DISSENTING OPINION BY ACOBA, J.,
IN WHICH RAMIL, J. JOINS

The majority awards Appellant Louan Torres (Louan) a portion of the pension benefits accrued by her late husband, Alfred Torres, Jr., (Alfred) under a pension plan known as the Operating Engineers Retirement Plan (the Plan) in which he was the participant, even though the majority upholds the entry of an order, which if determined to be a qualified domestic relations order (QDRO) as defined under § 414(p) of the Internal Revenue Code of 1986 (the Code), see 26 U.S.C. § 1 (2002), et seq., and § 206(d) of the Employee Retirement Income Security Act of 1974 (ERISA), see 29 U.S.C. § 1001 (2002), et seq.,[1] would assign any rights to Alfred's benefits to Alfred's former spouse, Appellee Margot Torres (Margot), and not Louan. While I believe that the order granting Margot's motion for entry of an amended QDRO by the family court of the first circuit (the court) was within the court's jurisdiction, I dissent from the majority's characterization of the QDRO and its resulting conclusion that the Plan is required to pay Louan benefits. Because this opinion is published and, thus, establishes precedent in our jurisdiction, see Appendix A attached hereto, the rules of law involved extend beyond this case alone.

[1] For consistency, hereinafter all cites to the Code and the ERISA statute refer to the United States Code.

I.

Margot and Alfred were married in 1967 and divorced on January 10, 1989. The divorce decree[2] (the decree) was submitted to the Plan as a domestic relations order (DRO) for QDRO determination. The decree indicates the court retains jurisdiction over the "retirement interest" of Alfred that was

---

[2] Certain provisions in the 1989 divorce decree are relevant. They provide as follows:

> a. Defendant's [(Alfred, Jr.)] Retirement. Plaintiff [(Margot)] is awarded a share of retirement under Defendant's Operating Engineers' Retirement Plan if, as, and when Defendant commences to receive the same. The share which [Margot] is awarded shall be computed according to the following formula:
>
> 1/2 x (19 years in plan / total years in plan at retirement) x Defendant's monthly gross retirement = [Margot]'s share
>
> For the purpose of this allocation of [Margot]'s interest, Defendant is the "Participant" in the aforementioned plan and [Margot] is the Alternate Payee (up to the percentage specified above) under the aforementioned Plan within the meaning of the Retirement Equity Act of 1984.
>
> The share awarded and assigned to the Alternate Payee from the aforementioned Plan shall be paid to the Alternate Payee if, as, and when Participant commences to receive retirement benefits from the Plan. Said payment, at the option of the Alternate Payee, may be paid to the Alternate Payee directly or transferred from the aforementioned Plan to a financial institution or other third party as directed by Alternate Payee in writing to said Plan.
>
> Defendant's name, current address and Social Security No. are: [ALFRED] . . . .
>
> Plaintiff's (Alternate Payee's) name, current address and social security No. are: [MARGOT] . . . .
>
> This Order is applicable to the Pension Trust Plan Operating Engineers' Retirement Plan, presently administered by the Pension Trust Plan Operating Engineers, 642 Harrison Street, San Francisco, California 94107.
>
> The Court shall retain jurisdiction over the retirement interest described herein for as long as the parties both shall live and after either party's death.
>
> The Court shall also have the authority to make every just and equitable order not inconsistent with any of the provisions herein.

(Emphases added.)

awarded to Margot "after either party's death" with authority "to make any just and equitable order not inconsistent with any" provisions of the decree.

The Plan acknowledged receipt of the decree on March 1, 1989. On September 8, 1997, the Plan apparently wrote a letter to Margot and Alfred, indicating that the 1989 divorce decree did not qualify as a QDRO. The Plan determined that the 1989 decree was not a QDRO because, among other things, the decree failed to account for survivor benefits and did not specify how long benefits were to be paid to Margot. In the same correspondence, the Plan also advised that it might be required to pay out the benefits to the person who might otherwise be entitled to them, if the DRO was not qualified as a QDRO within the eighteen-month period specified in the ERISA law.

Alfred applied to the Plan for pension benefits to be effective on December 1, 1997. He passed away on January 17, 1998, before completing his benefit papers. At the time of death, Alfred was married to Louan.

The court found that Margot did not receive a copy of the Plan's September 8, 1997 letter until June 1, 1998. On September 1, 1998, Margot's counsel apparently submitted a document denominated as the First Amended QDRO to the Plan. On February 28, 1999, the Plan's counsel responded to Margot's September 1, 1998 correspondence with suggested changes to be made to that First Amended QDRO. The suggested changes were made and a copy was sent to the attorney for Louan on March 1, 1999.

Up until June 1999, Margot and Louan apparently attempted to settle the dispute over Alfred's benefits. On June 23, 1999, Margot filed the motion which is the subject of this appeal, seeking an order for a QDRO, or to compel Louan, as Alfred's Successor-In-Interest, to execute the QDRO. Margot attached to her motion a Proposed "First Amended QDRO." The motion was heard on September 3, 1999, and Louan was represented by counsel.

The court found inter alia that, "[b]ut for the deceased [(Alfred's)] death, the Plan would have commenced paying [Alfred] pension benefits as soon as all paperwork had been completed, and those payments would have been made retroactive to December 1, 1997, the date Defendant became entitled to begin receiving the benefits."

In light of its findings, the court concluded that (1) the court had jurisdiction to enter an "amended" QDRO, (2) Margot was entitled under the QDRO to be treated as if she were Alfred's surviving spouse for purposes of the qualified joint and survivor annuity and/or qualified preretirement survivor annuity, as set forth in ERISA, 29 U.S.C. § 1005, and (3) Alfred's widow, Louan, had no interest in the benefits awarded to Margot. The court indicated it would enter orders granting Margot's motion (1) for entry of a QDRO and approving the proposed QDRO submitted and (2) to compel Louan to execute the first amended QDRO, and subsequently did so.

Pursuant to its findings and conclusions, the court entered the "First Amended [QDRO]" (the 1999 Order). It provides as follows:

> WHEREAS, [ALFRED, JR.] (the "Participant") and [MARGOT] (the "Alternate Payee"), . . . executed the [Divorce] Decree . . . filed herein on January 10, 1989; and
>
> WHEREAS, said Divorce Decree provided for the division of the Marital Assets between the Participant and the Alternate Payee; and
>
> WHEREAS, pursuant to the said Divorce Decree, this [QDRO] provides for the division and disposition of the benefits due to Participant under the Operating Engineers' Retirement Plan and grants the Alternate Payee rights to such benefits on the terms set forth in this QDRO;
>
> WHEREAS, said Divorce Decree provided that the Court shall retain jurisdiction over the retirement interest described therein for as long as the parties both shall live and after either party's death;
>
> WHEREAS, Defendant is deceased, having died on January 17, 1998;
>
> WHEREAS, this Order is intended to be a QDRO as defined in Section 414(p) of the Internal Revenue Code of 1986, as amended, and the Retirement Equity Act of 1984 (H.R. 4280);
>
> NOW, THEREFORE, IT IS HEREBY ADJUDGED, DECREED AND ORDERED that the Alternate Payee will receive payments from the Participant's retirement plan named below, pursuant to the court's assignment of benefits to Alternate Payee by the order herein below, in compliance with Sections 401(a)(13) and 414(p) of the Internal Revenue Code of 1986, as amended, as follows:
>
> 1. Definitions:
>
> (a) The term "Participant" shall mean [ALFRED, JR.], who is now deceased and whose last known address, social security number and date of birth were as follows:
>
> . . . .
>
> [ALFRED JR.] is survived by his spouse, [LOUAN,] who is ALFRED TORRES' survivor-in-interest.
>
> (b) The term "Alternate Payee" shall mean [MARGOT], whose current address, social security number and date of birth are as follows:
>
> . . . .
>
> (c) The term "Plan" shall mean the Pension Plan maintained by the Pension Trust Plan for Operating Engineers. The Plan Administrator is the Board of Trustees of the Pension Trust Plan for Operating Engineers located at . . . .
>
> 2. The Alternate Payee and this Court intend this Order to be a [QDRO] as defined in Section 401(a)(13) and 414(p) of the Internal Revenue Code of 1986, as amended, and the Retirement Equity Act of 1984, as amended. Accordingly, the Alternate Payee is granted a portion of benefits from the Plan, thereby entitling the Alternate Payee to receive a portion of benefits equal to a percentage of the Participant's Plan benefits as determined by paragraph 3 hereinbelow, and as provided for in this QDRO.

Furthermore, this QDRO shall not require the Plan to provide increased benefits (determined on the basis of actuarial value) and not require the Plan to provide benefits to the Alternate Payee which are required to be paid to another alternate payee under another order previously determined to be a [QDRO].

3. That portion of the Participant's total, unadjusted monthly pension benefit accrued in the Plan between the date of marriage (September 30, 1967) and the date of divorce (January 10, 1989) constitutes the marital property of Participant and Alternate Payee. In disposing of this marital property asset, Alternate Payee hereby is awarded as her separate property one-half of that marital property portion.

4. Alternate Payee shall be treated as if she were Participant's surviving spouse with respect to the marital property portion of his accrued pension benefits for the purpose of the 50% pre-retirement surviving spouse benefit provided under the Plan. Accordingly, she shall receive her one-half marital property share as a 50% pre-retirement surviving spouse benefit payable to her from February 1, 1998, as long as she shall live. No other benefit shall remain payable from that portion of the Participant's total accrued pension benefits accrued during his marriage to Alternate Payee.

5. If Participant or his beneficiary or surviving spouse is awarded a post-retirement benefit increase calculated based on the amount of benefits accrued, Alternate Payee shall share pro rata in any post-retirement.

6. This assignment of benefits does not require the Plan to provide any type or form of benefit or any option not otherwise provided under the Plan. Notwithstanding any provision to the contrary, the Participant may select to receive his accrued benefits under the Plan in whatever form he chooses, provided that the Participant selects a form that is permitted by the Plan.

7. During the effective term of the QDRO, the Alternate Payee shall be solely responsible for notifying and informing the Plan Administrator of the Plan as to any changes of her residential address.

8. This QDRO is issued pursuant to 581-47 of the Hawai'i Revised Statutes, as amended, which provides for the division of marital property rights, as defined therein between spouses and former spouses in actions for divorce.

9. The intent of this QDRO is to provide the Alternate Payee with a retirement payment that fairly represents her marital share of the retirement benefits as defined in paragraph 3 hereinabove. If any Order submitted to the Plan Administrator of the Plan is held not to be a [QDRO] within the meaning of Section 414(p) of the Internal Revenue Code of 1986, as amended, the parties agree to request a court of competent jurisdiction to modify the Order to make it a [QDRO], which reflects the parties' intent, said modification Order to be entered nunc pro tunc, if appropriate.

. . . .

11. The Court shall have continuing jurisdiction to make every order reasonably necessary to implement and accomplish the direct payment to Alternate Payee by the Plan Administrator of the Plan of her percentage share of

> Participant's gross retirement pay, including the right to advise the Plan Administrator of the precise amount of Participant's gross retired pay that is payable to Alternate Payee.
>
> 12. There are no prior conflicting court orders and no previous agreements providing any benefits under the Plan to a different spouse or different former spouse of the Employee.
>
> 13. A certified copy of this Order shall be served upon the Plan Administrator forthwith. This Order shall take effect immediately. Any amendment or modification of this Order to qualify this order as a [QDRO] shall be retroactive to the date of the parties divorce, January 10, 1989.

(Emphases added.) The court issued a copy of the 1999 "QDRO" to the Plan.

As represented in its amicus brief, on February 23, 2000, the Plan apparently notified Margot and Louan that it had accepted the November 17, 1999 Amended DRO as qualifying for QDRO status. The Plan has indicated that, to date, none of Alfred's benefits have been disbursed to anyone, including Louan. Also, as stated in Louan's answering brief, Louan has appealed that determination to the Plan's Board of Trustees (Board). The Board has not yet made its decision.

II.

On appeal, Louan maintains that the court erred because: (1) neither Louan nor Alfred's estate are parties to this action even though their rights are affected; (2) the court did not have jurisdiction to determine the rights to Alfred's pension benefits; (3) the court could not enter a posthumous QDRO, since it would interfere with Louan's vested interest in the survivor benefits arising from Alfred's pension and in "segregated amounts" under the ERISA provisions; and (4) there is

no competent evidence to support the contention that Margot did not receive a copy of the Plan's September 8, 1997 notice that the DRO did not constitute a QDRO. The Plan did not appear as a party to this case, however, it filed an amicus brief, taking the position that Margot is entitled to the survivor benefits granted under the 1999 Order if the order is valid under our domestic relations law.

III.

The court had jurisdiction of this case and had authority to award survivor benefits to Margot. See majority opinion at 29-32. Here, under Hawai'i Revised Statutes (HRS) § 580-47 (1993), the court had an equitable basis for making the award and was not precluded from doing so by HRS § 580-56 (1993). The court concluded that Margot "shall be treated as if she [was Alfred's] surviving spouse with respect to the marital property portion of his accrued pension benefits[.]" We review the family court's conclusion to award benefits under a manifest abuse of discretion standard. See Carroll v. Nagatori-Carroll, 90 Hawai'i 376, 381, 978 P.2d 814, 819 (1999) ("Under the abuse of discretion standard of review, the appellate court is not authorized to disturb the family court's decision unless (1) the family court disregarded rules or principles of law or practice to the substantial detriment of a party litigant; (2) the family court failed to exercise its equitable discretion; or (3) the

family court's decision clearly exceeds the bounds of reason." (Brackets and quotation marks omitted.)).

The court noted that "[t]he intent of this QDRO is to provide [Margot] with a retirement payment that fairly represents her marital share of the retirement benefits[.]" It was within reason to conclude that the right to survivor benefits arose out of the "retirement interest" awarded to Margot because the right to such benefits accrued during Margot's marriage to Alfred. Accordingly, there was no manifest abuse of discretion by the court in exercising its equitable powers to modify the divorce decree, and under the circumstances, the 1999 Order was not inconsistent with the decree.[3]

---

[3] It should also be noted that a qualified joint survivor annuity (QJSA) and a qualified preretirement survivor annuity (QPSA) are forms of benefit payment from a pension plan. Generally, a QJSA provides (1) annuity payments during the life of the participant and (2) a survivor annuity equal to at least 50% (and not greater than 100%) of the annuity payments above, during the life of the participant's surviving spouse, which together are the actuarial equivalent of a single annuity for the life of the participant. See 26 U.S.C. § 417(b).

A QPSA, which applies when the participant dies before receiving retirement benefits, and which the court apparently awarded Margot, provides annuity payments at least equal to the survivor annuity payments of the QJSA. Except in certain instances, the QJSA and QPSA must be provided as benefit payment options under all tax-qualified plans subject to section 401(a), including traditional pension plans. See 26 U.S.C. § 401(a)(11).

As noted, survivor benefits, such as a QPSA, arise out of retirement benefits, and, in the case of a QJSA, retirement benefits include survivor benefits. The survivor benefits contemplated by the 1999 Order arise out of the Alfred's retirement benefits. Although the record does not state whether the Plan is a tax-qualified plan that requires a QJSA or QPSA, or that the 50% pre-retirement surviving spouse benefit in the 1999 Order is a QPSA, the parties do not indicate otherwise. Such a survivor annuity awarded to Margot constitutes "retirement benefits" that arise out of Alfred's "retirement interest" awarded to Margot by the decree. Hence, the court's order is not inconsistent with the decree.

IV.

As noted by the Ninth Circuit in Trustees of the Dirs. Guild of Am.-Producer Pension Benefits Plans v. Tise, 234 F.3d 415 (9th Cir. 2000), the ERISA law was specifically modified by the Retirement Equity Act of 1984 (REA) to allow "state court orders issued pursuant to domestic relations proceedings [to] affect the distribution of pension benefits governed by ERISA." Id. at 419. See 29 U.S.C. § 1056(d)(3)(B)(ii) (A DRO is "any judgment, decree, or order" that "relates to the provisions of child support, alimony payments, or marital rights to a spouse, former spouse, child, or other dependents of a participant" and that "is made pursuant to a State domestic relations law[.]").

As is evident, the 1999 Order is a DRO within the meaning of the ERISA provisions. See id. The 1999 Order awards to Margot a share of Alfred's pension benefit that was accrued during their marriage. Also, the Order is issued pursuant to HRS § 580-47,[4] discussed supra, which provides for the division of

---

[4] The 1999 Order incorrectly cites to HRS § 580-47 as "581-47." HRS § 580-47 (Supp. 2001) provides, in pertinent part, as follows:

> (a) Upon granting a divorce, or thereafter if, in addition to the powers granted in subsections (c) and (d), jurisdiction of those matters is reserved under the decree by agreement of both parties or by order of court after finding that good cause exists, the court may make any further orders as shall appear just and equitable . . . (3) finally dividing and distributing the estate of the parties, real, personal, or mixed, whether community, joint, or separate . . . . In making these further orders, the court shall take into consideration: the respective merits of the parties, the relative abilities of the parties, the condition in which each party will be left by the divorce, the burdens imposed upon either party for the benefit of the children of the parties, and all other circumstances of the case. . . .

(continued...)

marital property rights. Because the Order concerns the marital property rights of a former spouse of a pension plan participant and is made pursuant to a state domestic relations law, the Order is a DRO within the meaning of the QDRO provisions. See Director's Guild, 234 F.3d at 420 (A DRO is "any order relating 'to the provision of child support, alimony, or marital property rights to a spouse, former spouse, child or other dependant of a plan participant . . . made pursuant to a State domestic relations law.'" (Citations omitted.)).

V.

The court's 1999 Order is designated "First Amended Qualified Domestic Relations Order." The order, however, does not constitute a QDRO unless it meets certain requirements. See 29 U.S.C. § 1056(d)(3).[5] Under section 414(p) of the Code and

---

[4](...continued)
(Emphasis added.)

[5] 29 U.S.C. § 1056(d)(3), in pertinent part, states:

> (B) For purposes of this paragraph -
> (i) the term "qualified domestic relations order" means a domestic relations order -
> (I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and
> (II) with respect to which the requirements of subparagraphs (C) and (D) are met, and
> . . . .
> (C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies -
> (i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,
> (ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate
> (continued...)

section 206(d)(3) of ERISA, generally a QDRO is an order that recognizes a spouse's, former spouse's, child's, or other dependent's rights to an individual's pension plan benefits, and assigns such rights. See 26 U.S.C. § 414(p)(7); 29 U.S.C. § 1056(d)(3); see also Directors Guild, 234 F.3d at 420 (A QDRO is a DRO that "creates or recognizes the existence of an alternate payee's right to . . . receive all or a part of the benefits payable with respect to a participant under an ERISA plan[.]" (Brackets omitted.)).

A.

First, in order to qualify as a QDRO, the order must: (1) assign to an alternate payee the right to receive all or a portion of the benefits payable with respect to a participant under a plan; (2) clearly specify the (a) plan, (b) names and last known mailing addresses of the participant and alternate

---

[5](...continued)

payee, or the manner in which such amount or percentage is to be determined,
(iii) the number of payments or period to which such order applies, and
(iv) each plan to which such order applies.

(D) A domestic relations order meets the requirements of this subparagraph only if such order -
(i) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,
(ii) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and
(iii) does not require the payments of benefits to an alternate payee which are required to be paid to another payee under another order previously determined to be a qualified domestic relations order.

(Emphases added.)

payee, (c) amount of benefits to be awarded to the alternate payee or the manner in which such amount may be calculated, and (d) number or period of payments; (3) not require the plan to provide (a) any type or form of benefits not offered under the plan, (b) increased benefits (on the basis of actuarial value), or (c) benefits to an alternate payee that are required to be paid to another alternate payee under a previous QDRO. See 26 U.S.C. § 414(p)(1)(A)(i), (2) and (3); 29 U.S.C. § 1056(d)(4)(B)(i)(I), (C) and (D).

Here, the 1999 Order states that an alternate payee shall receive a portion of the participant's benefits under the Plan; it identifies the Plan as the Pension Plan maintained by the Pension Trust Plan for Operating Engineers; gives the names and addresses of Alfred, as participant, and Margot, as alternate payee; and states the form, manner and amount of payment, including that the alternate payee shall be treated as the surviving spouse and her award shall be in the form of the "50% pre-retirement surviving spouse benefit" provided under the Plan, payable from February 1, 1998. Hence, the 1999 Order would appear to satisfy QDRO requirements.

Furthermore, it appears the court had made a QDRO determination of the 1999 Order. The 1999 Order is designated "First Amended Qualified Domestic Relations Order," it designates itself in the third WHEREAS clause as "this Qualified Domestic Relations Order ("QDRO")," it states in the sixth WHEREAS clause that "this Order is intended to be a QDRO as defined in Section

414(p) of the Internal Revenue Code of 1986," and it states in section 2 that "[t]he Alternate Payee and this Court intend this Order to be a Qualified Domestic Relations Order as defined in Section 401(a)(13) and 414(p) of the Internal Revenue Code of 1986 . . . ."[6]

B.

Second, a QDRO determination of the Order must be performed "by the plan administrator, by a court of competent jurisdiction, or otherwise." 26 U.S.C. § 414(p)(7).[7] Arguably the court, which had the authority to issue an order pursuant to HRS 580-47, see HRS 571-14 (Supp. 2001),[8] and implicitly to apply and interpret federal law, is "a court of competent jurisdiction" under the ERISA law. See In re Marriage of Oddino, 939 P.2d 1266, 1273 (Cal. 1997) (holding that "Congress extended concurrent state jurisdiction to any action by a participant or beneficiary to obtain or clarify benefits under the terms of a [QDRO] plan"); see also Jones v. American Airlines, Inc., 57 F. Supp. 2d 1224, 1232 (D. Wyo. 1999) ("It seems highly unlikely

---

[6] The only arguably contrary indication to QDRO status is section 13 of the 1999 Order, which indicates that the 1999 Order may require a QDRO determination inasmuch as it provides that "[a]ny amendment of this Order to qualify this order as a Qualified Domestic Relations Order shall be retroactive to the date of the parties [sic] divorce, January 10, 1989." (Emphasis added.)

[7] The majority and the parties seem to believe that only the plan administrator, here, the Plan, is the entity authorized to make a QDRO determination. The statute clearly states otherwise. See 29 U.S.C. § 1056(d)(3)(H)(i).

[8] HRS § 571-14(a)(3), in relevant part, provides that the family court "shall have exclusive original jurisdiction . . . [i]n all proceedings under [HRS] chapter 580[.]"

Congress, acting to protect the rights of former spouses and dependents as adjudicated in state court, would, at the same time, have deprived them of their existing ability to obtain enforcement of those rights in state court and required them instead to initiate a separate lawsuit in federal court whenever a retirement plan disputed the qualified status of the state court order."); Board of Trustees of the Laborers Pension Trust Fund for Northern California v. Levingston, 816 F. Supp. 1496, 1500 (N.D. Cal. 1993) ("In light of the specific use of the general term, 'court of competent jurisdiction' in the 1984 amendments, the most likely inference is that Congress presumed that both state and federal courts would be reviewing QDRO determinations.").

Under 29 U.S.C. § 1056(d)(3)(G)(i), then, the plan administrator and a "court of competent jurisdiction[,]" 29 U.S.C. § 1056(d)(3)(H)(i),[9] are authorized to determine whether a DRO meets the requirements of a QDRO. The law does not appear to prohibit a court, which has granted the DRO, such as the family court, from making a QDRO determination with respect to the same order.[10] Moreover, as mentioned previously, Margot represents the Plan has already determined that the DRO is a QDRO.[11]

---

[9] See infra note 11.

[10] See supra note 9.

[11] I believe that it is the better practice to submit orders for QDRO determination to the plan administrator which, because of its duties, may have more immediate familiarity with the plan, handling competing claims of this nature, and pension benefits law. See U.S.C. § 1056(d)(3)(H)(iv).

VI.

Louan argues that Margot's right to obtain a QDRO expired when Alfred passed away. For support, Louan cites Rivers v. Central and South West Corp., 186 F.3d 681, 683 (5th Cir. 1999) (concluding that ERISA pension benefits irrevocably vested on the date of the participant's retirement in the second wife, where the first wife had failed to obtain a QDRO prior to the participant's retirement); Samaroo v. Samaroo, 193 F.3d 185, 189 (3rd Cir. 1999) (holding that divorce decree is not a QDRO where it had effect of increasing plan liability by conferring survivor's benefits on ex-wife after right to those plan benefits had lapsed); Hopkins v. AT & T Global Information Solutions Co., 105 F.3d 153, 156 (4th Cir. 1997) (ruling that the surviving spouse ERISA benefits "vest in the participant's current spouse on the date the participant retires").

However, a straightforward reading of the statutory language does not indicate that the right to obtain a QDRO will expire at retirement, death, when benefits become payable or at any other particular time. See Directors Guild, 234 F.3d at 421 (indicating that "for all the detail of the QDRO requirements, ERISA nowhere specifies that a QDRO must be in hand before benefits become payable"); QDROs: The Division of Pensions Through Qualified Domestic Relations Orders [hereinafter QDRO Handbook] at 20-21 (Q&A 2-13) (2001) (indicating that the procedures set forth in section 414(p)(7) of the Code apply to an "order received on or after the date on which benefits would be

payable").[12] Rather, even when a QDRO would be rendered ineffective — such as when a participant's account is fully distributed, there is nothing in the account, and it is no longer accruing benefits — the statutes do not indicate that the right to obtain a QDRO has expired.

VII.

A DRO will not cause a pension plan, subject to section 401(a) of the Code and the anti-alienation provisions, to pay a participant's benefits other than to the participant or a beneficiary, such as Louan, unless that order is determined to be a QDRO. See 29 U.S.C. § 1056(d)(3); see also 26 U.S.C. § 401(a)(13).[13] In other words, a DRO shall cause the Plan to account separately for the amounts payable to Margot according to the 1999 Order, but to pay such amounts only upon a determination that it is a QDRO. See 26 U.S.C. § 414(p)(7)(A); 29 U.S.C. § 1056(d)(3)(H). Because the 1999 Order did constitute a DRO, the Plan was compelled to account separately for amounts that the

[12] The Secretary of Labor may issue regulations upon consultation with the Secretary of Treasury. See 26 U.S.C. § 414(p)(13). In consultation with the Treasury Department, the Department of Labor (DOL) has published the QDRO Handbook. See id. at 1 n.1.

[13] Section 401(a)(13), in relevant part, provides:

> A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated.

26 U.S.C. § 401(a)(13) (emphasis added.)

1999 Order awarded to Margot, the alternate payee. See 26 U.S.C. § 414(p)(7)(A); 29 U.S.C. § 1056(d)(3)(H)(i).

An order that is submitted to a plan for QDRO determination generally will suspend distribution of the segregated amounts for an eighteen-month period pending such a determination.[14] See 29 U.S.C. § 1056(d)(3)(H)(v); Director's Guild, 234 F.3d at 421 ("While the plan is making this determination, it must segregate the benefits that would be due

---

[14] 26 U.S.C. § 414(p)(7) states in relevant part as follows:

> (A) In general.--During any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or otherwise), the plan administrator shall separately account for the amounts (hereinafter in this paragraph referred to as the "segregated amounts") which would have been payable to the alternate payee during such period if the order had been determined to be a qualified domestic relations order.
>
> (B) Payment to alternate payee if order determined to be qualified domestic relations order.--If within the 18-month period described in subparagraph (E) the order (or modification thereof) is determined to be a qualified domestic relations order, the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons entitled thereto.
>
> (C) Payment to plan participant in certain cases.--If within the 18-month period described in subparagraph (E)--
>
> (i) it is determined that the order is not a qualified domestic relations order, or
>
> (ii) the issue as to whether such order is a qualified domestic relations order is not resolved,
>
> then the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons who would have been entitled to such amounts if there had been no order.
>
> (D) Subsequent determination or order to be applied prospectively only.--Any determination that an order is a qualified domestic relations order which is made after the close of the 18-month period described in subparagraph (E) shall be applied prospectively only.
>
> (E) Determination of 18-month period.--For purposes of this paragraph, the 18-month period described in this subparagraph is the 18-month period beginning with the date on which the first payment would be required to be made under the domestic relations order.

(Emphases added).

to the alternate payee under the terms of the DRO during the first 18 months that those benefits would be payable if the DRO is ultimately deemed a QDRO."). Orders that are determined to be QDROs after the eighteen-month period are applied to the relevant account prospectively. "Any determination that an order is a qualified domestic relations order which is made after the close of the 18-month period . . . shall be applied prospectively only." 29 U.S.C. § 1056(d)(3)(H)(iv); see also Directors Guild, 234 F.3d at 422 ("This benefit-segregation requirement obviously assumes that benefits may already be payable during the period the plan is determining whether [an order] is a QDRO.")

In this regard, Louan argues that, once the eighteen-month period following submission of the 1989 decree to the Plan expired, she had an irrevocable vested right in benefits to be paid as "the person . . . who would have been entitled to such amounts if there had been no order."[15] 26 U.S.C. § 414(p)(1)(C)(ii). Thus, she reasons, the 1999 Order interfered with that right. It is true that the 1989 divorce decree was submitted to the Plan for QDRO determination and, had an 18-month period expired without such a determination, any segregated amounts could have been paid out as if there were no order from

[15] The concept of vesting and the vesting of benefits provisions are not closely related to the QDRO provisions. Compare IRC § 411 and ERISA § 203 with IRC § 414(p) and ERISA § 206(d). Generally, when a participant retires and takes distribution from the plan, he is entitled to only his vested benefits, unvested benefits are forfeited. A QDRO may assign the participant's (or beneficiary's) vested benefits, however, to an alternate payee.

the court.[16] 26 U.S.C. § 414(p)(7); 29 U.S.C. § 1056(d)(3). Therefore, it is possible that Louan may have been eligible for payment of benefits under the plan at one point following Defendant's passing, inasmuch as the Plan apparently segregated the benefits. See 29 U.S.C. § 1056(d)(3)(H).

The ERISA law seemingly imposes an obligation on the Plan to pay the benefits to the beneficiary after an eighteen-month period has run, see supra note 15. However, the statute says nothing about rights vesting in the beneficiary after eighteen months. Cf. Ross v. Ross, 705 A.2d 784, 796 (N.J. Super. Ct. App. Div. 1998) (rejecting arguments that benefits vest in either the beneficiary's ex-wife or current wife and dividing benefits on other grounds). In this case, as the amicus brief seemingly indicates, the Plan —- by rule, discretion, or otherwise —- apparently refrained from making payments from the account to anyone, including Louan.

VIII.

On the other hand, once qualified as a QDRO, the 1999 Order took "effect immediately."[17] The 1999 Order is a different

---

[16] It is arguable as to when the eighteen-month period started, i.e., when "first payment would be required to be made under the [1989 DRO]." 26 U.S.C. § 414(p)(7)(E); see also supra note 15. I believe the answer to that question, however, is not relevant. See discussion infra.

[17] A QDRO can only order a Plan to make payments in the present or future and not in the past. See QDRO Handbook at 19 (Q&A 2-11) (the eighteen-month period can only begin after its receipt by the plan). Thus, the eighteen-month suspension period in effect was reset and began on November 17, 1999, or the date the Plan received the 1999 Order. See QDRO Handbook at 20-21 (Q&A 2-13). (It should be noted that a putative alternate payee cannot (continued...)

order from the 1989 decree, with a different payment commencement date. (The 1999 Order, granted on November 17, 1999, indicates that the benefits are payable to Margot, the alternate payee, immediately). Upon the 1999 Order taking effect as a QDRO, a determination the court made and the Plan is authorized to make independently and apparently did make, the "segregated amounts" should have become immediately payable to Margot. 26 U.S.C. § 414(p)(7)(B); 29 U.S.C. § 1056(d)(3)(H).

The 1999 Order would apply to the amount of benefits (and any appreciation thereof) existing in Alfred's Plan account on November 17, 1999, the date of the QDRO. If the Plan had made a distribution before November 17, 1999, for example, to a beneficiary such as Louan, the Order would not apply to such distributed amount. But the Plan did not make a distribution to Louan. Accordingly, the QDRO awarding payment to Margot takes effect prospectively from November 1999 as to the segregated benefits. In giving the QDRO prospective effect, I believe that the Plan is obligated to make payments required by the QDRO that had not already been paid out prior to the eighteen-month period of suspension of payment dating from November 17, 1999. Under the facts of this case, none of those funds have been paid out and, thus, all such funds are subject to the QDRO. See Metropolitan Life Ins. Co. v. Wheaton, 42 F.3d 1080, 1084 (7th

[17](...continued)
prevent payment to a beneficiary by having a domestic relations order granted every eighteen months because once a negative QDRO determination is made, the plan administrator may distribute any payable amounts. See 26 U.S.C. § 414(p)(7)(C).)

Cir. 1994) (explaining that the purpose of segregating funds is to protect ERISA plan administrators from paying the wrong party and being sued by a rival claimant).

IX.

Thus, we should not conclude that the Plan is to pay out to Louan segregated funds accumulated prior to November 17, 1999, as the majority holds. The controversy as to whether Louan should have been paid by the Plan prior to that date or at any point in time is not appropriately before us. The written plan itself does not appear to be in the record. Louan admits she has not filed a claim for payment. The record does not contain an instrument indicating that Louan is entitled to immediate payment of benefits. The Plan, as stated previously, is not a party to the suit, and thus, the Plan cannot be ordered to take any action. Cf. Haiku Plantations Assoc. v. Lond, 56 Haw. 96, 102, 529 P.2d 1, 5 (1974) ("In order for the decree of the lower court to be binding upon [] persons, they must be made parties to the suit, either as plaintiffs or defendants." (Internal quotation marks omitted.)). The Plan's funds were not interpleaded. Cf. Aetna Life Ins. Co. v. Bayona, 223 F.3d 1030, 1033 (9th Cir. 2000) (holding that interpleader is an action to obtain appropriate "equitable relief," which may be brought by participant, beneficiary, or fiduciary to enforce provisions of ERISA or terms of ERISA plan); Kapaia Store, Ltd. v. Henriques, 33 Haw. 557, 557 (1935) (holding that non-parties must resort to

interpleader in order to claim funds in hands of garnishee so that such claims may be adjudicated). The Plan has fiduciary duties with respect to any issues raised by Louan. See Tinoco v. Marine Chartering Co., Inc., 2002 WL 31443145 (5th Cir. 2002) ("Congress established extensive reporting, disclosure, and fiduciary duty requirements to insure against the possibility that the employee's expectation of the benefit would be defeated through poor management by the plan administrator." (Internal quotation marks omitted)).[18] Louan's appeal of the Plan's decision is presently pending before the Plan.

---

[18] According to the QDRO provisions of ERISA,

> [i]f a plan fiduciary acts in accordance with part 4 of this subtitle [relating to fiduciary duties] in —
> (i) treating a domestic relations order as being (or not being) a qualified domestic relations order, or
> (ii) taking action under [Section 414(p)(7) of the Code],
> then the plan's obligation to the participant and each alternate payee shall be discharged to the extent of any payment made pursuant such Act [sic].

29 U.S.C. § 1056(d)(3)(I). The fiduciary duty provisions in Part 4, which govern the actions of the Plan in its capacity of plan administrator, state, in pertinent part:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —
> (A) for the exclusive purpose of:
> (i) providing benefits to participants and their beneficiaries . . .
> (B) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character with like aims[.]

29 U.S.C. § 1104(a)(1)(A) and (B). In the context of a QDRO, a plan administrator also shall discharge its duties in the interests of an alternate payee, who "shall be considered for purposes of any provision of [ERISA] a beneficiary under the plan." 29 U.S.C. § 1056(d)(4)(J).

Ordering the Plan in effect to pay out to Louan from segregated amounts already subject to the QDRO would, in light of the circumstances, establish questionable precedence. For, it is the purpose of a QDRO to alienate the rights of a participant and a beneficiary, such as Louan. See 29 U.S.C. § 1056(d)(3)(A); Van Haden v. Supervised Estate of Van Haden, 699 N.E.2d 301, 304 (Ind. App. 1998) ("A QDRO allow[s] a plan participant to assign part of a pension plan in a divorce settlement."). Inasmuch as the 1999 Order has been determined to be a QDRO, its terms must be enforced. If there is a controversy with respect to Louan's claim, her dispute is with the Plan, not the QDRO, or with the ERISA law, not with the QDRO.

X.

As to the remaining issues, it should be evident from the discussion of the QDRO provisions supra, that Louan, as a successor-in-interest, has no authority to exercise with respect to whether the 1999 Order is a QDRO or in connection with the execution of any QDRO. 26 U.S.C. § 414(p)(7)(A); 29 U.S.C. § 1056(d)(3)(H). Rather, the statute authorizes the plan administrator or a court of competent jurisdiction to make a QDRO determination, and only the Plan may "execute" or make payments according to the terms of a QDRO. See id. Thus, I would hold that that part of the court's order compelling Louan, as successor-in-interest, to execute the 1999 Order is inappropriate and must be reversed.

Also evident from the discussion above, we need not resolve the question of whether the court erred in finding that Louan did not receive a copy of the Plan's September 8, 1997 notice informing her that the divorce decree did not constitute a QDRO until June 1, 1998. The answer to that question is not pertinent to the validity of the 1999 Order, which is the only relevant order.

AMENDED APPENDIX A

The lack of published opinions of this court has been cited as a "problem" by the legal community. See Report of the [Hawai'i] AJS Committee Reviewing Unpublished Opinions at 4 [hereinafter, "the Report"] and discussion infra. Views regarding that issue have been largely relegated to unpublished opinions, which are generally unavailable. Accordingly, I have included the following discussion as part of my concurrence. See N.K. Shimamoto, Justice is Blind, But Should She be Mute?, 6 Hawai'i B.J. 6, 7 (2002) [hereinafter Justice is Blind] ("The publication debate is currently a catch-22 for some judges and justices: if a judge or justice believes that an opinion should be published, and it is, there is no dispute over publication; if, however, a judge or justice believes that an opinion should be published, *and the majority votes not to publish*, then the judge or justice's work product (including why that particular case should be published) is simply relegated to a dissent or concurrence in an *unpublished* opinion." (Italicized emphases in original.)).

I.

It is in the nature of stare decisis that, when this court in effect decides matters of first impression, we in fact establish precedent and, therefore, should publish our opinion. When we fail to publish, we depart from the established procedure which lends legitimacy to our decision-making process and also

neglect our responsibility to provide guidance to courts, attorneys, and parties. The import of such an act is to make law for one case only, singling it out from all others, a process that can only be described as arbitrary. When there are fundamental reasons for publishing and we are given the opportunity to do so but fail to, we also compel our trial courts and counsel to rely on and employ the precedent established in other jurisdictions when trying cases in our own state.

II.

Unless we publish questions presented to us, they will continue to go unaddressed in any authoritative manner, and error may compound in other, similar cases leaving counsel and the trial courts to guess at the law to apply. Therefore, the fact that a majority of the court votes not to publish should not be determinative of the publication question. It is in the order of case law development that discourse on issues not covered in any existing published opinion should be disseminated and made available for examination, consideration, and citation by those similarly affected or interested. Only in the light of open debate can the dialectic process take place, subject to the critique of the parties, the bar, the other branches of government, legal scholars, and future courts. The resulting process of analysis and critique hones legal theory, concept, and rule.

Consequently, it should not matter whether such discourse is set forth in a majority, concurring, or dissenting

opinion. Justice Ramil has suggested adoption of a rule like that of the First Circuit Court of Appeals that would require publication of a case (1) when the case is unanimously decided by a single opinion without a dissent, if, "[a]fter an exchange of views," any single justice votes for publication; or (2) with "a dissent or with more than one opinion[,] . . . unless all participating judges decide against publication." Doe v. Doe, 99 Hawai'i 1, 15, 52 P.3d 255, 269 (2002) (Ramil, J., dissenting, joined by Acoba, J.) (quoting United States Court of Appeals of the First Cir. R. 36(b)(2)). See, N.K. Shimamoto, Justice is Blind, supra at 12 (Adoption of a "'one justice publication' rule, unlike the 'majority rules' rule, faithfully abides by the premises upon which SDOs and memorandum opinions were based, promotes judicial accountability, and facilitates a judge or justice's role in the legal system -- without sacrificing judicial economy."). Similar rules have been adopted in other jurisdictions.[19]

---

[19] See, e.g., 6th Cir. R. 206 ("The following criteria shall be considered by panels in determining whether a decision will be designated for publication in the Federal Reporter: . . . (4) whether it is accompanied by a concurring or dissenting opinion . . . . An opinion or order shall be designated for publication upon the request of any member of the panel."); 8th Cir., App. I, 28 U.S.C.A. ("The Court or a panel will determine which of its opinions are to be published, except that a judge may make any of his [or her] opinions available for publication."); 9th Cir. R. 36-2 ("A written, reasoned disposition shall be designated as an OPINION only if it: . . . [i]s accompanied by a separate concurring or dissenting expression, and the author of such separate expression requests publication of the disposition of the Court and the separate expression." (Capitalization in original.)); Ala. R. App. P. 53 ("[I]f in a 'No Opinion' case a Justice or Judge writes a special opinion, either concurring with or dissenting from the action of the court, the reporter of decisions shall publish that special opinion, along with a statement indicating the action to which the special opinion is addressed."); Ariz. Sup. Ct. R. 111(b)(4) ("Dispositions of matters before the court requiring a written decision shall be by written opinion when a majority of the judges acting determine[s] that it involves a legal or factual issue of unique interest or substantial public importance, or if the disposition of matter is accompanied by a separate concurring or dissenting expression, and the author of such separate expression desires that it be published, then the (continued...)

III.

Justice Ramil and I have agreed and will continue to agree to any recommendation by any of the other justices to publish a case even if the majority will not adhere to such a policy. We do so because we support and respect the opinion of any one of our colleagues that a decision warrants publication and that the views raised in the opinion should be disseminated. This is not an automatic and blind decision, but, instead, the recognition that every member of the judiciary, chosen to sit on the bench because of his or her expertise, has distinct and valuable viewpoints to offer in each case. Simply put, disagreement with a justice should not be a reason to limit the reach of that justice's comments. See N.K. Shimamoto, Justice is Blind, supra, at 7 ("A glance back through time reminds us that not only is this a country founded on the belief that we can voice our opinions against the majority, but that we have on numerous occasions embraced those opinions in the wisdom of a future day.")

IV.

By contrast with the "one justice" rule suggested by

---

[19](...continued)
decision shall be by opinion." (Internal section numbering omitted.)); N.D. Sup. Ct. Admin. R. 27, § 14(c) ("The opinion may be published only if one of the three judges participating in the decision determines that one of the standards set out in this rule is satisfied. The published opinion must include concurrences and dissents." (Emphasis added.)). For these, as well as other jurisdictions' rules, see Doe, 99 Hawai'i at 15 n.6, 52 P.3d at 269 n.6 (Ramil, J., dissenting, joined by Acoba, J.) (collecting similar rules in other jurisdictions).

Justice Ramil and which had once been the custom of this court,[20] the current "policy" in this court follows a "majority rules" approach, which the majority insists is the better course. The majority appears to assert that publication guidelines other than "majority rules" would result in our appellate process grinding to a halt. With all due respect, I submit that the majority's arguments against any one justice of this court calling for the publication of a particular case miss the mark.

We favor the use of summary disposition orders for the vast majority of cases in which they are currently appropriately utilized. Numerous such orders have been filed which we have signed. We also do not propose that every case in which a dissenting or concurring opinion is filed necessarily requires publication. A number of summary disposition orders have been filed with a separate opinion.[21] We did not urge that these cases be published, as we do here.[22]

---

[20] My understanding is that the majority rule regarding publication was recently adopted in 1996. As related by Justice Ramil, the custom of this court previously was to concur with a justice's recommendation to publish.

[21] See, e.g., State v. Irvine, No. 24193 (Hawai'i Jul. 12, 2002) (unpublished) (Acoba, J., dissenting); Saito v. Fuller, No. 23913 (Hawai'i Jun. 8, 2002) (unpublished) (Ramil, J., concurring; Acoba, J., dissenting); Ng. v. Miki, No. 24267 (Hawai'i May 28, 2002) (unpublished) (Moon, C.J. and Nakayama, J., dissenting); State v. Iha, Nos. 23083, 23156, 23157, 23158, 23161, 23177, 23178, 23189, 23190, 23191, 23192, 23193, 23213, 23234, 23235, 23236, 23237, 23238, 23239, 23240, 23242, 23253, 23254, 23255, 23256, 23257, 23258, 23259, 23260, 23274, 23326, 23327, 23328, 23329, 23330, 23347, 23359, 23363, 23364, 23365, 23366, 23371, 23436, 23437, 23438, 23452, 23453, 23561, 23596 (Hawai'i Aug. 27, 2001) (Nakayama, J., dissenting, joined by Ramil, J.).

[22] The majority's refusal to address issues of first impression has little to do with numbers. See, e.g., State v. Bush, No. 24808 (Oct. 11, 2002) (SDO) (Acoba, J., dissenting); State v. Makalii, No. 24833 (Oct. 2, 2002) (SDO) (Ramil, J., dissenting, joined by Acoba, J.); State v. Lopes, No. 24187 (Sept. 6, 2002) (SDO) (Acoba, J., concurring, joined by Ramil, J.); State v. Hauanio, No. 23034 (Aug. 30, 2001) (SDO) (Acoba, J., dissenting). The majority's approach will likely engender more such cases.

(continued...)

We believe that in some cases, however, a decision mustbe published. Guidance to litigants and the trial courts would be provided, where none exists. The analysis would be available by litigants for citation in pending or subsequent cases. The public and the legal community would be informed of the developing law in this area.

By ignoring, as it does, the views of other justices after a simple majority is obtained, the majority invites avoidable error. As we must all concede, error will occur under any system; the relevant inquiry is on which side error would weigh the least. I submit that there is more to be gained in a jurisprudential sense, and in the present legal milieu, from a policy which shares the decision to publish with each justice.

V.

Long-term dangers lurk in the silencing of discourse and debate. It has been found that unpublished opinions too easily hide hidden agendas or a lack of reasoning behind an opinion. See M.H. Weresh, The Unpublished, Non-Precedential Decision, 3 J. App. Prac. & Process 175, 181 (2001) ("The foremost [criticism of unpublished decisions] appears to be the arguable effect the practice has on judicial accountability."). Moreover, a rule that grants a majority of justices the power to determine that a case will not be published serves to quash the

[22](...continued)
Moreover, as observed, from July 2000 through December 2000, "the Supreme Court wrote 106 opinions: 56 cases (52.8%) were disposed of via SDO, 20 cases (18.9%) by memorandum opinion, and 30 cases (28.3%) by published opinion." N.K. Shimamoto, Justice is Blind, supra, at 6. Thus, only 28.3% of Hawai'i Supreme Court cases were published during this time period.

alternative views expressed in a dissenting or concurring opinion. See M. Hannon, A Closer Look at Unpublished Opinions, 3 J. App. Prac. & Process 199, 221 (2001) ("[T]he existence of dissenting opinions in unpublished opinions cuts against the premise that unpublished opinions are used only in 'easy' cases. . . . [C]ases containing dissents and concurrences are, by definition, controversial[.]" (Internal quotation marks and citations omitted.)); S.L. Wasby, Unpublished Decisions in the Federal Courts of Appeals: Making the Decision to Publish, 3 J. App. Prac. & Process 325, 329 (2001) (discussing a 1989 report which reflected findings "that a significant portion of non-unanimous rulings [in the Eleventh Circuit] were not published, [and] that the ideology of judges . . . played a role in what got published" and which concluded that "publication of opinions in the Eleventh Circuit is much more subjective than the circuit courts would have us believe." (Internal quotation marks and citation omitted.)).

A majority's decision not to publish an opinion can be wielded as a punitive measure against those justices choosing to dissent, or who question the majority rule. See, e.g., People v. Para, No. CRA 15889, slip op. at 34 (Cal. Ct. App. Aug. 1979) (Jefferson, J., dissenting) (objecting to the majority's reversal of its earlier decision to publish a case after the dissenting opinion had been circulated). Such dangers are not hypothetical, but pose real threats to the integrity and efficacy of this court's institutional role in a democratic system.

VI.

But nothing highlights the inefficacy of the "majority rules" approach to publication or undermines the majority's rationalization of its position more than the proposal submitted to this court to amend HRAP Rule 35 to permit (1) citation to unpublished opinions as persuasive authority and (2) petitions for publication of unpublished cases. On June 14, 2002, the Hawai'i Chapter of the AJS submitted the Report to the justices of the Hawai'i Supreme Court for our consideration. The proposal recommends that this court adopt an amendment to HRAP Rule 35,[23] because "[t]here is a problem perceived by the legal community with the continued use of summary disposition orders and, particularly, the inability to cite memorandum opinions despite

---

[23] The AJS recommendation, inter alia, suggests an amendment to HRAP Rule 35. See The Report at 18, 20. The suggested amendment adds a new subsection c and re-alphabetizes and supplements the current subsection c as follows:

> (c) Application for Publication. Any party or other interested person may apply for good cause shown to the court for publication of an unpublished opinion.
>
> [(c)] (d) Citation. A memorandum opinion or unpublished dispositional order shall not be considered nor shall be cited in any other action or proceeding as controlling authority, except when the opinion or unpublished dispositional order establishes the law of the pending case, re [sic] judicata or collateral estoppel, or in a criminal action or proceeding involving the same respondent.
>
> In all other situations, a memorandum opinion or unpublished dispositional order may be cited in any other action or proceeding if the opinion or order has persuasive value. A party who cites a memorandum opinion or unpublished dispositional order shall attach a copy of the opinion or order to the document in which it is cited, as an appendix, and shall indicate any subsequent disposition of the opinion or order by the appellate courts known after diligent search. If an unpublished decision is cited at oral argument, the citing party shall provide a copy to the court and the other parties. When citing an unpublished opinion or order, a party must indicate the opinion's unpublished status.

The Report at 22 (underscoring, indicating additions, and brackets, indicating deletions, in original).

the fact that these opinions appear to be of substantial length and content and often cite other case law as precedent for the conclusions." The Report at 4 (emphasis added). The consequences of not publishing have thus become a concern to the bench and the bar. A core function of this court is to interpret the law, to set forth our analysis, and to announce it for the education and guidance of the public. We abandon that function when we take a crabbed view of publication.

VII.

The dissatisfaction with the number of unpublished opinions is also one reason why the State legislature was prompted to authorize two additional judges on the Intermediate Court of Appeals (ICA) level. The 1996 backlog is reflective of a fundamental lack of resources. In 2001, the legislature authorized two additional judges to be appointed to the ICA, in view of the appellate case load. See 2001 Haw. Sess. L. Act 248, § 1, at 646 (amending Hawai'i Revised Statutes (HRS) § 602-51 to indicate that the number of judges on the ICA would be increased by two). In considering whether such a measure was necessary, the legislature viewed the additional judges as one remedy for the burgeoning use of summary disposition orders, which apparently prompted some parties "to question whether [they were] getting due process[]":

> Attempts to deal with the appellate case load have evolved into procedures and processes that have been viewed as controversial, causing some litigants to question whether the parties are getting due process. For example, a large number of cases were decided by summary disposition orders instead of opinion, and oral argument has become rare. . . . [I]f the State is to maintain an effective appellate justice system that disposes of cases in a timely manner and

> provides litigants with a fair hearing process, the number of ICA judges must be increased.

Stand. Comm. Rep. No. 1460, in 2001 House Journal, at 1495 (emphasis added). The legislators further indicated that such a measure would "improve the functioning and efficiency of the appellate judicial process." Conf. Comm. Rep. No. 166, in 2001 House Journal, at 1129.

However, as for funding for the two ICA judicial positions, the legislature reported that "[t]he Judiciary also testified that no appropriation is needed for the 2001-2002 fiscal year." Conf. Comm. Rep. No. 166, in 2001 House Journal at 1129. "[T]his bill will allow the Judiciary to begin the process of recruiting two new judges for the ICA. It is the intent of your Committee that no new additional funds be provided for this purpose for fiscal year 2001-2002." Stand. Comm. Rep. No. 976, in House Journal at 1495. The determination of whether these two ICA positions could have been funded under past or present judiciary budgets or at what point requests for legislative appropriations should be made is obviously subject to the exercise of the judiciary administration's discretion.

The reports also indicate that "[t]estimony of the Judiciary on this measure in this session indicated that expansion of the intermediate court is preparatory for later reorganization of the appellate system, which could be the subject of bills for the 2002 Session." Conf. Comm. Rep. No. 166, in 2001 Senate Journal at 944. A search of the 2002 legislative bills has not revealed any such reorganization plan.

What is stated is from the public record and we certainly do not intend to misrepresent the record. We are not privy to internal administrative decisions made by the judiciary administration. Obviously, we wholeheartedly agree with any and all efforts made to expand the current number of judges on the ICA.

VIII.

Any implication that the adoption of a one-justice rule would have a far-reaching adverse impact in criminal cases, child custody and parental termination cases, and for business and property owners in civil cases, would be a decidedly exaggerated one. A one-justice rule would not result in a rash of publication requests or a significant delay. The "one justice" approach has been adopted and implemented in many jurisdictions. Taking into account the expertise of all members of this court regarding the necessity of clarifying the law in any area makes the best use of our collective judicial wisdom.

It is evident that the number of cases on appeal, and the resulting hardship faced by litigants, may be in part due to the lack of clear legal precedent in an area of practice. Non-meritorious appeals are pursued by litigants when the law is murky, because the result is unpredictable. Thus, by not publishing and clarifying the law when such need is evident, we contribute to the uncertainty, and, thus, contribute to our backlog.

IX.

The possibility of unintended consequences resulting from establishing precedent should not, in my view, alter publication when warranted. We cannot hide behind the fear that, in deciding a case, we may be creating precedent. That is the nature of our common law system. See Anastasoff v. United States, 223 F.3d 898, 904-05 (noting that the common law doctrine of precedent directed that all cases decided contributed to the common law, and, thus, retained precedential value, even if those cases were not "published" in official reporters), vacated as moot on other grounds, 235 F.3d 1054 (8th Cir. 2000) (en banc). Common law is developed through the accumulation of cases, allowing application of rules of law to varying factual situations. A rule of law changes and is refined as time and the circumstances warrant, or may be abandoned altogether. If a case is fraught with contingent problems, it is our job to see to it that our decisions have the clarity and foresight to convey the effect intended, not to take refuge in the expedient cover of an unpublished decision.

Furthermore, as the court of last resort in this state, we are duty bound to decide hard issues presented to us and to render our best judgment in all cases. To allow a concern for unintended consequences to govern our decisions is to abandon our common law tradition altogether. To remain silent because we are afraid of what we might say undermines our role as the highest state court and the reason that we are here.

X.

A.

The Judiciary's website, is not the answer, and the fallacy of arguing it is, is transparent. If the searcher knows the specific name and date of filing of the case, the case can be located among numerous dispositions, including orders, listed chronologically and grouped by year and month, by date of decision. See State of Hawai'i Judiciary, Hawai'i Appellate Court Opinions and Orders, at http://www.state.hi.us/jud/ctops.htm (last updated Aug. 14, 2002). However, researching is another matter, entirely. The research capabilities are extremely limited, if not practically non-existent. The Judiciary home page is a repository of our recent dispositions; it is not a research tool.

B.

In any event, the reality is that, primarily, only published opinions are considered by lawyers and judges in researching the law with respect to a point of law or a specific issue. Only those dispositions that are accessible via the seventeen established case law search engines, such as found in the reporter system, are used by this state's Judiciary. The "publication by majority" rule then, for all practical purposes, suppresses dissenting and concurring theories from that body of law that would be consulted in any serious inquiry.

C.

Additionally, because the current HRAP Rule 35 prohibits citation to unpublished opinions, when a majority of this court votes against publication of a case, the dissenting and concurring opinions in those cases cannot be cited as authority by attorneys who hope to urge a similar view or a reexamination of a majority position, or by attorneys and trial judges who consider the separate opinions helpful in deciding related issues. Ultimately, in those situations, the value of dissenting and concurring opinions to practitioners and judges is nil.

XI.

Limited resources and a backlog do not warrant summary disposition of cases that should be published. This concept was recently expressed by the Eighth Circuit Court of Appeals, which strongly objected to the over-use of non-published cases as a panacea for judicial backlog and emphasized our obligation to spend the time necessary to do a competent job on each case:

> It is often said among judges that the volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision. We do not have time to do a decent enough job, the argument runs, when put in plain language, to justify treating every opinion as a precedent. If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an underground body of law good for one place and time only. The remedy, instead, is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case. If this means that backlogs will grow, the price must still be paid.

Anastasoff, 223 F.3d at 904 (emphasis added). Also, as one Court of Appeals judge has noted with regard to various plans in response to a growing backlog in the federal courts,

> [t]he frequently noted solution of reducing our caseload could reverse a series of salutary developments. The heavier caseload in large part reflects better access to the courts and more legal protections and benefits for less-favored members of society. I resist any wholesale surrender of these hard-fought victories to "reformers" rallying under the banner of judicial efficiency.

Patricia M. Wald, Symposium, The Legacy of the New Deal: Problems and Possibilities in the Administrative State (Part 2) Bureaucracy and the Courts, 92 Yale L.J. 1478, 1478 (1983).

XII.

Cases which require focused review, especially those that deal with matters of first impression or which should be published on other grounds, are not susceptible to disposition according to limited time lines as may be determined by a majority. Not all cases present simple and previously decided questions of law. The critical examination and review necessary inevitably and inescapably requires time to accomplish. See Anastasoff, 223 F.3d at 904. Such examination and review spawn many instances where separate opinions and positions may result in major modifications and even reversals of original positions agreed to by a majority of this court. Insistence upon a contrary approach can only have a deleterious effect on the parties affected, the outcome of cases, and the development of case law.

Moreover, even the ultimate resolution of some apparently simple cases through summary disposition may take more time then initially estimated. Issues not initially raised or addressed by the majority may be pointed out by a dissent or concurrence. The "majority" may change several times as justices

grapple with the law and facts posed within a case, and with other considerations and compromises. The decision of whether the case should be published or not may also change several times during the course of consideration. Accordingly, the end result of a lengthy dissent or concurrence by a justice attached to a summary disposition order may have had an earlier incarnation as a majority published decision. See N.K. Shimamoto, Justice is Blind, supra, at 7 n.12 ("In the case of the Justice or Judge who pens the majority opinion but does not garner the votes for publication, the Judge or Justice may be forced to write a concurring [or dissenting] opinion to . . . express disagreement with the decision of the majority not to publish.")

Thus, a majority rule decision regarding publication does not necessarily mean that more time and resources are saved. That time and effort may already be invested. This is exemplified, as the AJS Hawaii Chapter points out, by the fact that unpublished opinions of this court have been "of substantial length and content." The Report at 4. Also, denying "publication does not somehow deposit that time and energy back into the pool of resources so that it can be used on other cases." N.K. Shimamoto, Justice is Blind, supra, at 11.

More importantly, the expenditure of the court's resources in filling out the analysis of what was previously thought an "easy case" cannot be labeled a waste of resources, when a justice believes that justice is not being served by a superficial treatment of an appeal. Thus, we do not operate as a "committee," and our views, while opposed by the other justices, is certainly not intended to impugn their integrity. Case counts

and statistics should not drive our disposition or deliberative process. In a conflict between the two, our primary duty lies in giving a case and the litigants involved the time they deserve. See Anastasoff, 223 F.3d at 904.

XIII.

The rallying cry for those who raise the specter of backlogs as the justification for the expedient disposition of cases is "justice delayed is justice denied." As one judge has noted, speedy disposition is not to be equated with justice:

> To suggest that justice delayed is justice denied is not the answer. Justice delayed is not always justice denied, and speedy justice is not always justice obtained. Increased pressures on the judiciary resulting from increased litigation because of increased use of the courts by our society is an increased burden which must be met by the judiciary alone, without sacrificing the quality of the justice dispensed. The resulting pressures should and must be assumed by the judiciary without complaint. . . . If justice delayed is justice denied, then justice without quality is also justice denied, a result for which the judiciary alone will be held accountable without reference to collateral pressures from whatever source.

Graver v. Secretary of Health, Ed. & Welfare, 405 F. Supp. 631, 636-37 (E.D. Pa. 1975) (emphases added).

I agree that cases should be decided as promptly as possible. But there is no justice in a rush to judgment that is mandated by internal policies and procedures embracing summary decisions. Too often the administration of formulaic approaches for expediting cases becomes the focus of the time and energy of the court, which should otherwise be spent on our fundamental function of deciding cases. I see no virtue in a race to rubber stamp a circulating draft of a decision so that it may be issued quickly by the court. Such approaches detract the public's

attention from a prominent reason for such delays, that is, the lack of resources. See supra Section VII.

But other internal administrative obstacles cause inefficiencies that delay resolution of cases. Obstacles such as the lack of objective criteria as to whether an opinion should be published, see State v. Tauʻa, 98 Hawaiʻi 426, 441 n.1, 49 P.3d 1227, 1242 n.1 (2002) (Acoba, J., dissenting, joined by Ramil, J.) (opinions which depart from existing law should be published); Zanakis-Pico v. Cutter Dodge, Inc., 98 Hawaiʻi 309, 326, 47 P.3d 1222, 1239 (2002) (Acoba, J., concurring) (opinions which apply new rules of law should be published), and disputes concerning the publishability of an opinion, would be easily resolved by the rule adopted in some jurisdictions that the vote of one justice is sufficient to mandate publication. See Doe, 99 Hawaiʻi at 15 n.6, 52 P.3d at 269 n.6 (Ramil, J., dissenting, joined by Acoba, J.) But even the adoption of objective criteria and alternative measures such as proposed by the Hawaiʻi AJS will not cure the lack of published opinions, inasmuch as a majority disfavoring publication in the first place is unlikely to actually change its position even in the face of such objective standards or alternative measures. Hence, in our view, a single justice rule is necessary.

XIV.

Moreover, although a case that should be published exacts deliberation and, thus, time to complete, over the long-term, publication has the effect of decreasing the backlog and saving ourselves, trial courts, and attorneys needless expense of

time, effort, and resources. When we do not publish and address the questions squarely presented to us, there are wide-ranging systemic effects.

Each party for whom the issue subsequently arises is faced anew with an error that is "novel," because we have not yet addressed it. Trial courts must guess at what law should be applied, further delaying the resolution of trials. Law clerks, judges, and justices must in effect "reinvent the wheel." See John v. State, 35 P.3d 53, 64 (Alaska Ct. App. 1989) (Manheim, J., concurring) ("[S]o many of our decisions are unpublished that, given enough time and enough change of personnel, the court 'forgets' we issued those decisions."). Appellants and appellees must do the same. Thus, over the long-term, publication will reduce our backlog, by removing issues from our appellate treadmill.

Failing to publish decisions that should be published has a substantial impact on the public. When this court postpones for an indefinite time the resolution of issues presented before it, the result is to leave parties -- whether they are prosecutors and defendants in criminal cases, parents and children in family court cases, business entities, government, or the public at large -- and their attorneys to guess at what the law is in this jurisdiction, at the risk of guessing wrong. By the time the matter is brought again to this court, much time and events may have passed. It is no wonder that representatives of both the bench and the bar recommend the recourse of citing to the only body of law oftentimes available to them -- unpublished opinions.

XV.

In our view, the balance is to be struck in the context of our role as the court of last resort in this state and the long range perspective we must take. The litigants in each case deserve the considered judgment of each justice. Our obligation to the rule of law is to apply it assiduously, evenly, and justly; expediency should play no part in the task in which we are engaged. In that regard, more, not less, authoritative guidance strikes the right balance in our present legal milieu. By satisfying our obligation in individual cases, we fulfill our duty as stewards of the judicial power, to all parties and to the public at large without favoring any one party or the interests of one litigant over another.