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NO. 25454

IN THE INTERMEDIATE COURT OF APPEALS
OF THE STATE OF HAWAII

JOHN E. BEWS, Plaintiff-Appellee, v.
CHRIS A. WEST, fka CHRIS A. BEWS, Defendant-Appellant

APPEAL FROM THE FAMILY COURT OF THE SECOND CIRCUIT
(FC-D NO. 89-0332)

MEMORANDUM OPINION

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

Defendant-Appellant Chris A. West (Chris) appeals from the October 9, 2002 Order Re: Defendant's Motion and Affidavit for Post-Decree Relief Filed April 16, 2002, entered by Judge Eric G. Romanchak in the Family Court of the Second Circuit. We affirm.

BACKGROUND

Chris and Plaintiff-Appellee John E. Bews (John) were married on April 7, 1984.¹ A daughter was born on June 28, 1985. A son was born on October 1, 1987.

On August 24, 1989, John filed a Complaint for Divorce. On September 28, 1989, Chris and John entered into an Agreement Incident to and in Contemplation of Divorce (AICOD). This AICOD was filed on October 6, 1989, and states, in relevant part, as follows:

¹ The Matrimonial Action Information Sheet filed on August 24, 1989, reflects that the date of marriage is April 4, 1984.

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(d) We acknowledge our understanding that child support remains a modifiable issue, subject to further order of the Family Court, as long as it is payable under this paragraph. We further agree that our respective income records shall remain available to the other parent for review upon request of either parent; and that should one parent request either an increase or decrease of child support payments we will exchange information and first negotiate between ourselves as to an acceptable modified child support. If we are unable to come to an agreement between ourselves, we specifically agree to employ a mutual third party mediator before requesting the Court's assistance.

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15. ENFORCEMENT OF THIS AGREEMENT: If it becomes necessary to enforce the provisions of the Agreement, the prevailing party in any enforcement proceedings shall be entitled to collect his or her costs, including reasonable attorney's fees.

On October 30, 1989, Judge Douglas S. McNish entered a Decree Granting Divorce and Awarding Child Custody (Divorce Decree). This Divorce Decree approved and incorporated the AICOD, awarded joint legal custody of the children, awarded physical custody of the children to Chris, and ordered John to pay \$405 per month in child support through the Child Support Enforcement Agency (CSEA), maintain medical and dental insurance covering the children, maintain a \$100,000 life insurance policy insuring his child support obligation, and pay \$200 per month in spousal support from November 1989 through September 1990.

Subsequent to their divorce, both Chris and John entered into second marriages.

On April 12, 2001, Chris filed a Motion and Affidavit for Post-Decree Relief asking the court to order John to pay (1) increased child support consistent with the applicable Child Support Guidelines, (2) unpaid spousal support, and (3) attorney fees and costs.

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On August 23, 2001, after a hearing on June 20, 2001, Judge Barclay E. MacDonald entered Findings of Fact, Conclusions of Law and Order (August 23, 2001 FsOF, CsOL, and Order), which stated in relevant part as follows:

FINDINGS OF FACT

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15. [John] is the sole shareholder and the president of Maui Builders, Inc.[,] a Hawaii corporation. The corporation is [John's] primary source of income.

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20. [John's] business primarily builds "high end" or expensive houses. It builds on the average 4-6 houses at one time.

21. [John's] business income has fluctuated dramatically over the past 12 years. [John] testified this is the result of changes in the economy, the normal fluctuation of the construction industry[,], and disputes with homeowner's [sic].

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26. One recent loss occurred in the building of the Miller residence, which was completed in 1995.

27. [John's] business was not paid approximately \$500,000 by Mr. Miller.

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29. Another significant loss occurred after the building of the Sugarman residence.

30. In February of 2001[,], Mr. Sugarman, after refusing to pay the balance of \$243,000 owing on his contract, filed a lawsuit against [John's] business.

31. As a result of Sugarman's non-payment and the ongoing costs of defending the lawsuit, [John] had to borrow additional funds to pay the expenses of his business.

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33. [John] took out a personal loan secured by a second mortgage on the home owned by himself and his wife in the amount of \$200,000 for use by the Corporation. The Corporation makes all payments for this loan.

34. [John] commingled corporate assets of Maui Builders, Inc. with his personal assets, in particular, but not limited to,

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the financing and construction of his residence[.]

35. [John] adjusted his monthly salary in March 2001, as a result of the Sugarman loss and lawsuit. [John] is currently paid \$800.00 each week.

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42. [John] is budgeted to continue receiving \$800.00 each week until the end of the year. This would put his yearly gross income for 2001 at \$60,800. His monthly gross income at this rate would be \$5067.00.

43. Between 1988 and 2000 [John's] income has been as low as \$21,634 and as high as \$104,000. When [John's] income rose to \$104,000 in 1999 and 2000, [John] did not inform [Chris] or increase his child support payments.²

44. Between 1988 and 2000 [John's] annual income averaged \$65,291.

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47. The Court finds that establishing [John's] monthly income for 2001 based on the monthly payments to date and projected payments for 2001 is reasonable, so long as [Chris] is allowed the opportunity to "look back" over the entire year 2001 by motion filed after January 1, 2002 for the purpose of a recalculation of [John's] monthly income, and therefore [John's] child support obligation, based on any changes above that amount. The Court further finds that the preparation for and cost of such a motion and Court time therefor may be minimized by [John's] full, reasonable disclosure to [Chris] of his personal and corporate financial condition for calendar year 2001.

48. Any recalculation shall be effective as of the date of the filing of [Chris's] motion herein or April 12, 2001.

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50. The Corporation owes over \$500,000 in loans, including the loan secured by the mortgage on [John's] residence.

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55. [John's] salary was reduced because of the non-payment of \$243,000 by Mr. Sugarman and the costs associated with the

² In the October 6, 1989 Agreement Incident to and in Contemplation of Divorce, Plaintiff-Appellant John E. Bews (John) and Defendant-Appellant Chris A. West (Chris) "agree that our respective income records shall remain available to the other parent for review upon request of either parent; and that should one parent request either an increase or decrease of child support payments we will exchange information[.]" The last sentence of finding of fact No. 43 implies that, when John's income rose to \$104,000 in 1999 and 2000, John was legally required to inform Chris and/or increase his child support payments. This implication is not supported by the record.

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lawsuit filed by Mr. Sugarman.

56. The Court finds there is sufficient evidence of the currently deteriorating financial condition of the Corporation to find the reduction of [John's] income in March 2001 from the previous, much higher levels is reasonable. . . .

57. . . . [T]his court finds that the yearly average of [John's] income for 2001 provides a more realistic calculation of [John's] income for purposes of calculating child support at this point in time.

. . . .

60. Loans were made in [John's] own name and are being paid for by the Corporation, these loans never benefitted [John] since the monies received from the loan[s] were given to the Corporation to meet corporate needs.

61. [John's] wife is an employee of the Corporation, however she receives no benefits different than any other employees doing the same work.

62. [John's] wife does not receive any car allowances, company vehicles to drive[,] or any other benefits from the Corporation other than her salary.

63. [John's] wife receives gross weekly pay of \$720.00 each week. This payment is comparable with the salaries of other employees doing similar work.

. . . .

81. [John's] failure to disclose the substantial increase in his income in 1999 and 2000, his failure to disclose in 1999 or 2000 that the amount of his child support should fairly be significantly increased, his continued refusal to pay the \$2,400 in alimony and his commingling of corporate assets with his personal assets, in particular in the financing and construction of his residence, justified and created the necessity for [Chris'] detailed and extensive investigation and preparation for this hearing.

82. [Chris] is entitled to reasonable attorney's fees and costs in connection with her Motion to Compel Discovery filed June 19, 2001.

CONCLUSIONS OF LAW

. . . .

4. [Chris's] claim for alimony is barred by the Statute of Limitations. *Hawaii Revised Statutes*, § 657-5.

. . . .

6. [John's] income capacity in the local job market fluctuates rapidly and widely, and an average of his income for the year 2001, based on past income received and future, budgeted projections, provides a reasonable basis for establishing [John's]

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income for purposes of this motion.

7. A "look back" period after 2001 to determine [John's] actual income is very reasonable under the circumstances.

. . . .

ORDER

1. [Chris's] claim for payment of alimony is hereby denied.

2. The Court finds that there has been a material change in circumstances warranting a child support modification. [Chris's] income of \$1,765.00 and [John's] income of \$5067.00 shall be used to calculate [John's] child support obligation.

3. The child support obligation shall be computed as of the filing of [Chris's] motion herein of April 12, 2001. . . .

4. Within 45 days after January 1, 2001 [sic] [John], at [John's] sole cost, shall provide to [Chris] year end summaries of the financial condition of . . . Maui Builders, Inc., for calendar year 2001, including a detailed income statement and balance sheet and an itemized statement of all corporate distributions to [John] and [John's] wife during the previous calendar year, . . . and such other relevant financial information as requested by [Chris] that is reasonably appropriate to determine [John's] actual and imputed income during calendar year 2001. . . . Within 45 days after January 1, 2002, [John] and [Chris] shall file with this Court, with copies to the opposing party, then current Income and Expense and Asset and Debt statements. The above required disclosures shall continue through and including 2006 or until further order of the Court.

. . . .

7. If the financial information of the Corporation and other relevant financial data reveal a monthly gross income and child support obligation higher than determined herein, [Chris] shall be entitled to request a retroactive increase in [John's] monthly child support payments from April 12, 2001.

8. [Chris's] counsel is ordered to submit to the Court within twenty (20) days an Affidavit of Counsel in support of attorney's fees and costs for the Court's consideration. In the interim, [Chris's] request for attorney's fees and costs is reserved.

(Footnote added.)

On January 30, 2002, Judge MacDonald entered an order requiring John to pay \$8,649.50 in attorney fees and costs "directly to [Chris's] counsel in cash or equivalent (cashier's

check or certified check) within 30 days."

On April 16, 2002, Chris filed a Motion and Affidavit for Post-Decree Relief asking for an increase in child support retroactive to April 12, 2001, payment of past-due child support, payment of the \$8,649.50 attorney fees and costs, compliance with the informational requirements of the August 23, 2001 order, and an award of attorney fees and costs. This motion was heard on May 15, 2002 by Judge Romanchak.

On June 28, 2002, Judge Romanchak filed an Order for Post-Decree Relief (1) setting an August 5, 2002 trial to decide the merits of the request by Chris for an increase of child support retroactive to April 12, 2001, (2) entering judgment against John for \$2,846.78 unpaid child support, and (3) ordering John to pay "\$8,649.50 plus statutory [interest] accrued since January 31, 2002 within 21 days. [John was] ordered within 21 days to liquidate assets including any checking accounts or securities, IRS and/or Hawaii tax refunds to comply with this Order."

During the August 5, 2002 trial, the following was stated, in relevant part:

THE COURT: . . .

. . . [I]t didn't seem to be a real secret that this corporation was paying [John's wife] \$720 per week.

. . . .

[COUNSEL FOR CHRIS]: . . .

. . . We don't deny that she received 720. We knew about

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that.

What we didn't know is that instead of [John's] salary being cut by 66 percent, as he testified, because the corporation was in financial difficulty -- what you couldn't tell from the one pay stub of 720 was that between 3/23 and 5/25, they shifted his income to her in the amount of 1600, that amount on the pay stub.

. . . .

. . . What we're saying is that the amount that she's now earning, the 720 a month, ought to be imputed as income to him, because . . . he was earning \$2400 a . . . week. Now he's earning 800 and she's earning a large chunk of the difference, and it's an obvious income shift for child support.

That's our view. There is no other explanation for it.

THE COURT: Well, Judge MacDonald seemed to find that this payment is comparable with salaries of other employees doing similar work. Now, I suppose the issue is whether she is doing the work for 720 or not.

[COUNSEL FOR CHRIS]: Well, the issue is as of 1/1/01, she wasn't on the payroll at all. And then the question is -- she's on the payroll only as a way of shifting income from him to her.

In other words, I'm trying to prove that you should impute her income to [John].

THE COURT: He should fire her and this money should be paid to him and he should do her work. I mean, you're also asking me to find that that's not a necessary and reasonable expense

[COUNSEL FOR CHRIS]: Right.

THE COURT: I assume that Judge MacDonald found she did something here, because he made that finding, but let's assume that she just gets a check and doesn't show up to work. You know, I would agree with your argument. But this person is actually performing work, and it's not an unreasonable amount for the services she's providing. We have an issue of fact.

[COUNSEL FOR CHRIS]: Correct.

THE COURT: Okay. But I think I'm going to be bound by some of these findings. I will allow you to get into it, but I will tell you right now that I don't think that I can overturn these findings if they happen to be findings on the same issue.

If we have a different issue here that I don't see at this point, I'm willing to listen and I'm willing to assess it, but I'm certainly bound by the prior findings of the court. I can't overturn those. You had a chance to do that by appealing his decision. You didn't. Okay.

On October 9, 2002, after the August 5, 2002 trial,

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Judge Romanchak entered an Order Re: Defendant's Motion and Affidavit for Post-Decree Relief Filed April 16, 2002, stating, in relevant part, as follows:

FINDINGS OF FACT

1. The evidence presented at the hearing failed to establish that in "looking back" [John] has received more income than determined by this Court's Findings of Fact, Conclusions of Law and order entered on August 23, 2001.

2. [John] failed to timely provide to [Chris] financial information pursuant to this Court's Order filed August 23, 2001 and [Chris] incurred attorney's fees and costs in connection with the filing of the instant motion.

CONCLUSIONS OF LAW

1. There is a lack of evidence to support a modification to the Court's Order for child support as set forth in the Order filed August 23, 2001.

. . . .

ORDER

1. [Chris's] request for a modification of child support is denied.

2. [Chris] is awarded attorney's fees and costs related to [John's] failure to timely provide to [Chris] financial information pursuant to this Court's Order filed August 23, 2001.

3. Counsel for [Chris] shall submit to the Court a request for attorney's fees and costs as awarded by this order within twenty (20) days of the entry of this order by was [sic] of affidavit.

On October 21, 2002, John filed Plaintiff's Non-Hearing Motion to Reconsider the October 9, 2002 Order on Defendant's Motion and Affidavit for Post-Decree Relief Filed April 16, 2002.

On November 7, 2002, Chris prematurely filed her notice of appeal from the October 9, 2002 Order Re: Defendant's Motion and Affidavit for Post-Decree Relief Filed April 16, 2002.

On November 18, 2002, Judge Romanchak entered an Order Denying Plaintiff's Non-Hearing Motion to Reconsider the October 9, 2002 Order on Defendant's Motion and Affidavit for Post-Decree Relief Filed April 16, 2002.

On July 2, 2003, the Hawai'i Supreme Court assigned this appeal to this court.

POINTS ON APPEAL

In this appeal, Chris

respectfully requests . . . a judgment requiring [John] to pay child support consistent with the Guidelines by ruling that the wage income shifted to [John's] spouse on March 23, 2001 constitutes attributed gross income to [John] for child support calculation purposes. The court is also requested to enter a judgment and rule that the debt service paid by Maui Builders, Inc. constitutes gross income within the meaning of the Child Support Guidelines and is thus attributed income to [John] for child support calculation purposes[.]"

More specifically, Chris presents the following points on appeal:

A. Attributed Wages Income. The evidence at trial established that [John] as President, CEO[,] and sole stockholder of Maui Builders, Inc. made all personnel decisions and on March 23, 2001 reduced his wage income by 2/3rds from \$2,400/week to \$800/week and shifted that income to his spouse to avoid child support;

B. Attributed Income-Debt Service. The evidence at trial also established that [John] instructed his closely-held corporation to pay debt service on his personal mortgages on a regular and consistent basis and that this debt service should have been included as gross income for child support calculation purposes.

. . . .

The trial court was required to apply and follow the Amended Child Support Guidelines adopted November 1, 1998 (hereinafter "Guidelines" or ACSG") in determining whether there was sufficient evidence to warrant a child support modification. . . .

Absent a finding of special circumstances, the application of the Guidelines to determine periodic support is mandatory. The Guidelines provide a clear, specific and unambiguous definition of what constitutes "gross income" and the trial court failed to follow the Guidelines when it concluded that a modification was not warranted.

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As stated herein, on March 23, 2001, [John] reduced his wage compensation from \$2,400 to \$800 per week and diverted the precise differential (\$1,600 per week) to his spouse to avoid his child support obligation. The fact that [John's] spouse was not on the corporate payroll on January 1, 2001 and that the income shift on March 23, 2001 shifted [John's] precise salary reduction to his spouse was not known to the court at the first trial

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The trial transcript is replete with evidence that [John's] corporation, Maui Builders Inc., consistently made mortgage payments for [John] during 2000 and 2001. Neither mortgage is listed as a corporate obligation on the Maui Builders, Inc. corporate tax returns for 2000 or 2001. In fact the corporate tax returns demonstrate that [John] actually owed his corporation \$156,192. . . .

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[Chris] asserts that the trial court committed reversible error by limiting its Findings of Fact to state that the evidence presented at the hearing failed to establish that in "looking back" [John] received more income than determined by the Court's Findings of Fact, Conclusions of Law and Order entered on August 23, 2001. The Motion filed April 16, 2002 . . .

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expressly did not limit any claim of relief to only a retroactive modification. The Family Court was also required to consider the question of whether the evidence established if [Chris] was entitled to a prospective modification effective the date the instant motion was filed on April 16, 2002.

(Citation omitted).

DISCUSSION

A.

In the answering brief, John argued, in relevant part, as follows:

In this case, the [August 23,] 2001 ruling is preclusive as to the issues of imputed income based on the corporation's payment of the loan and the salary paid to John's spouse.

Whether the 2001 ruling was preclusive or only established the law of the case as to those two imputed income issues, the 2001 ruling substantially raised the bar as to Chris's burden of proof, and the deference due to the Family Court in its exercise of discretion in the 2002 ruling.

With respect to pre-2001 matters, we agree. The August 23, 2001 FsOF, CsOL, and Order authorized a 2002 "look-back" to John's 2001 gross income. It did not authorize a 2002 look back to any pre-2001 matters.

With respect to post-2000 matters, we disagree. The August 23, 2001 FsOF, CsOL, and Order authorized a 2002 "look-back" to John's 2001 gross income. It did not in any way restrict that look.

B.

As noted above, in the August 23, 2001 FsOF, CsOL, and Order, the court found, in relevant part, as follows:

55. [John's] salary was reduced because of the non-payment of \$243,000 by Mr. Sugarman and the costs associated with the lawsuit filed by Mr. Sugarman.

56. The Court finds there is sufficient evidence of the currently deteriorating financial condition of the Corporation to find the reduction of [John's] income in March 2001 from the previous, much higher levels is reasonable. . . .

57. . . . [T]his court finds that the yearly average of [John's] income for 2001 provides a more realistic calculation of [John's] income for purposes of calculating child support at this point in time.

. . . .

61. [John's] wife is an employee of the Corporation, however she receives no benefits different than any other employees doing the same work.

62. [John's] wife does not receive any car allowances, company vehicles to drive[,] or any other benefits from the Corporation other than her salary.

63. [John's] wife receives gross weekly pay of \$720.00 each week.³ This payment is comparable with the salaries of other

³ Exhibit G in evidence is a copy of the W-2 Wage and Tax Statement for John's wife for calendar year 2001. It reports that her compensation from Maui Builders, Inc. was \$37,440. Exhibit I in evidence is the "Employee Earnings

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employees doing similar work.

(Footnote added.) These FsOF were not appealed by Chris. Moreover, they are not clearly erroneous.

Chris contends that, "on March 23, 2001, [John] reduced his wage compensation from \$2,400 to \$800 per week and diverted the precise differential (\$1,600 per week) to his spouse to avoid his child support obligation." This contention misrepresents a material fact. When John reduced his wage compensation from \$2,400 to \$800 per week, he increased his wife's compensation from \$400 per week to \$720 per week retroactive to January 1, 2001, not "the precise differential (\$1,600 per week)".

The record is clear that because Chris was seeking additional child support, John caused Maui Builders, Inc., to reduce its monthly compensation to him and to begin paying a monthly compensation to his wife. Judge MacDonald and Judge Romanchak were presented with the question whether these changes caused an unreasonable (a) reduction of the monthly compensation paid to John, (b) shifting of John's income to John's wife, and/or (c) payment of monthly compensation to John's wife. Both judges answered all three questions in the negative. In light of the facts supported by the evidence, none of these answers are wrong.

History" for John's wife for calendar year 2001. It reports all checks from Maui Builders, Inc. to John's wife in 2001. Although it reports that nine \$1,600 checks were issued, it also reports that the grand total of the checks issued for the year 2001 was \$37,440, the equivalent of \$720 per week for fifty-two weeks.

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Prior to Chris seeking additional child support, both John and his wife were working for Maui Builders, Inc., but only John was being paid. When Chris sought additional child support, John and his wife were reasonably motivated to change the situation to conform to the facts. It is not reasonable for John's wife to work for Maui Builders, Inc. for free for the benefit of someone other than John. Reasonable compensation for reasonably necessary work actually performed by John's wife is not compensation to John. As long as Maui Builders, Inc., is paying John's wife a reasonable compensation for reasonably necessary work actually performed by her, Chris has no basis for complaint. Similarly, it is not reasonable for Maui Builders, Inc. to pay John more than it can afford to pay him.

C.

As noted above, in finding of fact no. 34, the August 23, 2001 FsOF, CsOL, and Order finds that "[John] commingled corporate assets of Maui Builders, Inc. with his personal assets, in particular, but not limited to, the financing and construction of his residence[.]" There is no evidence that John did not pay all amounts due from him to Maui Builders, Inc. for his residence. On the contrary, John testified that he began construction of his residence on August 13, 1999 and completed it in August 2000. John further testified that the construction cost for his residence was \$340,000, that he paid \$229,752 plus \$25,528, and that the balance was paid as follows:

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Q. Well, that leaves us with a balance of around \$90,000.

A. Right.

Q. Can you just explain to me how that was paid?

A. Well, when . . . I had a house prior to this, and we sold it, and then we bought this house. And I had this problem back in '95 where somebody didn't pay me a pile of money, and I was forced to put a second mortgage on my house to pay the bills, and that was a hundred thousand dollars through GE Capital.

When I sold the house, then . . . that mortgage was satisfied, so the company then owed me a hundred thousand dollars. And I had not much hope of getting it back, so basically I was able to go -- the company still owes me a little bit of money in that sense, because it is, like you say, about \$90,000.

D.

Chris contends that "[t]he evidence at trial also established that [John] instructed his closely-held corporation to pay debt service on his personal mortgages on a regular and consistent basis and that this debt service should have been included as gross income for child support calculation purposes." As noted above, however, the August 23, 2001 FsOF, CsOL, and Order found, in relevant part, as follows:

33. [John] took out a personal loan secured by a second mortgage on the home owned by himself and his wife in the amount of \$200,000 for use by the Corporation. The Corporation makes all payments for this loan.

. . . .

50. The Corporation owes over \$500,000 in loans, including the loan secured by the mortgage on [John's] residence.

. . . .

60. Loans were made in [John's] own name and are being paid for by the Corporation, these loans never benefitted [John] since the monies received from the loan[s] were given to the Corporation to meet corporate needs.

These findings were not appealed by Chris. Moreover, they are not clearly erroneous. They support the court's decision that

the corporation's payment of the second mortgage is not income to John for purposes of computing his child support obligation.

E.

Chris contends that her April 16, 2002 motion "expressly did not limit any claim of relief to only a retroactive modification. The Family Court was also required to consider the question of whether the evidence established if [Chris] was entitled to a prospective modification effective the date the instant motion was filed on April 16, 2002." (Emphasis in original; citation omitted.) Although we question the allegation that Chris "expressly" did not do so, we agree that Chris did not do so.

Chris further contends

that the record established at trial requires the Court to determine that a retroactive modification to April 12, 2001 is warranted and that the evidence also establishes that a prospective child support modification is warranted based on the Motion and Affidavit for Post-Decree Relief filed by [Chris] on April 16, 2002.

Although we agree that "[t]o limit relief, or limit the scope of the evidence, to the 'look back' period is . . . error," we conclude that Chris failed her burden of showing that she was harmed by this error. This conclusion is based on the fact that the evidence in support of an increase for the post-April 16, 2002 period is no different than the evidence that was insufficient to support an increase for the 2001 "look back" period.

CONCLUSION

Accordingly, we affirm the October 9, 2002 Order Re: Defendant's Motion and Affidavit for Post-Decree Relief Filed April 16, 2002.

DATED: Honolulu, Hawai'i, August 19, 2004.

On the briefs:

Guy A. Haywood
for Plaintiff-Appellee.

Chief Judge

Richard J. Diehl
(Diehl & Weger)
for Defendant-Appellant.

Associate Judge

Associate Judge