

NOT FOR PUBLICATION

NO. 25279

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

STEVEN CARLSON HENRIKSON, Plaintiff-Appellant, v.
VIRGIE ELIZABETH HENRIKSON, Defendant-Appellee

APPEAL FROM FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 02-1-0253)

MEMORANDUM OPINION

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

Plaintiff-Appellant Steven Carlson Henrikson (Steven or Husband) appeals from the following orders/decrees entered in the Family Court of the First Circuit by Judge Bode A. Uale: (1) the June 7, 2002 Divorce Decree; (2) the July 23, 2002 order denying Steven's motion for reconsideration; (3) the June 21, 2002 order requiring Steven to pay \$12,078.89 to counsel for Defendant-Appellee Vergie Elizabeth Henrikson (Vergie or Wife) for one-half of the attorney fees and costs incurred by Vergie in the case; and (4) the August 8, 2002 Judgment for Attorney's Fees and Costs in the amount of \$12,078.89. We vacate in part, affirm in part, and remand for reconsideration.

BACKGROUND

Steven and Vergie were married on May 13, 1990. Two children were born of this marriage, a son born on June 8, 1993 and a son born on August 7, 1998.

Steven filed a Complaint for Divorce on January 23, 2002. At the February 13, 2002 hearing, when Steven advised the court, "Your Honor, I do not want to be divorced," Vergie advised the court that she wanted the divorce. In a February 13, 2003 order, Judge Allene R. Suemori ordered:

1. The parties will obtain parenting counselling with June Ching or Craig Robinson.

In addition,

2. The parties are awarded temporary joint legal and physical custody with the following schedule: Husband shall have Thursday after school to Saturday at 5:00 p.m. Wife will pick children up at Saturday 5:00 p.m. at Husband's residence and keep them until Thursday drop off at school. Husband and Wife will have alternating holidays with the children, and if a holiday falls on Friday, Husband will pick children up Wednesday after school. They will each have children one week during spring break.
3. Child support per Child Support Guideline Worksheet, paid through CSEA [Child Support Enforcement Agency],
6. The parties will obtain marriage counselling prior to the settlement conference.

At the May 7, 2002 trial, Vergie testified of her intent to move to live with her father in South Carolina.

As noted in Steven's opening brief, "A wage statement for [Steven] which was received in evidence showed that he had gross year-to-date wages of \$89,818.41 through November 30, 2001[.]"

In its oral ruling, at the conclusion of the May 7, 2002 trial, the court awarded the legal custody of the children jointly to the parties and the physical custody of the children

to Vergie. The court further stated, in relevant part, as follows:

With regard to child support, I am ordering child support pursuant to guidelines. I am ordering that the parties -- if [counsel for Vergie], you don't have in your possession, I want the last six months of [Steven's] income to be averaged in order to come out with his current income. So I'm not going to use all 2001. We go back six months from today and look at his income and that will be his average income. And [Vergie's] income shall be pursuant to your Exhibit B.

I am ordering alimony. I think alimony is appropriate here. Due to the disparate income of the parties, I'm ordering that [Steven] pay [Vergie] \$2,000 a month for 18 months, and I'm calling it transitional alimony. [Vergie], you need to get yourself into a position that after that period of time, that you will be able to support yourself with the money that you make and the child support that you receive upon the conclusion of the 18 months.

I will confirm the stipulation of the parties that each will maintain \$100,000 in life insurance with both children as the beneficiaries.

I will grant [Steven's] request with regard to the tax exemptions because of his higher income, that he will be awarded the tax exemptions.

The retirement shall be pursuant to law, Hawaii law, divided pursuant to the Linson formula.

Visitation shall be Type B. If [Steven] is here in Hawaii and [Vergie] moves to South Carolina, if he relocates to South Carolina, it shall be Type A at the present time.¹ . . .

And again, pursuant to disparate earning capacity of the parties, I'm ordering that [Steven] pay for 50% of [Vergie's] attorneys' fees.

[Counsel for Vergie], I will order that you prepare the divorce decree and the pertinent documents.

(Footnote added.)

A Child Support Guidelines Worksheet was filed on June 6, 2002. It reported that Steven's monthly gross income was

¹ It appears that these two sentences should have been punctuated as follows: Visitation shall be Type B if [Steven] is here in Hawaii and [Vergie] moves to South Carolina. If he relocates to South Carolina, it shall be Type A at the present time.

\$6,165 (\$8,165 minus \$2,000 spousal support) and that Vergie's monthly gross income was \$3,600 (\$1,600 plus \$2,000 spousal support).

Consistent with the court's oral ruling, the June 7, 2002 Divorce Decree, in relevant part, (a) ordered Steven to "pay transitional spousal support of \$2,000.00 per month to [Vergie] for a period of eighteen (18) months, commencing on June 1, 2002"; (b) awarded joint legal custody and sole physical custody of the children to Vergie and permitted her to relocate with the children to Gaffney, South Carolina, subject to Steven's specified rights of visitation and contact by telephone and e-mail; (c) ordered Steven to pay child support of \$1,030 per month through the Child Support Enforcement Agency; (d) ordered Steven to maintain the children's current medical, vision, drug, and dental insurance coverage through his employer and ordered each party to pay one-half of all such expenses not covered by insurance; (e) ordered that Steven would be entitled to claim the children as his dependents for tax purposes; and (f) ordered Steven to pay counsel for Vergie \$12,078.89 for one-half of his attorney fees and costs incurred in this case.

On June 17, 2002, Steven filed a motion for reconsideration that stated, in relevant part, as follows:

1) . . . Specifically, the Decree fails to state that [Steven] was awarded the right to claim the children as dependents

on his state and federal income tax returns.² The [D]ecree further fails to provide for transportation costs associated with visitation.

2) . . . [T]he Court should reconsider . . . its order regarding physical custody of the parties['] minor children and the Court's reliance on [Vergie's] witness Barbara Luxford being more reliable than [sic] [Steven] and his two witnesses.

3. . . . Specifically, whether [Vergie] accurately stated [Steven's] income on the Child Support Guidelines Worksheet when . . . the evidence entered at trial, . . . , clearly demonstrates that [Steven] earns gross monthly income from all sources of not more than [sic] \$7,400 per month. . . .

4. . . . [T]he Court should reconsider . . . its decision to ignore Plaintiff's Trial Exhibit 2 and Defendant's Trial Exhibit B, p.1, which were received in evidence without objection of [Virgie], when said offered and received exhibits clearly establish the income earned by [Steven] at the time the Court actually decided this case.

5. . . . [T]he court should reconsider . . . its decision to award [Vergie] \$2,000.00 a month alimony for eighteen (18) months when the evidence entered at trial, . . . , clearly demonstrates that [Vergie] did not meet the requirements of Hawaii Revised Statutes § 580-47.

6. . . . [T]he court should reconsider . . . its decision that [Steven] pay one-half of [Vergie's] attorney's fees.

7. . . . [T]he court should reconsider . . . whether [Vergie's] attorney's fees are reasonable to require [Steven] to pay one-half of \$24,157.78.

On June 21, 2002, the court entered an order requiring Steven to pay \$12,078.89 to Vergie's attorney for one-half of Vergie's attorney fees and costs. On August 8, 2002, the court entered a Judgment for Attorney's Fees and Costs in the amount of \$12,078.89. On July 23, 2002, the court entered an order denying Steven's motion for reconsideration.

On September 25, 2002, the court entered its Findings of Fact and Conclusions of Law, in relevant part, as follows:

² This allegation is contradicted by section 15 b. of the June 7, 2002 Divorce Decree.

FINDINGS OF FACT

1. The Court finds that a prima facie case for divorce was established by [Vergie].

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6. The Court has considered Plaintiff's Exhibits "1", "2" and "7", which were admitted into evidence.

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11. The Court finds that [Steven] should pay child support to [Vergie] pursuant to the Child Support Guidelines Worksheet, with [Steven's] income calculation based upon an average from pay stubs from the six-month period prior to the date of trial. Although [Steven] was ordered to produce the last six months of pay stubs, he failed to do so.

12. The Court finds, in the absence of pay stubs for six months, that [Steven's] income as a construction contractor with Jacobsen labor Services, Inc., is \$8,165.00 per month based on Defendant's Exhibit "B00001."

13. The Court finds that [Vergie's] projected income will be \$1600.00 per month as a prospective Office Coordinator for B & E Associates in Gaffney, South Carolina,³

14. The Court finds . . . sufficient evidence of the wide disparity in the parties' incomes and [Vergie's] need for transitional alimony in connection with her relocation with the minor children to Gaffney, South Carolina.

15. The Court finds that the Declaration of Frank T. Lockwood for Fees and Costs filed on June 6, 2002, as well as the testimony of [Vergie] regarding the parties' disparate incomes, support [Vergie's] request for reimbursement of her attorney's fees and costs pursuant to H.R.S. Section 580-47.

16. The Court finds that [Vergie's] testimony that she had been verbally and mentally abused by [Steven] . . . is also credible. [Vergie] took awhile to discover that she was abused by [Steven] and a period of time passed before she decided to obtain a divorce.

CONCLUSIONS OF LAW

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5. It is reasonable for the Court to calculate [Steven's] income for purposes of child support based on . . . [Steven's] gross earnings of \$89,818.41 through November 30, 2001, averaging \$8,165.31 per month for the year 2001 (less the amount of \$2,000.00 ordered to be paid in alimony to [Vergie]).

³ Vergie testified that B & E Associates is her father's company.

6. . . . [I]t is reasonable that [Steven] should pay transitional alimony in the sum of \$2,000.00 per month to [Vergie] for a period of eighteen (18) months from the effective date of the Divorce Decree.

. . . .

8. Given the litigious nature of [Steven] in these proceedings, as well as counsel's required appearances at the hearing on the Motion and Affidavit for Pre-Decree Relief, the settlement conference, the calendar call, the hearing on the Motion for Extension of Time to Take Plaintiff's Deposition, and the half-day trial in this matter, it is reasonable that [Vergie] incurred attorney's fees and costs in excess of \$24,000.00.

9. It is fair and equitable, pursuant to H.R.S. Section 580-47, to require [Steven] to immediately pay one-half of [Vergie's] attorney's fees and costs to [Vergie's] counsel in the amount of \$12,078.89, with an interest rate of ten percent (10%) per year commencing on June 7, 1002.

10. There was no error in the Court's denial of Plaintiff's Motion for Reconsideration and/or Further Hearing and/or New Trial filed on June 17, 2002.

POINTS ON APPEAL

Steven challenges findings of fact (FsOF) nos. 6, 11, 12, 14, and 15 and conclusions of law (CsOL) nos. 5, 6, 8, 9, and 10. He contends that "[it] Was an Abuse of Discretion, and Clearly Erroneous, for the Family Court[:]" "to Order [Steven] to Pay Child Support of \$1,030 per Month Based on a Finding That He Earned \$8,165 per Month"; "to Award [Vergie] \$2,000 per Month Alimony for Eighteen Months"; "to Order [Steven] to Pay One-Half of Wife's Attorney's Fees and Costs Which Were Claimed to Total \$24,257.78"; and "to Deny [Steven's] Reconsideration Motion in Its Entirety."

DISCUSSION

1.

FOF no. 6 states that "[t]he Court has considered Plaintiff's Exhibits '1', '2' and '7', which were admitted into evidence." Steven contends that Exhibit "2" was not offered or received in evidence. He is wrong.

2.

FOF no. 11 states,

The Court finds that [Steven] should pay child support to [Vergie] pursuant to the Child Support Guidelines Worksheet, with [Steven's] income calculation based upon an average from pay stubs from the six-month period prior to the date of trial. Although [Steven] was ordered to produce the last six months of pay stubs, he failed to do so.

Steven contends that "no evidence established [Steven's] current income as of the May 7, 2002, divorce trial, or for the six-month period prior to the trial"; "[Steven] was not 'ordered' to do anything with regard to pay stubs"; and "[t]here is nothing in the record to establish what allegedly occurred after the conclusion of the trial with respect to production of the pay stubs." We disagree with the first two of these three contentions.

The court ordered, "I want the last six months of [Steven's] income to be averaged in order to come out with his current income. So I'm not going to use all 2001. We go back six months from today and look at his income and that will be his average income." This order was issued to both parties and to

counsel for both parties. The fact that "[t]here is nothing in the record to establish what allegedly occurred after the conclusion of the trial with respect to production of the pay stubs" is evidence that counsel for Steven and counsel for Vergie did not do what the court ordered done.

3.

FOF no. 12 states,

The Court finds, in the absence of pay stubs for six months, that [Steven's] income as a construction contractor with Jacobsen Labor Services, Inc., is \$8,165.00 per month based on Defendant's Exhibit "B00001."

Steven contends that there is "no evidence establishing [Steven's] current income, or his income for the six-month period prior to trial, was offered or received. . . . DF EX B, at 1, established that [Steven] earned \$3,700.00 in the second semi-monthly pay period in November 2001, and that he had gross year-to-date earnings of \$89,818.41 for the first eleven months of 2001 (an average of \$8,165.31 per month)."

COL no. 5 states,

It is reasonable for the Court to calculate [Steven's] income for purposes of child support based on . . . [Steven's] gross earnings of \$89,818.41 through November 30, 2001, averaging \$8,165.31 per month for the year 2001 (less the amount of \$2,000.00 ordered to be paid in alimony to [Vergie]).

Steven contends that "[t]he evidence did not establish his current income as of the date of the trial, or during the six-month period preceding the trial." We conclude that when calculating child support for purposes of the divorce decree, it

was within the court's discretion not to use "[Steven's] current income as of the date of the trial, or during the six-month period preceding the trial" and to use Steven's "gross year-to-date earnings of \$89,818.41 for the first eleven months of 2001 (an average of \$8,165.31 per month)."

4.

FOF no. 14 states,

The Court finds . . . sufficient evidence of the wide disparity in the parties' incomes and [Vergie's] need for transitional alimony in connection with her relocation with the minor children to Gaffney, South Carolina.

COL no. 6 states, in relevant part, that "it is reasonable that [Steven] should pay transitional alimony in the sum of \$2,000.00 per month to [Vergie] for a period of eighteen (18) months from the effective date of the Divorce Decree."

Steven contends that

no evidence was offered or received which established Steven's] current income as of the date of the trial, or during the six-month period preceding the trial. Further, if the alimony award was intended by the Court to equalize the parties disparate incomes post-divorce, that is not properly the objective of an alimony award. Also, to the extent that the alimony award was based on [Vergie's] supposed need for transitional alimony in connection with her relocation with the minor children to Gaffney, South Carolina, there was no evidence offered or received as to what costs or expenses [Vergie] anticipated in connection with that relocation.

Steven further contends "that an alimony award of \$2,000 per month for eighteen (18) months resulted in a payment to [Vergie] in excess of her reasonable needs in light of the cost of living in Gaffney, South Carolina, as well as in excess of his ability to pay.

Steven's monthly gross income was \$8,165. Vergie's monthly gross income was going to be \$1,600. If the monthly spousal support payable to Vergie was \$2,000, the monthly child support payable to Vergie pursuant to the Child Support Guidelines would be \$1,030. The amount \$1,600 plus \$2,000 plus \$1,030 equals \$4,630. In her Income and Expense Statement dated April 3, 2002, Vergie reported "Grand Total expenses: Housing, Trans., Debt & personal" for herself and the two children in the amount of \$3,282. Thus, we agree with Steven that the record does not support the court's award of \$2,000 per month spousal support to Vergie. We remand for reconsideration of the amount of spousal support payable, and because of the effect of the amount of spousal support payable upon the amount of the child support payable we remand for reconsideration of the amount of the child support payable.

5.

FOF no. 15 states,

The Court finds that the Declaration of Frank T. Lockwood for Fees and Costs filed on June 6, 2002, as well as the testimony of [Vergie] regarding the parties' disparate incomes, support [Vergie's] request for reimbursement of her attorney's fees and costs pursuant to H.R.S. Section 580-47.

COL no. 8 states,

Given the litigious nature of [Steven] in these proceedings, as well as counsel's required appearances at the hearing on the Motion and Affidavit for Pre-Decree Relief, the settlement conference, the calendar call, the hearing on the Motion for Extension of Time to Take Plaintiff's Deposition, and the half-day trial in this matter, it is reasonable that [Vergie] incurred attorney's fees and costs in excess of \$24,000.00.

COL no. 9 states,

It is fair and equitable, pursuant to H.R.S. Section 580-47, to require [Steven] to immediately pay one-half of [Vergie's] attorney's fees and costs to [Vergie's] counsel in the amount of \$12,078.89, with an interest rate of ten percent (10%) per year commencing on June 7, 1002.

Steven contends that

no evidence was offered or received establishing what [Steven] was earning as of the date of the trial, or during the six-month period preceding the trial. Furthermore, the *Declaration of Frank T. Lockwood for Fees and Costs*, filed June 6, 2002, lacks sufficient specificity to have allowed the Family Court to determine if the fees and costs claimed were reasonable or if they were necessarily incurred. . . .

We disagree with Steven and conclude that it was within the court's discretion to order Steven to pay \$12,078.89 of Vergie's attorney fees and costs.

6.

COL no. 10 states that "[t]here was no error in the Court's denial of Plaintiff's Motion for Reconsideration and/or Further Hearing and/or New Trial filed on June 17, 2002."

Steven contends that "[t]his Conclusion is wrong for all of the reasons set forth in the preceding Statements of Error." We conclude that this point is mooted by our decisions above.

CONCLUSION

Accordingly, as to the September 25, 2002 Findings of Fact and Conclusions of Law, we vacate the "\$2,000" amount in Conclusions of Law nos. 5 and 6. As to the June 7, 2002 Divorce Decree, we vacate the "\$2,000.00" amount in section "3. **SPOUSAL**

SUPPORT" and the "\$1,030.00" amount in section "7. **CHILD SUPPORT"**. We remand for reconsideration of the amount of spousal support and child support payable. In all other respects, we affirm the June 7, 2002 Divorce Decree and the September 25, 2002 Findings of Fact and Conclusions of Law.

DATED: Honolulu, Hawai'i, December 22, 2003.

On the briefs:

Robert M. Harris
for Plaintiff-Appellant.

Chief Judge

Associate Judge

Associate Judge