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No. 51968-2-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

In re:

JOSEPH A. BUNDY

Respondent

v.

PAMELA J. RUSH,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY

BRIEF OF APPELLANT

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I. INTRODUCTION

Pursuant to RCW 26.19.071(6), does a trial court abuse its discretion by not imputing income to a Tacoma Police Officer who voluntarily retires at age 56, when there is no documented physical or psychological disability that would preclude him from working full time?

Pam Rush (hereinafter, "Ms. Rush") and Joseph Bundy (hereinafter, "Mr. Bundy") were married in September of 2002. (CP 210) They have one child of their marriage, a son, age 12. (CP 210) A Decree of Dissolution and a Final Order of Child Support were entered in the Superior Court of Pierce County on January 10, 2010. (CP 210). At the time the divorce was final, both parties served as law enforcement officers with the City of Tacoma Police Department. (CP 211) The support order required Mr. Bundy to pay $619.50 per month in child support and 50% of the child's uninsured medical and other expenses. (CP 211)

In June 2017, Mr. Bundy retired from service as a police officer at age 56. (CP 189). On October 6, 2017, Ms. Rush filed a Petition for Modification of Support, asking the court to modify the parties' original child support order.[1] (CP 160-163) A hearing on Ms. Rush's petition to

[1] Ms. Rush's intent was to file her petition to modify months before Mr. Bundy retired, but due to various factors, including a death in Mr. Bundy's family, Ms. Rush waited to file her petition until later. (CP 220-221)

modify child support took place on April 11, 2018, at which time a Pro Tem Commissioner entered modified order of support. (CP 305-328). The Pro Tem Commissioner concluded that Mr. Bundy was voluntarily underemployed pursuant to RCW 26.19.071(6) and imputed income to him using his historical rate of pay at $8,420.58 and an additional amount of $311.42 for other rental income. (CP 319) Mr. Bundy subsequently filed a Motion for Revision, asking for a denovo review of the trial court's decision to impute his income. (CP 329-356)

A hearing on Mr. Bundy's Motion for Revision took place on April 27, 2018. (CP 374). The Honorable Judge Karena Kirkendoll, subsequently issued a letter ruling granting the revision request. (CP 374-375). Specifically, Judge Kirkendoll found that Mr. Bundy is not voluntarily under-employed because he earned the right to full retirement benefits, which the Court found is the same as full time employment. (CP 374). Specifically, the court stated:

> **"…Under such circumstances, earning the right to full retirement benefits is the equivalent of full time gainful employment. …".**

(CP 374).

The trial court ordered a new child support amount of $424.73 per month pursuant to Mr. Bundy's retirement income which was less than the

support Mr. Bundy was paying of $619.50 as ordered in 2010.[2] (CP 441). The trial court also ordered when the child turns 12, Mr. Bundy's obligation increases to $521.41 per month, also less than what he was ordered to pay in 2010. (CP 441) Mr. Bundy was also granted an abatement of $150 per month for an overpayment caused by the reduction in child support from October 1, 2017 (date of filing) to May 31, 2018 totaling $1,558.16. The trial court subsequently declined Ms. Rush's Motion for Reconsideration.

II. STATEMENT OF THE CASE

Ms. Rush is a police officer for the City of Tacoma. (CP 211) Mr. Bundy was a police officer for the City of Tacoma, but retired on July 1, 2017. (CP 188). According to his Social Security Statement, his full retirement age is age 67, but Mr. Bundy elected to retire early at age 56. (CP 214). Mr. Bundy became a law enforcement officer in 1996 and served for 21 years prior to his early retirement. (CP 188) Prior to that, he worked as a security guard for a school district and for a corrections facility. (CP 287) Mr. Bundy does not have 32 years of service as a police officer. (CP 257)

[2] Mr. Bundy did not provide confirmation regarding the amount of his retirement benefits from the Department of Retirement Systems other than his 2017 1099R. (CP 401) Therefore, it is unknown how many months of pay the 1099R includes.

Mr. Bundy alleged that he retired as a result of injuries and health issues that prevent him from meeting the emotional and physical demands of police work. (CP 258-259) He identified one on-the-job injury that occurred in 1997 while he was in pursuit of a suspect. (CP 259) He also stated he was "involved" in three shootings, but there is no evidence he was ever shot three times. (CP 399) Additionally, he claims he suffered a stress-related heart attack back in 2003, but he did not provide medical records to substantiate that claim. Ms. Rush testified that Mr. Bundy did not have a heart attack on that occasion, but that he suffered an anxiety attack when he received discipline for serious policy violations at the police department. (CP 399)

All of the other injuries Mr. Bundy described occurred outside of work. (CP 258) He was involved in a motorcycle accident in 2013. (CP 258) The accident did not result in major injury. (CP 289) Rather, according to his discharge records, he was released with a minor concussion and directed to take Tylenol. (CP 289) He continued to work without documented issues for 5 years thereafter. (CP 289-290)

Mr. Bundy claims that his prior injuries and health issues are the reasons for his retirement, but no governmental agency or medical provider has deemed him disabled or otherwise not able to work. In fact,

he did not produce any medical records to substantiate his statements about his allegedly recent poor health whatsoever. (CP 288-290)

Rather, Mr. Bundy admitted that he retired from law enforcement because he "no longer wanted to" work in the field. (CP 258) It is undisputed that, whatever his motivations, the decision to retire was purely voluntary and he continues to engage in physically demanding activities to this day. (CP 289-290) Specifically, Mr. Bundy rides motorcycles, participates in motocross and engages in manual labor related to house flipping and remodeling. (CP 289-290)

Regarding sources of income, Mr. Bundy presently receives full retirement benefits from his work with the City of Tacoma. (CP 189) Upon separation from City of Tacoma he has full receivership, without penalty for withdrawal, of his Deferred Compensation funds in the amount of nearly $300,000 from which he can draw any monthly amount to maintain his lifestyle post retirement. (CP 254) This is essentially an additional savings account. He also has an interest in a real-estate business that he owns with his brother from which he received an additional $1,299.22 per month in income for 2016. (CP 190) Although Mr. Bundy failed to provide tax returns for his business, the LLC had $228,354.24 in the bank as of January of 2018. (CP 250) Mr. Bundy and his brother bought, fixed up and sold a property in 2017. (CP 402)

Additionally, Mr. Bundy receives an average of rental income of $419.83 from property he leases. (CP 402) Mr. Bundy also receives a $500 per month net benefit from VEBA for uninsured medical expenses through age 65. (CP 216)

A review of the bank statements that Mr. Bundy provided revealed substantial deposits from an unknown source. (CP 216) Specifically, the following deposits were not explained by Mr. Bundy:

01/08/16:	**$6,025 deposit for unknown reason**
02/29/16:	**$1,500 deposit for unknown reason**
03/10/16:	**$1,240.59 deposit for unknown reason**
04/14/16:	**$1,099.42 deposit for unknown reason**
07/12/16:	**$2,200 deposit for unknown reason**
08/26/16:	**$4,318.28 City of Tacoma Deposit-amount out of ordinary**
12/10/16:	**$1.102.01 deposit for unknown reason**
06/09/17:	**$8,600.00 deposit for unknown reason**
07/10/17:	**$500.00 deposit for unknown reason**
07/18/17:	**$428.00 deposit for unknown reason**
09/05/17:	**$2,940 deposit for unknown reason**
09/12/17:	**$1,159.75 deposit for unknown reason**

(CP 216)

As can be seen, the above unexplained deposits continued after Mr. Bundy retired in July of 2017. (CP 216) Additionally, Mr. Bundy also had a check to his business for $6,438.10 on 1/31/18 which is contradictory to his claim that his business is not income generating. (CP 250)

Mr. Bundy also lives a lifestyle that reflects the income that Ms. Rush identified he earns. Specifically, Mr. Bundy's bank statements show that he has substantial frivolous expenses such as eating out almost every day, gym memberships, body building supplements, gun shop purchases, motorcycle shop purchases, and auto body shop purchases. (CP 216) Mr. Bundy also owns numerous classic cars, two boats, four motorcycles, and trailers. He also owns 43 acres of land in Grant County. (CP 216-217)

Ms. Rush is still employed as a first response police officer with the City of Tacoma. (CP 211) She entered law enforcement in 1997, roughly 1 year after Mr. Bundy entered the field. (CP 400) Ms. Rush is entering her 22 year in law enforcement. Ms. Rush has experienced numerous job-related and life-related injuries as well as job-related stress. (CP 212-213) In 2014 she suffered a knee injury that resulted in surgery, requiring her to be off work for about 5 months, and she was subsequently deemed to have a 10% disability. (CP 213) In December 2016 she fell down the stairs and broke her ribs and was off from work for a period of four months. (CP 213) In July 2017, she broke two bones in her foot while on the job and was out of commission for about three months. (CP 213) She continues to suffer pain as a result of the injury. (CP 213) Nonetheless, Ms. Rush continues to work full-time in law enforcement to support her son. (CP 213)

In Ms. Rush's Petition for Modification of Child Support, she specifically asked the Court to order that the parties would pay their proportionate share of the child's extracurricular activity expenses. (CP 358) Ms. Rush described to the Court the types of activities that the parties' son engages including: (1) little league, (2) club baseball and associated clinics, (3) club and recreational soccer, (4) recreational or club football and (5) the numerous youth summer camps he enjoyed. (CP 219) Mr. Bundy's Response to Petition states he would pay for the activities that were jointly agreed upon, but the expenses not agreed upon, would be paid by the parent choosing the activity. (CP 219)

The trial court's order of support, in Paragraph 21, does not require either party to contribute towards the extracurricular activities of the child, regardless whether the activity is agreed or not. (CP 448-449)

III. ASSIGNMENTS OF ERROR

A. Assignments of Error

a. The Trial Court Erred By Not Imputing Income To The Father Pursuant To RCW 26.19.071(6) At His Historical Rate Of Pay, When The Father Voluntarily Took An Early Retirement From Police Work, Is Not Disabled, And Is Not Working.

b. The Trial Court Erred When It Concluded The Father's Eligibility For Full Time Retirement Benefits Is The Equivalent Of Full-Time Gainful Employment Pursuant To RCW 26.19.071(6) When He Is Not Employed Full-Time In Any Capacity And

His Benefits Amount To A Fraction Of His Income When He Was Working.

c. **The Trial Court Erred When It Did Not Include The Father's: (1) Rental Income; (2) House Flipping Income; And (3) VEBA Income As Identified By The Mother In The Child Support Worksheets.**

d. **Pursuant To RCW 26.19.080, The Trial Court Erred By Failing To Order The Parties To Pay Their Proportionate Share Of The Child's Extracurricular Activities As Requested By The Mother.**

IV. ARGUMENT AND ANALYSIS

A child support determination may be overturned if the trial court's decision is manifestly unreasonable, based on untenable grounds, or granted for untenable reasons. *In re Marriage of Stenshoel,* 72 Wn. App. 800, 803; *In re Marriage of Curran*, 26 Wn. App. 108, 110, 611 P.2d 1350 (1980). This court must, therefore, determine whether the lower court made an error of law and whether the findings of fact are support by substantial evidence. *In re Marriage of Stern*, 68 Wash.App. 922, 929, 846 P.2d 1387 (1993).

A. The Sufficiency Of The Findings

Generally, findings of fact that are not supported by substantial evidence may be overturned on appeal. *In re Marriage of Stern*, 68 Wn. App. 922 at 929. Appellate courts treat the lower court's findings of fact as verities on appeal so long as they are supported by substantial

evidence. Marriage of Chandola, 180 Wn.2d 632 (2012). Evidence is substantial when it is *"sufficient to persuade a fair-minded person of the truth of the matter asserted."* Id. Disputed evidence is deemed substantial if it presents any reasonable view that substantiates the court's findings, even if there are reasonable alternative interpretations. *Fred Hutchinson Cancer Research Center v. Holman*, 107 Wn. 2d 693, 732 P.2d 974 (1987).

A court's decision is unreasonable and untenable if it rests on factual findings that are not supported by the record or facts that don't meet the correct applicable standard. *State v. Rindquist* 79 Wn. App. 786, 793, 905 p. 2d 922 (1995).

1. The Findings Of Fact Are Not Supported By Substantial Evidence.

Ms. Rush argues that Mr. Bundy is voluntarily unemployed or, alternatively, voluntarily underemployed and therefore, pursuant to RCW 26.19.071(6) the court must impute his income. Voluntary unemployment is "unemployment that is brought about by one's own free choice and is intentional rather than accidental…" *In re Marriage of Brockopp*, 78 Wn. App. 441, 446 n. 5, 898 P.2d 849 (1995). The court shall determine whether a parent is underemployed based upon their work history, education, health, age and any other relevant factors.

Dewberry v. George 115 Wn. App. 351, 62 P.3d 525 (2003); *In re Marriage of Clarke* 112 Wn. App. 370, 375-76, 48 P.3d 1032 (2002); *Marriage of Schumacher*, 100 Wn. App. 208, 212, 997 P.2d 399 (2000).

In this case, the court focused on Mr. Bundy's employment as a police officer, including the duration of his employment, the nature of the employment, and the alleged injuries he sustained during his tenure. Specifically, the trial court found that: (1) Mr. Bundy was "a law enforcement officer with almost 32 years of service"; (2) Mr. Bundy was "shot three times in the line of duty"; (3) Mr. Bundy suffered "numerous other injuries"; and (4) Mr. Bundy suffered a "stress-related heart attack." (CP 374-375) Therefore, the trial court concluded Mr. Bundy's decision to retire was reasonable, and further, that his entitlement to full retirement benefits was "equivalent to full-time gainful employment." (CP 374-375)

a. The Trial Court Incorrectly Concluded That Mr. Bundy Served As A Police Officer For 32 Years Prior To His Voluntary Retirement

The trial court's findings are not supported by substantial evidence. First, Mr. Bundy did not serve as a police officer for 32 years. Although his representations were inconsistent, he served for 21 years, and started just six months before Ms. Rush became a Tacoma police

officer herself.[3] (CP 188) (CP 288-289) Prior to becoming a police officer, Mr. Bundy worked as a security officer for a school district and a corrections facility. (CP 288) However, the trial court's finding that Mr. Bundy was a law enforcement officer for 32 years is incorrect and not supported by substantial evidence.

b. The Trial Court Incorrectly Concluded That Mr. Bundy Was Shot Three Times In The Line Of Duty

Second, Mr. Bundy testified that he was "involved in three shootings," <u>not that he was shot three times in the line of duty</u> as the trial court erroneously concluded. (CP 258) Ms. Rush is aware of Mr. Bundy's employment history and testified that he was never shot in the line of duty. (CP 399) Because she is also a Tacoma police officer, she would be aware if Mr. Bundy had been shot in the line of duty.

Mr. Bundy also cited "numerous injuries" but only one of the injuries he described occurred at work. (CP 258-259) He testified that he suffered an injury requiring hospital care while in pursuit of a criminal.[4] (CP 259)

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[3] Mr. Bundy represented on page 1 of his March 7, 2018 declaration that he retired after 21 years in law enforcement with the City of Tacoma Police Department and had worked overall for 31 years. (CP188) Mr. Bundy later testified in his April 5, 2018 Responsive Declaration that he spent 32 years in law enforcement. (CP 257) Those two positions are inconsistent.

[4] He did not state when or where the injury occurred or provide any medical records to substantiate the assertion.

Notably, Ms. Rush experienced two on the job injuries that interfered with her ability to work. In November 2014, she sustained a knee injury requiring surgery. (CP 212) She was out of work on disability leave until March 2015 and has a permanent state qualified disability. (CP 212) In July 2017, she broke two bones in her foot while on the job. (CP 212) She was out of work recuperating until November 2017 when she returned to do part-time duty. (CP 212) She experiences ongoing significant pain a result of the injury <u>but she continues to work full-time to support the parties' child</u>. (CP 212)

Mr. Bundy's other alleged injuries occurred outside of work, not in the line of duty. (CP 399-400) In 1997, he was involved in a car accident. There is no evidence that the accident resulted in long-term injuries or issues. Rather, he continued to work in law enforcement for two decades. (CP 399-400) In 2013, he was involved in a motorcycle accident. He sustained a minor concussion as a result. (CP 399-400) There is no evidence the five-year-old injury impacted his ability to work. In fact, no governmental agency or medical provider has concluded that Mr. Bundy is disabled or cannot work on a full time basis.

c. The Trial Court Incorrectly Concluded That Mr. Bundy Suffered A Stress Related Heart Attack Due To His Employment

Finally, Mr. Bundy claims he had a stress-related heart attack. (CP 258) Again, Mr. Bundy failed to provide any medical or documentary evidence whatsoever to substantiate the claim. There are no records indicating when the incident occurred or what caused it. Ms. Rush testified that Mr. Bundy never suffered a heart attack, but suffered an anxiety attack in 2003 after he was disciplined for serious policy violations at the police department. (CP 399) Additionally, Mr. Bundy continues to engage in physically demanding activities from riding motocross motorcycles to manual labor related to house flipping and remodeling projects. (CP 289) In fact, he admits that he spent 10 months flipping a house for profit with his brother and his wife. [5] (CP 260)

The findings fail to acknowledge other key, undisputed facts. Namely, both parties worked as police officers for the same law enforcement agency for roughly the same period of time. (CP 400) During their tenure, both parties experienced the emotional and physical toll of policing, including on-the-job injuries. (CP 400) Ms. Rush continues to work but Mr. Bundy voluntarily chose to stop working. (CP 400)

[5] Mr. Bundy claims that his health interfered with the project but there is nothing in the record to substantiate the self-serving allegation.

Mr. Bundy claims that he retired because he did not want to continue the physically demanding work of policing. (CP 258) There is no verifiable documentary or other evidence, however, that he was physically or psychologically incapable of doing the work. To the contrary, he chose to forgo optional light duty work within the police department and engage in the physically demanding work of flipping houses with his brother.[6] He claims that he cannot and will not continue that work anymore either, and he apparently does not intend to find other work. (CP261) There is no evidence that he cannot work in either capacity or in another less rigorous capacity.

Nonetheless, the court concluded that he is voluntarily underemployed rather than voluntarily unemployed. (CP 374) The court further concluded that the retirement benefits he receives are equivalent to full-time gainful employment. (CP 374) Notably, however, Mr. Bundy is not working in any capacity and the benefits he receives amount to a fraction of the income Mr. Bundy was earning as a full-time police officer. (CP 374) In light of the forgoing, the findings are deficient and not supported by substantial evidence.

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[6] It is also significant that the parties' long time friend, Jennifer Terhaar testified that Mr. Bundy boasted that he had so much construction work going on, that he could barely keep up and was unable to help her with a leaky roof and window at her home.

B. Abuse Of Discretion Standard Of Review

The standard of review for child support determinations is an abuse of discretion. *In re Marriage of Campbell*, 22 Wn. App 560, 598 P.2d 1124 (1978). A court abuses its discretionary power when the decision rendered is manifestly unreasonable or based on untenable grounds or untenable reasons. *In re Marriage of Kovacs*, 121 Wn.2d 801, 854 P.2d 629 (1993). A decision is manifestly unreasonable if it is outside the range of acceptable choices given the facts and applicable legal standards; it is based upon factual findings the record does not support; it is based on an incorrect standard of law or the facts do not meet the requirements of the correct standard. *State v. Rindquist,* 79 Wn. App. 786, 793, 905 p. 2d 922 (1995).

1. The Court Abused Its Discretion When It Failed To Conclude That Mr. Bundy Is Not Voluntarily Unemployed Pursuant To RCW 26. 19.071(6) Even Though Mr. Bundy Voluntarily Retired From Policing At Just 56 Years Of Age And Is Not Otherwise Working.

A parent cannot avoid or mitigate their obligation to support their children by refusing to work or voluntarily taking a low paying job. *Marriage of Brockopp*, 78 Wn. App. 441, 446 n. 5, 898 P.2d 849 (1995). RCW 26.19.071(6) therefore requires the court to impute income to a parent who is voluntarily unemployed or voluntarily underemployed.

Voluntary unemployment is "unemployment that is brought about by one's own free choice and is intentional rather than accidental…" *In re Marriage of Brockopp*, 78 Wn. App. 441, 446 n. 5, 898 P.2d 849 (1995).

The court shall determine whether a parent is underemployed based upon their work history, education, health, age and any other relevant factors. *Dewberry v. George* 115 Wn. App. 351, 62 P.3d 525 (2003); *In re Marriage of Clarke* 112 Wn. App. 370, 375-76, 48 P.3d 1032 (2002); *Marriage of Schumacher,* 100 Wn. App. 208, 212, 997 P.2d 399 (2000). If the parent is voluntarily underemployed but "gainfully employed on a full-time basis" the court must determine whether the parent is purposefully unemployed in order to reduce their child support obligation. RCW 26.19.071(6); *Dewberry v. George* 115 Wn. App. 351, at 368.; *In re Marriage of Brockopp*, 78 Wn. App. 441, 446.

In imputing income, the court should look at the level of employment at which the parent is capable and qualified, by examining the parent's work history, education, health, age, and other relevant factors. RCW 26.19.071(6). *Marriage of Peterson*, 80 Wn.App. 148 (1995), review denied, 129 Wn.2d 1014 (1996).

A court may also consider other financial sources, not as income or resources, but in relation to the parent's economic prospects. *Marriage of Curran*, 26 Wn.App 108, 110-11, (1980).

A parent who works part time, even to care for 5 children and serve in the National Guard, may be found to be voluntarily under-employed. *Marriage of Wright*, 78 Wn.App 230, 234 (1995).

Division II of the Court of Appeals has refused to uphold a parent's decision to voluntarily reduce income without a showing of good faith. *Matson v. Matson,* 95 Wn. App. 592, 976 P.2d 157 (1999). In *Matson*, *supra*, the obligor parent voluntarily terminated his contract because it required him to work on Sundays, in violation of his religious beliefs. He argued that he should have the freedom to change jobs for his own satisfaction. The court disagreed, noting that the "Legislature's intent for child support statutes contradicts Mattson's position" because the Legislature "intended the best interests of the children to be the paramount priority." Id. at 604.

Like *Matson*, Mr. Bundy was not forced to leave his work. To the contrary, he made the personal and voluntarily decision to retire. Not only that, he retired early at just 56 years of age. According to his Social

Security Statement, his full retirement age is 67 years, so his retirement is not only voluntary, it's substantially premature. (CP 214)

Mr. Bundy did not have to retire for any physical or psychological reason. He is not disabled. To the contrary, he admits that he simply did not want to tackle the inherent risks and physical demands of police work. (CP 258) Notably, however, Mr. Bundy only described one on-the-job injury in 21 year career as a police officer. Ms. Rush has served as a police officer for roughly the same period of time for the same law enforcement agency and despite two on the job injuries she continues to work on a full time basis. (CP 289)

Mr. Bundy alleged that he retired because he could not keep up with the physical demands on policing but he admits he started a labor-intensive house flipping company with his brother. He also voluntarily engages in dangerous, physically demanding activities such as riding motocross motorcycles. (CP 289-290) Thus, like Matson, *supra*, Mr. Bundy failed to establish sufficient, good faith justification for taking a dramatic reduction in his income.[7]

Mr. Bundy also failed to establish that he could not find other, light-duty work as a police officer, return to his work as a security

[7] The Pro Tem Commissioner imputed income to Mr. Bundy at $8,8420.58 plus $311.42 in rental income. The Superior Court Judge used $2,873.03 and $311.42 in rental income for Mr. Bundy.

officer, or secure other employment. Additionally, given that he is currently receiving retirement income, his next job would not need to pay his historical income. He simply chose not to find supplemental employment, which is the very definition of voluntary unemployment. Mr. Bundy is not trying to work at all anymore. After retirement, he initially flipped houses with his brother, but now claims he cannot and will not do that work either. As a result, he is voluntarily unemployed.

The court reasoned that Mr. Bundy's decision to retire was reasonable because after considering his years of service, he was eligible to retire. However, that is not the issue. RCW 26.19.071(6) *requires* the court to impute income where a parent is voluntarily unemployed or voluntarily underemployed, regardless of the party's motivations. Mr. Bundy has every right to decide to retire early, but his decision to do so also means the Court should have imputed income to him based on his employment as a full time police officer.

Further, the court erroneously classified Mr. Bundy as underemployed when, in fact, he is not working at all. Per his own statement, he will not continue flipping houses. He cites health issues but again, he is not disabled and there is no evidence that he is unemployable. He simply stopped working. Under the circumstances

RCW 26.19.071(6) requires the court to find him voluntarily unemployed and impute income accordingly.

2. The Trial Court Abused Its Discretion When It Concluded That Mr. Bundy's Eligibility For Full Retirement Benefits Equates To Full-Time Gainful Employment.

Pursuant to RCW 26.19.071(6) the court cannot impute to a parent that is gainfully employed on a full-time basis unless the court finds that the parent is voluntarily underemployed in order to reduce their support obligation. RCW 26.19.071(6).

There are no analogous published cases that support the trial court's conclusion that *"earning the right to full retirement benefits is equivalent to full-time gainful employment."* (CP 374) However, the unpublished case, Marriage Alwin, involves a similar fact pattern. *In re the Marriage of John Alwin and Hemming Alwin*, No. 63832-7-1, Court of Appeals Division 1 (2009). In Alwin, *supra*, John, the obligor, worked as a professor for Central Washington University. He regularly commuted the long distances between Pullman and Ellensburg and Tacoma and Ellensburg for his work. At age 62, he was entitled to retire under his retirement system so he elected to resign his position. Like Mr. Bundy, he claimed that it was always his intention to retire at that point.

The trial court found John voluntarily unemployed because there was no requirement that he retire as a tenured professor at age 62 and no evidence that age or health or any other circumstance prevented his continued employment. Therefore, the court concluded, his retirement constituted "unemployment brought about by one's own free choice." On review, the Court of Appeals for Division I affirmed the trial court decision.

The Court of Appeals noted that "neither statute nor case law cited by John suggests that a party's motive is relevant to the determination of voluntary unemployment." The court further noted that even if, as a married couple, the parties anticipated John would retire at 62, his decision to retire came after the divorce under materially different circumstances. The court concluded that imputation of income is statutorily mandated under such circumstances, noting that John could retire if/when age justified it.

This case is analogous to Alwin. Like John, Mr. Bundy had the ability to retire when he did but neither his age nor his health required it. Rather, he elected to retire because he did not want to continue to serve as a police officer. However reasonable his motives are not relevant to the determination of whether the result of his decision is that he is voluntarily unemployed.

Mr. Bundy's decision to retire early, if it results in a diminished child support payment, is not in the child's best interests. As a result, he receives a fraction of his prior income in the form of retirement benefits and nominal income from a rental. Pursuant to his testimony, he does not intend to continue flipping houses and does not appear to have any other intention of working. As a result, the child is left with significantly less financial resources, despite getting older in age. The trial court's ruling resulted in a reduction in support for the child from $619.50 to $424.73 per month, which is not insignificant. This is precisely the type of case that RCW 26.19.071(6) is intended to address.

Pursuant to RCW 26.19.071, in the absence of records of a parent's actual earnings the court shall impute income in the following order of priority:

> **(a) Full-time earnings at the current rate of pay;**
> **(b) Full-time earnings at the historical rate of pay based on reliable information, such as employment security department data;**
> **(c) Full-time earnings at a past rate of pay where information is incomplete or sporadic;**
> **(d) Full-time earnings at minimum wage in the jurisdiction where the parent resides if the parent has a recent history of minimum wage earnings, is recently coming off public assistance, aged, blind, or disabled assistance benefits, pregnant women assistance benefits, essential needs and housing support, supplemental security income, or disability, has recently been released from incarceration, or is a high school student;**

(e) Median net monthly income of year-round full-time workers as derived from the United States bureau of census, current population reports, or such replacement report as published by the bureau of census. 24 26.19.071(6).

In the case sub judice, had Mr. Bundy continued to work as a police officer instead of voluntarily resigning his position, he would have earned at least $8,420.58 per month in addition to the other income he earns. Pursuant to RCW 26.19.071(6), the trial court abused its discretion by failing to impute income to Mr. Bundy. His income should have been based on his full-time earnings at historical rate of pay pursuant to RCW 26.19.071(6).

3. Pursuant To RCW 26.19.071(3), The Trial Court Abused Its Discretion By Not Including Mr. Bundy's The Other Income On The Child Support Worksheets.

RCW 26.19.071(3) lists the specific income sources that are to be included in a parent's gross income for purposes of calculating child support. Self-employment income, rental income and retirement benefit income are all included in RCW 26.19.071(3).

In the instant case, the financial documents that Mr. Bundy provided displayed clear evidence of income in addition to the pre-retirement and retirement income he received from being a Tacoma police officer.

Specifically, Mr. Bundy admitted that he has an interest in a real estate business (LLC) with his brother. The records reflect that Mr. Bundy received an additional $1,299.22 net per month in income for 2016 from that business. (CP 190) Further, although Mr. Bundy failed to provide tax returns for his business, the LLC had $228,354.24 in the bank as of January of 2018. (CP 250) Mr. Bundy and his brother bought, fixed up and sold a property in 2017. (CP 402) However, the trial court did not include any income for Mr. Bundy in the child support worksheets regarding this business.

Additionally, Mr. Bundy admittedly owns a rental property in Puyallup, WA. Pursuant to the financial records Mr. Bundy provided, he receives an average of rental income of $419.83 from property he leases. (CP 402) Despite this evidence, the trial court did not include the proper amount of rental income on the child support worksheets.

Further, it was undisputed that Mr. Bundy receives an additional $500 per month net benefit from VEBA for uninsured medical expenses through age 65. (CP 216) Despite this additional $500 in net income per month that Mr. Bundy receives, the trial court did not include this income on the child support worksheets.

Pursuant to RCW 26.09.071(3), the trial court abused its discretion by not including all sources of income on the child support worksheets regarding Mr. Bundy.

4. The Trial Court Abused Its Discretion By Not Ordering The Parties To Pay Their Proportionate Share Of Extracurricular Activities For Their Son.

RCW 26.19.080 governs the payment of daycare or other child rearing expenses and provides that those expenses shall be paid in the same proportion as the basic child support obligation. Specifically, RCVW 26.19.080 in relevant part states,

> **…Day care and special child rearing expenses, such as tuition and long-distance transportation costs to and from the parents for visitation purposes, are not included in the economic table. These expenses shall be shared by the parents in the same proportion as the basic child support obligation. …**

Id. *See* Marriage of McCausland, 159 Wn.2d 607 (2007).

Ms. Rush specifically requested in her Petition for Modification of Child Support that Mr. Bundy pay his proportionate share of the expenses their child incurred for the activities he was historically engaged. (CP 161) In her declarations to the Court, Ms. Rush identified the specific historical extracurricular activities that the parties previously agreed their son could participate. Those activities included little league, club baseball and associated clinics, club and recreational soccer, recreational or club football, karate, and numerous other youth camps. (CP 219) Ms. Rush

also testified in her declarations that while Mr. Bundy historically reimbursed her for those expenses, he had refused to do so after Ms. Rush filed her child support modification proceeding. (CP 219-220) In fact, Mr. Bundy agreed that he would pay the extracurricular activity expenses that he agreed upon in his Response to Petition. (CP 183) Pursuant to RCW 26l.19.080, the trial court abused its discretion by not including that each parent shall pay their proportionate share of extracurricular activities for the child.

V. CONCLUSION

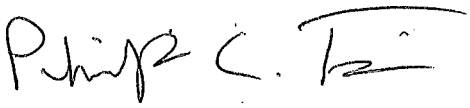
In conclusion, the trial court's findings of fact are not supported by substantial evidence. The trial court abused its discretion by failing to impute income to Mr. Bundy at his historical rate of pay. The trial court also abused its discretion by failing to include all sources of income regarding Mr. Bundy in the child support worksheets and to order the parties to pay the extracurricular activities for the child in proportion to their income.

As a matter of public policy, the Court should impute income to Mr. Bundy. Otherwise, the precedent set would allow any parent who is simply eligible for retirement to quit their job and not pay child support commensurate with their earning capacity regardless of their age and the

other factors contained in RCW 26.09.071. This would not only apply to law enforcement but also to firefighters, and other military personnel who have positions that may physically put them in harm's way as inherent with their job. Ms. Rush respectfully asks that you grant her appeal pursuant to the arguments and authority enumerated herein.

Dated this 15th day of October, 2018.

Respectfully submitted,



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