

DISSENTING OPINION BY GINOZA, J.

I respectfully dissent with regard to that part of the Memorandum Opinion which affirms the denial of Wife's motion to modify spousal support. As set forth below, I would remand for further proceedings.

In Vorfeld v. Vorfeld, 8 Haw. App. 391, 804 P.2d 891, (1991), this court set out the analysis for considering a request to modify court-ordered spousal support, as follows:

A motion for the modification of court-ordered spousal support presents the family court with the following three questions.

1. Have any of the relevant circumstances materially changed?

A material change in the relevant circumstances has occurred when a party's relevant circumstances that are proven to exist at the time of the modification hearing are materially different from the party's relevant circumstances that were proven to exist when the family court entered its spousal support order.

As outlined in Cassiday v. Cassiday, 6 Haw. App. 207, 215-16, 716 P.2d 1145, 1151 (1985), aff'd in part, rev'd in part, 68 Haw. 383, 716 P.2d 1133 (1986), the relevant circumstances are as follows. The first relevant circumstance is the payee's need. What amount of money does he or she need to maintain the standard of living established during the marriage? The second relevant circumstance is the payee's ability to meet his or her need without spousal support. Taking into account the payee's income, or what it should be, including the net income producing capability of his or her property, what is his or her reasonable ability to meet his or her need without spousal support? The third relevant circumstance is the payor's need. What amount of money does he or she need to maintain the standard of living established during the marriage? The fourth relevant circumstance is the payor's ability to pay spousal support. Taking into account the payor's income, or what it should be, including the income producing capability of his or her property, what is his or her reasonable ability to meet his or her need and to pay spousal support?

2. If the answer to question 1 is yes, should there be a modification?

3. If the answer to question 2 is yes, what should the modification be?

When answering any of the above questions, the following two rules apply: Any part of the payor's current inability to pay that was unreasonably caused by the payor may not be considered and must be ignored. Any part of the payee's current need that was caused by the payee's violation of his or her duty to exert reasonable efforts to attain self-sufficiency at the standard of living established during the marriage may not be considered and must be ignored. *Saromines v. Saromines*, 3 Haw. App. 20, 641 P.2d 1342 (1982).

8 Haw. App. at 402-03, 804 P.2d at 897-98 (internal citation omitted) (emphases added).

The first Vorfeld question (whether any relevant circumstances have materially changed) should be reviewed under the right/wrong standard. See Davis v. Davis, 3 Haw. App. 501, 506, 653 P.2d 1167, 1171 (1982) (addressing a similar analysis in a child support modification case). For the other two questions (whether there should be a modification and, if so, what should the modification be), "the manifest abuse of wide discretion standard is applicable." Id.

An integral part of the first Vorfeld question is considering the parties' respective "needs", or in other words, the amount of money each needs "to maintain the standard of living established during the marriage." Wife contends that, in denying her request to modify spousal support, the family court "failed to consider and make express findings respecting the marital standard of living, Wife's ability to maintain that standard of living without spousal support, and Defendant's ability to provide support, while maintaining that standard of living for him[.]" Based on the record, I would conclude that the family court did not consider the parties' respective "needs" as required by Vorfeld and thus did not properly address the first Vorfeld question.

In its August 4, 2009 order denying Wife's motion to modify and extend spousal support, the family court made numerous findings of fact focused on Wife's employment status and her job

search efforts since the divorce. The family court ultimately found that "Plaintiff has not exerted sufficient effort to secure the best employment available." While I would not disturb this finding<sup>1</sup> and recognize it is a legitimate part of the modification question, I believe the family court overly focused on this one issue at the expense of the entire relevant Vorfeld analysis.

As asserted by Wife, there is no indication that the family court considered, as required by Vorfeld, whether there were material changes to the amount Wife needed to maintain the standard of living established during the marriage or, more pertinent to this case, her ability to meet that need without spousal support. Without addressing the standard of living established during the marriage, there is no baseline for the Vorfeld modification analysis. Originally, in the Divorce Decree, the family court had determined that "the parties have had a relatively affluent lifestyle with vacation trips from time to time about the world." Therefore, for Wife's modification request, Vorfeld required the family court to at least consider this standard of living in determining any materially changed circumstances.

A crucial factor in this case appears to be whether there has been a material change in Wife's ability to maintain her standard of living without spousal support "[t]aking into account [Wife's] income, or what it should be, including the net income producing capability of [Wife's] property[.]" 8 Haw. App. at 391-92, 804 P.2d at 892 (emphasis added). As noted, the family court addressed at length what Wife's *employment* income "should be" but did not address in any meaningful way the "net income producing capability of [Wife's] property." This is

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<sup>1</sup> Wife argued this finding was not supported by the evidence.

significant in this case where Wife's ability to maintain her standard of living is based to a large extent on the property or assets she was awarded in the Divorce Decree (i.e., a Fidelity stock account).<sup>2</sup> In the August 4, 2009 order, the family court addressed this issue only to the extent it found that "[s]ome of the assets awarded to [Wife] from the divorce trial may have gone down in value following the divorce." However, the family court did not consider the impact on Wife's ability to maintain her standard of living.

Given the significant drop in the value of the primary asset awarded to Wife at the time of the divorce, the importance of that asset in maintaining her standard of living, and that the family court did not consider or make any findings as to standard of living factors, I would remand for further proceedings to assess all of the criteria set forth in Vorfeld.

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<sup>2</sup> As established by the family court's February 20, 2007 order, which laid out much of the basis for the divorce decree, Wife was awarded a Fidelity account which at that time was worth \$1,151,346. The family court further ordered Wife to make an equalization payment of \$437,300 plus interest. In granting a stay of the equalization payment pending the initial appeal, Wife was ordered to place \$500,000 in a joint account. Subsequently, mainly due to the downturn in the economy, the remaining value of the Fidelity account substantially decreased. Approximately two years later, based on an account statement ending April 30, 2009, the Fidelity account had a balance of \$286,680. From the time of the divorce, Wife has twice withdrawn funds from the Fidelity account to meet her financial needs, the last withdrawal for \$20,000.