

NO. 23792

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

KELLY D. HO, Plaintiff-Appellee, v.
RUSSELL C. HO, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 99-2257)

MEMORANDUM OPINION

(By: Burns, C.J., Watanabe and Lim, JJ.)

Defendant-Appellant Russell C. Ho (Russell) appeals from the September 14, 2000 Order Denying Motion and Affidavit for Post-Decree Relief filed August 24, 2000, entered by District Family Judge Gale Ching. We affirm.

Russell and Plaintiff-Appellee Kelly D. Ho (Kelly) were married on November 25, 1989. Their son was born on May 28, 1991. Their daughter was born on December 23, 1995.

Russell had worked for the State of Hawaii as a paralegal since about 1990. During the first five or six years of that employment, he was with the Child Support Enforcement Agency. Subsequently, he worked as a paralegal for the Attorney General's office preparing Child Protective Services petitions, pretrial statements, and adoption petitions.

On July 20, 1999, Kelly filed a Complaint for Divorce. On August 17, 1999, Russell filed an Income and Expense Statement noting that he was being paid \$2,667 per month by the State of

Hawai'i. On February 18, 2000, Russell's employment at the Attorney General's office was terminated. The reason was his inadequate performance on the job.

At the May 18, 2000 hearing on the motion to set, Kelly's attorney read onto the record a stipulated proposed decree and stipulated proposed amendments thereto. Russell's attorney informed the court that "my client . . . he's unemployed[.]" The court ordered Kelly's attorney to submit the proposed decree within twenty days and noted that the decree would be effective upon signing and filing.

At the end of May, 2000, Russell was hired by the Hawaiki Nui Entertainment Company (HNEC) to operate its office. HNEC puts on shows at graduations or office functions. Russell's income was a base salary of \$800 per month. Although there was potential for him to receive a percentage of three to four percent of the gross income received by HNEC for certain shows, Russell had not yet earned more than the base salary.

On August 24, 2000, Russell filed a motion seeking a reduction of child support and stating, in relevant part, as follows:

Previous child support was determined at a time when [Russell] was unemployed based on the assumption that [Russell] would earn the same amount as he did in his previous employment with the State. Unfortunately, [Russell's] employment pays substantially less and the child support has to be modified in order for [Russell] to live.

On September 5, 2000, District Family Judge Linda K. C. Luke entered the family court's Decree Granting Divorce and Awarding Child Custody. It awarded joint legal custody and sole physical custody of the two children to Kelly, subject to Russell's detailed rights of visitation. It ordered Russell to pay to Kelly child support of \$250 per month per child commencing June 1, 2000.

The hearing on Russell's August 24, 2000 motion was held on September 13, 2000, by Judge Ching. Russell testified, in relevant part, as follows:

Q. And so, when you agreed to pay the five hundred dollars a month, you were aware at that time that you were unemployed, but you were thinking about taking this position at the Hawaii Nui Entertainment Company, correct?

A. Well actually, I just agreed to that amount so we could move the hearing -- move the proceeding along, 'cause I knew the child support guideline would calculate the actual amount.

Q. But you agreed on May the 18th to pay the five hundred dollars a month?

A. Whatever we agreed at that time. Yeah.

Q. And at that time you were either currently unemployed or considering taking the position that you have right now?

A. Correct.

Russell's counsel argued, in relevant part, as follows:

If you run the guidelines, your Honor, based on the actual incomes and not taking into account an imputed income, actually his child support obligation would be about twenty dollars total. Of course that's lower than the minimum of fifty dollars a month per child.

Therefore, I guess what we're saying is that it should be the minimum of a hundred dollars per month, which does exceed seventy percent of his net income. But I don't think that there's any way that can be avoided under the guidelines. I think that's -- that's, you know, the least he can pay.

In its oral decision, the court uttered two especially relevant statements. First, it stated that "[t]he Court does not find any significant change in circumstances[.]" Second, it stated:

Mr. Ho, the best I can tell you at this point -- like I said, I believe you're a smart guy, and if this present employment does not sufficiently provide you with the financial resources to satisfy your obligations, I would suggest that, you know, you seek either additional or other employment -- 'cause I think you've got the qualities to seek other employment. But -- and you -- you need to fulfill your obligations. Okay.

On September 14, 2000, the court entered an Order Denying Motion and Affidavit for Post-Decree Relief filed August 24, 2000.

In this appeal, Russell argues, in relevant part, as follows:

The trial court erred in finding that [Russell's] acceptance of employment at a salary of \$800.00 per month did not constitute a material change of circumstances to justify modification of child support, where [Russell's] original child support obligation was based on an assumed salary of \$2,670.00 per month.

. . . .

The trial court's reliance upon the September 5, 2000 filing date of the decree as a benchmark for finding no material change of circumstances was erroneous. This is because, as previously stated, the decree *by its terms* reflects that the "circumstances" contained in the decree dated September 5, 2000 were as of May 18, 2000, when the parties placed their divorce agreement on the record. Thus, the real question presented to the trial court at the hearing of the underlying motion was whether there were any materially changed circumstances since May 18, 2000.

There is no doubt that there was a material change of circumstances after May 18, 2000. On May 18, 2000, [Russell] was unemployed, and the parties therefore selected an artificial income figure for [Russell], based on the amount he had been making in his last job (from which he had been involuntarily terminated for poor performance).

(Emphasis in original.)

We disagree with the statement that "[Russell's] original child support obligation was based on an assumed salary of \$2,670.00 per month." Why the parties agreed to \$250 per child per month child support is not the relevant question. The relevant question is, what factual information did the court have when it ordered Russell to pay \$250 per child per month? We agree with Russell that "the real question presented to the trial court at the hearing of the underlying motion was whether there were any materially changed circumstances since May 18, 2000." The relevant material circumstances are those circumstances known to the court, not to the parties.

The following were the relevant facts known to the court at the hearing in May: (1) Russell had been employed in a job that paid him \$2,667 per month; (2) Russell had been terminated from that job because of his inadequate performance on the job; and (3) Russell was unemployed.

The question is, have the relevant facts known to the court at the hearing in May materially changed so as to justify a decrease in the amount of child support payable by Russell? The answer is no. First, the only material change is that Russell is now employed in a job that pays him \$800 per month. In other words, Russell is being paid \$800 more per month now (in September) than he was then (in May). Second, the court implicitly found that Russell's earning potential was

substantially greater than \$800 per month. This fact is relevant pursuant to Hawaii Revised Statutes § 576D-7(a)(2) (1993), which states, in relevant part, as follows:

Guidelines in establishing amount of child support. (a) The family court, in consultation with the agency, shall establish guidelines to establish the amount of child support when an order for support is sought or being modified under this chapter. The guidelines shall be based on specific descriptive and numeric criteria and result in a computation of the support obligation.

The guidelines may include consideration of the following:
. . . .

(2) The earning potential, . . . of both parents[.]

This fact is also relevant pursuant to The 1998 Amended Child Support Guidelines which states in section II, in relevant part, as follows: "F. **IMPUTED INCOME** may be used when a parent is . . . employed below full earning capacity. The reasons for this limitation must be considered."

CONCLUSION

Accordingly, we affirm the September 14, 2000 Order Denying Motion and Affidavit for Post-Decree Relief filed August 24, 2000.

DATED: Honolulu, Hawai'i, February 6, 2002.

On the briefs:

Steven J. Kim (Lynch Ichida Thompson & Kim, of counsel) for Defendant-Appellant.	Chief Judge
Kelly D. Ho, Plaintiff-Appellee, <i>pro se</i> .	Associate Judge
	Associate Judge