NO. 28699

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

CHILD SUPPORT ENFORCEMENT AGENCY, STATE OF HAWAIʻI,
Plaintiff, v. PT, Defendant-Appellant, v. EM,
(now known as ED), Defendant-Appellee

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-P NO. 98-1170)

MEMORANDUM OPINION
(By: Nakamura, C.J., Fujise and Leonard, JJ.)

Defendant-Appellant PT appeals from an April 20, 2007 post-judgment order (Order) of the Family Court of the First Circuit (family court),[1] granting Defendant-Appellee EM's (now known as ED) Motion and Affidavit for Relief After Order or Decree regarding child support.

BACKGROUND

On November 20, 1998, Plaintiff-Appellee Child Support Enforcement Agency, State of Hawaiʻi (CSEA) filed a Complaint for Establishment of Paternity on behalf of child SM. On March 23, 1999, the family court entered a judgment, which among other things, adjudicated PT as the father of SM and awarded joint legal custody to PT and EM, physical custody of SM to EM, and reasonable visitation to PT. Pertinent to this appeal, the

[1] The Honorable Gale L.F. Ching presided.

family court[2] found that exceptional circumstances warranted deviation from the Child Support Guidelines because "Obligor [PT's] total monthly child support obligation is greater than 70% of Obligor's available income for primary support, therefore child support is assessed at 70% of Obligor's available income and divided between [PT's] three children." As a result of this finding, the family court ordered PT to pay $420 per month in child support.

On November 3, 2006, EM filed her Motion and Affidavit for Relief After Order or Decree (Motion), asking that the March 23, 1999 Judgment be modified to increase the child support payment from $420 to $950 per month.[3] EM based this request on her averments that PT had enjoyed an increase in income since the 1999 order and that PT received a monthly payment from a trust and was anticipating a "large lump-sum payout" from this trust. EM also submitted a Child Support Guidelines Worksheet, which was admitted into evidence as Exhibit A, EM's 2005 tax return, which was admitted into evidence as Exhibit D, and a Financial Information Sheet in support of her request.

At the December 28, 2006 hearing on EM's Motion, both EM and PT testified. EM also offered Exhibits B and C, "copies of the payroll records we received from Matson," PT's employer. EM's counsel explained that these documents were portions of documents she received directly from Matson pursuant to a subpoena she had issued. PT objected, citing a "lack of foundation." The family court reserved ruling at this juncture.

During cross-examination of PT, EM's counsel again sought to introduce Exhibits B and C.

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[2] The Honorable Darryl Y.C. Choy presided and entered the March 23, 1999 Judgment.

[3] EM also asked for an increase in payments on child support in arrearage. This request was not addressed by the April 20, 2007 Order.

Q. Could you please look at Exhibit B? So what it says there -- maybe the 4th -- it's the fifth line down, 1, 2, 3, 4, 5 -- new hire, it says 6/05/2006, you would agree that's correct information from Matson?

A. Yes.

Q. And it does say your name, [PT] is up on top?

A. Yes.

Q. Okay. So you would agree that Exhibit B is correct in terms of your hire date?

A. Yes.

Q. And sir, could you please look at Exhibit C?

A. Okay.

Q. Would you agree that on the payroll record on Exhibit C, each of those pay statements has the name [PT} -- where it says --

A. Yes.

Q. Is that your employee ID number?

A. That's my Social Security number.

Q. Okay. So do you agree that these appear to be fair and accurate records on you?

. . . .

A. I see my name there, but I have no verification on numbers. I just haven't looked at that closely.

. . . .

Q. So could you please take a minute and look at those and let me know if you think those are fair and accurate reportings of your income.

. . . .

A. I cannot answer that.

In support of admission of Exhibits B and C, EM's counsel argued,

based on the procedures and protocols in Family Court, you have the subpoena from Matson in the file. I have here records with [PT's] name -- and the fact that he's identified Exhibit B as being correct representation of the start date. We could submit that as B and C. There is enough evidence for the Court, in light of the subpoena in the record, the records with his name, and what he admitted to be a Social Security number, and he's already acknowledged the authenticity and correctness of Exhibit B, we would admit B and C into evidence.

Nevertheless, the family court did not rule on the admissibility of Exhibits B and C, ordering instead that the parties submit written closing arguments in which they would also address admission of these exhibits.

The parties filed their written closing arguments and, on April 20, 2007, the family court entered its Order, awarding child support in the amount of $950 per month. The family court did not file any findings of fact or conclusions of law in support of the Order nor did it rule on the admissibility of Exhibits B and C in the Order.

PT filed for reconsideration, which was denied on July 25, 2007. This timely appeal followed.

On appeal, PT challenges the Order on three grounds.[4] He argues that the family court erred when it did not abide by the terms of original judgment wherein extraordinary circumstances based on his support of two other children were found, reducing his child support obligation from that calculated under the Child Support Guidelines. Second, he maintains that because Wong v. City & Cnty. of Honolulu, 66 Haw. 389, 665 P.2d 157 (1983), requires "cogent reasons" before deviation from the original judgment could be ordered, the failure to issue findings of fact and conclusions of law disclosing those reasons was an abuse of the family court's discretion. Finally, PT reasons that, as the family court did not accept Exhibits B and C into evidence, there was no evidence upon which to base the calculation of the child support award. EM did not file an answering brief.

[4] We note that PT's points on appeal do not comply with Hawaiʻi Rules of Appellate Procedure (HRAP) Rule 28(b)(4). "[F]ailure to comply with HRAP [Rule] 28(b)(4) is alone sufficient to affirm the judgment of the circuit court." O'Connor v. Diocese of Honolulu, 77 Hawaiʻi 383, 385, 885 P.2d 361, 363 (1994); Bettencourt v. Bettencourt, 80 Hawaiʻi 225, 228, 909 P.2d 553, 556 (1995); City & Cnty. of Honolulu v. Kailua Auto Wreckers, Inc., 66 Haw. 532, 533, 668 P.2d 34, 35 (1983). However, "the policies of this court are to permit litigants to appeal and to have their cases heard on the merits, where possible." O'Connor, 77 Hawaiʻi at 386, 885 P.2d at 364. Counsel is warned that future violations of the rules may result in sanctions. HRAP Rule 51.

DISCUSSION

EM's Motion was authorized by Hawaii Revised Statutes (HRS) §§ 584-15(e) and 576D-7(e) (2006).[5] At the hearing on EM's Motion, the 2004 Child Support Guidelines[6] were in effect. See HRS § 576D-7(d). Courts are required to use the Child Support Guidelines established by HRS § 576D-7, "except when exceptional circumstances warrant departure." HRS § 571-52.5 (2006).

> The court's application of HRS § 584-15(d) is reviewed for abuse of discretion. Cf. Nabarrete [v. Nabarrete], 86 Hawaiʻi [368,] 372, 949 P.2d [208,] 212 [(App. 1997)] ("Since no rules or guidelines have been published advising the family court how to decide [a certain child support issue], the relevant appellate standard of review is the abuse of discretion standard."). An abuse of discretion occurs if the trial court has "clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 114, 839 P.2d 10, 26 (1992) (citation omitted).

Child Support Enforcement Agency v. Doe, 98 Hawaiʻi 58, 64, 41 P.3d 720, 726 (App. 2001) (some brackets added). EM bore the

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[5] These statutes provided then, as they do now,

> [576D-7](e) The responsible or custodial parent for which child support has previously been ordered shall have a right to petition the family court or the child support enforcement agency not more than once every three years for review and adjustment of the child support order without having to show a change in circumstances. The responsible or custodial parent shall not be precluded from petitioning the family court or the child support enforcement agency for review and adjustment of the child support order more than once in any three-year period if the second or subsequent request is supported by proof of a substantial or material change in circumstances.
>
> [§584-15] (e) In determining the amount to be paid by a parent for support of the child and the period during which the duty of support is owed, a court enforcing the obligation of support shall use the guidelines established under section 576D-7. Provision may be made for the support, maintenance, and education of an adult or minor child and an incompetent adult child, whether or not the petition is made before or after the child has attained the age of majority.

The record shows no other petition for review of the support order within the three years immediately preceding EM's Motion.

[6] See 2004 Guidelines, https://ku.ehawaii.gov/juddocs/page_server/SelfHelp/Forms/Oahu/7D004AF15FE5ADBDEEA9E49E98.html (last accessed June 23, 2011) reprinted in 1 Hawaii State Bar Association, 2005 Hawaiʻi Divorce Manual, § 4, App. 3 (7th ed. 2005).

burden of proof as the moving party. See id., citing Ho v. Leftwich, 88 Hawaiʻi 251, 257, 965 P.2d 793, 799 (1998) (the plaintiff "must bear the burden of proving all of the elements of her case").

PT's first two points are closely related. He asserts that the family court was bound by the terms of the March 23, 1999 Judgment, in which it was determined that "extraordinary circumstances" warranted deviation from the amount he would have paid in child support as calculated under the Child Support Guidelines unless "cogent reasons" justifying the change were found. However, PT provides no authority for the proposition that concepts of comity or law of the case apply in a post-judgment modification of child support situation.

Rather, under the statutory framework, a custodial parent is entitled to a review of the child support calculations without having to show a change in circumstances, once every three years. HRS § 576D-7(e). Whether "exceptional circumstances" exist warranting a deviation from the child support guidelines is a question of law. Child Support Enforcement Agency v. Doe, 104 Hawaiʻi 449, 455, 91 P.3d 1092, 1098 (App. 2004). While it is true that whether to grant a deviation from the Child Support Guidelines is a matter of discretion, id., the statutory framework is designed to periodically revisit the support calculation and the family court was asked to reevaluate the child support award in light of circumstances in existence at the time of the Motion.

PT's third point, however, has merit. EM asked that PT's child support obligation be increased from $420 to $950 because PT "has recently commenced employment at Matson Terminals where he is currently earning approximately $91,000 per year" and argued that PT's trust income should be taken into account. To that end, EM offered Exhibits B and C which purported to be employment documents attesting to PT's start-of-employment date with Matson and his salary. However, there is no indication in

the record that the family court ever accepted these exhibits into evidence.

PT testified that the June 5, 2006 start date with Matson reflected on Exhibit B was correct and also testified that he worked overtime an average of eighteen to twenty hours per week. However, PT did not testify to the amount he was paid and there was no other evidence supporting EM's allegation that he earned $91,000, or any other amount, from this employment.

Trust income is also included in calculating a parent's income for child support purposes. See 2004 Guidelines https://ku.ehawaii.gov/juddocs/page_server/SelfHelp/Forms/Oahu/7D004AF15FE5ADBDEEA9E49E98.html (last accessed June 23, 2011) reprinted in 1 Hawaii State Bar Association, 2005 Hawaiʻi Divorce Manual, § 4, App. 3 (7th ed. 2005). PT acknowledged that he received anywhere between $180 and $500 per month from a trust and that the trust was scheduled to be dissolved in September, presumably of the next year, 2007, but he testified that he had "no idea" what amount he would receive from the trust's dissolution.

As there was insufficient evidence presented establishing an increase in PT's income, the family court abused its discretion when it granted EM's motion increasing the child support to be paid by PT.

Therefore, the Family Court of the First Circuit's April 20, 2007 Order is vacated, and the matter is remanded for a ruling on the admissibility of Exhibits B and C and calculation of the amount of child support based on the evidence admitted.

DATED: Honolulu, Hawaiʻi, June 29, 2011.

On the briefs:

Chief Judge

Christopher R. Evans,
for Defendant-Appellant.

Associate Judge

Associate Judge