

FILED

SEP 27 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COA No. 28899-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

EARTH FEATHER QUINTERO (now GUARDIPEE), Appellant,

v.

DAVID QUINTERO, SR., Respondent.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. In its order on modification, the court erred by entering finding of fact 2.2:

The custody decree/parenting plan/residential schedule should be modified because a substantial change of circumstances has occurred in the circumstances of the children or the nonmoving party and the modification is in the best interest of the children and is necessary to serve the best interest of the children. This finding is based on the factors below: . . .

The children's environment under the custody decree/parenting plan/residential schedule is detrimental to the children's physical, mental or emotional health and the harm likely to be caused by a change in environment is outweighed by the advantage of a change to the children. . . .

The following facts, supporting the requested modification, have arisen since the decree or plan/schedule or were unknown to the court at the time of the decree or plan/schedule:

- G.A.L. recommendation
- Children's request to remain with their father
- Mother has:
 - History of drug and alcohol related offenses.
 - Founded by CPS twice.
 - Found in contempt of court in bad faith.
- Father has no history of any of these concerns.
- The children's physical, mental and emotional health as well as educational needs are best met while with father. (CP 169).

B. In its order on modification, the court erred in entering finding of fact 2.7:

The following substantial change has occurred in the circumstances of either party or of the children:

- Relocation of children by Mother across the state without proper notification to father or courts.
- While with Mother the children missed substantial amounts of school, negatively affecting their education performance.
- Mother on several occasions failed to show for scheduled visitations and has not maintained consistent contact with children.
- Father has the quality time and has proved most involved in the children's schooling.
- It is in the children's best interests to remain with the father who has established continuity for their needs. (CP 172).

C. The court erred by modifying the parenting plan to designate David Quintero as the primary custodial parent.

D. The court erred by ordering Ms. Guardipee to pay child support when it had no basis to impute income to her.

Issues Pertaining to Assignments of Error

1. Did substantial evidence support finding of fact 2.2?
(Assignment of Error A).

2. Did substantial evidence support finding of fact 2.7?

(Assignment of Error B).

3. Did the court abuse its discretion by modifying the parenting plan to designate Mr. Quintero as the primary custodial parent under RCW 26.09.260? (Assignment of Error C).

4. Did the court err by ordering Ms. Guardipee to pay child support when it had no basis to impute income to her?

(Assignment of Error D).

II. STATEMENT OF THE CASE

Earth Feather Quintero (now Guardipee), filed a motion to modify the parenting plan. (CP 69 ; RP 208). In 2004, she and David Quintero had agreed to a parenting plan with Ms. Guardipee as the primary custodial parent. (CP 29-36, 37-42). In 2007, the parties had a parenting plan calling for joint custody. (CP 47-54). The case proceeded to bench trial as adequate cause had been established for hearing the petition. (CP 167; RP 6).

Amid allegations of abuse and neglect, Michael Little was appointed guardian ad litem in April 2009. (CP 104; RP 8, 9). Initially, he was to determine primary custodial placement for Sky and Aztec Quintero. (RP 9). Ms. Guardipee and Mr. Quintero had a joint parenting plan before. (CP 47-54; RP 10).

There were CPS allegations against the parents. (RP 11). Some were founded and others were inconclusive. (*Id.*). The CPS referral by Ms. Guardipee in July 2005 concerned Mr. Quintero arguing with his wife in front of the children and involving domestic violence with a knife wound. (RP 11-12). This report was found to be inconclusive. (RP 12). There was a founded allegation in June 2006 involving Ms. Guardipee and drugs/alcohol. (*Id.*). Mr. Quintero made a final referral on March 22, 2009, when Ms. Guardipee allegedly hit Aztec on the bottom with a shoe. (*Id.*). This had a finding of N/A. (*Id.*).

Mr. Little felt both parents loved their boys, had proper living conditions, and the children were happy in both places. (RP 13). Aztec was a very happy child and loving of both parents, but Sky had developmental problems with speech and language delays. (*Id.*). Mr. Little spoke with the children's teachers at Sunset Elementary in Airway Heights. (RP 14). Mr. Fredericks, Aztec's teacher from 2008-2009, had significant contact with Mr. Quintero, but not Ms. Gaurdipee. (*Id.*). Mr. Little also spoke with Ms. Dominguez, Sky's special education teacher. (*Id.*). Sky had been in special education from January to June 2008 and from October 2008 to the end of school in 2009. (*Id.*). Ms. Dominguez had little

interaction with Ms. Guardipee, who had removed Sky from school in late 2008 and placed him in the Indian school system. (*Id.*).

On August 28, 2009, Mr. Little's recommendation was for the children to stay with Mr. Quintero as he provided consistency and a stable environment. (RP 18). On the other hand, he stated:

Once again, while the children were at this school, I was concerned that the mother had not had much contact, when I originally had done the investigation, that she had not been involved in their care. That being said, I did find and did speak with the medical providers who were providing counseling for Sky who said the mother was very involved in that early on, that she was involved in his care. So once again, I'm left with trying to determine, you know, who's providing the most consistent, caring environment. (RP 19).

Mr. Little stated both parents loved their children and cared deeply for them. (RP 19). The big problem was they simply did not get along. (*Id.*). He felt there seemed to be no way for the two of them to communicate. (*Id.*).

Mr. Quintero is disabled and has limited means. (RP 18, 20). An important issue for Mr. Little was that Mr. Quintero had lost or given up his phone so it was very difficult for Ms. Guardipee to have contact with the children. (RP 20). He told the father it was inappropriate not to have some kind of phone access for the children and the mother to communicate with each other. (*Id.*).

On April 28, 2009, an order was entered awarding temporary custody to the father with reasonable contact for the mother. (RP 21-22). Mr. Little understood there had been little contact with the mother since the order “because the father could not be contacted.” (RP 22). As in his report, Mr. Little recommended placement of the children to be with the father. (RP 23).

Mr. Little acknowledged knowing that Sky and Aztec were enrolled members of the Colville Confederated Tribes. (RP 26). He had not been to or had contact with WaHeLut Indian School. (RP 27). He also had not been in contact with Roosevelt Elementary School, which Sky and Aztec had attended when they lived with Ms. Guardipee in Spokane. (*Id.*). Mr. Little was aware counseling had been ordered for Sky and Aztec, but did not know whether Mr. Quintero had followed through. (RP 30, 31). He knew the father had a criminal history and anger problems. (RP 33). Mr. Little was unaware that Mr. Quintero's daughter, Monica, had a protection order against him. (RP 33).

John Guenther was a social worker with DSHS – Children and Family Services. (RP 49). Around 2006, he had been assigned the case of Sky and Aztec Quintero. (RP 50). Mr. Guenther said Ms. Guardipee engaged in and successfully

completed intensive outpatient treatment services and Vanessa Behan parenting classes. (*Id.*) She completed a bonding-attachment assessment with Judy Houk and a psychological evaluation with Dr. Wert. (*Id.*) Her Individual Service and Safety Plan commented Ms. Guardipee was not a threat to her children, provided she did not relapse. (RP 52). DSHS closed out her case because she was in compliance:

They closed out your case because they did not see you as a threat to your children, and the compliance issue, you know, perpetuated that. (RP 53).

Mr. Guenther recalled Mr. Quintero did his intake and started counseling for domestic violence. (RP 53). He also said Mr. Quintero had been involved with Spokane Tribal CPS. (RP 54). Although both parents had concerning behaviors at the time of the referrals, they had made progress in services so that the children were not believed to be at risk of abuse or neglect. (*Id.*) A parenting plan was filed with a 50/50 split. (*Id.*) Because he had not been involved with the parents for years, Mr. Guenther could make no recommendation as to which parent should have the children. (RP 55).

The court commented to the parties:

And I do want to remind parties that there is, as we

all know, a long history to your family, and the many things such as Mr. Guenther was requested to testify about are old, they're remote in time, they occurred before the present difficulties arose and the basis of this current dispute. So if we get into old things that really aren't all that relevant, I will remind you of that. Okay. If things are long since past, they may well be irrelevant since they're remote in time. (RP 63).

Sean Dotson, principal of Sunset Elementary, had been contacted a number of times by Ms. Guardipee about Sky and Aztec. (RP 64). She called him a few days before the trial worried about the boys because the phone was disconnected. (RP 65). When Ms. Guardipee asked if she could talk to the children on the phone, Mr. Dotson contacted Sky's teacher and asked him to have Sky give her a call at lunch time. (*Id.*). The teacher came back to Mr. Dotson and said Aztec was told by his father not to make that call during school. (*Id.*). The issue was not pressed at the time. (*Id.*). Aztec was in fifth grade at Sunset. (RP 66). Mr. Dotson was aware of Sky's developmental delay and knew him well. (*Id.*).

Mr. Dotson spoke with both of the children's teachers. (RP 69). Ms. Dominguez reported Sky was making adequate progress in light of his developmental delay. (*Id.*). Aztec's teacher said his levels of performance were OK, but he was concerned that Aztec

was not completing his homework and assignments as he would like him to do. (RP 70). On tests, he was making reasonable progress. (*Id.*). But Aztec's fourth-grade report card reflected F grades in mathematics for his second and third term as well as English grades of D in the second quarter and F in the third quarter of the school year ending in June 2008. (RP 79, 80). Moreover, the majority of his areas in work habits were listed as "not meeting expectations." (*Id.*).

Jessica Bankey was Sky's speech language pathologist and worked at Sunset Elementary. (RP 84). She said he had severe speech and language delay. With respect to assessments, there is a range of age-equivalency scores. (RP 85). For expressive communication, Sky was at 3 years, 5 months; understanding spoken words, 3 years, ten months; understanding of spoken language, 4 years eleven months; understanding of vocabulary, 5 years, seven months. (RP 86). Sky's birthday is October 8, 2001, and he was seven years, five months at the time he was tested in March 2009. (*Id.*). Sky needed a Vantage Lite augmentative communication device for his speech:

. . . It is a dynamic screen. It's kind of like a computer. And so what it would have on there would be different vocabulary pictures, and he would point to those on the

screen, and then it would have speech output so that he could express his wants and needs and ideas, even social communications skills, to other kids, adults.” (RP 86-87).

The process for obtaining the device involved trying to get funding through Medicaid. (RP 87). Ms. Bankey was working with the manufacturer of the device to get the necessary documentation. (*Id.*). All the paperwork had been submitted to Medicaid in Washington state. (*Id.*). The last piece was to observe Sky using the device. (*Id.*). At the time of trial, Ms. Bankey could not say for certain that Sky would receive the device. (RP 88).

Ms. Bankey initially had more contact with Mr. Quintero in obtaining the device. (RP 90). But Ms. Guardipee had been in contact with her during the school year about the device and asking questions about it. (*Id.*). Sky’s previous speech therapist had tried to order the device, but he was no longer going to her because of transportation problems on Mr. Quintero’s part. (RP 93).

Monica, Mr. Quintero’s daughter, was raised by her grandfather for a time. (RP 95). When she was 15, she ran away from home and went to Pasco where Mr. Quintero was living. (RP 96). But she had not had any contact with him for about 12 years.

(RP 98). She had a protection order against her father in 1997.

(RP 99). Ms. Quintero had concerns about Sky and Aztec:

I'm afraid of their involvement, as they get older, with drugs, as I was introduced to them while I lived with David Quintero, my father. I'm concerned about their upbringing with their schooling. I work for the school district, so I work with quite a few kids that have developmental problems. I'm also concerned about what Mr. Quintero will introduce them to, gangs, drugs, and that type of lifestyle. I was introduced to that when I lived with him. And luckily I escaped when I did. (RP 150).

She would choose Ms. Guardipee to parent the boys. (RP 151).

On questioning from Mr. Quintero as to how she could say he caused her to go in a worse way, she testified:

Yes, it did get worse after I did live with you, because there was incest involved, there was harder drugs. I'm not sure if you recall, but I was hooked on crack cocaine because you introduced me to it and showed me how to cook it and took me along to do drug deals and to hide it underneath my bra or to hide it in my panties. (RP 153).

Since March 2009, Trish Aller managed the apartments where Mr. Quintero lived. (RP 102). Michelle Ortiz also lived in the complex. (RP 103). Ms. Aller was unaware Ms. Ortiz was not to be around Sky and Aztec. (*Id.*). She also was unaware of the domestic violence between Mr. Quintero and Ms. Ortiz. (*Id.*).

Brian Clark, Ms. Guardipee's half- brother, was the tribal roads director for the Colvilles. (RP 105). Tribal funds were

available in obtaining his education and those funds were also there for Sky and Aztec as tribal members. (RP 108-109).

Deanna Clark, Ms. Guardipee's mother, had no contact with Sky and Aztec when they were with their father. (RP 110). She believed her relationship with her grandsons was really strong and they were bonded. (*Id.*). She testified Mr. Quintero had been denying access to the boys and had been alienating them from Ms. Guardipee's family. (RP 111). Ms. Clark viewed the relationship between her daughter and her sons as being a very strong bond, especially with Sky, who was developmentally delayed. (*Id.*).

In the time Sky and Aztec lived with their mother in Olympia, Ms. Clark felt their educational needs were being met at WaHeLut Indian School. (RP 112). It was a federally funded school with special education teachers and a speech therapist. (*Id.*). Ms. Clark said the boys were very close to their younger sister, Kiteri. (RP 113). She felt Sky and Aztec were very sad when having to return to their father after visiting Ms. Guardipee on the west side. (*Id.*).

Ms. Clark believed life was going very well for Ms. Guardipee in Olympia. (RP 116). She had a nice two-bedroom apartment with the boys having their own bedroom. Ms. Guardipee took them to church on Sunday and was very active in the church,

being on the board and teaching Sunday school. She was also going to college. (*Id.*). Ms. Guardipee engaged the boys in various activities in Olympia. (RP 117).

When asked by Mr. Quintero, Ms. Clark said, "I've seen you high, David. And the children have told me that you and Michelle drink on a regular basis and then you fight and argue, and it gets pretty intense, and the police have had to be called because of it." (RP 121-122).

Michelle Ortiz and Mr. Quintero used to date and were romantically involved. (RP 126). She acknowledged an incident when she fell in his apartment during an argument and injured herself. (RP 127). Sky and Aztec were in the room. (*Id.*). There had been protection orders between Ms. Ortiz and Mr. Quintero in the past. (RP 129). Ms. Ortiz said they both needed outside assistance, but it could not be done with "[Ms. Guardipee's] restricting the access to the children." (RP 132). She did want to continue a relationship with Mr. Quintero. (*Id.*).

Carolyn Werre was employed at the American Indian Community Center for about 16 years and met Ms. Guardipee when she was 19 and a student there. (RP 140). Ms. Werre viewed her "as being an honest person, a good person, a very calm

person when things are not looking good.” (RP 141). She never saw the boys having a bad relationship with Ms. Guardipee. (*Id.*) Ms. Werre had last seen Mr. Quintero about 3 years before. (RP 142). He became very angry when he found out the boys were possibly going to be picked up by Ms. Clark for a “drop-off visit” because Ms. Guardipee had been in a car accident. (*Id.*) He got angry with Ms. Werre in front of the children and got angry in front of the staff. (*Id.*) She had to ask him to leave. (*Id.*) Ms. Werre believed the children should be with Ms. Guardipee in a “very stable, loving home.” (RP 143).

Mr. Quintero acknowledged the boys were not in counseling. (RP 159). He missed one visitation to bring the children to the pick-up at McDonald’s in Ellensburg for Ms. Guardipee because of an e-mail she had sent to one of the boys saying she would be unable to make it due to snow in the pass. (RP 156). Another visit was missed because they had not spoken. (*Id.*)

Ms. Guardipee acknowledged the June 17, 2007 parenting plan provided the father shall have the children from mid-December to the end of the school year. (RP 190). On January 6, 2009, Mr. Quintero picked up the children from WaHeLut Indian School with the assistance of Nisqually police. (RP 190-191).

Ms. Guardipee relocated to Olympia when she was raped by another man. (RP 192, 193). She feared for her and the children's safety. (*Id.*). Ms. Guardipee informed Mr. Quintero she was relocating to Olympia. (*Id.*). In December 2008, he was aware the children were in WaHeLut Indian School. (*Id.*).

The court denied her motion to modify the parenting plan, but granted modification to Mr. Quintero. In its oral ruling, the court stated:

Although these allegations [of drug use and mental health issues as to Ms. Guardipee and gang activity, gambling, alcohol and drug issues, and sexual abuse by Mr. Quintero] are concerning, apart from the testimony on each of those allegations, [Ms. Quintero] has not met any burden of proof to show that these matters are events that would impact the Court's decision today. And in some respects, these are old allegations. In other respects, there really hasn't been much in the way of proof of any such allegations and establishment of a connection between the care by Mr. Quintero of Aztec and Sky and those allegations. That's not to say that – again, in the past there have been deficiencies on the part of both parents here.

So to sum all this up, neither parent is a perfect parent, but that's not what the decision is about here. The Court needs to decide whether or not [Ms. Guardipee's] met her burden of proof, or conversely, Mr. Quintero in his countering, amended parenting plan has met his burden of proof to show that the children should be placed with him as primary residential parent.

...

The parenting plan was agreed in 2004, and that's the one that is being followed currently, as said earlier in my comments, and one-half of the year to Mom; one-half to Dad. Again, at that time no allegations of need for restrictions on contact were raised. . . .

Subsequently the difficulties arose in the juvenile court setting, dependency case. That was in about 2006. And again Mr. Little testified that in about 2007 there was a modification to the original parenting plan. Again, that modification did not raise any allegations of need for limitation or restrictions on contact. . . .

Difficulties arose again when Mom moved to the coast. I don't quarrel with her reasons for doing that. . . .

The more persuasive testimony is that it would be detrimental, given Sky's special needs, to remove him from his current school environment. This is not to say that the Sunset School is better than the WaHeLut School . . . And it would appear that children in general would be very well-served by attending either school.

. . . .

So I am finding that it is in the children's best interests in accord with that statute to remain at their school, and the Court is determining that Mr. Quintero should be the primary residential parent. And when I say this, I say it with the recognition certainly that there have been tremendous problems in the past, and no one is free of blame here, but I'm not casting blame. I'm doing what I believe is in the best interest of Aztec and Sky. (RP 205, 206, 208, 211, 216).

The court subsequently entered findings, conclusions, and an order reflecting its oral decision. (CP 150-158, 167-173).

The court also ordered Ms. Guardipee to pay child support based on imputed income. (CP 174). This appeal follows. (CP 191).

III. ARGUMENT

A. Substantial evidence does not support finding of fact 2.2.

A trial court's findings of fact will not be disturbed when there is substantial evidence to support them. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). Here, ample evidence does not support the trial court's determination as to finding of fact 2.2.

The trial court found the parenting plan should be modified because a substantial change of circumstances had occurred and modification was in the best interest of the children and necessary to serve their best interest. (CP 169). Its finding was based on the factor that the children's environment under the parenting plan was detrimental to their physical, mental or emotional health and the harm likely to be caused by a change in environment was outweighed by the advantage of a change to them. (*Id.*). The court cited several facts to support its determination. (*Id.*).

The first fact is the guardian ad litem recommended placement with the father. (CP 169). The record supports the finding as that was his recommendation. (RP 23).

The court found the children requested to remain with their father. (CP 169). The guardian testified Aztec loved both parents

but would rather be with his father. (RP 16). But there is no such testimony regarding Sky's preference. Accordingly, the evidence only supports Aztec's preference to stay with Mr. Quintero.

The court also found Ms. Guardipee had a history of drug and alcohol-related offenses that were twice founded by CPS and had been found in contempt of court in bad faith. (CP 169). The record shows there had been at least 14 CPS referrals involving both Mr. Quintero and Ms. Guardipee, some founded and others inconclusive. (RP 11). But they were in years past. (*Id.*). The court stated it considered old things irrelevant. (RP 63). From December 2005 to March 2009, "there was only one other founded allegation against Ms. Guardipee" involving drugs. (*Id.*). The record does not support the finding there were two founded CPS referrals. As for the contempt in bad faith, Ms. Guardipee acknowledged that had happened. (RP 187).

The court found the father had no history of any of these concerns. (CP 169). To the contrary, the record shows that Mr. Quintero did indeed have such a history. (See *e.g.*, CP 193, 194, 196, 197, 202, 206, 210). The court commented on that history in its oral ruling, but ignored it in making this finding. (RP 205). The record reflects testimony of past and current drug usage and

domestic violence, and sexual abuse by Mr. Quintero. (See, e.g., RP 33, 53, 121, 122, 127, 129, 142, 150-153). In the order on modification, the court wrote: “No contact between Ms. Ortiz and the children is permitted until satisfactory proof of progress in counseling to address domestic violence issues is presented by declaration(s) from counselors and supplemental proposed order is offered.” In these circumstances, substantial evidence does not support this finding.

Although the court made the finding that “the children’s physical, mental and emotional health as well as educational needs were best met with [the] father” (CP 169), it is a conclusion of law and is subject to de novo review. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 43, 59 P.3d 611 (2002). The record shows both parents loved their boys and had proper living conditions. (RP 13). Many of the concerns with Ms. Guardipee had been resolved and posed no threat to the children. (CP 151, 154). The court’s conclusion that the children’s needs were best met with Mr. Quintero does not flow from its findings in 2.2. The crucial findings relating to this issue are unsupported by substantial evidence and in turn do not support its conclusion.

B. Substantial evidence does not support finding of fact 2.7.

In finding of fact 2.7, the court determined there were several substantial changes that occurred in the circumstances of either party or the children. (CP 172). This finding is not supported by substantial evidence. *Thorndike, supra*.

The court found Ms. Guardipee relocated the children across the state without proper notification to Mr. Quintero or the courts. (CP 172). The record, however, reflects Ms. Guardipee informed the father that she planned to relocate to Olympia. (RP 192). He also was aware the children were at WaHeLut Indian School. (*Id.*). After she was raped, Ms. Guardipee moved to Olympia because she feared for her and her children's safety. (*Id.*). She testified she was unaware of the paperwork that was supposed to be filed with the court "because I was in fear of my safety." (RP 193).

The court also found the children had missed substantial amounts of school, negatively affecting their educational performance. (CP 172). There is nothing in the record showing the children missed substantial time at WaHeLut Indian School. Although Ms. Dominguez noted Sky had lost significant progress he had made while he was in the Sunset school system, he was nonetheless progressing well in light of his developmental delay (RP 15, 35-36, 66). The record also reflects both Sky and Aztec

had been having problems with their educational performance before being removed to Olympia. (RP 13, 66, 79, 80). This finding is unsupported by substantial evidence.

The court found the father had the quality time and had proved most involved in the children's schooling. (CP 172). The court's determination, however, ignored the testimony showing Ms. Guardipee was concerned about their education and was involved. (RP 5, 19, 64, 90, 93). The court also commented Mr. Quintero had the time to spend with the boys and at school because of his "unfortunate disability." (RP 212). The court also encouraged Ms. Guardipee to continue with her studies, but then held it against her by saying going to school would take away time she would otherwise have available to spend with the boys. (*Id.*). This finding is not supported by ample evidence.

The last finding stated it was in the children's best interests to remain with the father, who had established continuity for their needs. (CP 172). This is actually a conclusion of law reviewed de novo. *Robel*, 148 Wn.2d at 43. There was continuity because Mr. Quintero inappropriately withheld phone contact with the boys from Ms. Guardipee, including another missed visit. (RP 19). The guardian ad litem recognized the impropriety of the no-contact

situation. (*Id.*). Mr. Quintero's limited income interfered with communication because he lacked access to the internet or a phone. (*Id.*). Withholding contact with the mother, even to the point of being inaccessible to the guardian ad litem as well (RP 22), is an improper basis for concluding Mr. Quintero had established continuity for the boys' needs. This conclusion of law does not flow from the unsupported findings.

C. The court abused its discretion by designating Mr. Quintero as the primary custodial parent under RCW 26.09.260.

RCW 26.09.260(1) provides that the court shall not modify a prior custody decree or parenting plan unless it finds, on the basis of facts that have arisen since the prior decree or plan or that were unknown to the court at the time of the prior decree or plan, that a substantial change has occurred in the circumstances of the child or the nonmoving party and that the modification is in the best interests of the child. The court made such a determination. (CP 169). But its findings in support of that decision were not supported by substantial evidence and cannot stand.

A trial court's ruling on placement of children is reviewed for abuse of discretion, which occurs when the decision is manifestly unreasonable or based on untenable grounds. *In re Marriage of*

Kovacs, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). For the reasons stated in section III A and B, *supra*, the court's decision that it was in the children's best interest to be with the father relied on findings unsupported by substantial evidence and therefore constituted an abuse of discretion as it was based on untenable grounds. 121 Wn.2d at 795. In these circumstances, the court's designation of Mr. Quintero as the primary custodial parent must be reversed.

D. The court erred by ordering Ms. Guardipee to pay child support when it had no basis to impute income to her.

The court continued presentment on child support several times in order for financial information to be gathered. (RP 233, 242). At the December 21, 2009 hearing, Mr. Quintero told the court he wanted to modify his child support worksheets and acknowledged Ms. Guardipee was going to college and she received somewhere in the range of \$400 a month. (RP 232). At presentment on January 15, 2010, Mr. Quintero submitted proposed worksheets, but the court stated:

I don't recall seeing any, at least recent financial declarations that reflect the kind of numbers you're talking about on your new set of proposed worksheets. (RP 236).

The previous worksheet reflected child support of \$50 per child because their income was so low. (RP 236, 239). The court asked Mr. Quintero where he got Ms. Guardipee's income from and where the financial declarations were. (RP 237). He told the court he had not received any financial information from her. (*Id.*). Commenting on the imputed income in the new worksheets, the court said:

Well, I don't know that I can impute income, can I, unless I have a financial declaration that supports that and/or testimony at the trial. I don't recall any testimony at the trial, the hearing on that. (RP 237).

Mr. Quintero reminded the court he was asked to go back and meet with Ms. Guardipee or by phone to get her financial statements. (RP 238). He said he received nothing from her. (*Id.*).

When the court asked her why she had not cooperated with Mr. Quintero on preparing the child support worksheets and order, she said she had been waiting for a phone call from him, but his phone was not working for the past couple weeks. (RP 239). The court again continued the presentment so the child support worksheets could be worked out. (*Id.*). Since the father got money from tribal TANF, Ms. Guardipee suggested Spokane Tribal TANF and the State do the child support order. He agreed. (RP 241).

On February 26, 2010, the court held the continued presentment hearing. (RP 247). It signed the child support worksheets and signed the child support order. (RP 251, 255). She argued to the court the child support papers reflected incorrect calculations. (RP 256). When Ms. Guardipee asked for a deviation, the court told her she could move for reconsideration or appeal. (RP 255-256).

The child support worksheet imputed income to Ms. Guardipee:

The mother has not worked in more than 9 (nine) years, has no disability to prevent her from working, and she has not presented any evidence that she is a student. (RP 159).

The child support also stated Ms. Guardipee “refused to provide any financial information and is voluntarily unemployed, therefore her income is imputed.” (RP 175). Monthly income was imputed at \$1482. (RP 160, 176). Based on the imputed income, she was ordered to pay monthly child support of \$516. (RP 179).

An order for child support shall be supported by written findings of fact upon which the support determination is based. RCW 26.19.035(2). This requirement applies in support modification proceedings. *In re Marriage of Wayt*, 63 Wn. App.

510, 512-13, 820 P.2d 519 (1991). On appeal, the court considers whether the findings are supported by substantial evidence and whether the court made a correctable legal error. *In re Marriage of Shellenberger*, 80 Wn. App. 71, 80-81, 906 P.2d 968 (1995).

Decisions setting child support are left to the sound discretion of the trial court unless that discretion is exercised in an untenable or unreasonable way. *In re Marriage of Booth*, 114 Wn.2d 772, 776, 791 P.2d 519 (1990). Before income can be imputed, however, the court must find that the obligor parent is voluntarily unemployed or underemployed. *In re Marriage of Pollard*, 99 Wn. App. 48, 52, 991 P.2d 1201 (2000).

The court erred by ordering Ms. Guardipee to pay child support on the information before it because nothing in the record supports imputing income to her. The worksheet stated Ms. Guardipee had not presented any evidence she was a student. (RP 159). But the record clearly reflects that Mr. Quintero knew she was going to college and got around \$400 per month. (RP 232). Her mother also testified Ms. Guardipee was in college. (RP 116). Being a student, Ms. Guardipee was not voluntarily unemployed or underemployed. (RP 159, 175). Furthermore, she did not have the opportunity to provide any of her financial

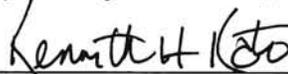
information to Mr. Quintero, as ordered by the court, to complete the child support worksheet. (RP 220, 235). Abusing its discretion, the court erred by ordering child support improperly based on imputed income that should not have been attributed to Ms. Guardipee. *In re Marriage of Booth*, 114 Wn.2d at 776.

IV. CONCLUSION

Based on the foregoing facts and authorities, Ms. Guardipee respectfully urges this Court to reverse the order on modification designating Mr. Quintero as the primary custodial parent and the order for support and remand for further proceedings.

DATED this 27th day of September, 2011.

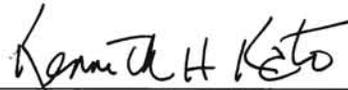
Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on September 27, 2011, I served a true and correct copy of the Brief of Appellant by first class mail, postage prepaid, on David Quintero, 13513 W. 6th Ave., Apt. 107, Airway Heights, WA 99001.



Kenneth H. Kato