

NOT FOR PUBLICATION IN WEST'S HAWAII REPORTS AND PACIFIC REPORTER

NO. 27817

IN THE INTERMEDIATE COURT OF APPEALS
 OF THE STATE OF HAWAII

M.S.K., Petitioner-Appellant,
 v.
 T.L.L., Defendant-Appellee

NORMA T. YARA
 CLERK, APPELLATE COURTS
 STATE OF HAWAII

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APPEAL FROM THE FAMILY COURT OF THE THIRD CIRCUIT
 (FC-P NO. 05-1-042K)

MEMORANDUM OPINION

(By: Recktenwald, Chief Judge, Nakamura, and Fujise, JJ.)

In this child custody and support case, the Family Court of the Third Circuit (family court)¹ awarded Petitioner-Appellant M.S.K. (Petitioner or Mother) sole physical custody of A.K.L. (Child), but only so long as Mother resides within the Kona area. If Mother relocates to Hilo or the mainland, sole physical custody of the child would be transferred to Defendant-Appellee T.L.L. (Father). The family court also awarded Mother \$3,000 per month in child support, which was less than the presumptive amount from the Child Support Guidelines, and \$2,000 in attorney's fees and costs.

Unhappy with the geographic restrictions on her physical custody and the amounts awarded for child support and attorney's fees and costs, Mother appeals from the family court's: 1) November 28, 2005, "Findings of Fact, Conclusions of Law, Judgment of Paternity, and Order on Petitioner's 'Verified Petition For Paternity and Custody' Filed June 13, 2005;" 2) November 28, 2005, Order awarding Mother attorney's fees and costs; and 3) February 10, 2006, "Order Granting In Part and

¹ The Honorable Aley K. Auna, Jr. presided.

Denying In Part Petitioner's Motion For Reconsideration, Filed December 8, 2005."

On appeal, Mother asserts that the family court: 1) abused its discretion in awarding custody of Child to Mother for only so long as Mother remains in the Kona area; 2) abused its discretion in finding that the presumptive amount of child support exceeds Child's appropriate standard of living; 3) clearly erred in finding that exceptional circumstances warranted a downward deviation from the Child Support Guidelines; and 4) abused its discretion in awarding Mother only \$2,000 for attorney's fees and costs. We affirm the family court's child custody award, but we vacate its award of child support and its decision denying Mother's request for attorney's fees and costs in excess of \$2,000. We remand the case for further proceedings consistent with this memorandum opinion.

BACKGROUND

Mother and Father met in June 1994 and lived together from April 1995 to about September 2002 when Father moved from the family home. Mother became pregnant with Child in 1998, and Child was born in December 1998. Mother and Father were never married.

In July 2001, Mother quit her job because of a back injury and because Father and Mother agreed that Mother should stay home and provide full-time care for Child. After Father separated from Mother, he bought a five-bedroom home for Mother and Child and allowed them to live there rent free. In addition to paying the mortgage for the house, Father made arrangements for Mother to receive a monthly paycheck of approximately \$2,800 gross (\$2,000 net) from a company owned by Father. Mother did not actually perform any work for this company but Father put her on the payroll so that she could obtain medical insurance coverage for herself and Child and to provide Mother with income she could use to support Child. While Mother was Child's primary caretaker, Father remained actively involved in Child's life.

Sometime in 2003, Mother met M.B. They were married in April 2005. M.B. worked and lived in California, where he resided by himself in a three-bedroom, two-bath home.

On June 13, 2005, Mother filed a "Verified Petition for Paternity and Custody." In Mother's petition, she requested: 1) that Father be adjudged the legal father of Child; 2) that both Mother and Father be awarded joint legal custody of Child, with Mother retaining sole physical custody; and 3) that Father pay child support according to the Child Support Guidelines, as well as Mother's attorney's fees and costs.

Prior to and during the hearing on Mother's petition, Mother stated that it was her desire to move with Child to California so they could live with M.B. Mother stated that if she were not allowed to move with Child to California, she wanted to move to Hilo to be near her mother and sister. After hearing the testimony of both parties and their witnesses, the family court entered a written decision on Mother's petition on November 28, 2005.

The family court ordered that Mother shall be awarded sole physical custody of Child so long as Mother remains in the Kona area. If, however, Mother decides to move to the mainland or relocate to Hilo, the family court ordered that Father shall be awarded sole physical custody.

With respect to child support, Father submitted an income and expense statement which listed gross monthly receipts of \$79,166 in average commissions² and monthly expenses of \$6,025 for housing and transportation, \$2,508 for Father's personal expenses, and \$5,134 for Child's personal expenses. Mother's amended income and expense statement showed a monthly income of \$2,081 and monthly expenses of \$789 for housing and transportation, \$420 for Mother's personal expenses, and \$520 for Child's personal expenses. Father did not file an asset and debt statement. He filed a paternity financial information sheet

² The income and expense statement of Defendant-Appellee T.L.L. (Father) also reflected an additional \$2,737 in monthly net salary.

which identified the value of his real property as \$1,400,000 and personal property as \$80,000, but did not fill in requests for bank account balances and the value of securities, stocks, and bonds.

Due to Father's extraordinary monthly income, the family court found that Father would owe \$7,940 per month in child support based Father's Child Support Guidelines computation.³ The family court determined that "this amount clearly exceeds the appropriate standard of living for [Child][,]" and that Father had met his burden of showing exceptional circumstances warranting a deviation from the Child Support Guidelines. The family court found that it would be just and equitable to order Father to pay \$2,000 per month in child support.

The family court found that pursuant to Hawai'i Family Court Rules (HFCR) Rule 7(b)(5), Father was required to file an asset and debt statement. As a sanction for Father's failure to file an asset and debt statement, the family court ordered Father to pay \$2,000 in Mother's reasonable attorney's fees and costs. Mother requested that Father be ordered to pay all of Mother's attorney's fees and costs, which she claimed totaled \$11,415. The family court, however, only ordered Father to pay the \$2,000 in attorney's fees and costs it had imposed as a sanction.

Thereafter, on December 8, 2005, Mother filed a Motion for Reconsideration, asking the family court to reconsider: 1) its award of custody to Father if Mother moves from the Kona area, 2) the amount of child support awarded to Mother, and 3) the amount of attorney's fees awarded to Mother. On February 10, 2006, the family court issued an order granting in part and denying in part Mother's Motion for Reconsideration. The court revised the amount of child support awarded to Mother, raising it from \$2,000 to \$3,000 per month. The court refused to change the

³ Petitioner-Appellant M.S.K. (Mother) computed Father's child support obligation under the Child Support Guidelines as \$8,030 per month.

conditions it imposed on child custody or its award of attorney's fees and costs.

DISCUSSION

I.

Mother contends that the family court erred in conditioning its award of sole physical custody of Child to Mother on Mother's remaining in the Kona area and in awarding sole physical custody to Father if Mother moves away. We disagree.

HRS § 571-46 (2006) provides the criteria and procedure for awarding custody of children. HRS § 571-46 states in relevant part that "[c]ustody should be awarded to either parent or to both parents according to the best interests of the child" In Fisher v. Fisher, 111 Hawai'i 41, 137 P.3d 355 (2006), the Hawai'i Supreme Court held that "[u]nder HRS § 571-46, the sole issue in a custody determination is the child's best interests, which is an issue of ultimate fact." Id. at 47, 137 P.3d at 361 (quoting Maeda v. Maeda, 8 Haw. App. 139, 143, 794 P.2d 268, 270 (1990)). The supreme court stated that

Hawai'i courts have consistently adhered to the best interests of the child standard as paramount when considering the issue of custody. In so doing, the family court is granted broad discretion to weigh the various factors involved, with no single factor being given presumptive paramount weight, in determining whether the standard has been met.

Fisher, 111 Hawai'i at 50, 137 P.3d at 364.

There was substantial evidence in the record to support the family court's determination that its child custody award was in Child's best interests. The family court found that both Mother and Father were fit and proper parents. However, in denying Mother's motion to reconsider its child custody award, the family court indicated that it had concerns about Mother's judgment in matters implicating the safety and well-being of Child. The record reflects that Mother allowed her adult son to reside with Mother and Child even though the son, when he was fourteen years old, had sexually abused a young girl. The family court noted that Mother had a "very callous and insensitive

attitude" regarding the sexual abuse committed by her son. The court further noted, among other things, that Mother took advantage of Father's financial resources by not telling him about her marriage; that Mother allowed her adult children and others to live in the house provided by Father without paying rent; that Child has lived all her life on the island of Hawai'i and has the majority of her extended family there; and that Child attends school in Kona and has many friends there.

The family court specifically found:

It is in the best interests of [Child] that she ([Child]) remain in Kona in close proximity to Father. Kona is where [Child's] stability and safety will be ensured. It would be detrimental for [Child's] well-being for her to move to California.

We conclude that the family court did not clearly err in determining that its custody award was in Child's best interests. Pursuant to HRS § 571-46, we hold that the family court did not abuse its discretion in awarding Mother sole physical custody of Child so long as Mother remains in the Kona area, but transferring custody to Father if Mother moves away. See Maeda, 8 Haw. App. at 143, 794 P.2d at 270 (upholding family court's award of sole legal and physical custody of a child to his mother subject to the condition subsequent that the mother's custody would automatically be terminated and the custody transferred to the father if mother moved out of the family court's jurisdiction).

II.

Mother argues that the family court erred in deviating downward from the presumptive amount of child support calculated under the Child Support Guidelines (the "Guidelines") without evidence or findings to support that deviation. We conclude that the family court did not provide adequate findings to explain or support its "exceptional circumstances" downward departure from the presumptive Guidelines amount. In particular, we are unable to determine how the family court arrived at its award of \$3,000 in child support. Accordingly, we vacate the family court's child support award and remand with instructions that the family

court enter sufficient findings to explain and substantiate its award of child support. In doing so, we express no view on what the appropriate amount of child support should be or whether the family court may order a departure from the Guidelines.

A.

Relevant statutes for determining child support include Hawaii Revised Statutes (HRS) § 571-52.5 and § 576D-7 (2006).

HRS § 571-52.5 provides:

When the court establishes or modifies the amount of child support required to be paid by a parent, the court shall use the guidelines established under section 576D-7, except when exceptional circumstances warrant departure.

HRS § 576D-7, in turn, requires the family court to establish child support guidelines and identifies factors that the guidelines may consider.⁴

⁴ Hawaii Revised Statutes (HRS) § 576D-7 (2006) provides in relevant part as follows:

§ 576D-7 Guidelines in establishing amount of child support.

(a) The family court, in consultation with the [child support enforcement] 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:

- (1) All earnings, income, and resources of both parents; provided that earnings be the net amount, after deductions for taxes, and social security. Overtime and cost of living allowance may be deducted where appropriate;
- (2) The earning potential, reasonable necessities, and borrowing capacity of both parents;
- (3) The needs of the child for whom support is sought;
- (4) The amount of public assistance which would be paid for the child under the full standard of need as established by the department;
- (5) The existence of other dependents of the obligor parent;
- (6) To foster incentives for both parents to work;
- (7) To balance the standard of living of both parents and child and avoid placing any below the poverty level whenever possible;
- (8) To avoid extreme and inequitable changes in either parent's income depending on custody; and

The version of the Guidelines worksheet applicable to the family court's determination in this case has three sections which are used to determine the child(ren)'s total child support needs and a fourth section to calculate the child support payable by each parent.

Under HRS § 571-52.5, the family court must use the Guidelines to determine child support unless "exceptional circumstances warrant departure." The party seeking an exceptional circumstances departure from the amount computed by the Guidelines has the burden of proof. Richardson v. Richardson, 8 Haw. App. 446, 457, 808 P.2d 1279, 1286-87 (1991). Among the exceptional circumstances warranting a departure is "[a] monthly income that would result in a computation higher than the reasonable needs of the children based on the relevant standard of living." Nabarrete v. Nabarrete, 86 Hawai'i 368, 371, 949 P.2d 208, 211 (App. 1997).

In Richardson, we formulated the test to apply in determining whether an exceptional circumstances departure was warranted under the circumstances presented by this case:

In this situation the three questions of fact that must be answered are: (1) What is the appropriate standard of living? (2) What is the total cost of the children's reasonable needs at the appropriate standard of living? (3) If the answer to question (2) is less than the total amount computed according to . . . the [Guidelines], then the case involves an exceptional circumstance.

Richardson, 8 Haw. App. at 457, 808 P.2d at 1287. This court also identified the relevant criteria that the family court should use in applying this test:

What criteria shall the family court use when factually deciding the child's appropriate standard of living in a particular case? In our view, the following subsections of HRS

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- (9) If any obligee parent (with a school age child or children in school), who is mentally and physically able to work, remains at home and does not work, thirty (or less) hours of weekly earnings at the minimum wage may be imputed to that parent's income.

§ 576D-7 (Supp.1990) are the most relevant:

- [(a)](1) All earnings, income, and resources of both parents; . . .
 - (2) The earning potential, reasonable necessities, and borrowing capacity of both parents;
. . . .
 - (7) To balance the standard of living of both parents and child . . . ;
 - (8) To avoid extreme and inequitable changes in either parent's income depending on custody;
. . . .
- [(b)](3) Applied to ensure, at a minimum, that the child for whom support is sought benefits from the income and resources of the obligor parent on an equitable basis in comparison with any other minor child of the obligor parent[.]

Based on the above, we conclude that (a) the parents' prior financial situation; (b) the custodial parent's current financial situation; and (c) the noncustodial parent's current financial situation are all relevant considerations when factually determining the child's appropriate standard of living in a particular case.

Id. at 457-58, 808 P.2d at 1287.

B.

In response to Mother's Motion for Reconsideration, the family court determined that the monthly amount of child support owed by Father based on the Guidelines would be between \$7,940 and \$8,025 per month, but ordered Father to pay child support in the amount of \$3,000 per month based on an exceptional circumstances departure. Although the court indicated its belief that the amount computed under the Guidelines would be excessive, it did not provide sufficient findings for this court to determine how it arrived at its award of \$3,000 per month in child support. Without such findings, we are unable to determine whether the court's downward departure to an award of \$3,000 per month in child support was warranted.

Our review of the figures cited by the family court also indicates certain flaws in the court's analysis. When Mother submitted her amended income and expense statement, she was living rent free in the house provided by Father. The record

indicates, however, that the rent-free situation would not continue. Nevertheless, the family court did not impute any housing costs to Mother and thus did not appear to consider housing expenses that Mother would incur in the future in determining the appropriate amount of child support to award.

In addition, the family court found that Father was spending \$7,936 (\$2,802 + \$5,134) to support Child. The \$2,802 is the amount of "salary" paid by Father's business to Mother, even though she did not work, and the \$5,134 comes from Father's statement of the monthly amounts he spends on Child. However, the \$5,134 figure already includes the \$2,802 "salary" paid to Mother, and thus the court double-counted the \$2,802 amount by adding it to the \$5,134 in computing the expenses spent on Child.

C.

Father did not submit an asset and debt statement and did not provide complete information regarding his assets. For example, no information was provided with respect to Father's bank account balances and the value of his securities. HFCR Rule 7(b)(5) requires that both the movant and the respondent submit income and expense and asset and debt statements, signed by the parties, in connection with "[a]ny motion seeking an order for or modification of financial or monetary relief of any kind, except for an award of attorney's fees in enforcement proceedings." (Emphasis added.)

We reject Father's claim that he was not required to submit an asset and debt statement because Mother sought child support pursuant to her petition for paternity and custody, and not through a separate motion. We construe the term "motion" as used in HFCR Rule 7(b)(5) as encompassing a petition requesting child support. However, we also reject Mother's claim that the only appropriate sanction for Father's failure to submit an asset and debt statement was to deny his request for a downward departure from the Guidelines. We conclude that the family court did not abuse its discretion in sanctioning Father by awarding

Mother \$2,000 in attorney's fees and costs, rather than by denying Father's departure request. See HFCR Rules 7(b)(5) and 37(b)(2).

D.

We vacate the family court's award of child support. On remand, we instruct the family court to apply the test set forth in Richardson to determine whether and to what extent a departure from the Guidelines is appropriate in awarding child support. The family court shall make findings that show how it applied the Richardson test, that provide a clear explanation of how it arrived at the amount of child support it awards, and that set forth the reasons supporting the award. Father's "current financial situation," which includes his assets and debts as well as his income, is relevant in determining the "appropriate standard of living" for Child. Richardson, 8 Haw. App. at 457-58, 808 P.2d at 1287. Thus, the family court on remand should require Father to submit an asset and debt statement.

III.

The family court's view on Mother's request for attorney's fees and costs may be affected by its decision on remand regarding the appropriate amount of child support to award. Thus, we decline to reach Mother's claim that the family court erred in failing to award more than \$2,000 in attorney's fees and costs. Instead, we vacate the family court's decision to deny Mother's request for attorney's fees and costs in excess of \$2,000 and permit the family court on remand to consider Mother's request for attorney's fees and costs in conjunction with its award of child support.

In paternity actions, the family court has the discretion to order attorney's fees and costs. HRS § 584-16 (2006). The family court found that Father's monthly income was over 28 times greater than Mother's. Mother requested that Father pay her attorney's fees, which she represented was \$11,415. However aside from awarding Mother \$2,000 in attorney's fees and costs, which the family court awarded as a sanction for

Father's failure to submit an asset and debt statement, the court denied Mother's request for attorney's fees and costs. The court provided no explanation for its denial.

Under the circumstances of this case, it would be beneficial for the family court to state its reasons for exercising its discretion in ruling on Mother's request for attorney's fees and costs. Therefore, we instruct the family court on remand to set forth its findings and reasons in ruling on Mother's request for attorney's fees and costs in excess of the \$2,000.

CONCLUSION

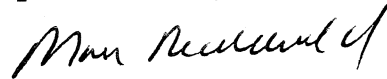
With respect to family court's: 1) November 28, 2005, "Findings of Fact, Conclusions of Law, Judgment of Paternity, and Order on Petitioner's 'Verified Petition For Paternity and Custody' Filed June 13, 2005"; 2) November 28, 2005, Order awarding Mother attorney's fees and costs; and 3) February 10, 2006, "Order Granting In Part and Denying In Part Petitioner's Motion For Reconsideration, Filed December 8, 2005," we affirm the portions of those decisions that a) awarded child custody and b) awarded \$2,000 in attorney's fees and costs as a sanction for Father's failure to file an asset and debt statement. We vacate the portions of those decisions that awarded child support and denied Mother's request for attorney's fees and costs in excess of \$2,000, and we remand the case for further proceedings consistent with this Memorandum Opinion.

DATED: Honolulu, Hawai'i, September 26, 2007.

On the briefs:

Michael S. Zola
for Petitioner-Appellant

Robert M. Harris
for Respondent-Appellee



Chief Judge



Associate Judge



Associate Judge