, 2015, the trial court vacated restraining orders that were ordered in the Decree of Dissolution, but had not been requested in the Petition for Dissolution. The trial court also set a maintenance termination date of 36 months after entry of the Decree of Dissolution, and allowed the Petition for Modification of Child Support to proceed. CP 238-239. Otherwise, David's request to vacate the final orders was denied. CP 238-239.

On September 28, 2016, David filed a Motion for an Order

Modifying Child Support. CP 249-275. On December 12, 2016, Pro Tem Joe Quaintance entered final orders modifying child support, reducing child support from \$1293.00 to \$153.00 per month, effective July 2016. CP 276-292, CP 280-292. Both parties filed a timely Motion for Revision. CP 293, 294, 295-314. Both parties also filed supplemental declarations in support of their respective Motions for Revision, that had not before the commissioner below. CP 316-325, 326-331, 332-347.

On revision, the trial court revised the child support from \$153.00 per month to \$945.02 per month finding David was voluntarily underemployed. CP 365-373, 374-386. The imputed income to David and included his VA disability income. CP 382. The trial court imputed income to Susan, but did not include her disability income in the child support worksheets. Id., RP 14.

In its written ruling on Revision, the trial court specifically referenced, and relied on, photos that were attached to the declaration filed by Susan in support of her Motion for Revision, that was not before Commissioner Pro Tem Quaintance, at the hearing below. CP 368.

David filed a Motion for Reconsideration of the trial court's Order on Revision. CP 391-395. The trial court granted reconsideration, in part, eliminating David's back support obligation that predated the filing of the

Petition for Dissolution. CP 396-398. All other requests for relief were denied. Id.

David filed a timely notice of appeal. CP 399-429.

2. Facts

David was born in Singapore, to American parents. CP 116. He lived there the first 26 years of his life, before coming to America and joining the Army. CP 116. At the end of 2010, David was honorably, and medically discharged from the United States Army after serving 10 years as a Korean linguist, a Chief Warrant Officer and then as a Black Hawk helicopter pilot. CP 115-116. While in the military David was supporting Susan, their three children, and her five children from a prior relationship. Id.

On October 2, 2010, while on terminal leave from the Army, David moved his family to Savannah, Georgia, at Susan's insistence. CP 116. On October 15, 2010, David flew back to Washington to JBLM to finish out-processing, and to pack up the remainder of the items the family left behind. Id.

David was eager to get back to Savannah, to spend time with his family after 10 years in the military, and to begin working on his troubled marriage. Id. On November 2, 2010, the day after completing his out-processing, David left for Savannah in a rented moving truck. Id. On his way, David traveled to California to visit his uncle, Jan. CP 116.

Late on November 6, 2010, David checked his bank account late

and found it had been emptied. CP 116-117. Susan did not respond to David's inquiries about the status of the joint bank account. CP 117. David was devastated, overwhelmed, and depressed and not sure what he should do next. Id. He continued to try to reach Susan. Id. Susan agreed David could come to Savannah at Christmas to talk things over. Id.

On November 21, 2010, approximately \$39,000.00 was deposited into the bank account David shared with Susan. Id. This was a severance payment from the Army for David's involuntary medical discharge. Id. Because Susan had invited David to Savannah for Christmas, and he believed they would work out their differences, it never occurred to him to restrict her access to this account, and he took no action to divert the deposit of these monies. Id.

Susan withdrew nearly all of this money from the account on the same day it was deposited. Id. By calling the bank, David was able to get approximately \$3,000.00 of the approximately \$39,000.00 that was deposited. Id. David contacted Susan and asked her to make more of the money available to him. CP 119. Susan refused, but David believed that he would be home at Christmas, and they would resolve the issue at that time. Id.

On December 21, 2010, David flew to Savannah to be with his

family for Christmas. Id. He was stranded in the airport on Christmas Eve, but arrived at his home Christmas Day to find it empty. Id. Susan never notified David she never intended to be in Savannah on their designated meeting date and time. Id. David later learned that Susan returned to Washington State on December 6, 2010, allowing David to waste what little money he had on tickets to a state where his family had not been in nearly three weeks. Id.

David called and texted Susan, but she refused to see him. Id. Initially Susan told David she moved to Alabama. Id. Later she admitted she returned to Washington. Id. David was devastated, without hope and out of money. Id.

On January 30, 2011, David received his W2, and attempted to file his taxes in the hope of getting some money back. Id. His federal tax return was denied as Susan had already filed their taxes, using David's social security number, without his knowledge and without his consent. Id. Susan received a tax refund of approximately \$15,065.00.

Susan filed for dissolution in February 2011, but David did not learn of it until late 2012 when Susan advised him they were divorced. CP 120. David knew nothing of the contents of the final orders until April 2014 when his passport was confiscated at the U.S. Embassy in Bangkok,

where he was living at the time. Id. Despite not having been gainfully employed since 2010, and having received only \$3000.00 of his \$39,000.00 severance pay, David learned he had a support obligation of over \$70,000.00. Id.

Between January 2011 and March 2011, David and Susan were in contact via email while he was looking for employment. CP 121. Not once during this time did Susan tell David she had filed for dissolution. Id.

When Susan filed for dissolution, she served David at the home of David's uncle in California, where David did not live. CP 122, 163. This is a fact Susan did not dispute in her responsive declarations. She testified under oath she knew David was only in California temporarily to visit his uncle. CP 135, 150. Susan had an address in Tacoma for David, but never attempted service at that address. CP 135. Susan also had David's email address, but never emailed the dissolution documents to him, even though they were communicating via email during this time. CP 122, 146-147. The only evidence in the record that David ever used the California address was a "Preliminary Lien Notice" for Security Public Storage, dated July 3, 2011 covering a period from June 2011 to July 2011. CP 165. This time period is after the Petition for Dissolution was filed, and after the date of service in California. CP 4-13, 14. Susan saw David in

person in February 2011 at a Chuck E. Cheese, but did not attempt to serve him. CP 120, 135. Susan never testified that she believed David resided at the home in California where she had him served.

In her Petition for Dissolution, Susan requested the trial court enter a decree of dissolution, provide maintenance, change her name, award tax exemptions and award payment of fees and costs. CP 12. Importantly, Susan did not ask the Court to approve her proposed parenting plan, determine child support, or divide property and liabilities. Id.

David found and retained a lawyer, and found several issues with the final orders. CP 122. Among other things, the Decree was inconsistent with the Petition regarding spousal maintenance and it misstated David's income. Id. David asked the Court to set child support based on his actual financial circumstances, and to require Susan to account for the nearly \$55,000.00 in community funds she received. Id.

On May 15, 2015, the trial court denied the motion to vacate the final orders, but vacated the restraining order included in the Decree of Dissolution, and set a maintenance termination date. CP 238-239. The trial court also ruled David's modification of support could go forward.

David was given a medical retirement from the military effective November 1, 2010 with a 70% disability rating. CP 241, CP *To be*

supplemented. He was paid \$51,525.72 (gross) from the military with \$38,644.27 (net) deposited into the joint account he shared with Susan, of which he received approximately \$3,000.00. Id. Susan also received over \$15,000.00 in a federal income tax return. Id., CP 150. Susan admitted she received these funds. CP 135, 149-150. Neither at the time of her filing, nor finalization of the dissolution did Susan disclose these sums of money to the Court. CP 4-13, 87-94, 241.

David does not know if he is employable given his disability. CP 242. In the years after his medical retirement from the military, he earned very little money. Id. In 2016 he began experiencing other medical issues, including severe headaches, insomnia, and unexplained fevers. Id. At the time he filed his declaration, he was earning \$1512.00 per month, representing his VA disability income. Id.

D. ARGUMENT.

1. THE FINAL ORDER OF CHILD SUPPORT
ENTERED APRIL 20, 2017 IS ERRONEOUS.

A trial court exercises broad discretion in modification of the child support provisions of a divorce decree. In re Marriage of Blickenstaff, 71 Wn.App. 489, 498, 859 P.2d 646 (1993). Courts of appeal review a trial court's decision regarding child support for abuse of discretion. In re Marriage of Griffin, 114 Wash.2d 772,

776, 791 P.2d 519 (1990). Substantial evidence must support the trial court's findings of fact. In re Marriage of Peterson, 80 Wn.App. 148, 153, 906 P.2d 1009 (1995) rev. denied 129 Wn.2d 1014, 917 P.2d 575 (1996).

In setting child support, the trial court must take into consideration all factors bearing upon the needs of the children and the parents' ability to pay. Blickenstaff, 71 Wn.App. at 498 (citing former RCW 26.19.020). Overall, the child support order should meet each child's basic needs and should provide any “additional child support commensurate with the parents' income, resources, and standard of living.” RCW 26.19.001. To facilitate these goals, the Legislature directs that the child support obligation should be “equitably apportioned between the parents.” RCW 26.19.001.

- i. The trial court applied a different standard to David than to Susan when determining income.

In all proceedings which determine or modify child support, the uniform child support schedule applies. RCW 26.19.035(1)(c); In re Marriage of Wayt, 63 Wn.App. 510, 512, 820 P.2d 519 (1991); In re Marriage of Lee, 57 Wn.App. 268, 274 n. 3, 788 P.2d 564 (1990). The schedule bases the child support

obligation on the combined monthly net incomes of both parents. RCW 26.19.020. It allocates each parent's burden according to his or her share of the combined monthly net income. RCW 26.19.080.

A parent's monthly gross income is determined by considering all income. RCW 26.19.071(1). "Except as specifically excluded in subsection (4) of this section, monthly gross income shall include income from any source ...". RCW 26.19.071(3). A trial court's failure to include all sources of income not excluded by statute is reversible error. See In re Marriage of LaDouceur, 58 Wn.App. 12, 16, 791 P.2d 253 (1990). The uniform child support schedule requires the court to make written findings of fact which must be supported by the evidence and in turn support the court's conclusion. RCW 26.19.035(2); In re Marriage of Sacco, 114 Wn.2d 1, 3-4, 784 P.2d 1266 (1990); Wayt, 63 Wn.App. at 512.

Voluntary unemployment or underemployment will not allow a parent to avoid his or her financial obligation to the children who are the subjects of the support order. In re Marriage of Shellenberger, 80 Wn.App. 71, 81, 906 P.2d 968 (1995). When assessing the income and resources of each household, the court must impute income to a parent when that parent is voluntarily

unemployed or voluntarily underemployed. RCW 26.19.071(6).

The court determines whether to impute income by evaluating the parent's work history, education, health, age and any other relevant factor. RCW 26.19.071(6); Peterson, 80 Wn.App. at 153. If the court decides the parent is “gainfully employed on a full-time basis,” but also underemployed, the court makes a further determination whether the parent is purposely underemployed to reduce his or her support obligation. RCW 26.19.071(6); Peterson, 80 Wn.App. at 153, 906 P.2d 1009.

Here, the trial court entered final child support worksheets. CP 382-386. The trial court imputed income to both parties. CP 382. However, the court included David’s disability income, but excluded Susan’s disability income. Id. The record is devoid of any findings, or factual basis that would support such a result. It is an abuse of discretion for the Court to have engaged in disparate treatment of the parties in this manner, and the court’s ruling is not supported by substantial evidence. Accordingly, this Court should vacate this order.

- ii. The trial court did not require Susan to verify her income as required by RCW 26.19.071(2)

Income shall be verified by tax returns from the preceding 2 years and current pay stubs; income not appearing on tax returns and pay stubs must be verified by “other sufficient verification”. RCW 26.19.071(2). In In re Marriage of Bucklin, 70 Wn.App 837, 855 P.2d 1197 (1993), Division Three found that where the trial court had modified child support without the statutorily mandated verification of Mr. Bucklin’s income, it exercised its discretion in an untenable and manifestly unreasonable way by essentially guessing Mr. Bucklin’s income. Id. at 841.

Here, like in Bucklin, Susan did not file any of the statutorily mandated verification. Susan did not file proof of any of her income. She did not file her bank statements, tax returns, disability documentation, or any other documentation to verify her income as required by RCW 26.19.071(2). The only evidence the court had before it was a sworn financial declaration without any documentation to corroborate her income. Thus, the trial court abused its discretion when it modified support without any

verification of Susan's income, and the Order should be vacated.

- iii. The trial court erred when it imputed income to David in addition to his disability pay.

Courts of appeal review the trial court's findings of fact following a trial by affidavit to determine whether they are supported by substantial evidence, and whether the trial court made a correctable legal error. In re Marriage of Stern, 68 Wn.App. 922, 929, 846 P.2d 1387 (1993). Voluntary unemployment or underemployment does not shield a parent from child support obligations. RCW 26.09.170(6). In Blickenstaff, 71 Wn.App. at 495, the court defined voluntary unemployment under RCW 26.09.170 by reference to RCW 26.19.071(6) (enacted in 1991).

That statute provides in relevant part:

The court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. The court shall determine whether the parent is voluntarily unemployed or voluntarily underemployed based upon that parent's work history, education, health, and age, or any other relevant factors.... In the absence of any information to the contrary, a parent's imputed income shall be based on the median income of year-round full-time workers as derived from the United States Bureau of census....

RCW 26.19.071(6) (emphasis added).

Here, the trial court imputed income to David based on minimum wage *and* the receipt of his VA disability income. David received a 70% disability rating, and had no post-military employment that would demonstrate he was capable of earning the amount the trial court imputed to him. In fact, the evidence in the record was that David was unsure if he was even employable, given his worsening disability.

There is no evidence, let alone substantial evidence, that the court considered David's work history, health, age, or any other relevant factors related to imputing income to David beyond his disability pay. Therefore, the Court abused its discretion when it imputed income to David in addition to his VA disability pay.

- iv. The trial court abused its discretion when it considered new evidence on revision.

A motion to revise is governed by RCW 2.24.050. That statute provides:

All of the acts and proceedings of court commissioners hereunder shall be subject to revision by the superior court....Such revision shall be upon the records of the case, and the findings of fact and

conclusions of law entered by the court commissioner, and unless a demand for revision is made within ten days from the entry of the order or judgment of the court commissioner, the orders and judgments shall be and become the orders and judgments of the superior court, and appellate review thereof may be sought in the same fashion as review of like orders and judgments entered by the judge.

Our Washington Supreme Court decided in In re Marriage of Moody that a “superior court judge's review of a court commissioner's ruling ... is limited to the evidence and issues presented to the commissioner.” 137 Wn.2d 979, 992–93, 976 P.2d 1240 (1999). Further, if the trial court determines that additional evidence is required, the judge should “remand to the commissioner for further proceedings [as] necessary.” Moody, 137 Wash.2d at 992.

Here, on revision, the trial court specifically relied on a declaration that was not before the commissioner as a basis to infer David was on vacation, had money at his disposal, and was intentionally avoiding his child support obligation. CP 368. This was clearly error. This requires remand for the trial court to either consider the Motion for Reconsideration without consideration of evidence that was not before the commissioner, or remand to the

trial court to send back to the commissioner with instructions to consider the new evidence.

F. CONCLUSION.

For the foregoing reasons, David respectfully requests this Court reverse the trial court's orders and find the trial court abused its discretion when it modified the Order of Support without any statutorily mandated verification of Susan's income, by imputing income to David without substantial evidence of his ability to earn that income, and by treating David and Susan's income differently.

DATED: July 8, 2018

LAW OFFICE OF SOPHIA M. PALMER, PLLC,



SOPHIA M. PALMER, WSBA No. 37799

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

07/08/18



Date

Signature

LAW OFFICE OF SOPHIA M. PALMER

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