

No. 31303-4-III

**FILED**  
**May 19, 2014**  
Court of Appeals  
Division III  
State of Washington

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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In re the Parenting and Support of RTL, Child.

EMILIO E. P. LOPEZ, Respondent,

and

NICHOLETTE B. LIEDKIE, Appellant.

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BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR

1. The court erred by entering the final parenting plan designating Emilio E. P. Lopez as the primary custodial parent.....1

2. The court erred by ordering Nicholette B. Liedkie to pay child support based on its findings in paragraph 3.2, Person Paying Support (Obligor).....1

*Issues Pertaining to Assignments of Error*

1. Because it failed to follow the proper procedure under *In re Parentage of C.M.F.* by treating this modification as an initial custody proceeding, did the court err by entering the final parenting plan designating Mr. Lopez as the primary residential parent? (Assignment of Error 1).....1

2. Did the court err by ordering Ms. Liedkie to pay child support based on imputed Income? (Assignment of Error 2).....1

II. STATEMENT OF THE CASE.....2

III. ARGUMENT.....11

A. Since the trial court acknowledged Ms. Liedkie “had official legal custody in Idaho” of RTL, *In re Parentage of C.M.F.* applies so the court should have treated Mr. Lopez’s petition for residential schedule and parenting plan as a modification rather than an initial proceeding.....11

B. The court erred by imputing income to Ms. Liedkie when the record shows she was

working a 30-hour week at \$9/hour and she was  
not voluntarily underemployed.....17

IV. CONCLUSION.....18

## TABLE OF AUTHORITIES

### Table of Cases

*Dewberry v. George*, 115 Wn. App. 351, 62 P.3d 525,  
*review denied*, 150 Wn.2d 1006 (2003).....18

*In re Brockopp*, 78 Wn. App. 441, 848 P.2d 849 (1995).....18

*In re Parentage of C.M.F.*, 179 Wn.2d 411,  
314 P.3d 1109 (2013).....11, 15, 16

### Statutes

RCW 26.09.260.....14, 16

RCW 26.09.270.....14, 16

RCW 26.19.071(6).....17, 18

RCW 26.26.375.....15

## I. ASSIGNMENTS OF ERROR

1. The court erred by entering the final parenting plan designating Emilio E. P. Lopez as the primary custodial parent.

2. The court erred by ordering Nicholette B. Liedkie to pay child support based on its findings in paragraph 3.2, Person Paying Support (Obligor):

The net income of [Ms. Liedkie] is imputed at \$1348.46 because [her] income is unknown.

The amount of imputed income is based on the following information in order of priority. The court has used the first portion for which there is information:

minimum wage [deemed to be \$9.00 per hour by court order] in the jurisdiction where the parent lives at full-time earnings because the parent was recently released from incarceration.

### *Issues Pertaining to Assignments of Error*

1. Because it failed to follow the proper procedure under *In re Parentage of C.M.F.* by treating this modification as an initial custody proceeding, did the court err by entering the final parenting plan designating Mr. Lopez as the primary residential parent?

(Assignment of Error 1).

2. Did the court err by ordering Ms. Liedkie to pay child

support based on imputed income? (Assignment of Error 2).

## II. STATEMENT OF THE CASE

At the time final orders were entered on October 30, 2012, RTL was 11 years old. (CP 151). He was the son of Mr. Lopez and Ms. Liedkie. (CP 144). As found by the court, Mr. Lopez was RTL's acknowledged father and Ms. Liedkie was the mother. The Acknowledgement of Paternity was filed on or about March 22, 2001. (CP 145). Mr. Lopez filed a petition for residential schedule and parenting plan on May 3, 2010, seeking residential placement of RTL with him. (CP 2, 5). On July 14, 2010, Ms. Liedkie responded and asked that RTL continue living at her home. (CP 60).

A hearing was held on August 9, 2010. (8/9/10 RP 3). Ms. Liedkie was then in jail in Bonner County, Idaho. (*Id.* at 3-4). RTL was living with his grandparents on Ms. Liedkie's side. (8/9/10 RP 5). The court granted Mr. Lopez temporary residential placement and the child support issue was reserved. (*Id.* at 9-10; CP 69).

Subsequently, on February 28, 2011, another hearing was held. Washington Chapperal, RTL's grandfather, had filed a declaration asking for postponement of the trial on Mr. Lopez's

petition until Ms. Liedkie's release from federal prison on November 28, 2011. RTL had been living with him for about 10 months. (*Id.*) The court said Ms. Liedkie had a tough row to hoe since RTL was living with Mr. Lopez and how could it be in the best interests of RTL to go back with her when she got out of prison. (*Id.*)

Ms. Liedkie had been in prison for about two years. (2/18/11 RP 50). Meanwhile, RTL had been living with his grandparents for about a year-and-a-half. (*Id.* at 40-41). The court set the trial for January 4, 2012. (*Id.* at 47; CP 88). Ms. Liedkie's release date was May 15, 2012, so trial was continued to June 14, 2012. (1/4/12 RP 46-47; CP 92, 93). The trial date was continued at Mr. Lopez's request to September 7, 2012. (6/14/12 RP 60, 66; CP 101).

Trial was held on September 7, 2012. (9/7/12 RP 108). Beverly Fowler, executive director of Change Point women's treatment program, had been Ms. Liedkie's treatment counselor since March 2012. (*Id.* at 116). Ms. Fowler said she was an excellent participant with regular attendance in the outpatient program that also involved random drug testing. (*Id.* at 117-18). Ms. Fowler indicated Ms. Liedkie had an excellent prognosis. (*Id.* at 118). She began outpatient treatment on March 5, 2012, after

her prison release and entry into a halfway house. (*Id.* at 119).

The program lasted about a year with group sessions followed by individual counseling. (*Id.*). Ms. Liedkie's drug tests had all been negative. (*Id.* at 120).

At the time of the drug charges, Ms. Liedkie had custody of her children, RTL and BL. (9/7/12 RP 123). After her first seven months of incarceration, Mr. Lopez got temporary placement of RTL. (*Id.* at 122). She was charged in federal court after state court charges were dropped. (*Id.* at 124-25). Ms. Liedkie pleaded guilty to conspiracy to distribute methamphetamine and received a 30-month sentence in November 2010. (*Id.* at 125-26, 129). She was now on probation. (*Id.* at 127). Her parents had RTL and BL after she was jailed. (*Id.* at 128). RTL and BL were close and best friends. (*Id.* at 132). BL, born July 31, 2006, was about five years younger than RTL, born March 22, 2001. (*Id.* at 133, 149).

Ms. Liedkie testified Mr. Lopez's home was uninhabitable. (9/7/12 RP 133). RTL had dental hygiene problems and suffered seasonal allergies exacerbated by pet dander from dogs and cats. (*Id.* at 134-36). Mr. Lopez now had three dogs and a cat. (*Id.* at

136). Ms. Liedkie kept a safe, clean, and quiet environment for her kids. (*Id.*). Her Clarkston home was very clean with no pets. (*Id.* at 136-37).

Ms. Liedkie was employed within a week of being released from prison. (9/7/12 RP 138). She was a roofer for McPeak Roofing and Decking and had been working there for six months at the time of trial. (*Id.*). She wanted to have primary residential placement of RTL and had the support of her parents to help out when she was at work. (*Id.* at 138-39). Ms. Liedkie said RTL had changed schools several times while he was living with her, but she had to do what she had to do as a single mother. (*Id.* at 151). If they had to move, they had to move. (*Id.*). RTL had trouble with math and absences from school. (*Id.* at 155-56). Ms. Liedkie said RTL was doing well with school now and liked being with his father. (*Id.* at 166). She noted RTL had asthma from living in an allergy house, that is, Mr. Lopez's home, and "his whole respiratory system [was] inflamed" when he came over. (*Id.* at 166-67).

Although an Idaho court had ordered Mr. Lopez to pay child support on November 12, 2002, Ms. Liedkie had received very little. (9/7/12 RP 173; CP 48, 49, 53). This lack of child support

coincided with the times RTL changed schools a number of times. (*Id.* at 173). Mr. Lopez had some involvement with RTL until he was a year-and-a-half old. (*Id.* at 177). His parents got into an argument and they went their separate ways until Ms. Liedkie contacted Mr. Lopez about five years later. (*Id.*). In 2008, Mr. Lopez had gone through inpatient drug and alcohol treatment for a year in Oregon. (*Id.* at 175). Ms. Liedkie acknowledged he was paying on his back child support. (*Id.* at 177). She said she changed RTL's doctor in August 2012 without consulting Mr. Lopez and had also filled out intake forms and consents to treatment on RTL's behalf. (*Id.* at 184-85). She did so because RTL needed to be away from an environment with animals and the child's present doctor was not adequately caring for his needs. (*Id.* at 193). As far as her pay was concerned, Ms. Liedkie said she made \$9/hour for a 30-hour week. (*Id.* at 189).

RTL lived with Mr. Chapperal, his grandfather, for the first 6-7 months after Ms. Liedkie's arrest. (9/7/12 RP 197). After about four months, Mr. Lopez called, but RTL did not want to talk to him. (*Id.*). RTL had a hard time breathing so Mr. Chapperal took him to a Doctor Krisher. (*Id.* at 200). Mr. Lopez accompanied them. (*Id.*).

The doctor said to get the pets out of the house. (*Id.*) RTL had problems breathing after he had been to Mr. Lopez's home. (*Id.* at 207). Mr. Chapperal took RTL to the doctor for asthma, with which he was diagnosed at the age of eight, several times. (*Id.* at 209, 222). Although Mr. Chapperal asked the Doctor Krisher numerous times to contact CPS, he would not get involved. (*Id.* at 223). The doctor was, however, concerned with RTL's health. (*Id.* at 230). The grandfather came to understand he could not bring RTL to the doctor himself. (*Id.* at 225). Mr. Chapperal was also fearful of Mr. Lopez's lack of love for RTL. (*Id.* at 228).

Kathy Liedkie, RTL's grandmother, noted Nicholette had financial problems during RTL's "formative years." (9/7/12 RP 233). Her daughter had custody of BL, RTL's younger brother, and grandmother was heartbroken with their being split up. (*Id.* at 236). She had seen RTL's allergy problems and Mr. Lopez was aware of them. (*Id.* at 237). Ms. Liedkie felt the Lopez home was inhumane. (*Id.* at 240).

Fawn Randall, Nicholette's best friend, testified the Lopez home was filthy with an unkempt yard. (9/7/12 RP 250-52). She also mentioned a dog with ringworm. (*Id.*)

Ruthie Krueger, Nicholette's grandmother, said RTL had a smoke allergy. (9/7/12 RP 256). She also wished BL and RTL were not split up. (*Id.* at 261).

Mr. Lopez testified he was paying back support and it was a sizable amount. (9/7/12 RP 263-64). He did not live in a pig sty now. (*Id.* at 264-65). At his home, he had no cats and two dogs. (*Id.* at 266). There had been no CPS checks at his house. (*Id.* at 267). Although the Lopez household sometimes had six kids staying there at various times, only two lived there all the time. (*Id.* at 267-08) Mr. Lopez worked at Cleanup and Total Restoration and made \$15/hour. (*Id.* at 268). He said RTL had state medical insurance with dental coverage in Idaho. (*Id.* at 271). Mr. Lopez lived in Lapwai, Idaho, when he got custody of RTL. (*Id.* at 276). He said RTL was allergic to cats, but did not make any complaints about dogs. (*Id.* at 280-81).

Mr. Lopez called the federal probation officer on Ms. Liedkie three times. (9/7/12 RP 277). He once denied her visitation with RTL because she had changed contact information provided to health care providers without contacting him. (10/1/12 RP 302-03). Mr. Lopez was aware RTL had depression. (*Id.* at 315).

Olivia Lopez married Emilio Lopez on February 6, 2010. (10/1/12 RP 331). She said RTL was doing well in school and did well on the Idaho State Achievement Test, along with good grades and good attendance. (*Id.* at 332-37). Ms. Lopez acknowledged the yard was in bad shape, but the house was habitable. (*Id.* at 338). She had worked for Lapwai School District for two years. (*Id.* at 340). She said RTL neither had depression nor was he bipolar. (*Id.* at 341). There was nothing abnormal about him. (*Id.* at 342).

April West was a second grade teacher at Cornerstone Christian School and knew RTL. (10/1/12 RP 366). He had been missing school a lot, but Mr. Lopez became pro-active about his problems. (*Id.* at 367-68). Ms. West testified both Ms. Liedkie's side of the family and Mr. Lopez's side were concerned and wanted RTL to do well. (*Id.* at 371-72).

In its oral ruling, the court noted Mr. Lopez had been a nonexistent parent for the formative years of RTL's life while Ms. Liedkie had official custody of RTL by an Idaho court order. (10/1/12 RP 387-88). The court also commented that due to her incarceration on the federal drug offense, she was the "author of her own misfortune." (*Id.* at 392). The court awarded primary

residential placement of RTL with Mr. Lopez. (*Id.* at 395).

On October 30, 2012, the court entered Findings of Fact and Conclusions of Law on Petition for Residential Schedule/Parenting Plan or Child Support, Parenting Plan Final Order, and Judgment and Order Establishing Residential Schedule/Parenting Plan and Child Support. (CP 144-46, 147-50, 151-59). On November 26, 2012, the court entered the Final Order of Child Support with worksheet. (CP 162-70, 171-75). This appeal followed.

### III. ARGUMENT

A. Since the trial court acknowledged Ms. Liedkie “had official legal custody in Idaho” of RTL, *In re Parentage of C.M.F.* applies so the court should have treated Mr. Lopez’s petition for residential schedule and parenting plan as a modification rather than an initial proceeding.

*In re Parentage of C.M.F.*, 179 Wn.2d 411, 314 P.3d 1109 (2013), provides the framework for the court’s analysis of this child custody proceeding involving RTL. In its oral ruling, the court expressly acknowledged Ms. Liedkie “had official legal custody in Idaho” of RTL. (10/1/12 RP at 388; *see also* CP 48, 49, 53). It stated:

I'll make a few observations first before I give you my ruling. Nothing, father explains that he was the disappearing dad early on in RTL's life, basically at mother's behest, request or insistence. Needless to say, he was a non-existent parent for many, many years, the formative years of RTL's life. The other, and we look at the rules regarding, you know, this isn't a case where neither parent has legal custody and we start from scratch, and so the factors in 26.09.187 subpart 3, subpart a, the usual factors The court looks at, there's, there's seven of them, and I'll just highlight them . . . If these parties had, if there had never been any custody decree entered in Washington, these are the factors the court's gotta go by. It's a little bit different here where we had a parent, mom, who had official legal custody in Idaho and, by reason of her voluntary acts, she ended up engaged in conduct that resulted in her pleading guilty to a felony level drug charge in federal court and ending up with this being out of pocket in prison for, for two, two and a half years, counting the, maybe it was less than two years, I can't remember, counting the time that she had to spend in the halfway house, but clearly from roughly, I think she got arrested on the federal charges the Ides of March, March 15 of 2010 until relatively recently, by her own conduct, voluntary conduct, she placed herself out of pocket and unable to take care, any care of her child. . . Mom certainly never consented to the child, R, going to live with dad during her, the time she had to serve her debt to society. . . Certainly on mom's watch, she enjoyed a, she had a lot of strengths. I, I can't for the life of me figure out the schooling thing because missing that many days of school . . . , not, not making sure that the child gets to school so that the child can learn the sufficient information to be able to progress to the next level, I mean that, that's as unforgiveable as dad denying mom her

first weekend visitation after my temporary court order. You can't excuse either behavior. . . This case is about, in my opinion, whether or not R has integrated himself into his father's home. The statute says it would have had to been with mother's consent and it would have been binding on her. But by her actions, she knew or should have known that if she does something to take herself out of the child's life for that long a period of time, the child's gonna go to the dad in all likelihood. And so, I'm treating it as, while it was involuntary on her part, she didn't want to give up her child but she had to go pay her debt to society, you know, she was the author of her own misfortune that lost her custody. Had she never gone to prison, she never, we wouldn't be here today. She'd still have full legal custody, period. Absolutely period. . . Again, I'm splitting hairs here, I've gotta decide what's best for RTL. And I know that mom can provide and give all these things for RTL now, but when RTL was on her watch, how was she doing the last couple of years before she lost him? Not real well. Lotta changes in residency, back and forth, economically driven to be sure, but what was the fallout effect on R? . . . I said earlier that the law abhors, hates a change. That is most particularly true in the area of change of residential placement of a child. . . There are insufficient grounds for this Court to pull [RTL] out of his current living arrangement. I hereby grant primary residential placement, it used to be called legal custody in the State of Washington, full legal custody in the State of Washington, to father. (10/1/12 RP 387-395).

Although the trial court knew Ms. Liedkie had official legal custody of RTL and set forth his analysis of the custody issue

because of the prior custody order, it did not expressly find there was adequate cause to hold a modification hearing as required by *C.M.F.* and entered no findings or conclusions finding adequate cause or supporting its change of custody. (CP 69, 144-46, 147-5-, 151-59). Throughout the proceedings, the case was treated as an initial custody proceeding rather than a modification. The court erred.

The court cannot modify or prior custody decree or parenting plan unless it finds, on the basis of facts arising since the prior decree or plan or 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 modification is in the best interest of the child and is necessary to serve the best interests of the child. RCW 26.09.260. The party seeking to modify a custody decree or parenting plan must submit an affidavit setting forth facts supporting the requested order of modification. RCW 26.09.270. The court must deny the motion unless it finds “adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be

granted.” *Id.* This procedure was not followed below.

Mr. Lopez filed his petition under former RCW 26.26.375 as an initial custody proceeding. (CP 2). He filed no supporting affidavits as required by RCW 26.09.270. The court never made a finding of adequate cause. During the two days of the custody hearing, the court did not make the necessary finding there was a substantial change in circumstances necessitating a modification. The court faulted Ms. Liedkie for going to prison, but she was no longer incarcerated. The court even indicated she was the “poster woman for recovery.” (10/1/12 RP 392). In its oral opinion, the context is made clear because it considered Ms. Liedkie as the moving party who had to show adequate cause to change custody from Mr. Lopez to her. (*Id.*, at 392, 395). But the initial change in custody from Ms. Liedkie to Mr. Lopez was made without the proper showing of adequate cause and the court’s so finding. Moreover, the temporary order giving Mr. Lopez custody of RTL pending the final parenting plan for determination after trial neither cures the failure to find adequate cause in the first instance nor does it change the fact that Ms. Liedkie had “official legal custody” of RTL. *C.M.F.*, 179 Wn.2d at 424. Ms. Liedkie did not waive her

rights by failing to object to the incorrect procedure because “it would run contrary to the public policy embodied in chapter 26.09 RCW (*i.e.*, protect the “best interests of the child”) if the custodial parent could waive a statutory requirement meant to protect the stability of the child’s life.” *C.M.F.*, 179 Wn.2d at 431). The court erred.

The change in RTL’s custody from Ms. Liedkie to Mr. Lopez was based on the incorrect premise that this was an initial custody proceeding and not a modification. Indeed, even realizing Ms. Liedkie had “official legal custody” of RTL after the hearing was over, the court’s stated reason for keeping RTL with his father, *i.e.*, Ms. Liedkie’s incarceration, no longer existed. The court did not find adequate cause for a modification because it treated Mr. Lopez’s petition as an initial custody proceeding. Just as in *C.M.F.*, 179 Wn.2d at 432, the court should have required Mr. Lopez “to submit the affidavits required by RCW 26.09.270 and meet his burden of proof that there had been a substantial change in circumstances as required by RCW 26.09.260.” The procedure was wrong and the case should be remanded for appropriate resolution as a modification. *Id.* at 432-33.

B. The court erred by imputing income to Ms. Liedkie when the record shows she was working a 30-hour week at \$9/hour and she was not voluntarily underemployed.

The court imputed the net income of Ms. Liedkie at \$1,348.46 because her income was unknown. (CP 143, 150). But her income was known to the court as she testified at trial that she made \$9/hour and was working a 30-hour week as a roofer. (9/7/12 RP 138). She was employed within a week of being released and had worked for six months. (*Id.*). Furthermore, there was no testimony Ms. Liedkie was voluntarily underemployed or was not working.

RCW 26.19.071(6) addresses imputation of income:

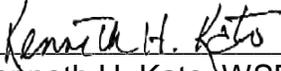
The court shall impute income to a parent when the parent is voluntarily unemployed or voluntarily underemployed. The court shall determine whether the parent is voluntarily underemployed or voluntarily unemployed based upon that parent's work history, education, health, and age, or any other relevant factors. A court shall not impute income to a parent who is gainfully employed on a full-time basis, unless the court finds that the parent is voluntarily underemployed and finds that the parent is purposely underemployed to reduce the parent's child support obligation. . .

Ms. Liedkie was gainfully employed on a full-time basis. Making \$270/week, her gross monthly income was approximately \$1161. The court imputed a net income higher than her gross without finding she was voluntarily underemployed and was purposely underemployed to reduce her child support obligation. RCW 26.19.071(6) prohibits the court from imputing income in Ms. Liedkie's circumstances. See *In re Brockopp*, 78 Wn. App. 441, 848 P.2d 849 (1995). The court abused its discretion by imputing income to Ms. Liedkie because the decision was based on unreasonable and untenable grounds. *Dewberry v. George*, 115 Wn. App. 351, 367, 62 P.3d 525, review denied, 150 Wn.2d 1006 (2003). The child support issue must also be remanded to reflect a calculation based on Ms. Liedkie's actual, rather than imputed, income.

#### IV. CONCLUSION

Based on the foregoing, Ms. Liedkie respectfully urges this court to reverse the primary residential placement of RTL with Mr. Lopez and the imputation of income to her and to remand the case for appropriate resolution as a modification of custody and to set child support based on her actual income.

DATED this 18<sup>th</sup> day of May, 2014.

  
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CERTIFICATE OF SERVICE

I certify that on May 18, 2014, I served a copy of the brief of appellant by email, as agreed by counsel, on Richard Laws at ricklaws@cableone.net.

  
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