NO. 23531

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

CONRAD DANIEL WAGGENER, Plaintiff-Appellant, v.
BEVERLY JO WAGGENER, Defendant-Appellee

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 94-1704)

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

Plaintiff-Appellant Conrad Daniel Waggener (Plaintiff, Conrad, or Husband) appeals from the April 12, 2000 Order Granting in Part and Denying in Part Defendant's Motion Re: Enforcement of the Divorce Decree Filed February 25, 2000 (April 12, 2000 Order), and May 17, 2000 Order Denying Plaintiff's Motion for Reconsideration (May 17, 2000 Order), entered by Per Diem District Family Judge Paul T. Murakami. We affirm in part, vacate in part, and reverse in part.

BACKGROUND

Conrad and Defendant-Appellee Beverly Jo Waggener (Defendant, Beverly, or Wife) were married on March 25, 1975. They have three children. Conrad filed a Complaint for Divorce on May 12, 1994.

On January 6, 1995, a partial settlement was stated on the record and orally ordered. The written document was not entered until January 11, 1996, when a Partial Agreement Re:

Divorce Settlement; Order (January 11, 1996 Order), approved as to form and content by Conrad and Beverly and approved as to form by the attorneys for Conrad and Beverly, was entered by District Family Judge Marjorie Higa Manuia. This document stated, in relevant part, as follows:

> 6. RETIREMENT. All of the parties' IRA accounts, including but not limited to Defendant's United Federal Credit Union IRA, Defendants's Twentieth Century IRA, Defendant's Mutual Qualified IRA, and her United Airlines 401(k) plan, as well as Plaintiff's Aloha Airlines 401(k) plan, Plaintiff's United Federal Credit Union IRA, and Plaintiff's Twentieth Century Mutual Fund IRA Account shall be divided equally by the parties as to all amounts earned and accrued during the parties' marriage. Each party shall promptly provide all verification of account information, including account values, for this purpose. The Aloha Airlines defined benefit retirement plan earned by Plaintiff and Plaintiff's U.S. Air Force retirement benefit, as well as Defendant's United Airlines Pension Plan,[1] shall be divided by the "Linson" formula, that is, each party shall receive one-half (1/2) times (years or points accrued in the plan during the marriage) divided by (total years or points accrued in the plan at the date of retirement) times the gross benefit available to recipient.
>
> Specific wording of the awards of retirement is reserved for further agreement and/or order of the Court.

(Footnote added.)

In other words, it was agreed and ordered that the defined benefit retirement plans shall "be divided by the "Linson" formula, that is, each party shall receive one-half (1/2) times (years or points accrued in the plan during the marriage) divided by (total years or points accrued in the plan at the date of retirement) times the gross benefit available to recipient." It was also agreed and ordered that the defined

[1] It appears that the "United Airlines Pension Plan" and the "United Airlines defined benefit plan" referred to subsequently are the same plan.

contribution retirement plans "shall be divided equally by the parties as to all amounts earned and accrued during the parties' marriage."

In a letter to District Family Judge Darryl Choy, dated April 9, 1996, the attorney for Beverly stated that she and Conrad's attorney

> have consulted extensively on the wording and provisions of the Decree for the above-referenced case. To the best of my knowledge, our wording is identical except as follows. . . .
>
> . . . .
>
> Other areas. With respect to other issues, [Conrad's attorney] and I have no further disputes regarding wording. I believe wording is identical in all other areas.

None of the exceptions involved the wording of the Divorce Decree governing the division of any of the defined benefit or defined contribution retirement plans.

On May 14, 1996, Judge Choy entered the Divorce Decree, prepared by the attorneys for Conrad and approved as to form by the attorney for Beverly, and decided in section 5, in relevant part, as follows:

> (iv) Husband's U.S. Air Force Reserve Retired Pay. Defendant shall be awarded a monthly percentage share of Plaintiff's U.S. Air Force Reserve retired pay when Plaintiff commences to receive the same.
>
> Defendant's monthly percentage share shall be as determined by the following formula:

| | | | | | | |
|---|---|---|---|---|---|---|
| 1/2 | X | x (total retirement credit points accrued by Plaintiff from the date of marriage to December 31, 1994) y (total retirement credit points accrued by Plaintiff at the time of his retirement) | X | Plaintiff's monthly disposable retired pay | = | Defendant's monthly percentage share |

. . . .

(v) Other Retirement Interests. Defendant shall be awarded and assigned a share of the retirement benefits under Plaintiff's Aloha Airlines defined benefit plan according to the formula below. As the Alternate Payee, Defendant shall have the right to elect to receive benefit payments under Plaintiff's Aloha Airlines defined benefit plan at the first date that payments to an Alternate Payee (Defendant) are allowed under the plan or any time thereafter.

The share which Defendant shall be awarded shall be computed according to the following formula:

| | | | | | | |
|---|---|---|---|---|---|---|
| 1/2 | X | x (total number of years of Plaintiff's participation in the plan during the marriage as of December 31, 1994) y (total number of years of Plaintiff's participation in the plan at the time Defendant elects to receive her share of Plaintiff's benefits) | X | Plaintiff's gross retirement benefits at the time of Defendant's election | = | Defendant's share |

Each party shall be taxed on his or her share of the Aloha Airlines defined benefit payments.

Plaintiff shall be awarded and assigned a share of the retirement benefits under Defendant's United Airlines defined benefit plan according to the formula below. As the Alternate Payee, Plaintiff shall have the right to elect to receive benefit payments under Defendant's United Airlines defined benefit plan at the first date that payments to an Alternate Payee (Plaintiff) are allowed under the plan or any time thereafter.

The share which Plaintiff shall be awarded shall be computed according to the following formula:

| | | | | | | |
|---|---|---|---|---|---|---|
| 1/2 | X | x (total number of years of Defendant's participation in the plan during the marriage as of December 31, 1994) y (total number of years of Defendant's participation in the plan at the time Plaintiff elects to receive his share of Defendant's benefits) | X | Defendant's gross retirement benefits at the time of Plaintiff's election | = | Plaintiff's share |

Each party shall be taxed on his or her share of the United Airlines defined benefit payments.

> Qualified Domestic Relations Orders shall be prepared to effect the division of the foregoing defined benefit plans.
>
> The division of his retirement benefits under the Aloha Airlines defined benefit plan notwithstanding, Plaintiff shall be awarded all of his Aloha Airlines defined contribution plan, his Aloha Airlines 401(k) plan account, his United Airlines Federal Credit Union IRA, his 20th Century Mutual Fund IRA's [sic], and his Merrill Lynch IRA. The division of her retirement benefits under the United Airlines defined benefit plan notwithstanding, Defendant shall be awarded all of her United Airlines 401(k) plan account (which includes her former United Airlines defined contribution plan), her United Airlines Federal Credit Union IRA, and her 20th Century Mutual Fund IRA. **To the extent that as of December 31, 1994 the value of either party's total combined interest in the retirement accounts identified herein (excluding the Aloha Airlines defined benefit plan, the USAFR retired pay, and the United Airlines defined benefit plan) exceeded the value of the other party's total combined interest in the retirement accounts identified herein (excluding the Aloha Airlines defined benefit plan, the USAFR retired pay, and the United Airlines defined benefit plan), one-half (1/2) of the difference in that value as of December 31, 1994 shall be transferred by way of a Qualified Domestic Relations Order, if necessary, from the retirement account(s) of the party having the greater total combined interest as of December 31, 1994 to the retirement account(s) of the party having the lesser total combined interest as of December 31, 1994.**

(Emphasis added.)[2]

On June 3, 1996, Beverly filed a motion for reconsideration regarding issues unrelated to the formulas for the division of the retirement accounts. This motion was initially decided by an order entered on October 24, 1996. An amended order was entered on November 18, 1996.

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[2] "All or any portion of the interest in a qualified plan that is awarded to a spouse by a QDRO may be rolled over tax free to an IRA or to another qualified plan, subject to the same rules that apply in the case of a distribution to a participant (see IRC [Internal Revenue Code] §§ 402(c) & 402(e)(1)(B))." 2000 Hawai'i Divorce Manual, section 6, page 22. The IRC states, at 26 USC 402(e)(1)(B) (1998), in relevant part, as follows: "Rollovers. If any amount is paid or distributed to an alternate payee who is the spouse or former spouse of the participant by reason of any qualified domestic relations order . . . , subsection (c) shall apply to such distribution in the same manner as if such alternate payee where the employee." 26 USC 402(c) states the "[r]ules applicable to rollovers from exempt trusts."

The Divorce Decree was not appealed. However, the parties thereafter did not agree on any Qualified Domestic Relations Order (QDRO). It was not until February 25, 2000, that Beverly filed a Motion Re: Enforcement of the Divorce Decree (February 25, 2000 Motion) seeking:

> 27. In summary, the following is requested:
>
> a. That the Qualified Domestic Relations Order (Aloha Airlines, Inc. Pilot's Equity Annuity Plan) include language that Wife should be entitled to any interest and investment earnings or losses accrued from December 31, 1994 to the date of distribution.
>
> b. That Husband's counsel provide copies of the QDROs relating to Husband's Aloha Airlines defined benefit plan and Wife's United Airlines defined benefit plan for review prior to submission to the Plan Administrators.
>
> c. That Husband cooperate and provide all military information necessary in order for DFAS to honor Wife's application for her share of his military retired pay.
>
> d. That Husband be responsible for wife's attorney fees and costs for filing this motion.

The April 12, 2000 Order entered by Judge Murakami decided, in relevant part, as follows:

> Subsequent to the trial, it was calculated that Plaintiff had the larger fund, so it was calculated that he was to assign to Defendant **$61,265.34** through a QDRO from his annuity plan. However, for a variety of reasons, said QDRO still has not been filed some almost four years since the date of the Divorce Decree. Essentially, Defendant is seeking whatever gains or losses that are attributable to the **$61,265.34** as it has "sat" in Plaintiff's account awaiting transfer to Defendant. Plaintiff opposes on the grounds that this would be modifying the specific provisions of the Divorce Decree, which the Court lacks jurisdiction to do some almost four years after the entry of the Decree. . . .
>
> This Court, . . . , **HEREBY FINDS AND ORDERS AS FOLLOWS:**
>
> 1. That after review of the record, it would appear that both Plaintiff and Defendant bear some responsibility for the delay in the submission of the necessary QDRO. Moreover, the sum of **$ 61,265.34** is not insubstantial.

> As the Court understands the situation, per the Decree, Plaintiff is receiving a "Linson" share of Defendant's United Airlines retirement, and Defendant is similarly receiving a share of Plaintiff's Aloha Airlines and military retirement. Conceptually, what this means to the Court is that both sides are already sharing in whatever gains and losses occurred to the other's plans up through the date of retirement. It would therefore seem to the Court that this "retirement offset" should not be treated any differently, otherwise it results in Plaintiff having had benefit of the use of the **$ 61,265.34** to generate income throughout the entire period. This would be a windfall that the trial judge, in dividing the retirement plans equally, would not have envisioned as fair. In fact, it is clear that the parties took great pains to divide the retirement fairly. Conversely, if there was a loss in that period since 1994, it would be equally unfair to Plaintiff to have him shoulder the loss. Therefore, to the extent that there were any gains or losses since December 31, 1994 with regard to the $ **61,265.34**, said sums are to be apportioned either to the Defendant's credit or to be debited against the account as of the filing of the QDRO according to how the entire fund did. As far as the Court can determine, this is not a post divorce modification of a Decree beyond one year, but rather a clarification. Defendant's Motion is therefore granted as to her first request.
>
> 2. To the extent that Defendant may modify or include in the QDRO further provisions that work to the advantage of either or both parties, but do not penalize or disadvantage the other party, the Court will grant Defendant's second request. Put another way, if there is a provision or option that is desired in the QDRO by Defendant, she can request its inclusion, so long as Plaintiff is not harmed, penalized, or restricted in the choices or options that he may want to exercise. Plaintiff is similarly free to make what selections he wishes with the same limitations. The requester is to bear the costs of any revisions or changes to the document.
>
> 3. With regard to the military retirement information request, the Court finds that said request is moot, and although the timing of the information is debatable, it may also be coincidental. Thereby, Defendant's third request is denied.
>
> 4. With regard to the Defendant's fourth request for attorney's fees, the Court finds that there was a legitimate question that needed resolution, and therefore, the Court at this time will deny the request for attorney's fees, each to pay their own.

(Emphases in the original.)

On April 24, 2000, Conrad filed Plaintiff's Motion for Reconsideration asking

> the Court to reconsider and modify its orders (1) granting [Beverly's] request to revise the Qualified Domestic Relations Order to include interest and investment earnings or losses attributable to the retirement offset of $ 61,265.34 and

(2) allowing the parties to include in the defined benefit Qualified Domestic Relations Orders additional provisions not included in or contemplated by the Divorce Decree.

The May 17, 2000 Order denied this motion.

On August 14, 2000, following the filing of Conrad's notice of appeal on June 16, 2000, the family court entered its Findings of Fact and Conclusions of Law (FsOF and CsOL). With those FsOF and CsOL challenged by Conrad outlined in bold print, the relevant FsOF and CsOL are as follows:

> II. FINDINGS OF FACT.
>
> . . . .
>
> 12. On January 4, 2000, Mr. [Craig H.] Yim [Defendant's attorney] sent a response to Mr. [Charles T.] Kleintop [Plaintiff's attorney] requesting that the QDRO Re: Aloha Airlines pilots' Equity Annuity Plan be revised to include the following language: "Amount of Alternate Payee's Benefit. This Order assigns to the Alternate Payee a portion of the Participant's Total Account Balance under the Plan. That portion shall be $61,265.34 of the Participant's total account balance accumulated under the Plan as of December 31, 1994 plus any interest and investment earnings or losses attributable thereon from the period subsequent to December 31, 1994 until the date of final distribution."
>
> 13. By letter dated January 22, 2000, Mr. Kleintop disagreed with the suggested revision to the QDRO Re: Aloha Airlines Pilots' Equity Annuity Plan.
>
> **14. For a variety of reasons, the QDROs relating to the equalization of the defined contribution plans and the defined benefit plans have not been completed or filed.**
>
> DEFINED BENEFIT PLAN
>
> 15. The Divorce Decree provided that Wife is awarded and assigned a share of the retirement benefits under Husband's Aloha Airlines defined benefit plan based on the court's Linson formula. The decree also provided that Husband is awarded and assigned a share of the retirement benefits under Wife's United Airlines defined benefit plan based on the court's Linson formula.

**16. Wife requested that the court not sign any QDRO's prepared and submitted by Husband's counsel because Wife had not been given the opportunity to review them before they were pre-qualified by the Plan Administrator, and that the proposed QDRO's drafted by Husband's counsel does not include many benefits provisions allowed by the plan.**

**17. The QDROs relating to the defined benefit plans drafted by Husband's counsel, although pre-qualified by the plan administrator, left out provisions for a pro rata share of any employer provided early retirement subsidies, which Aloha Airlines allows; failed to provide provisions for pro rata share of post retirement cost of living adjustments that Aloha Airlines allows; failed to put provisions that would allow the alternate payee to designate a beneficiary of her benefits when she dies, which Aloha Airlines allows; failed to provide other death benefit provisions for the alternate payee, which Aloha Airlines allows.**

**18. All of the above provisions were left out of the QDRO drafted by Husband's counsel and sent to the plan administrator for approval before providing Wife's counsel an opportunity to review and make appropriate changes.**

**19. The omission of these provisions would seriously jeopardize the benefits afforded to Wife under the proposed QDRO drafted by Husband's counsel.**

HUSBAND'S U.S. AIR FORCE RESERVE RETIRED PAY

20. The Divorce Decree also provides that Wife is awarded a monthly percentage share of Husband's U.S. Air Force Reserve retired pay when Husband commences to receive the same.

21. On August 14, 1996, Wife provided an exemplified and certified copy of the Divorce Decree to the Defense Finance and Accounting Services (DFAS) for implementation of the direct payment of Wife's share of Husband's Air Force Reserve retired pay benefits.

22. On August 29, 1996, and on October 15, 1996, DFAS acknowledged Wife's application, however, they would not honor her application because the Divorce Decree provides for a division of retired pay by means of a formula wherein the number (i.e. the length of the parties[']  marriage or the reserve points earning during the marriage) is not specifically set forth. DFAS required a certified copy of a clarifying order awarding either a percentage or a fixed amount of the member's retired pay, or which provides a formula wherein the only missing element is the denominator.

23. On October 4, 1999, Wife requested from Husband, the total retirement points accrued from the date of marriage to December 31, 1994; total retirement credit points accrued at the time of his retirement; and the date of retirement. Wife received no information from Husband.

24. On February 25, 2000, Wife filed her Motion Re: Enforcement of the Divorce Decree. The matter was set for hearing before the Honorable Judge Paul T. Murakami on April 5, 2000.

25. On April 3, 2000, Husband filed Plaintiff's Memorandum In Opposition To Defendant's February 25, 2000 Motion RE: Enforcement Of The Divorce Decree. Husband argues that Wife's motion is a motion to modify the divorce decree, which the court lacks jurisdiction to order.

26. Husband argues that Wife's request for copies of the Aloha Airlines Defined Benefit QDRO and the United Airlines Defined Benefit QDRO is moot because they have recently provide these documents to Wife.

27. Husband further argues that since Husband has not yet begun receiving his military retirement benefits and since he intends to provide wife with his retirement information, Wife's motion is both unripe and unnecessary.

28. Husband provided the requested information regarding his military retirement benefits on April 3, 2000, 2 days prior to the hearing on April 5, 2000 by way of his Trial Exhibit 11.

29. Husband further argues that "It is impossible - it was impossible to give all of the retirement information to 0000Mr. Yim prior to now, because Mr. Waggener just retired from the Air Force in the summer of last year." (Transcript of April 5, 2000 hearing, [p]age 20, lines 2-5)

30. On October 4, 1999, Mr. Yim sent a letter to Mr. Kleintop requesting the military retirement information. (Trial Exhibit I.)

31. A review of Husband's Trial Exhibit 11, which is a Service History for Mr. Waggener, shows that the report file date is October 9, 1999, five days after Wife's request, but not provided to Wife until April 3, 2000, nearly 6 months after receipt.

**32. Court found that both Plaintiff and Defendant bear some responsibility for the delay in the submission of the necessary QDROs.**

33. The sum of $61,265.34 is not insubstantial.

34. Plaintiff is receiving a "Linson" share of Defendant's United Airlines retirement, and Defendant is receiving a "Linson" share of Plaintiff's Aloha Airlines and military retirement.

**35. Conceptually, what this means to the Court is that both sides are already sharing in whatever gains and losses occurred to the other's plan up through the date of retirement.**

**36. That the treatment of the defined contribution plan "retirement offset" should not be treated any differently, otherwise it results in Husband having had benefit of the use of the $61,265.34 to generate income throughout the entire period. This would be a windfall that the trial judge, in dividing the retirement plans equally, would not have envisioned as fair.**

**37. It is clear that the parties took great pains to divide the retirement fairly.**

**38. Conversely, if there was a loss in that period since 1994, it would be equally unfair to Plaintiff to have him shoulder the loss.**

III. CONCLUSIONS OF LAW.

Based upon the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

**1. This Court has the jurisdiction of the subject matter and the parties pursuant to HRS [Hawaii Revised Statutes] 580-47, 571-3, and 571-8.5(a)(10).**

2. HRS 571-3 provides that the Family [C]ourt is a division of the Circuit Court and, in addition to its powers as set forth in the statutes, may also exercise general equity powers as authorized by law.

3. HRS 571-8.5(a)(10) authorizes the Family Court to "make and award such judgements, decrees, orders, and mandates, issue such executions and other processes, and do such other acts and to take such other steps as may be necessary to carry into full effect the powers which are or shall be given" to it.

**4. Therefore, to the extent that there were any gains or losses since December 31, 1994 with regard to the $61,265.34, to be transferred from Husband's Aloha Airlines Defined Contribution Plan to Wife, said sums are to be apportioned either to the Wife's credit or to be debited against the account as of the filing of the QDRO according to how the entire fund did up to the date of final distribution.**

5. **The Court concludes that this is not a post divorce modification of a Decree beyond one year, but rather a clarification.**

6. **Wife's Motion is therefore granted as to her first request.**

7. **To the extent that Wife may modify or include in the QDRO further provisions that work to the advantage of either or both parties, but do not penalize or disadvantage the other party, the Court will grant Wife's second request.**

8. **If there is a provision or option that is desired in the QDRO drafted by Wife, she can request its inclusion, so long as Husband is not harmed, penalized, or restricted in the choices or options that he may want to exercise.**

9. **Husband is similarly free to make what selections he wishes with the same limitations.**

10. The person making the requested changes is to bear the costs of any revisions or changes to the document.

11. The Court finds Wife's request for Husband's military retirement information is moot, and although the timing of the information is debatable, it may also be coincidental. Wife's request for Husband's military retirement information is denied.

12. The Court finds that there was a legitimate question that needed resolution, and therefore, the Court will deny Wife's request for attorney fees and order that each party be responsible for their own attorney fees and costs.

(Underscoring in original.)

DISCUSSION

A.

The January 11, 1996 Order awarded each party one-half of the "all amounts earned and accrued during the parties' marriage" in the following defined benefit retirement plans: Aloha Airlines defined benefit plan, U.S. Air Force retirement benefit, and United Airlines Pension Plan. The Divorce Decree,

however, stated something different than "all amounts earned and accrued during the parties marriage[.]"

The amount of the U.S. Air Force Reserve Retired Pay was stated as the "total retirement credit points accrued by Plaintiff from the date of marriage to December 31, 1994 . . . total retirement credit points accrued by Plaintiff at the time of his retirement[.]" (Emphasis added.)

The amount of the Aloha Airlines defined benefit plan was stated as the "total number of years of Plaintiff's participation in the plan during the marriage as of December 31, 1994 . . . total number of years of Plaintiff's participation in the plan at the time Defendant elects to receive her share of Plaintiff's benefits[.]" (Emphasis added.)

The amount of the United Airlines Pension Plan was stated as the "total number of years of Defendant's participation in the plan during the marriage as of December 31, 1994 . . . total number of years of Defendant's participation in the plan at the time Plaintiff elects to receive his share of Defendant's benefits[.]" (Emphasis added.)

The Divorce Decree also stated something different than "all amounts earned and accrued during the parties marriage" when it awarded each party all of his or her defined contribution retirement plans and ordered as follows:

> To the extent that as of December 31, 1994 the value of either party's total combined interest in the retirement accounts . . . exceeded the value of the other party's total combined interest in

> the retirement accounts . . . , one-half (1/2) of the difference in that value as of December 31, 1994 shall be transferred by way of a Qualified Domestic Relations Order, if necessary, from the retirement account(s) of the party having the greater total combined interest as of December 31, 1994 to the retirement account(s) of the party having the lesser total combined interest as of December 31, 1994.

There is no disagreement that (a) the result of the calculations contemplated by the Divorce Decree was that Conrad owed Beverly 61,265.35 defined contribution retirement plan dollars from his "retirement account(s)" to her "retirement accounts,"[3] and (b) the Divorce Decree did not state that Defendant shall be entitled to all gains or losses from December 31, 1994, through the date of distribution on the 61,265.34 defined contribution retirement plan dollars payable.

Pertaining solely to the defined contribution retirement plans, Conrad challenges the following award by the April 12, 2000 Order: "Therefore, to the extent that there were any gains or losses since December 31, 1994 with regard to the **$61,265.34**, said sums are to be apportioned either to the Defendant's credit or to be debited against the account as of the filing of the QDRO according to how the entire fund did." Challenging CsOL Nos. 1 and 5, Conrad contends that the family court had no jurisdiction to modify the division of the parties' retirement interests almost four years after the divorce decree was entered. Challenging FsOF

[3] There is a substantial difference between (a) owing 61,265.35 defined contribution retirement plan dollars from your defined contribution retirement account(s) to the defined contribution retirement accounts of another person, and (b) owing $61,265.35 to the other person.

nos. 14, 32, 35, 36, 37, and 38 and CsOL nos. 4 and 6, Conrad contends that the April 12, 2000 Order erroneously awarded the pre-divorce and post-divorce gains or losses on the "$61,265.34" to Beverly retroactively. We conclude that the family court was not authorized to modify the Divorce Decree.

The Divorce Decree stated a formula for determining the specific amount of a specific and unique kind of dollars to be paid from a specific fund or funds to a specific fund or funds. The formula involved a comparison of the combined value of Beverly's United Airlines 401(k) plan, United Airlines Federal Credit Union IRA, and Twentieth Century Mutual Fund IRA against the combined value of Conrad's Aloha Airlines defined contribution plan, Aloha Airlines 401(k) plan account, United Airlines Federal Credit Union IRA, Twentieth Century Mutual Fund IRAs, and Merrill Lynch IRA. The parties subsequently calculated that the amount to be paid by Conrad to Beverly "by way of a Qualified Domestic Relations Order, if necessary, from the retirement account(s) of [Conrad] to the retirement account(s) of [Beverly]" was 61,265.35 defined contribution retirement plan dollars.

In its COL no. 4, the family court ordered that

> to the extent that there were any gains or losses since December 31, 1994 with regard to the $ 61,265.34, to be transferred from Husband's Aloha Airlines Defined Contribution Plan to Wife, said sums are to be apportioned either to the Wife's credit or to be debited against the account as of the filing of the QDRO

> according to how the entire fund[4] did up to the date of final distribution.

(Footnote added.)

Years ago, the relevant ending date when dividing and distributing property and debts in a divorce case was the date of final separation in contemplation of divorce (DOFSICOD). Woodworth v. Woodworth,7 Haw. App. 11, 740 P.2d 36 (1987). As noted in Jackson v. Jackson, 84 Hawai'i 319, 933 P.2d 1353 (App. 1997), it was decided in Myers v. Myers, 70 Haw. 143, 764 P.2d 1237 (1988), that the relevant ending date is the date of the conclusion of the evidentiary part of the trial (DOCOEPOT).

As noted above, the January 11, 1996 Partial Agreement Re: Divorce Settlement; Order that had been approved as to form and content by Conrad and Beverly and approved as to form by the attorneys for Conrad and Beverly stated that

> 6. RETIREMENT. All of the parties' IRA accounts, including but not limited to Defendant's United Federal Credit Union IRA, Defendants's Twentieth Century IRA, Defendant's Mutual Qualified IRA, and her United Airlines 401(k) plan, as well as Plaintiff's Aloha Airlines 401(k) plan, Plaintiff's United Federal Credit Union IRA, and Plaintiff's Twentieth Century Mutual Fund IRA Account shall be divided equally by the parties **as to all amounts earned and accrued during the parties' marriage**. Each party shall promptly provide all verification of account information, including account values, for this purpose. The Aloha Airlines defined benefit retirement plan earned by Plaintiff and Plaintiff's U.S. Air Force retirement benefit, as well as Defendant's United Airlines Pension Plan, shall be divided by the "Linson" formula,

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[4] The increase or decrease in the value of the 61,265.34 defined contribution retirement plan dollars from Plaintiff-Appellant Conrad Daniel Waggener's "retirement account(s)" to Defendant-Appellee Beverly Jo Waggener's (Beverly) "retirement accounts," cannot be calculated "according to how the entire fund did up to the date of final distribution." It was not derived from one fund. It was derived from various funds. It can be calculated according to how its ingredient amounts did in the various funds from which they came starting at the date of the conclusion of the evidentiary part of the trial and concluding at the date of final distribution.

> that is, each party shall receive one-half (½) times **(years or points accrued in the plan during the marriage)** divided by (total years or points accrued in the plan at the date of retirement) times the gross benefit available to recipient.

(Emphases added.)

In this case, Conrad reported that the DOFSICOD was May 9, 1994. The DOCOEPOT was September 20, 1995. The Divorce Decree was entered on May 14, 1996. Thus, the January 11, 1996 agreement/order specified a date no earlier than the September 20, 1995 DOCOEPOT. Despite the above agreement/order, and despite the fact that the DOCOEPOT was September 20, 1995, and the Divorce Decree was entered on May 14, 1996, the Divorce Decree divided Conrad's U.S. Air Force Reserve retired pay, Conrad's Aloha Airlines defined benefit plan, Beverly's United Airlines defined benefit plan, and all defined contribution retirement plans as of December 31, 1994. Nevertheless, Beverly's motion for reconsideration did not seek reconsideration of the December 31, 1994 date. Moreover, Beverly did not appeal.

Although the May 14, 1996 Divorce Decree (a) awarded the nonowner party the amount to be determined pursuant to a precise formula and the amount was determined to be 61,265.35 defined contribution retirement plan dollars, (b) did not award the nonowner party any part of any of the other party's defined benefit pension plans or defined contribution retirement plans that was earned, deposited, or accumulated post-December 31, 1994, and (c) did not award Beverly the post-December 31, 1994, gains or

losses attributable to the 61,265.35 defined contribution retirement plan dollars, Beverly argues that with respect to the 61,265.35 defined contribution retirement plan dollars being rolled over into her retirement plan from Conrad's retirement plan(s), the Divorce Decree entitles her "to any interest and investment earnings or losses accrued from December 31, 1994 to the date of distribution."[5] We disagree. We conclude that when the family court's April 12, 2000 Order awarded the post-December 31, 1994 gains or losses attributable to the 61,265.35 defined contribution retirement plan dollars, it added a substantive provision to the Divorce Decree without authorization to do so. First, it did so by adding the earnings or losses attributable to the 61,265.35 defined contribution retirement plan dollars during the period from December 31, 1994, to the September 20, 1995 DOCOEPOT.[6] Second, it did so by adding the earnings (or subtracting the losses) attributable to the 61,265.35 defined contribution retirement plan dollars during the period

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[5] In the family court, the attorney for Beverly stated, in relevant part, as follows:

> [B]asically all my client is asking for is like anything else, if the Court ordered a judgment to be paid at sixty-one thousand dollars, and for whatever reason that amount is delayed, we should get interest on our money. Had I received that sixty-one thousand, I could have put it in an IRA and it could have grown tremendously in this blue market.

[6] Although the record does not specify the amount of the earnings, it is clear that on April 12, 2000, there were earnings and not losses. We can only guess what the situation will be on the date of distribution.

from September 20, 1995, to the date of distribution, whenever that occurs in the future.

The decision to include or not to include a provision ordering that Beverly is the beneficiary of or liable for "any interest and investment earnings or losses accrued from December 31, 1994 to the date of distribution" of the 61,265.35 defined contribution retirement plan dollars from Conrad's "retirement account(s)" to Beverly's "retirement accounts," was a major issue for decision by the parties and, ultimately, by the court when it entered the Divorce Decree. The omission of this provision meant that Conrad's debt and Beverly's credit was unaffected by future events, positive or negative, until the QDRO effectuated the transfer.

B.

CsOL nos. 7, 8, and 9 authorize the QDRO to contain "further provisions that work to the advantage of either or both parties, but do not penalize or disadvantage the other party," and provisions or options desired by one party so long as the other party is not thereby "harmed, penalized, or restricted in the choices or options that he [or she] may want to exercise."

Challenging FsOF nos. 16, 17, 18, and 19 and CsOL nos. 7, 8, and 9, Conrad contends that the April 12, 2000 Order erroneously retroactively awarded certain additional benefits from each party's defined benefit plan to the other party.

Conrad argues that the fact that Beverly did not request such relief in her February 25, 2000 Motion barred the family court from granting it to her. In contrast to his position regarding the profits and losses on the 61,265.35 defined contribution retirement plan dollars after December 31, 1994, and until payment, Conrad argues that Beverly

> is, once again, simply trying to modify the clear and unambiguous intent of the Divorce Decree and obtain additional benefits to which she isn't entitled. . . .
>
> . . . [Beverly] wants to add new benefits to the defined benefit QDROs which were never agreed to by the parties or ordered in the Divorce Decree. These extra benefits materially change the division of the parties' defined benefit plans described in the May 14, 1996 Divorce Decree. . . . [Beverly] obviously wants to obtain all possible benefits under [Conrad's] defined benefit plan (even if they may be greater than the benefits [Conrad] can obtain under [Beverly's] defined benefit plan). Unfortunately, she should have requested those benefits during the divorce trial or before the Divorce Decree was entered, not after the Family Court lost jurisdiction.
>
> In addition, there is no evidence in the record supporting the Family Court's . . . findings that the proposed QDROs do not include many benefits allowed by the plan or supporting the specific benefits [Beverly] requested. . . .
>
> Finally, the April 12, 2000 Order is wrong because it states that [Beverly] can elect to receive additional benefits which "do not penalize or disadvantage" [Conrad] (and vice versa). . . . However, if [Beverly] receives the additional benefits she wants, that will have the effect of penalizing [Conrad]. . . . Under § 206(d)(3)(D)(i)-(iii) if the Employee Retirement Income Security Act of 1974 and § 414(p)(3)(A)-(C) of the Internal Revenue Code, a QDRO must not require a plan to provide more benefits for the alternate payee than the participant is entitled to receive under the plan. Therefore, additional benefits which [Beverly] receives from [Conrad's] defined benefit plan will be at [Conrad's] expense. Likewise, additional benefits which [Conrad] receives from [Beverly's] defined benefit plan will be at [Beverly's] expense. However, since [Conrad] earns much more than [Beverly], [Beverly] has more to gain by obtaining additional benefits. This is simply unfair to [Conrad].

(Emphases in the original.)

In response, we first conclude that the fact that in her February 25, 2000 motion Beverly did not request such an award did

not bar the family court from ordering it. This is because we also disagree with Conrad's allegation that we are talking about "new benefits . . . which were never . . . ordered in the Divorce Decree." As previously noted, the Divorce Decree awarded each party one-half of the during-the-marriage part of the other party's interest in his or her defined benefit retirement plans. Each party was thereby implicitly awarded all benefits available because of such ownership "that work to the advantage of either or both parties, but do not penalize or disadvantage the other party" and do not cause the other party to be "harmed, penalized, or restricted in the choices or options that he [or she] may want to exercise."

Second, we observe that Conrad's allegation that "there is no evidence in the record supporting the Family Court's . . . findings that the proposed QDROs do not include many benefits allowed by the plan or supporting the specific benefits [Beverly] requested" appears to be an objection that what Beverly seeks is merely a request for benefits she has already been awarded. We conclude that, except in situations where the duplication is obvious and unquestionable, such an objection is a waste of judicial time and resources.

Third, Conrad alleges that "additional benefits which [Beverly] receives from [Conrad's] defined benefit plan will be at [Conrad's] expense" and "additional benefits which [Conrad]

receives from [Beverly's] defined benefit plan will be at [Beverly's] expense" because relevant law says that "a QDRO must not require a plan to provide more benefits for the alternate payee than the participant is entitled to receive under the plan." (Emphases in original.) We conclude that this issue is premature. The QDRO effectuating the rollover must be lawful. Its lawfulness, however, cannot be determined until it is prepared and executed. Moreover, the limitations imposed by the family court preclude the additional benefits from being at Conrad's expense. Whatever additional benefits to Beverly that Conrad proves "penalize or disadvantage" him, or by which he is "harmed, penalized, or restricted in the choices or options that he [or she] may want to exercise[,]" are not authorized.

Finally, Conrad alleges that "[Beverly] has more to gain by obtaining additional benefits. This is simply unfair to [Conrad]." In other words, Conrad contends that "further provisions that work to the advantage of [Beverly], but do not penalize or disadvantage [Conrad]," and provisions or options desired by Beverly so long as Conrad is not thereby "harmed, penalized, or restricted in the choices or options that [Conrad] may want to exercise" are "unfair to [Conrad]" because Conrad gets nothing in return. We disagree. The Divorce Decree, which is final and unappealable, authorizes such benefits to Beverly and does not authorize compensation for them to Conrad.

CONCLUSION

Accordingly, with respect to the August 14, 2000 Findings of Fact and Conclusions of Law, we vacate FsOF nos. 19, 36, and 38, and CsOL nos. 4, 5, and 6, and affirm the remainder.

With respect to the April 12, 2000 Order Granting in Part and Denying in Part Defendant's Motion Re: Enforcement of the Divorce Decree Filed February 25, 2000, focusing on the part where the family court **"HEREBY FINDS AND ORDERS AS FOLLOWS,"** our decision is as follows (emphasis in original):

1. Section 1 contains two paragraphs. We affirm the first paragraph. We vacate the second paragraph and reverse the family court's decision granting Beverly's request "a." in her February 25, 2000 Motion Re: Enforcement of the Divorce Decree.

2. We affirm sections 2, 3, and 4.

DATED: Honolulu, Hawai‘i, June 28, 2002.

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Chief Judge

Associate Judge

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