ARTICLE: WALDECKER V. O'SCANLON: A MATERIAL CHANGE IN CIRCUMSTANCES

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Text

Following precedent established by the Hawaii Intermediate Court of Appeals (the "ICA"), Hawaii family courts have long required that a party seeking modification of a child custody order must first make a threshold showing of a material change in circumstances since the prior child custody order. In family law parlance, the stan-dard is sometimes referred to simply as "material change." In *Waldecker v. O'Scanlon*, 137 Haw. 460, 375 P.3d 239 (2016), the Hawaii Supreme Court held that the material change standard is not to be applied as a threshold test that bars consideration of the best interests of the child. *Id.* at 471, 375 P.3d at 250.

The ICA previously required a party to make a threshold showing of material change when a party sought modification of a prior spousal support or child support order. *See Doe VII v. Roe VII*, 8 Haw. App. 437, 792 P.2d 308 (1991) (requiring threshold showing of material change in circumstances for modification of prior child support order); *Vorfeld v. Vorfeld*, 8 Haw. App. 391, 804 P.2d 891 (1991) (requiring threshold showing of material change in circumstances for modification of prior spousal support order). In *Nadeau v. Nadeau*, 10 Haw. App. 111, 861 P.2d 754 (1993), the ICA extended the material change standard to modification of child custody and visitation orders. *See id.* at 121, 861 P.2d at 759.

The purpose of the material change in circumstances requirement is to prevent unnecessary relitigation of child custody matters. One extreme example of unnecessarily long custody litigation is the Canadian case of *Geremia v. Harb*, which involved a total of twenty-five different custody orders over the course of two years. *See* Noel Semple, *Whose Best Interests? Custody and Access Law and Procedure*, 48 Osgoode Hall L.J. 287, 309 (2010) (discussing *Geremia v. Harb*, [2008] 90 O.R. 3d 185 (Can. Ont. Sup. Ct. J.)). The issue of whether a material change has occurred often arises in the context of cases where one party intends to relocate out of the state. *See* Janet Leach Richards, *Children's Rights v. Parents' Rights: A Proposed Solution to the Custodial Relocation Conundrum*, 29 N.M.L. Rev. 245, 246 (1999). Relocation issues are particularly common in Hawaii because of the State's large military population. *See, e.g., Fisher v. Fisher*, 111 Haw. 41, 48, 137 P.3d 355, 362 (2006) (mother sought permission to relocate with children when her new husband transferred to military base outside of Hawaii).

The ICA has consistently applied the standard to appeals of child custody determinations since deciding *Nadeau* in 1993. *See, e.g.*, *Hollaway v. Hollaway*, 133 Haw. 415, 421, 329 P.3d 320, 326 (App. 2014) (quoting *Nadeau*, 10 Haw. App. at 121, 861 P.2d at 759) (holding that "[T]o obtain the family court's change of a custody order, the movant 'must show a material change of circumstances since the previous custody order . . . ."); *Egger v. Egger*,

112 Haw. 312, 318, 145 P.3d 855, 861 (App. 2006) (same); *In re Doe*, 93 Haw. 374, 388, 4 P.3d 508, 522 (App. 2000) (same).

The Hawaii Supreme Court has referred to the material change standard in child custody appeals. *See Doe v. Doe*, 98 Haw. 144, 153, 44 P.3d 1085, 1094 (2002) (citing *In re Doe*, 93 Haw. at 388, 4 P.3d at 522; *Nadeau*, 10 Haw. App. at 121, 861 P.2d at 759). In *Doe*, Father filed a petition for custody of his child, who was then in Mother's custody in Calgary, Canada. 98 Haw. at 153, 44 P.3d at 1094. The Hawaii court granted Father sole legal and physical custody of Child. *Id.* Following a Hague Convention [1] proceeding in Canada, Mother and Child returned to Hawaii. *Id.* The Hawaii court granted Mother visitation, but legal and physical custody remained with Father. *Id.* at 147-48, 44 P.3d at 1088-89. Mother moved for reconsideration, and Father responded that there had been no material change in circum-stances that would warrant reconsideration of the Hawaii court's previous custody award. *Id.* at 153, 44 P.3d at 1094. The court agreed, and Mother appealed. *Id.* at 149, 44 P.3d at 1090.

In its opinion, the Hawaii Supreme Court did not apply the material change in circumstances as a threshold test, but rather, noted that "it [was] helpful to address the applicability of the 'material change in circumstances' standard[.]" *Id.* at 153, 44 P.3d at 1094. Citing *In re Doe* and *Nadeau*, the Court explained the test as follows:

> Although this requirement is not expressly articulated in the statutes, several cases of the Intermediate Court of Appeals (ICA) have indicated that a parent seeking a change in his or her child's custody status must demonstrate that there has been a material change in the child's circumstances that warrant amendment of the original custody decision.

Id. (internal quotations and citations omitted). After explaining the test, the Court determined that it did not apply, because Mother's post-hearing motions were part of the original custody determination. *Id.* Unlike the circumstances in *In re Doe* and *Nadeau*,Mother was not seeking modification of a custody order entered in a prior proceeding. *See id.*

In subsequent cases, such as *Fisher v. Fisher*, 111 Hawaii 41, 137 P.3d 355 (2006), the Court has gone as far as to state that the "*sole* issue in a custody determination is the child's best interest." *Id.* at 47, 137 P.3d at 361 (emphasis added). However, until *Waldecker*, the Court has never expressly clarified that material change is not a threshold test that can bar consideration of the best interests of the child.

After the material change standard stood as the de facto test for custody modification for over a quarter century, the Hawaii Supreme Court reversed course in *Waldecker v. O'Scanlon*, 137 Haw. 460, 375 P.3d 239 (2016). The *Waldecker* court expressly overruled *Nadeau* and other ICA case law "to the extent they suggest that a material change in circumstances is required before the court can consider the best interests of the child in modifying a custody order." *Id.* at 470, 375 P.3d at 249. As the law stands today, the family court must consider the best interests of the child regardless of whether a party has shown a material change in circumstances since the prior custody order. *See id.* The Court reasoned that "jurisprudential concerns regarding repetitive motions cannot conflict with the requirements of *HRS § 571-46*, that . . . 'any custody award shall shall be subject to modification or change *whenever* the best interests of the child require or justify the modification or change.'" *Id.* at 470-71, 375 P.3d at 249-50 (emphasis in original).

Of the jurisdictions that do not apply the material change in circumstances as a threshold test, some jurisdictions simply hold that the best interest of the subject child is paramount and do not apply as strict of a presumption in favor of the existing custody order. In Pennsylvania, for example, a material change in circumstances is *not* a prerequisite for modification of a custody order. *See R.M.G. v. F.M.G.*, 986 A.2d 1234, 1235 (Pa. Super. Ct. 2009) (affirming custody modification "[b]ecause a material change in circumstances is *not* a pre-requisite to modification" (emphasis added)). The relevant Washington statute also expressly permits modification of custody whether or not there has been a material change in circumstances. *See Troxel v. Granville*, 530 U.S. 57, 61 (2000) (quoting *WASH. REV. CODE § 26.10.160(3)* (1994)) ("The court may order visitation rights for any person when visitation

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[1] The *Doe* court was referring to the Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89. *See* 98 Haw. at 146 n.3, 44 P.3d at 1087 n.3.

may serve the best interest of the child whether or not there has been any change of circumstances."). However, many jurisdictions still appear to apply the material change in cir-cumstances standard as a threshold test. In Rhode Island, for example, it was proper for a trial court to ignore a guardian ad litem's recommendation that custody modification would be in a child's best interest, where there was no showing of a material change. *See D'Onfrio v. D'Onofrio*, 738 A.2d 1081, 1084 (R.I. 1999).

By failing to clarify that the material change in circumstances standard is not a threshold test, the Hawaii Supreme Court may have allowed the family courts to decide twenty-six years of child custody cases as though the standard were a threshold test. It is conceivable that these cases could have been decided differently if the family court were permitted to consider the best interests of the subject children, instead of declining to consider a request for custody modification where the party seeking modification could not show a material change in circumstances.

Perhaps the *Waldecker* court's clarification merits reconsideration of the twenty-six years of custody cases since *In re Doe* and *Nadeau*, or at least the cases where a party sought custody modification but could not show material change. *See* Haw. Fam. Ct. R. 60(b)(6) (permitting relief from judgment or order for any other reason justifying relief from the operation of the judgment). *But see Hammon v. Monsef*, 8 Haw. App. 58, 64, 792 P.2d 311, 314 (1990) (holding that "something more than a 'mere' change in the law is necessary to provide the grounds for Rule 60(b)(6) relief."). In any event, it seems that the Hawaii Supreme Court has finally righted the ICA's course, and Hawaii joins the jurisdictions that do not require a threshold showing of material change before con-sidering the best interests of a child.

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