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Division II  
State of Washington  
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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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In re the Marriage of:  
ROBERT WOOD,  
Appellant/Cross-Respondent,  
and  
ANGELINA WOOD,  
Respondent/Cross-Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
THE HONORABLE ANNE L. HIRSCH

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REPLY BRIEF OF CROSS-APPELLANT

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SMITH GOODFRIEND, P.S.

CONNOLLY, TACON &  
MESERVE

By: Valerie A. Villacin  
WSBA No. 34515  
Victoria E. Ainsworth  
WSBA No. 49677

By: Amy L. Perlman  
WSBA No. 42929

1619 8<sup>th</sup> Avenue North  
Seattle, WA 98109  
(206) 624-0974

201 5<sup>th</sup> Avenue S.W., Suite 301  
Olympia, WA 98501  
(360) 943-6747

Attorneys for Respondent/Cross-Appellant

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## I. INTRODUCTION

The trial court erred in refusing to impute a higher income to the father based on its finding that the father was working “full time” and there was no evidence that he was “voluntarily underemployed for purposes of not paying an appropriate amount of support.” However, before a trial court is authorized to not impute income to a voluntarily underemployed parent, it must also find that he is “*gainfully employed on a full-time basis.*” RCW 26.19.071(6) (emphasis added). If a parent is not gainfully employed full-time, the trial court must impute income to that parent, regardless whether the parent is underemployed for purposes of reducing his child support obligation. RCW 26.19.071(6).

The father here is not “gainfully employed” by working as a bus driver earning one-third of his historical salary in his customary occupations as a naval flight officer and a systems engineer project manager. The father’s reasons for leaving his previous position – because he was “unqualified” and “wanted to move closer to his children” – does not absolve him of his obligation to pay child support. This Court should reject the father’s attempts to justify his

deliberate choices and direct the trial court to impute income to him on remand.

## II. CROSS-REPLY ARGUMENT

### A. **The trial court erred in refusing to impute a higher income to the father, who is voluntarily underemployed.**

“A parent should not be allowed to avoid a child support obligation by voluntarily remaining in a low paying job, or by not working at all.” *Marriage of Foley*, 84 Wn. App. 839, 843, 930 P.2d 929 (1997). Yet, despite properly finding the father voluntarily underemployed (4/17 RP 49-50; CP 132), the trial court then erred in refusing to impute the father’s income “as if [he] were employed at the level at which [he] is capable and qualified.” *Marriage of Sacco*, 114 Wn.2d 1, 4, 784 P.2d 1266 (1990); *Marriage of Schumacher*, 100 Wn. App. 208, 215, 997 P.2d 399 (2000); RCW 26.19.071(6).

#### 1. **It is undisputed that the father is voluntarily underemployed in his current position as a bus driver.**

It is undisputed that the father, “young and healthy” with a college degree and over 20 years of military experience, is “certainly” capable and qualified of earning “substantially more income than he is currently making.” (RP 61, 126; 4/17 RP 49, 60-61; CP 132) Indeed, the father does not refute that he consistently

earned over “[a] hundred thousand or more” during the last five to eight years of marriage. (4/17 RP 13) Rather, without any citation to the record or supporting authority,<sup>1</sup> the father claims that he “had no choice [but] to leave his military career after 20 years” and that “military officers are not able to match the income they had earned in the service.” (Reply 13) First, the record is entirely devoid of *any* evidence that the father’s retirement was anything but voluntary. Second, in so arguing, the father blatantly disregards his own testimony that he was not “unemployed at any point between leaving [the Navy] and moving to California” because he *immediately* found a new job earning \$131,000 as a systems engineer project manager after he retired. (RP 144-46)

Furthermore, that the father purportedly quit his job in July 2013 “because he was unqualified” and “because he wanted to move closer to his children, in Washington” (Reply 12) is irrelevant. In *Marriage of Wright*, 78 Wn. App. 230, 234, 896 P.2d 735 (1995), this Court rejected the mother’s similar argument that, “because she is working half-time at a hospital, is the primary caretaker of

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<sup>1</sup> The father’s failure to support his claims with any authority is reason enough to reject his argument. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (this Court does not consider arguments “not supported by any reference to the record nor by any citation of authority”).

five children,” and “is a member of the National Guard, she is doing all that she can be expected to do and no additional income should be imputed to her.” This Court held that “voluntary under-employment by either parent will not shield that parent from a child support obligation . . . . *regardless of the merit of the reason for the under-employment.*” *Wright*, 78 Wn. App. at 234 (emphasis added). “Because the record discloses that [the mother] could have obtained full-time employment as a nurse,” this Court found that the trial court properly imputed to her additional income for purposes of calculating child support. *Wright*, 78 Wn. App. at 234.

Similarly, the Court in *Marriage of Pollard*, 99 Wn. App. 48, 991 P.2d 1201 (2000), reversed the trial court’s finding that the mother was not voluntarily underemployed. The Court found on appeal that “[c]learly [the mother’s] choice to leave the military and her former salary . . . was voluntary, motivated by her desire to raise the two young children of her new family.” *Pollard*, 99 Wn. App. at 54. The Court held that, “[w]hile laudable, these actions cannot adversely affect her obligation” under the child support statute. *Pollard*, 99 Wn. App. at 54; *see also Marriage of Jonas*, 57 Wn. App. 339, 340, 788 P.2d 12 (1990) (“[n]o matter how legitimate

their reasons” for voluntary underemployment, “each [parent] is accountable for earnings foregone in making the choice to be unemployed”).

Whether it was because he felt “unqualified” for the position or he “wanted to move closer to his children,”<sup>2</sup> the father concedes that he voluntarily “left that job as a systems engineer” by choice (Reply 12), despite not “hav[ing] another job lined up when [he] quit.” (RP 146-47) *See Pollard*, 99 Wn. App. at 54 (“voluntary means the result of free choice; intentional rather than accidental”) (cited source omitted); *Marriage of Goodell*, 130 Wn. App. 381, 390, ¶ 18, 122 P.3d 929 (2005) (trial court erred in failing to impute income to the mother because she “demonstrated her employability when she held a [prior] job”; “mere fact that she chose to quit her job does not render her employment status involuntary”). The “merit of the reason” for doing so is thus irrelevant. *Wright*, 78 Wn. App. at 234.

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<sup>2</sup> The mother did not “alienat[e] [the father] from his children.” (Reply 15) Rather, as the trial court expressly found, “she’s been trying to maintain and improve the father’s relationship [with the children] during the marriage and that continued after the separation.” (4/17 RP 58) Regardless, the parties’ previous long-distance relationship has no bearing on the father’s obligation to provide for his children by securing a job for which he is capable and qualified, rather than voluntarily taking a position earning a fraction of his historical salary.

Accordingly, because it is undisputed that the father voluntarily left both his military career and his job as a project manager, the father's attempt to distinguish *Marriage of DewBerry*, 115 Wn. App. 351, 62 P.3d 525, *rev. denied*, 150 Wn.2d 1006 (2003), and *Marriage of Schumacher*, 100 Wn. App. 208, 997 P.2d 399 (2000), is particularly unavailing. (Reply 12-13) Neither the father in *DewBerry* or in *Schumacher* "voluntarily left" his "long-established career." (Reply 12-13, emphasis in original) The father in *DewBerry* was "laid off from Eddie Bauer in 1999," a year prior to the parties' separation, 115 Wn. App. at 358, while the father in *Schumacher* initially "was unable to work . . . after he fell off a roof and suffered a concussion." 100 Wn. App. at 215. Although the father in *DewBerry* later held two part-time jobs and "there was no suggestion that [he] is trying to lower his income to avoid child support," 115 Wn. App. at 368, and the father in *Schumacher* "occasionally worked 16 hours or more a day," 100 Wn. App. at 215, the Courts in both cases held that the fathers' subsequent underemployment was "brought about by his own free choice" and imputed a higher income on historical "salary levels." *DewBerry*, 115 Wn. App. at 367-68; *Schumacher*, 100 Wn. App. at 215.

*DewBerry* and *Schumacher* were decided on even less compelling facts than these. (Reply 12) Despite purportedly quitting his job in July 2013 “to move back up here and be closer to the kids,” the father remained in California, unemployed, until finally moving to Washington in January 2014. (RP 146-47) Although the father claims he “was job seeking on the Internet and not having any luck” during those five months that he stayed in California (RP 146), there is no evidence suggesting that he “diligently searched for employment” (Reply 14) when he relocated to Washington.<sup>3</sup> Instead, contrary to his claims that he took a job “so that he could support his family” (Reply 14), the father remained unemployed while living in the family home. (RP 155) Only after the parties separated in July 2014 did the father finally obtain a job as a bus driver, earning \$20 per hour, after a year of voluntary unemployment. (RP 146, 155; 4/17 RP 13, 49; Reply 14) That the father does not have “an established post-retirement second career” (Reply 12) is of his own doing.

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<sup>3</sup> Imputing to the father an income that he is “capable and qualified of earning” would not “require” him “to travel out of state or country . . . to earn income” or “relocate out of state to obtain a similar job with federal contractors in California, at the cost of sacrificing his relationship with his children.” (Reply 14-15) Because the father once again provides *no* evidence to support his contention that “there were no opportunities earning six-figures, for which he was qualified in Washington” (Reply 14), this Court should disregard this argument. *Cowiche*, 118 Wn.2d at 809.

**2. A parent working in a low-paying position for which he is entirely overqualified is not “gainfully employed.”**

Because the trial court found the father was voluntarily underemployed, it was required, under RCW 26.19.071(6), to impute income to him. The only exception to the requirement that income be imputed to a voluntarily underemployed parent is if the trial court finds that the voluntarily underemployed parent “is gainfully employed on a full-time basis” and finds that the parent is not “purposely underemployed to reduce the parent's child support obligation.” RCW 26.19.071(6).

The trial court here did not find the father “gainfully employed.” Instead, in declining to impute income to the father, the trial court focused solely on the fact that “[h]e works full time” and the court’s belief that there was no evidence “that he’s underemployed for purposes of not paying an appropriate amount of support.” (4/17 RP 49-50; CP 132) But the trial court should have also determined whether he was “*gainfully* employed on a full-time basis” before considering whether the father was “purposely underemployed to reduce [his] child support obligation.” RCW 26.19.071(6) (emphasis added); *Marriage of Peterson*, 80 Wn. App.

148, 153, 906 P.2d 1009 (1995), *rev. denied*, 129 Wn.2d 1014 (1996). (Reply 12-15)

Although RCW 26.19.071 does not define “gainful employment,” trial courts should “look[] to the nature of the employment and whether it is the person’s usual or customary occupation.” *Peterson*, 80 Wn. App. at 153-54 (finding the father “gainfully employed” where the “current employment and income appear to be consistent with his work history”); *see also Schumacher*, 100 Wn. App. at 214 (the *Peterson* “Court looked at [the father’s] work history to determine whether he had gainful employment in his customary occupation”).

Notwithstanding that the father was voluntarily underemployed based upon his “work history, education, health, and age,” RCW 26.19.071(6), the father was also not “gainfully employed” because his employment as a bus driver is not “gainful when compared with his work and income history.” *See Peterson*, 80 Wn. App. at 154. In *Peterson*, for instance, the trial court imputed income to the father, who worked as a bail bond agent, because it believed that he was voluntarily underemployed due to his age, college education, and law school education. 80 Wn. App. at 151-52. In ultimately reversing the trial court’s decision imputing

income to the father, Division One did not dispute that the father was “underemployed,” as found by the trial court. However, because the father “had little experience in traditional legal practice” and his present income as a bail bond agent fell within the range of his income from his prior employment working for a union as a contract negotiator, the Court concluded he was “gainfully employed.” *Peterson*, 80 Wn. App. at 154. Therefore, because the mother had not asserted that the father was purposely underemployed to reduce his child support obligation, the Court held that the trial court should not have imputed income to him.

Here, the father is both voluntarily underemployed *and* not gainfully employed because his employment as a bus driver does not comport with his work history and experience, and the income that he earns as a bus driver falls nowhere near the income he earned as a naval flight officer and a systems engineer project manager. The father had a 20-year military career that enabled him to immediately secure a “top secret” position as a systems engineer project manager upon leaving the Navy, where he earned three times the income that he is earning now as a bus driver. (RP 145) The father was therefore not gainfully employed, and the trial court should have imputed income to him.

Regardless of whether he was purposely underemployed to reduce his child support, a parent who works full-time should not be allowed to even unintentionally reduce his or her child support obligation based on a “self-imposed curtailment of earning capacity.” *Lambert v. Lambert*, 66 Wn.2d 503, 509-10, 403 P.2d 664 (1965) (“self-induced decline” in income “did not constitute such an exceptional change in circumstance” warranting reduction in child support); *Jonas*, 57 Wn. App. at 340 (even where the “record discloses nothing to suggest that either parent was voluntarily unemployed for the purpose of avoiding child support obligations,” “each is accountable for earnings foregone in making the choice to be unemployed”).

*Marriage of Curran*, 26 Wn. App. 108, 611 P.2d 1350 (1980) is particularly instructive. In *Curran*, the trial court imputed income to the father, who was “employed by a family business” earning “a salary that is substantially below what he could earn in the open market,” and who received “loans and gifts from his parents.” 26 Wn. App. at 109-10. Division One affirmed, relying on the trial court’s “determina[ation] that it was unreasonable for Mr. Curran to continue in a position yielding a very low salary given his

educational and business background.” *Curran*, 26 Wn. App. at 110.

Under the trial court’s analysis, a parent can reduce his child support obligation by working below the level that he is capable and qualified, for an income well below the amount he historically earned, so long as he is employed full-time and it is for reasons other than to reduce his child support obligation. This is inconsistent with, and undermines, the legislative intent and public policy behind child support orders. Such a rule would allow a parent’s preferences in employment to prevail over the children’s financial needs. But “[w]here the parent’s interests conflict with the child’s rights to basic nurturing, physical health, and safety, *the rights of the child prevail.*” *Welfare of A.W.*, 182 Wn.2d 689, 712, ¶ 55, 344 P.3d 1186 (2015) (emphasis added); *see also Marriage of Mattson*, 95 Wn. App. 592, 603, 976 P.2d 157 (1999) (rejecting father’s argument “that he should have the freedom to change jobs for his own satisfaction, regardless of his child support obligation”; “the statutory framework show[s] that the Legislature intended the best interests of children to be the paramount priority”). In determining and allocating parents’ responsibilities, including in providing financial support for their child, “the best interests of the child shall be the standard.” RCW

26.09.002; RCW 26.09.004(2)(f).

For instance, in *DewBerry v. George*, 115 Wn. App. 351, the father, who had a history of executive-type sales and marketing jobs, wished to pursue a career as a longshoreman. Division One rejected the father's argument that he should be imputed income based on what he could earn from 40 hours of longshore work, rather than his historic income in his executive positions. *DewBerry*, 115 Wn. App. at 368. In refusing to impute income to the father based on his chosen career, it did not matter to the Court that the father was not "trying to lower his income to avoid child support." *DewBerry*, 115 Wn. App. at 368. Instead, the Court focused on the fact that the father, "by his own free choice," was working at a level and income below his historic capability. *DewBerry*, 115 Wn. App. at 367-68.

The trial court here erred in not imputing income to the father when he was not "gainfully employed," regardless that "[h]e works full time." (4/17 RP 50) Given his work history and qualifications, it is entirely "unreasonable for [the father] to continue in a position yielding a very low salary." *Curran*, 26 Wn. App. at 110. The trial court should have imputed to the father a higher income because he is not "gainfully employed" in a position

for which he is capable and qualified in light of his “customary occupation.”

**B. This Court should award the mother her attorney fees on appeal.**

This Court should deny the father’s request for attorney fees and instead award the mother her appellate fees based on her need and his ability to pay. RCW 26.09.140; RAP 18.1(a); *Leslie v. Verhey*, 90 Wn. App. 796, 807, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999). The mother should not be forced to use her maintenance and property awards to defend the trial court’s discretionary rulings supported by substantial evidence after the father made a tactical decision not to seek reconsideration in the trial court, which he concedes “would have avoided the legal cost of filing this appeal.” (Reply 32)

**III. CONCLUSION**

This Court should affirm the trial court in its entirety, but if this Court remands for any reason, it should direct the trial court to impute the father’s income at his historical rate of pay for purposes of calculating the parties’ child support obligations. This Court should also deny the father’s request for attorney fees on appeal and award the mother her appellate fees.

Dated this 29 day of May, 2018.

SMITH GOODFRIEND, P.S.

CONNOLLY, TACON &  
MESERVE

By: 

Valerie A. Villacin  
WSBA No. 34515  
Victoria E. Ainsworth  
WSBA No. 49677

By: \_\_\_\_\_



Amy L. Perlman  
WSBA No. 42929

Attorneys for Respondent/Cross-Appellant

**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on May 29, 2018, I arranged for service of the foregoing Reply Brief of Cross-Appellant, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 29<sup>th</sup> day of May, 2018.

  
\_\_\_\_\_  
Andrienne E. Pilapil

**SMITH GOODFRIEND, PS**

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Reply Brief of Cross-Appellant

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Sender Name: Andrienne Pilapil - Email: andrienne@washingtonappeals.com

**Filing on Behalf of:** Valerie A Villacin - Email: valerie@washingtonappeals.com (Alternate Email: andrienne@washingtonappeals.com)

Address:  
1619 8th Avenue N  
Seattle, WA, 98109  
Phone: (206) 624-0974

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