IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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MARGOT C. TORRES, Plaintiff-Appellee,

vs.

ALFRED TORRES, JR., Defendant,

and

LOUAN TORRES, Successor-In-Interest/
Party-In-Interest-Appellant.

NO. 23089

APPEAL FROM THE FAMILY COURT OF THE FIRST CIRCUIT
(FC-D NO. 88-0178)

DECEMBER 17, 2002

MOON, C.J., LEVINSON, AND NAKAYAMA, JJ.;
ACOBA, J., DISSENTING, WITH WHOM RAMIL, J., JOINS

OPINION OF THE COURT BY MOON, C.J.

Successor-in-interest/party-in-interest-appellant Louan B. Torres (Louan), the surviving spouse of Alfred Torres, Jr. (Alfred), appeals from the Family Court of the First Circuit's: (1) November 17, 1999 order granting the motion of plaintiff-appellee Margot C. Torres (Margot), Alfred's ex-spouse, for entry of an amended "qualified domestic relations order"; and

(2) December 17, 1999 order denying Louan's motion for reconsideration of the grant of Margot's motion. The family court's orders effectively amended Margot and Alfred's 1989 divorce decree [hereinafter, Decree or initial Decree] after Alfred's death and awarded survivorship benefits from Alfred's pension to Margot. On appeal, Louan contends that the family court erred because: (1) neither Louan nor Alfred' estate were parties to the instant action, which was brought by Margot; (2) the language of the Decree and Hawai'i Revised Statutes (HRS) § 580-56 (1993) did not permit the family court to exercise jurisdiction over the rights to survivor benefits associated with Alfred's pension; (3) the court's finding concerning the date that Margot received notice from Alfred's pension fund that she was not entitled to retirement benefits based on the Decree as it was then written was clearly erroneous; (4) the court's orders interfered with Louan's rights to pension benefits insofar as, under the Employee Retirement Income Security Act of 1974 (ERISA), Pub. L. No. 93-406, 88 Stat. 832, as amended by the Retirement Equity Act of 1984 (REA), Pub. L. No. 98-397, 98 Stat. 1426 (codified at 29 U.S.C. § 1001 et. seq.), such rights vested in Louan at either Alfred's retirement or death; and (5) the court's orders further interfered with Louan's rights to certain "segregated amounts" of the pension benefits pursuant to ERISA, as amended by the REA. Margot disagrees and also contends that

this court does not have jurisdiction over Louan's appeal because the appeal is untimely. Finally, amicus curia The Board of Trustees of the Pension Trust Fund for Operating Engineers (the Fund), the trustees of Alfred's pension, submits that the family court's orders do not violate federal law. For the reasons discussed herein, we affirm the family court's orders.

I. INTRODUCTION

Because this case involves aspects of pension benefits that are governed by federal law, a preliminary review of some aspects of this law may facilitate an understanding of the background facts. ERISA, as amended by the REA [hereinafter, collectively, ERISA, unless it is clear from the context that pre-REA aspects of ERISA are discussed], is designed to ensure the proper administration of employee benefit and pension plans. See Boggs v. Boggs, 520 U.S. 833, 839, reh'g denied, 521 U.S. 1138 (1997). In initially enacting ERISA, Congress explained that:

> [T]he growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; . . . the continued well-being and security of millions of employees and their dependents are directly affected by these plans; . . . they are affected with a national public interest; . . . [and] they have become an important factor affecting the stability of employment and the successful development of industrial relations . . . .

29 U.S.C. § 1001(a).[1] ERISA is an intricate and comprehensive regulatory scheme. See Boggs, 520 U.S. at 841. All employee benefit plans must conform to various reporting, disclosure, and fiduciary requirements, see generally 29 U.S.C. §§ 1021, 1031, and 1101 to 1114. In addition to the foregoing requirements, pension plans must also comply with various participation, vesting, and funding requirements. See generally 29 U.S.C §§ 1051 to 1086; Boggs, 520 U.S. at 841.

The principal object of ERISA is to protect

> the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. § 1001(b); see also Boggs, 520 U.S. at 845. ERISA imposes a general duty upon plan fiduciaries to act "solely in the interest of the participants and beneficiaries . . . for the exclusive purpose of . . . providing benefits to participants and their beneficiaries . . . ." 29 U.S.C. § 1104(a)(1)(A)(i).

A typical form of retirement benefit is a "qualified joint and survivor annuity" (QJ&SA) that, under ERISA, each pension plan is required to offer to its participants. See 29

[1] Unless expressly indicated, all references to Title 29 of the United States Code are to the 2000 edition, which contains language identical to the statutory provisions in place at the time of the family court proceedings. There have been no significant substantive changes in the law pertinent to this case since that time.

U.S.C. § 1055(a)(1).[2] A QJ&SA guarantees payment of a stipulated amount to two persons -- typically the retired participant and his or her spouse -- while both are alive. See 29 U.S.C. § 1055(d);[3] see also Dorn v. International Brotherhood of Electrical Workers, 211 F.3d 938, 941 (5th Cir. 2000). If the participant dies first, the surviving spouse is guaranteed, for the remainder of his or her life, payments equal to at least fifty percent of the amount received while the participant was alive. 29 U.S.C. § 1055(d). Should the participant die after working long enough to qualify for benefits but before retiring, the surviving spouse is also guaranteed lifetime payments; this benefit is referred to as a qualified preretirement survivor

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[2] 29 U.S.C. § 1055(a) states:

> Each pension plan to which this section applies shall provide that--
>
> (1) in the case of a vested participant who does not die before the annuity starting date, the accrued benefit payable to such participant shall be provided in the form of a qualified joint and survivor annuity, and
>
> (2) in the case of a vested participant who dies before the annuity starting date and who has a surviving spouse, a qualified preretirement survivor annuity shall be provided to the surviving spouse of such participant.

[3] 29 U.S.C. § 1055(d) provides, in relevant part:

> For purposes of this section, the term "qualified joint and survivor annuity" means an annuity--
>
> (1) for the life of the participant with a survivor annuity for the life of the spouse which is not less than 50 percent of (and is not greater than 100 percent of) the amount of the annuity which is payable during the joint lives of the participant and the spouse, and
>
> (2) which is the actuarial equivalent of a single annuity for the life of the participant.

annuity (QPRSA). See 29 U.S.C. §§ 1055(a)(2) and 1055(e).[4] Both forms of benefits -- the QJ&SA and the QPRSA -- are referred to

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[4] 29 U.S.C. § 1055(e) states, in relevant part:

> For purposes of this section--
>
> (1) Except as provided in paragraph (2), the term "qualified preretirement survivor annuity" means a survivor annuity for the life of the surviving spouse of the participant if--
>
> (A) the payments to the surviving spouse under such annuity are not less than the amounts which would be payable as a survivor annuity under the qualified joint and survivor annuity under the plan (or the actuarial equivalent thereof) if--
>
> (i) in the case of a participant who dies after the date on which the participant attained the earliest retirement age, such participant had retired with an immediate qualified joint and survivor annuity on the day before the participant's date of death, or
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> (ii) in the case of a participant who dies on or before the date on which the participant would have attained the earliest retirement age, such participant had--
>
> (I) separated from service on the date of death,
>
> (II) survived to the earliest retirement age,
>
> (III) retired with an immediate qualified joint and survivor annuity at the earliest retirement age, and
>
> (IV) died on the day after the day on which such participant would have attained the earliest retirement age, and
>
> (B) under the plan, the earliest period for which the surviving spouse may receive a payment under such annuity is not later than the month in which the participant would have attained the earliest retirement age under the plan.
>
> In the case of an individual who separated from service before the date of such individual's death, subparagraph (A)(ii)(I) shall not apply.
>
> (2) In the case of any individual account plan or participant described in subparagraph (B) or (C) of subsection (b)(1) of this section, the term "qualified preretirement survivor annuity" means an annuity for the life of the surviving spouse the actuarial equivalent of which is not less than 50 percent of the portion of the account balance of the participant (as of the date of death) to which the participant had a nonforfeitable right (within the meaning of section 1053 of this title).

collectively throughout this memorandum as "surviving spouse benefits" or "survivor benefits."

To accomplish its ends, ERISA contains a broad anti-alienation, or "spendthrift" provision, 29 U.S.C. § 1056(d)(1), (discussed infra), that prohibits pension plans from assigning benefits to individuals other than the designated participant or current surviving spouse. Moreover, ERISA also contains a broad preemption provision that supersedes contradictory state laws, 29 U.S.C. § 1144(a) (discussed infra), including, in some respects, domestic relations law. Prior to the enactment of the REA, courts apparently disagreed as to whether this preemption provision, in combination with the spendthrift provision, barred state courts from issuing orders in domestic relations proceedings that could affect pension benefits governed by ERISA. See Trustees of the Directors Guild of America-Producer Pension Benefits Plans v. Tise, 234 F.3d 415, 419 (9th Cir. 2000) [hereinafter, Directors Guild]. As a result, a participant's ex-spouse was at risk, in some circumstances, of being "frozen out" of any retirement benefits earned by the participant attributable to employment that took place during the course of the marriage. If the participant remarried and subsequently died, the surviving spouse -- rather than the ex-spouse -- may have been entitled to the benefits payable under either a QJ&SA or a QPRSA, regardless

of the equities of the situation. See 29 U.S.C. §§ 1055(d) and 1055(e).

> Responding to the confusion on this point, and "taking into account changes in work patterns, the status of marriage as an economic partnership, and the substantial contribution to that partnership of spouses who work both in and outside the home," Congress amended ERISA in 1984 [by passing the REA] specifically to provide for state-court-ordered assignments of plan benefits to former spouses and dependents.

Directors Guild, 234 F.3d at 419 (quoting Senate Judiciary Committee, S. Rep. No. 98-575 at 1 (1984)). The REA created an exception to ERISA's general anti-alienation provision by permitting pension benefits to be disbursed to a former spouse who presents a "qualified domestic relations order" (QDRO) to a pension plan administrator. 29 U.S.C. § 1056(d)(3); see also Directors Guild, 234 F.3d at 419-20.

> QDROs are a subset of "domestic relations orders" ("DROs"); DROs are any orders relating "to the provision of child support, alimony, or marital property rights to a spouse, former spouse, child, or other dependent of a plan participant . . . made pursuant to a State domestic relations law." 29 U.S.C. § 1056(d)(3)(ii). A DRO is a QDRO if it "creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or part of the benefits payable with respect to a participant under a[n ERISA] plan[.]" 29 U.S.C. § 1056(d)(3)(B).

Directors Guild, 234 F.3d at 420 (footnote omitted). An alternate payee is "any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant." 29 U.S.C. § 1056(d)(3)(K). Once a QDRO is

obtained, ERISA requires that the "alternate payee," rather than the current spouse, be treated as if he or she were the current spouse "[t]o the extent provided in" the QDRO. 29 U.S.C. § 1056(d)(3)(F).

In order to qualify as a QDRO, a DRO must contain a requisite degree of specificity and meet certain substantive requirements. 29 U.S.C. §§ 1056(d)(3)(C) and 1056(d)(3)(D). These will be discussed infra in greater detail. When an alternate payee (e.g., an ex-spouse) obtains a DRO, the alternate payee must present the DRO to the pension plan; the pension plan is responsible for determining whether the DRO meets the above requirements to create a QDRO and for notifying the participant and the alternate payee of its decision. 29 U.S.C. § 1056(d)(3)(G)(i)(II).[5] A participant or beneficiary may bring a civil action in state or federal court, see 29 U.S.C. § 1132(e)(1), to challenge the pension plan's determination as to whether a DRO is a QDRO or to "recover benefits due to him [or her] under the terms of his [or her] plan, to enforce his [or

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

> In the case of any domestic relations order received by the plan--
>
> (I) the plan administrator shall promptly notify the participant and each alternate payee of the receipt of such order and the plan's procedures for determining the qualified status of domestic relations orders, and
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> (II) within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

her] rights under the terms of the plan, or to clarify his [or her] rights to future benefits under the terms of the plan[.]" 29 U.S.C. § 1132(a)(1). With this review in mind, we turn to the facts of this case.

II. BACKGROUND

Margot and Alfred were married in 1967 and divorced in 1989. They had no children. The divorce occurred after Alfred ceased working for employers who contributed to the Fund, and all of Alfred's pension benefits that accrued in the Fund were derived from Alfred's employment that occurred during his marriage to Margot. The January 10, 1989 Decree entered by the family court provided that:

> [Margot] is awarded a share of retirement under [Alfred's] Operating Engineers' Retirement Plan if, as, and when [Alfred] commences to receive the same. The share which [Margot] is awarded shall be computed according to the following formula:
> [(½) x (19 years in plan/total years in plan at retirement) x ([Alfred's] monthly gross retirement) = ([Margot's] share)].
>
> For the purpose of this allocation of [Margot's] interest, [Alfred] 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 [Alfred] 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.
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> . . . .
>
> 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.

> The Court shall also have specific authority to make any orders it deems just and equitable as a result of the income tax consequences which flow from the division and distribution of the aforementioned retirement interest. It is the intent of the Court that each party shall be taxed on his or her respective share of the retirement benefits at such time(s) said share becomes subject to taxes.

The Decree also contained a reciprocal provision awarding Alfred a share of "retirement benefits" from Margot's retirement plan.

A copy of the Decree was sent to Alfred's pension fund (i.e., the Fund), which acknowledged receipt of it on February 2, 1989. On March 1, 1989, the Fund sent a letter to Margot, indicating that it would determine whether the Decree met the requirements necessary to establish it as a QDRO under federal law.

Following the 1989 divorce, Alfred married Louan in October 1991. They had one child. On September 8, 1997, the Fund sent letters individually addressed to Margot and to Alfred, indicating that the Decree was not a QDRO within the meaning of ERISA. Among the problems identified by the Fund was the fact that the Decree did not clearly state whether Margot was entitled to surviving spouse benefits.

Approximately two months later, in November 1997, Alfred requested the appropriate paperwork to apply for and receive his pension benefits from the Fund; however, he had not completed the paperwork necessary to receive benefits from the Fund before he died on January 17, 1998. At the time of his death, Alfred was married to Louan. The Fund agrees that Alfred

is eligible for benefits retroactive to December 1, 1997. The Fund permitted Louan, as Alfred's surviving spouse, to elect on Alfred's and her behalf that the pension benefits be paid in a "100% Contigent Annuitant" form. This payment option differs from a QJ&SA in that the contingent annuitant form provides reduced benefit payments to the participant and spouse while the participant is alive; in exchange, after the participant's death, the surviving spouse is guaranteed to receive the same amount for the remainder of his or her lifetime.

On September 1, 1998, Margot's counsel received from Louan's counsel a copy of the Fund's September 7, 1997 letter to Alfred and Margot indicating that the Fund had determined that the Decree did not constitute a valid QDRO. The record is silent as to any communication between the litigants that may have taken place between September 1997 and September 1998. Language in the Fund's amicus brief, however, suggests that benefits were not paid to Louan following Alfred's death in January 1998. Between September 1998, and June 1999, counsel for Margot and Louan engaged unsuccessfully in discussions attempting to resolve the matter of who was entitled to the survivor benefits from Alfred's pension. During this time, the Fund also advised Margot's counsel concerning the elements of a valid QDRO.

On June 23, 1999, Margot filed a motion in the family court seeking to amend the 1989 Decree by entry of a "QDRO" or

for an order to compel Louan to "execute" the QDRO. It should be noted here that, although Margot's motion was fashioned as a request to enter a "QDRO," as discussed earlier, the family court can only enter a DRO; the pension plan determines whether the DRO is a QDRO. Consequently, Margot's motion is more properly considered as a request to amend the 1989 Decree, and the family court's November 17, 1999 order, ultimately granting Margot's motion, is more properly considered as an amendment to the Decree. Hereinafter, the family court's November 17, 1999 order and the December 17, 1999 order denying Louan's motion for reconsideration will be referred to collectively as a "DRO," an "amended Decree[,]" or similar designation.

Attached to Margot's motion was an affidavit of her attorney, stating that the Decree had been sent to the Fund in 1989 and that, on March 1, 1989, the Fund had acknowledged receipt of the Decree. The affidavit further states that, "[h]owever, no word was received from the Fund until September 1, 1998, when [Louan's attorney] faxed to [Margot's attorney] a copy of the Fund's September 8, 1997 letter" addressed individually to Margot and to Alfred, stating that the Fund had determined that the Decree did not qualify as a QDRO. Through her attorney, Louan was provided notice of Margot's motion.

By special appearance, Louan filed a memorandum in opposition to Margot's motion on July 9, 1999, contending that

Louan had not been made a proper party to the litigation and that the proceedings should be dismissed or continued until the proper parties were named and until she had an opportunity to conduct discovery. The hearing on the motion was thereby continued to August 4, 1999. Louan and Margot subsequently exchanged memoranda addressing primarily the substantive legal issues, discussed infra, pertaining to whether the family court could grant Margot's motion under state and federal law. On August 4, 1999, the litigants apparently met with the court, and the court set a "short trial" for September 3, 1999. At the September 3, 1999 hearing, Margot and Louan presented legal argument but no testimony was taken. The family court took the matter under advisement, and, on September 10, 1999, Louan filed a second supplemental memorandum in opposition to Margot's motion.

On September 24, 1999, the family court issued a minute order[6] that read:

> COURT RULED IN FAVOR OF MS. OKIMOTO [ATTORNEY FOR MARGOT]. [ATTORNEY] OKIMOTO TO PREPARE ORDER. [ATTORNEYS] WERE CONTACTED BY TELEPHONE OF THE COURT'S DECISION.

On November 17, 1999, the family court filed its findings of fact, conclusions of law, and order granting Margot's request to amend the Decree. Among the family court's findings was the statement that "[Margot] did not receive a copy of the Fund's

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[6] The minute record is not part of the record on appeal and ordinarily may not be cited. See generally Hawai'i Rules of Appellate Procedure (HRAP) Rule 10(a) (1999). The litigants do not dispute the form and contents of the minute order and is referred to only insofar as it is necessary to resolve a jurisdictional issue. See discussion infra.

September 8, 1997 letter until [September 1, 1998] when a copy was faxed to [Margot's] counsel by [Louan's counsel]."[7] The court also filed a DRO that same date specifying that: (1) the portion of Alfred's total, unadjusted monthly pension benefit, which accrued in the Plan during Alfred's and Margot's marriage, constituted the "marital property" of Alfred and Margot and that Margot was entitled to half of this benefit; and (2) Margot should be treated as if she were Alfred's surviving spouse with respect to Alfred's retirement benefits "for the purpose of the 50% pre-retirement surviving spouse benefit provided[,]" payable from February 1, 1998 until she dies. The effect of the family court's DRO is that, if it is qualified by the Plan, Margot would be entitled to survivor benefits as a QPRSA beginning February 1, 1998, until she dies, and Louan is not entitled to any survivor benefits from the Fund. Although not part of the record on appeal, Louan states in her opening brief that the Fund accepted the court's DRO as a QDRO in February 2000. According to Louan, she filed an administrative appeal of this determination, and the

[7] The family court's finding actually states that the September 7, 1997 letter was faxed to Margot's counsel by Louan's counsel on June 1, 1998, rather than September 1, 1998. The letter bears a fax imprint with the name of Louan's counsel and a date of June 1, 1998, but the significance or accuracy of this imprint is unclear. The affidavit of counsel for Margot indicates that the letter was received on September 1, 1998, and Louan states in her opening brief that she assumes that the court's reference to June 1 was a clerical error. Thus, both parties agree that the letter was received on September 1, 1998 rather than June 1, 1998. We, therefore, utilize September 1, 1998 as the operative date. The correct date is not material to the outcome of this case because, as discussed infra, the dispute is over the basis of the family court's finding that Margot, rather than Margot's counsel, received the September 7, 1997 letter sometime in 1998.

appeal was pending at the time the parties filed their briefs in this case.

Louan filed a motion for reconsideration on November 24, 1999, which was summarily denied by the family court on December 17, 1999. Louan filed a notice of appeal on January 13, 2000.

III. STANDARDS OF REVIEW

Questions of jurisdiction are considered de novo. Beneficial Hawai'i v. Casey, 98 Hawai'i, 159, 164, 45 P.3d 359, 364, reconsideration denied, 98 Hawai'i 159, 45 P.3d 359 (2002); State v. Adam, 97 Hawai'i 475, 481, 40 P.3d 877, 883 (2002). Questions of statutory interpretation are reviewed de novo. Office of Hawaiian Affairs v. State, 96 Hawai'i 388, 394, 31 P.3d 901, 907 (2001).

The family court's legal conclusions are reviewed de novo. See In re Doe, 96 Hawai'i 272, 283, 30 P.3d 878, 889 (2001). Findings of fact are reviewed under the clearly erroneous standard, id., and the family court's "equitable" decisions are reviewed under the abuse of discretion standard. See generally In re Doe, 84 Hawai'i 41, 46, 928 P.2d 883, 888 (1996).

IV. DISCUSSION

A. Appellate Jurisdiction: Timeliness of Louan's Appeal

Margot contends that this court lacks jurisdiction because Louan's appeal is untimely inasmuch as it was not filed within thirty days of the family court's September 24, 1999 minute order. Appellate jurisdiction is a base requirement to resolve an appeal, and this court has an obligation to determine that such jurisdiction exists. See Peterson v. Hawai'i Elec. Light Co., Inc., 85 Hawai'i 322, 326, 944 P.2d 1265, 1269 (1997).[8]

Margot submits that September 24, 1999 -- the date of the family court's minute order -- is the relevant date for

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[8] There are two other issues concerning appellate jurisdiction that are not raised by the parties. First, Louan is not a formal party to the divorce action between Margot and Alfred. However, in opposing Margot's motion, she was permitted to participate in the family court proceedings as if she were a party, see discussion in subsection B. infra, and she is clearly "aggrieved" by the family court's ruling insofar as she contends that the family court's ruling has wrongfully caused her to lose the survivor benefits to which she would otherwise be entitled. Consequently, we hold that Louan has standing to appeal the family court's ruling. Cf. Makani Dev. Co., Ltd. v. Riley, 4 Haw. App. 542, 543 n.1, 670 P.2d 1284, 1286 n.1 (1983) (purchaser at a judicial foreclosure sale had standing to appeal even though not a party to the foreclosure proceeding).

Second, the family court's orders are neither (1) a final judgment, order, or decree, see HRS §§ 571-54 and 641-1(a), or (2) a certified interlocutory order, HRS § 641-1(b), the two primary types of appealable orders. Nonetheless, the family court's orders conclusively determined the disputed issue of who was entitled to the rights to survivor benefits and are sufficiently distinct from the remainder of the divorce proceeding to meet the "requisite degree of finality of an appealable order." In re Doe, 96 Hawai'i at 283, 30 P.3d at 889 (citation and internal quotation marks omitted). Consequently, we hold that it has jurisdiction to consider Louan's appeal.

triggering the thirty-day deadline to file a notice of appeal mandated by HRAP Rule 4(a) (1985).[9] According to Margot, although a pending motion for reconsideration delays the time to file the notice of appeal, see HRAP Rule 4(a)(4)(v), the motion for reconsideration must be timely filed in the first place. A motion for reconsideration of a decree, order, or "decision and order" must be filed within twenty days after filing of the decree or order or announcement of the "decision and order," whichever occurs sooner. Hawai'i Family Court Rules (HFCR) Rule 59(g)(1) (1982). Margot claims that the family court's September 24, 1999 minute order constituted a valid "decision and order." Consequently, Margot maintains that a motion for reconsideration should have been filed within twenty days of September 24, 1999 in order to delay the time for appeal. Because Louan's motion for reconsideration was not filed until November 24, 1999 -- seven days after entry of the written DRO but two months after the date of the court's minute order -- Margot contends that the time to file the notice of appeal was not delayed by operation of rule and that, accordingly, Louan's December 17, 1999 notice of appeal was untimely. Margot's contention is without merit.

A "decision and order" of the family court was defined as "a written or oral decision issued by the court determining

[9] The applicable HRAP and family court rules discussed in this subsection have been substantially revised since Louan filed her motion for reconsideration and notice of appeal.

all or part of the issues raised by a pleading or pleadings in any action, where appropriate orders are embodied in or announced together with the decision." HFCR Rule 54(a)(3) (1982) (emphasis added). The family court's September 24, 1999 minute order, notifying the parties that it had decided in favor of Margot, did not "embody" or "announce" appropriate orders; the court's reasoning and the precise contours of its decision remained to be expressed in the written order. Consequently, the time within which Louan was required to file her motion for reconsideration did not begin on September 24, 1999.

Pursuant to HRS § 571-54 (1993), "[a]n interested party aggrieved by any order or decree of the [family] court may appeal to the supreme court for review of questions of law and fact upon the same terms and conditions as in other cases in the circuit court . . . ." The thirty-day time limit to file a notice of appeal from circuit court or family court cases runs from entry of the "judgment or order appealed from." See HRAP Rule 4(a). The applicable family court rules do not define the term "order," but define the term "decree" as including "a written decree, a written judgment or any written order from which an appeal lies." HFCR Rule 54(a)(1) (1982) (emphases added). Accordingly, under the circumstances of this case, the time period within which Louan was required to file her notice of appeal began on November 17, 1999, the date that the family court filed its written DRO --

not September 24, 1999, the date of the family court's minute order.

Although the thirty-day time period to file the notice of appeal began to run on November 17, 1999, it was delayed beginning on November 24, 1999, when Louan timely filed her motion for reconsideration. Pursuant to HRAP Rule 4(a)(4)(v), if a timely motion for reconsideration is filed, "the time for appeal for all parties shall run from the entry of the order" granting or denying the motion. The family court entered its order denying Louan's motion for reconsideration on December 17, 1999. Louan filed her notice of appeal on January 13, 2000. Accordingly, we hold that Louan's appeal is timely and that this court has appellate jurisdiction over the case.

B. Status of Alfred's Estate and Louan as Proper Parties to this Action

Louan contends that the family court erred in granting Margot's motion because neither Alfred's estate nor Louan are parties to this action. Louan points out that HFCR Rule 25(a) (1982) requires the family court to dismiss the action in the event of the death of a party if a proper representative of the party is not substituted for the deceased party. Margot submits that the doctrine of judicial estoppel should prevent Louan from advancing this argument. We agree with Margot.

Margot's motion is a continuation of a divorce proceeding between Margot and Alfred. HFCR Rule 25(a)(1) (1982) states:

> If a party dies and the case is not thereby extinguished, the court may on motion order substitution of the proper parties where appropriate. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of process. Unless the motion for substitution is made not later than 180 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(Emphasis added.) Margot, as the other party to the divorce action, or perhaps Louan, as a claimed "successor or representative" to Alfred's retirement interests, should have moved for substitution of a personal representative or special administrator to represent Alfred's estate. See HRS § 560:3-104 (Supp. 1998) ("No proceeding to enforce a claim against the estate of a decedent or the decedent's successors may be revived or commenced before the appointment of a personal representative.").

However, the foregoing defect does not require this court to vacate the family court's ruling. To begin, the primary dispute in this case concerns survivor benefits that are directly payable to either Louan or Margot and are not subject to testamentary or intestate transfer. See generally Boggs v.

Boggs, 520 U.S. 833 (1997). Morever, under the doctrine of judicial estoppel,

> a party will not be permitted to maintain inconsistent positions or to take a position in regard to a matter which is directly contrary to, or inconsistent with, one previously assumed by him [or her], at least where he [or she] had, or was chargeable with, full knowledge of the facts, and another will be prejudiced by his [or her] action.

Roxas v. Marcos, 89 Hawai‘i 91, 124, 969 P.2d 1209, 1242 (1998), reconsideration denied, 89 Hawai‘i 91, 969 P.2d 1209 (1999) (brackets omitted); see also Rosa v. CWJ Contractors, Ltd., 4 Haw. App. 210, 218, 664 P.2d 745, 751 (1983).

In this case, Louan asserted in her first memorandum opposing Margot's motion that she was not a proper party to the action and requested dismissal or a continuance to substitute the proper parties or to conduct discovery. A continuance was granted shortly thereafter. Nevertheless, Louan did not move to substitute the proper party on Alfred's behalf or to intervene, pursuant to HFCR Rule 24(a) (1982),[10] on her own behalf. In addition, Louan does not point to anywhere in the record demonstrating an attempt on her part to conduct discovery. Instead, Louan filed additional memoranda opposing Margot's

[10] HFCR Rule 24(a)(2) permits an individual to seek intervention "when the applicant claims an interest relating to the property, transaction or custody or visitation of a minor child which is the subject of the action and [the applicant] is so situated that the disposition of the action may as a practical matter impair or impede [the applicant's] ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

motion primarily on the substantive legal grounds discussed herein. Furthermore, Louan appeared at the September 3, 1999 hearing, filed a motion for reconsideration of the family court's November 17, 1999 order, and fully participated in all of the relevant family court proceedings. Thus, Louan has participated in all practical respects as a "party" to protect her asserted interests throughout this litigation. It is inconsistent for her to now claim that she is not such a "party," and, allowing her to do so would prejudice Margot, who has relied upon Louan's participation in the proceedings. Accordingly, we hold that Louan is estopped from claiming that she was not a proper party to this case for the purpose of defending her claim to survivor benefits from the Fund. See Ross v. Ross, 705 A.2d 784, 790-92 (N.J. Super. Ct. App. Div. 1998) (surviving spouse who participated fully in family court proceedings disputing ex-spouse's claim to retirement benefits was bound by family court's judgment notwithstanding the fact that she was not formally a party to the action).

C. Jurisdiction of the Family Court Pursuant to the Language of the Decree and HRS § 580-56

Louan contends that the language of the Decree and HRS § 580-56 (quoted infra) do not permit the family court to exercise jurisdiction over the rights to survivor benefits from Alfred's pension. We disagree with both of these contentions.

1. Language of the Decree

Louan contends that the family court did not have jurisdiction to amend the Decree in the manner in which it did because survivor benefits were not contemplated by the language of the initial Decree. Louan submits that the language in the Decree, specifying that Margot should receive benefits "if, as, and when" Alfred commences to receive them, indicates that Margot's receipt of benefits in the initial Decree was conditioned on Alfred's eligibility for benefits. Louan points out that, in contrast, the amended Decree provided Margot with a preretirement survivor annuity -- i.e., a benefit payable to her should Alfred die before he retired and became eligible for benefits. Thus, according to Louan, the amended Decree awarded Margot something that was not described in the initial Decree and, consequently, the family court had no jurisdiction to do so. Margot, on the other hand, points out that the initial Decree permitted the family court to enter orders that are "just and equitable" so long as the orders are not inconsistent with any other provision of the Decree. She submits that the amended Decree, permitting her to receive surviving spouse benefits, is "just and equitable" because she was married to Alfred during the entire course of his employment that led to the pension benefits. According to Margot, there is nothing in the amended Decree that is inconsistent with the initial Decree. We agree with Margot.

Louan, for her part, does not contend that it is inequitable for Margot to receive the surviving spouse benefits. Rather, Louan relies on case law in which several courts have construed DROs so as not to provide survivor benefits where express language mentioning such benefits is absent. For example, in Robson v. Electrical Contractors Association Local 134 IBEW Joint Pension Trust of Chicago, Pension Plan No. 5, 727 N.E.2d 692, reh'g denied, 727 N.E.2d 692 (Ill. App. Ct. 2000), the Illinois Court of Appeals, construing an apparently valid QDRO, held that a former spouse of a pension participant was not entitled to surviving spouse benefits because the language of the QDRO did not expressly provide for such benefits. See id. at 698. As the court pointed out, a QDRO must be drafted "to include very specific information with explicit instructions to the plan administrator." Id. at 697; see also supra at 9. A QDRO that fails to expressly provide for survivor benefits will not entitle the person named to receive survivor benefits from the pension plan. See id. at 698. In the instant case, however, the family court was not asked to determine whether the initial Decree met the stringent requirements to qualify it as a valid QDRO under federal law; as noted earlier, this task falls to the Plan. Rather, the family court was asked to exercise its authority, under state law, to issue a "just and equitable" order amending the Decree. The degree of specificity needed for the

latter is not governed by federal law. Thus, Robson is distinguishable from the instant case. Likewise, Dorn v. International Brotherhood of Electrical Workers, 211 F.3d 938 (5th Cir. 2000), also cited by Louan, is distinguishable on similar grounds. See id. at 946-47.

Louan further relies upon Quade v. Quade, 604 N.W.2d 778 (Mich. Ct. App. 1999). In Quade, the Michigan Court of Appeals affirmed a trial court's decision refusing to enter a DRO to provide for early retirement benefits because the divorce decree did not expressly and specifically provide for such benefits. See id. at 779-80. Although the appellate court appeared to base its decision on this ground, the decree in Quade also contained additional evidence supporting the court's decision in the form of handwritten language suggesting that the parties had considered and, inferentially, rejected, the applicability of early retirement benefits. See id. at 780. Thus, Quade is also distinguishable insofar as additional affirmative evidence -- not present in this case -- supported the Michigan court's determination that the decree did not contemplate early retirement benefits. Similarly, the court in Samaroo v. Samaroo, 193 F.3d 185 (3d Cir. 1999), another case cited by Louan, discusses additional evidence supporting its conclusion that a divorce decree lacking express mention of

survivor benefits does not provide for such benefits, see id. at 188 n.2, and, in any event, the conclusion is dictum. See id.

Louan also points to Roth v. Roth, 506 N.W.2d 900 (Mich. Ct. App. 1993). In Roth, the appellate court affirmed a trial court's refusal to amend a divorce decree in order to provide for a preretirement survivor annuity for an ex-spouse because the decree did not expressly provide for such benefits. See id. at 903-04. The provision in the decree describing the ex-spouse's entitlement to receive a "distribution" from the participant's pension plan was similar to the provision in the Decree in this case. See id. at 901. However, there is nothing in Roth which suggests that the decree in that case permitted the trial court to retain primary jurisdiction to enter "just and equitable" orders regarding the retirement issue. The Michigan appellate court's reasoning was based in part upon its conclusory statement that, "as written, the judgment precludes distribution of pension benefits to plaintiff [ex-spouse] until defendant [plan participant] begins to and only for so long as he does receive them." Id. at 903. The court concluded that, "regrettably, the law affords plaintiff no relief" from the terms of the decree. Id. at 904.

Most significantly, the plaintiff's motion to amend the decree in Roth was brought pursuant to Michigan Rules of Court (MCR) Rule 2.612(C) (1985), Relief from Judgment or Order, which

is similar to HFCR Rule 60(b).[11] See Roth, 506 N.W.2d at 903. The required showing for relief under this rule is clearly higher than when a case is being considered pursuant to the court's primary, or continuing, jurisdiction in the first instance, as in this case. See generally Hugel v. Hugel, 603 N.W.2d 121, 124 (Mich. Ct. App. 1999). Apparently applying the standard outlined by MCR 2.612(C)(1)(f), the court in Roth determined that there

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[11] MCR Rule 2.612(C) states:

> Grounds for Relief From Judgment.
>
> (1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:
>
> (a) Mistake, inadvertence, surprise, or excusable neglect.
> (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).
> (c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.
> (d) The judgment is void.
> (e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.
> (f) Any other reason justifying relief from the operation of the judgment.
>
> (2) The motion must be made within a reasonable time, and, for the grounds stated in subrules (C)(1)(a), (b), and (c), within one year after the judgment, order, or proceeding was entered or taken. A motion under this subrule does not affect the finality of a judgment or suspend its operation.
>
> (3) This subrule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding; to grant relief to a defendant not actually personally notified as provided in subrule (B); or to set aside a judgment for fraud on the court.

were no "extraordinary circumstances" that would permit it to exercise its discretion to modify the divorce judgment because the plaintiff was charged with knowledge of the law at the time of the divorce and "knew" that the decree did not provide for these benefits. See Roth, 506 N.W.2d at 903. In contrast to Roth, the language of the Decree in this case permitted the family court to retain primary jurisdiction to enter "just and equitable" orders over the retirement interest at issue. Accordingly, the Michigan court's decision in Roth is not directly applicable to this case.

In sum, Louan has not met her burden of establishing that the family court abused its discretion in amending the Decree, and we hold that the language of the Decree does not prohibit the family court from so doing.

2. HRS § 580-56

Louan also contends that the DRO violates HRS § 580-56. She submits that HRS § 580-56 requires the family court to "expressly reserve" its jurisdiction over Margot's and Alfred's property and that it did not do so in the Decree. Louan also appears to argue that the DRO violates HRS § 580-56 because it divides Alfred's property. These arguments require a closer review of HRS § 580-56.

HRS § 580-56 provides in relevant part:

> (a) Every decree of divorce which does not specifically recite that the final division of the property of the parties is reserved for further hearing, decision,

> and orders shall finally divide the property of the parties to such action.
>
> . . . .
>
> (d) Following the entry of a decree of divorce, or the entry of a decree or order finally dividing the property of the parties to a matrimonial action if the same is reserved in the decree of divorce, or the elapse of one year after entry of a decree or order reserving the final division of property of the party, a divorced spouse shall not be entitled to dower or curtesy in the former spouse's real estate, or any part thereof, nor to any share of the former spouse's personal estate.

(Emphasis added.) The "personal estate" of either party includes personal property such as retirement benefits. See Linson v. Linson, 1 Haw. App. 272, 278, 618 P.2d 748, 751, reconsideration denied, 1 Haw. App. 665, 618 P.2d 748 (1980). Thus, the statute mandates that, when the family court issues a divorce decree, the decree is final with respect to its division of the parties' property unless the court specifically retains jurisdiction for the purpose of additional property division. If the family court retains jurisdiction for further property division, it loses such jurisdiction and may not permit either party access to the property of the other party (1) once the court subsequently divides the property, or (2) after the passage of one year, whichever occurs first. See Boulton v. Boulton, 69 Haw. 1, 3-4, 730 P.2d 338, 339 (1986).

In this case, although the Decree permitted the family court to retain jurisdiction for the purpose of issuing "just and equitable" orders pertaining to the retirement interest, the Decree did not expressly provide for further division of Margot's and Alfred's property. Rather, the Decree permits the family

court to issue orders, inter alia, requiring the parties to make payments to one another to equalize income tax liabilities or, arguably, amending the Decree in order to correct errors that would disqualify the Decree as a QDRO. Moreover, even if the Decree did provide for further division of the parties' property, the strictures of HRS § 580-56 forbid the family court from doing so after the passage of one year. Accordingly, it is necessary to examine whether the November 1999 DRO further divided the retirement interest in a manner that permitted Margot to receive benefits that would ordinarily flow to Alfred. If so, then the amended Decree violated HRS § 580-56.

We conclude that nothing in the record suggests that, in permitting Margot to obtain a preretirement survivor annuity, the amended Decree affected Alfred's personal entitlement to retirement benefits. If the initial Decree had not been amended and Alfred had lived to commence collecting retirement benefits, his pension plan would have permitted him to receive benefits in the form of a QJ&SA. As noted earlier, a QJ&SA would have permitted Alfred to receive a fixed income for his lifetime, and if his spouse survived him, she would have been entitled to receive at least fifty percent of that fixed income for the remainder of her life. 29 U.S.C. § 1055(d). However, even if the initial Decree had been amended, as it was here, and Alfred had begun to collect his retirement benefits, he would still have

been entitled to the same benefits in the form of a QJ&SA. Similarly, even if Alfred had died before collecting retirement benefits, his surviving spouse, as defined by ERISA, would have been entitled to collect benefits in the form of a QPRSA in which Alfred would not collect benefits individually. See 29 U.S.C. § 1055(e). Thus, Alfred would have been entitled to the same benefits regardless of whether or not the family court amended the Decree. Accordingly, the family court's order amending the Decree did not change Alfred's benefits and did not permit Margot to obtain any portion of Alfred's property that would otherwise have accrued to Alfred.[12]

Based upon the foregoing reasoning, we hold that the family court's DRO amending the Decree was not inconsistent with the language of the initial Decree or the strictures of HRS § 580-56. Consequently, the family court possessed appropriate jurisdiction to amend the Decree.

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[12] In addition to the QJ&SA, federal law also requires that pension plans permit a recipient to elect to waive the QJ&SA form of benefit during a specified applicable period, see 29 U.S.C. § 1055(c)(1), presumably to receive benefits in some other form such as a lump sum payment or the "100% Contingent Annuitant" form of payment which Louan was permitted to elect on behalf of herself and Alfred. Thus, it could be argued that, by amending the Decree, the family court divided a portion of Alfred's personal property by depriving him of the right to elect to waive the QJ&SA and receive some other form of payment. However, the waiver of the right to collect benefits as a QJ&SA must be consented to by the participant's spouse. See 29 U.S.C. § 1055(c)(2). The person named in a QDRO is treated as the participant's spouse for purposes of collecting survivor benefits and consenting to the collection of benefits in some form other than a QJ&SA. See 29 U.S.C. § 1056(d)(3)(F). Thus, by amending the Decree to create a subsequent QDRO, the family court effectively changed the identity of the "spouse" who could collect survivor benefits and consent to the collection of benefits in some form other than a QJ&SA. Such an order, however, does not affect Alfred's interest in or entitlement to pension benefits in any way.

D. Family Court's Findings Regarding When Margot Learned That the 1989 Decree Was Not a QDRO

Louan next contends that the family court's finding of fact that "[Margot] did not receive a copy of the Fund's September 8, 1997 letter until [September 1, 1998] when a copy was faxed to [Margot's] counsel by [Louan's counsel]" is clearly erroneous. Louan submits that the declaration of Margot's counsel averring that the Decree was submitted to the Fund in 1989 and that "no word was received from the Fund until September 1, 1998, when [Louan's attorney] faxed to [Margot's counsel] a copy of the Fund's September 8, 1997 letter" does not support the family court's finding that Margot did not receive a letter from the Fund earlier. Louan is correct.

Under the clearly erroneous standard of review, this court will not disturb a finding of fact unless it is "left, after examining the record, with a definite and firm conviction that a mistake has been committed. The test on appeal is whether there was substantial evidence to support the conclusion of the trier of fact. Substantial evidence is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." In re Doe, 96 Hawai'i at 283, 30 P.3d at 889 (citation omitted). Here, the record contains an acknowledgment by the Fund that it received the Decree in 1989. However, the affidavit of Margot's counsel, stating that "no word" was received from the Fund until 1998 is

competent evidence only as to when Margot's counsel received the letter. Counsel's affidavit is hearsay and irrelevant with respect to Margot's knowledge of the letter and cannot support the trial court's finding that Margot did not receive the letter until 1998. Because there is no other evidence suggesting that Margot did not receive the letter until 1998, the family court's finding is unsupported in the record. Accordingly, we hold that the family court's finding is clearly erroneous.

Louan urges that the family court's decision should be reversed on the basis of the foregoing error. Louan points out that, in a reply memorandum to the family court, Margot argued that her delay in requesting the amended Decree was justified because she did not learn of the Plan's failure to qualify the decree as a QDRO until 1998. Louan further points out that Margot was informed by the Fund in 1989 that it would advise her as to its determination regarding the qualified status of the decree and that, "[n]otwithstanding this notice, Margot apparently never inquired about the status of the Fund's determination." Louan contends that Margot "sat on her rights" and, presumably, cannot now seek to have the Decree amended. We disagree.

HRS § 641-2 (1993) provides in pertinent part that "[n]o judgment, order or decree shall be reversed, amended or modified for any error or defect unless the court is of the

opinion that it has injuriously affected the substantial rights of the appellant." In order for the court's erroneous finding to constitute reversible error, Louan must indicate how the erroneous finding affected the outcome of the court's decision. See Wright v. Wright, 1 Haw. App. 581, 585, 623 P.2d 97, 100 (1981). She has not done so. Louan points to nothing in the record to suggest the events that transpired between either (1) the Fund's 1989 letter acknowledging receipt of the Decree and the Fund's September 7, 1997 letter addressed to Margot and Alfred; or (2) the September 7, 1997 letter and September 1, 1998, when Margot's counsel became aware of the letter's existence. Similarly, Louan points to nothing in the record concerning the communications, actions, or motivations of the parties until after September 1998. As an active participant in the relevant proceedings, Louan could have introduced evidence concerning factual matters that might have influenced the family court's discretionary determination to amend the Decree.[13] However, she did not do so. Instead, Louan chose to focus primarily on the legal -- rather than factual -- grounds for opposing Margot's motion. Accordingly, because Louan has not shown how the family court's erroneous finding of fact affected the court's decision in this case, we hold that the erroneous

[13] As indicated earlier, if Louan's status as a nonparty was an impediment to conducting discovery, she could have moved to intervene pursuant to HFCR Rule 24. See supra at 22.

finding did not affect Louan's substantial rights and does not constitute reversible error.

E. Whether the Amended Decree Interferes with Louan's Vested Rights Under ERISA

Louan contends that the family court erred by amending the Decree in favor of Margot because, under ERISA, the right to surviving spouse benefits associated with a participant's retirement plan vests in the participant's spouse on the date that the participant retires. Because Alfred was eligible for retirement benefits beginning December 1, 1997, and the Fund agrees that -- had he not died -- Alfred would have received benefits retroactive to that date, Louan submits that the rights to surviving spouse benefits vested in her on that date and that, therefore, the family court could not subsequently enter a DRO entitling Margot to these benefits. Alternatively, Louan contends that, under ERISA, the right to surviving spouse benefits vested in her when Alfred died and that the family court, for the same reason, could not subsequently award these benefits to Margot. We disagree with both contentions.

1. Vesting of Retirement Benefits in Current Spouse Upon Participant's Retirement

To support her contention that surviving spouse benefits vested in her on the date of Alfred's eligibility for retirement, Louan relies upon authority from the Third, Fourth, and Fifth Federal Circuits, which is discussed infra. The Fund,

in contrast, calls our attention to Directors Guild, supra, in support of its contention that Louan did not obtain vested rights to Alfred's pension benefits because Margot secured an interest in those rights prior to Alfred's retirement. Reviewing these arguments and the applicable portion of ERISA, we hold that the family court's DRO is not inconsistent with the provisions of ERISA and that, therefore, the family court did not err. First, we explain why ERISA does not prohibit the family court's DRO; second, we explain why we believe that the case law relied upon by Louan is either incorrect or distinguishable.

In Directors Guild, Suzanne Tise, the ex-spouse, had obtained a child support judgment against the pension plan participant, Charles Myers, in state court.[14] Directors Guild, 234 F.3d at 417. Over the course of the next ten years, Myers did not pay the judgment. See id. In an effort to collect the arrearage, Tise returned to state court in 1991 and secured an order effectively barring Myers's pension plan from disbursing any proceeds of the plan to Myers without first notifying Tise. See id. When the pension plan informed Tise in 1994 that she did not have a valid QDRO, Tise initiated state court proceedings to obtain an order that could be qualified as a QDRO and to enjoin

[14] Tise had actually never been married to Myers but was placed in the same legal position as an ex-spouse due to the fact that she represented the interests of the couple's minor children and thus was an appropriate "alternate payee" under ERISA. See Directors Guild, 234 F.3d at 420 n.3 and discussion infra concerning an "alternate payee." The distinction is not material to this case.

the pension plan from distributing the proceeds of the pension until the order was issued. See id. at 418. Various proceedings ensued over the course of the next two years, during which Myers died before entry of the order sought by Tise. See id. at 418-19. Prior to his death, Myers named another individual, Yvonne Curry, as the beneficiary of the death benefits payable under the plan.[15] Id. at 418. In April 1996 -- after Myers had died -- the state court entered an order, effective nunc pro tunc to 1991, enabling Tise to collect upon the child support arrearage by attaching the death benefits payable under the plan. See id. at 419. Curry, however, claimed that she, and not Tise, was entitled to the death benefits because, under ERISA, the benefits became vested in Curry upon Myers's death. See id. at 419. Therefore, Curry claimed that the state court's April 1996 order was unenforceable. Id. The pension plan filed an interpleader action in federal district court, and the district court ruled that the April 1996 order was enforceable, entitling Tise to an appropriate portion of the death benefits. See id. at 418-19.

Affirming, the United States Court of Appeals for the Ninth Circuit noted that "the QDRO provisions of ERISA do not

[15] Myers apparently died before retirement because the court stated that, "[u]nder the terms of [Myers's] pension plan, death benefits, in the form of 120 monthly payments equivalent to those Myers would have received himself had he retired the day before he died, then became payable to his designated beneficiary." Id. at 418. The court did not explain why Myers's benefits were not paid in the form of a QPRSA. The distinction, however, is not relevant to this case.

suggest that [the ex-spouse] has no interest in the plan until she obtains a QDRO, they merely prevent her from enforcing" an already-existing interest until the QDRO is obtained. Id. at 421 (citing In re Gendreau, 122 F.3d 815, 819 (9th Cir. 1997), cert. denied, 523 U.S. 1005 (1998)) (internal quotation marks and brackets omitted). Thus, the Ninth Circuit essentially held that Tise had an "already-existing interest" in Myers's pension plan before he died in the form of state court orders affecting his pension benefits. See id. at 421-23. The court concluded that, "[b]ecause a QDRO only renders enforceable an already-existing interest, there is no conceptual reason why a QDRO must be obtained before the plan participant's benefits become payable on account of his retirement or death." Id. at 421. The court based its conclusion on its analysis of "[s]everal features of [ERISA's] language and structure[,]" id., which we now discuss.

Directors Guild points out that there is no express language in ERISA mandating that a QDRO be obtained before the initial payout of benefits. Id. Indeed, the case against such a requirement is stronger than the mere argument that it is not expressly mentioned. An analysis of the language and structure of the relevant provisions of ERISA demonstrates that the lack of an express requirement that a QDRO be obtained before the initial payout of benefits is consistent with, and an essential part of, the overall scheme and intent of the law.

Under the pre-REA version of ERISA, a broad preemption provision superseded contradictory state law. The preemption provision, which is still in effect, states in relevant part that

> the provisions of this subchapter [including 29 U.S.C. §§ 1055 and 1056] . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit . . . .

29 U.S.C. § 1144(a). This preemption provision initially applied to ERISA's prohibition against the alienation or assignment of benefits, ERISA (1974) § 206(d)(1), 88 Stat. at 864 (now codified at 29 U.S.C. § 1056(d)(1)), and continues to do so. The anti-alienation provision states that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated."

However, the REA created an exception to ERISA's anti-alienation provision by providing that benefits could be alienated or assigned pursuant to a QDRO. Section 1056(d)(3)(A) states:

> Paragraph (1) [the anti-alienation provision] shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

(Emphasis added.) When a QDRO is obtained, ERISA mandates that:

> To the extent provided in any qualified domestic relations order-- . . . the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of section 1055 of this title (and any spouse of the participant shall not be treated as a spouse of the participant for such purposes)[.]

29 U.S.C. § 1056(d)(3)(F)(i). Thus, through the vehicle of a QDRO, the REA amended ERISA to create a mechanism whereby a participant's former spouse is entitled to be treated as the "current" spouse for purposes of receiving the benefits of a QJ&SA, qualified preretirement annuity, other form of benefit, or for purposes of waiving the QJ&SA.

Under ERISA, the term "qualified domestic relations order" or QDRO connotes a very specific meaning. According to 29 U.S.C. § 1056(d)(3)(B)(i):

> [T]he 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[.]

The requirements of subparagraphs (C) and (D) will be discussed infra. In the context of a QDRO, an "alternate payee" is "any spouse, former spouse, child, or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant." 29 U.S.C. § 1056(d)(3)(K). Finally, the term "domestic relations order" or DRO (in contrast to a "qualified" DRO) means:

> any judgment, decree, or order (including approval of a property settlement agreement) which--
>
> (I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

> (II) is made pursuant to a State domestic relations law (including a community property law).

29 U.S.C. § 1056(d)(3)(B)(ii).

The relevance of the foregoing is that ordinary state domestic relations law creates a DRO. However, any such DRO that awards benefits from an ERISA-qualified pension plan to someone other than the participant or "default" beneficiary as provided by ERISA is unenforceable against a pension plan unless the DRO is "qualified." As discussed supra, the pension plan determines whether the domestic relations order is properly qualified under federal law, 29 U.S.C. § 1056(d)(3)(G), and the plan's determination may be reviewed in state or federal court. 29 U.S.C. §§ 1132(a)(1)(B) and (e)(1). As further noted supra, see 29 U.S.C. § 1055(d)(3)(B)(i)(II), the qualification requirements that establish a DRO as a QDRO are listed in 29 U.S.C. §§ 1055(d)(3)(C) and (D). We turn now to these qualification requirements.

Subparagraph (C) states:

> 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 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.

29 U.S.C. § 1055(d)(3)(C). The requirements in this subparagraph describe the degree of specificity which a DRO must contain in order to qualify it as a QDRO [hereinafter, specificity requirements]. Note that there is nothing in the specificity requirements that addresses substantive state domestic relations law; their effect is simply that, in order to overcome ERISA's preemption of state law, the state DRO must contain a requisite degree of written specificity.

Subparagraph (D) contains additional requirements needed to establish a DRO as a QDRO. Subparagraph (D) states:

> 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 payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

29 U.S.C. § 1055(d)(3)(D). The requirements of subparagraph (D) provide that, in order to overcome ERISA's preemption of state law, the state DRO must meet certain substantive requirements. More succinctly, the state DRO cannot require the Plan to provide benefits: (i) in a form not contemplated by the provisions of the plan; (ii) in a greater amount than contemplated by the provisions of the plan; and (iii) that are already committed to someone else pursuant to an earlier state court order. The obvious import of these substantive requirements is to protect

pension plans from being raided by state court orders that would require plan administrators to pay out benefits not provided for, or contemplated by, the plan contract or federal law. Thus, by not recognizing such orders as "qualified," ERISA preempts any state court order that would endanger the resources of a pension plan. Cf. Dickerson v. Dickerson, 803 F. Supp. 127, 133 (E.D. Tenn. 1992) ("the intent of Congress in enacting ERISA was to protect the fiscal integrity of covered pension plans for the benefit of all of their participants") (emphasis omitted).

When viewed in conjunction with subparagraph (D), it is evident that the specificity provisions of subparagraph (C) serve a similar purpose. In particular, by mandating a requisite degree of specificity in order to qualify a DRO as a QDRO, subparagraph (C) ensures that plan administrators will be able to precisely identify their future obligations. Thus, both the specificity and substantive requirements enable plan administrators to fulfill their principal fiduciary obligations to participants and beneficiaries, as well as serve to implement one of ERISA's primary goals of providing a secure retirement income for the nation's workforce.

Notably absent from any of the foregoing provisions is any mention that benefits "vest" in any one of two or more beneficiaries with competing claims to those benefits. Nor would such a provision reflect the primary concern of ERISA or be

essential to its operation. The resolution of competing claims involving such matters as alimony, child support, and property (including pension interests) accrued during a marriage is entirely within the province of state domestic relations law; as illustrated above, ERISA's "qualification" of such domestic relations orders is concerned solely with enabling the plan to fulfill its fiduciary duties by ensuring that its obligations are clear and its liabilities are kept within the bounds of its contract and federal law. As long as ERISA's qualification requirements are met, any DRO permissible under state domestic relations law should be binding upon a pension plan. When Congress provided that a benefit should be available to "surviving spouses," see, e.g., 29 U.S.C. § 1055(a)(2), it expressly left to state law the determination of the identity of such surviving spouse. See 29 U.S.C. § 1056(d)(3)(F)(i) ("To the extent provided in any qualified domestic relations order . . . the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of section 1055 of this title (and any spouse of the participant shall not be treated as a spouse of the participant for such purposes)[.]") (Emphasis added.)); see also Boggs, 520 U.S. at 848 ("As a general matter, the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States. Support

obligations, in particular, are deeply rooted moral responsibilities that Congress is unlikely to have intended to intrude upon.") (Internal citations and quotation marks omitted.)); cf. In re Marriage of Oddino, 939 P.2d 1266, 1272 (Cal. 1997) ("To the extent former spouses and dependents have rights in a participant's retirement benefits, those rights derive not from ERISA, but from state domestic relations law."); see generally Patton v. Denver Post Corp., 179 F. Supp. 2d 1232, 1238 (D. Col. 2002) (concluding that "there is nothing in [ERISA] or its legislative history" that precludes state courts from exercising their authority to grant retrospective relief in a domestic relations case"); Hogle v. Hogle, 732 N.E.2d 1278, 1279, 1284 (Ind. Ct. App. 2000) (holding that ERISA did not prevent an Indiana state court from attaching the defendant's pension assets based upon a California writ of execution entered to enforce an alimony arrearage). Thus, nothing in the structure of ERISA supports Louan's claim that survivor benefits "vested" in her at Alfred's retirement. The most that can be inferred from the foregoing structure is that, under ERISA, the pension plan has a right to know the sum total of its actuarial obligation at a reasonable point in time -- such as the participant's retirement or, perhaps if it occurs earlier, the participant's death -- and that, after such point in time, state court orders cannot increase a plan's obligation. Therefore, as long as it does not

adversely affect pension plans in such a manner, there is nothing in the language or structure of ERISA that requires a QDRO to be obtained before pension benefits are initially paid out at the participant's retirement.

In addition to the foregoing, language in 29 U.S.C. § 1056(d) appears to specifically anticipate, and provide for, situations in which a valid QDRO does not issue until after a participant's benefits are initially paid out. Subparagraphs (G) and (H) identify the responsibilities of a pension plan once it receives a DRO. Specifically, "[o]nce the pension plan is on notice that a domestic relations order has issued that may be a QDRO, the plan may take a reasonable period to determine whether the order is a QDRO and therefore creates obligations for the pension plan." Directors Guild, 234 F.3d at 421 (emphasis in original omitted); 29 U.S.C. § 1056(d)(3)(G)(i). With respect to this "reasonable period," subparagraph (H) states in its entirety:

> (i) 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 subparagraph 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.
>
> (ii) If within the 18-month period described in clause (v) 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.
>
> (iii) If within the 18-month period described in clause (v)--

> (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.
>
> (iv) Any determination that an order is a qualified domestic relations order which is made after the close of the 18-month period described in clause (v) shall be applied prospectively only.
>
> (v) For purposes of this subparagraph, the 18-month period described in this clause 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.

29 U.S.C. § 1056(d)(3)(H).

Subparagraph (H) contains several provisions that demonstrate that the structure of ERISA specifically contemplates that the identity of the individual entitled to benefits may not be certain until after the initial payout of benefits begins. First, the very subject matter of subparagraph (H) itself is concerned with actions the pension plan must perform during a period in which it is being determined who is entitled to receive benefits. During this time period, the pension plan is required to segregate benefits during the first eighteen months that such benefits would be payable if a DRO is ultimately determined to be a QDRO. 29 U.S.C. § 1056(d)(3)(H)(i) and (v). "This benefit-segregation requirement obviously assumes that benefits may already be payable during the period the plan is determining whether the DRO is a QDRO." Directors Guild, 234 F.3d at 422.

Second, "Congress expressly contemplated that further state court proceedings might ensue during the 18-month QDRO-

determination period[,]" id., because 29 U.S.C. § 1056(d)(3)(H)(i) expressly provides for the possibility that the issue whether a DRO is a QDRO might have to be determined "by a court of competent jurisdiction" during this period. Moreover, because one would ordinarily expect a plan to be able to decide whether a DRO qualifies as a QDRO in a period of time far less than eighteen months, "the evident purpose of the 18-month period was to provide a time in which any defect in the original DRO could be cured" by a state court. Directors Guild, 234 F.3d at 422. For this reason, the statute provides that the ex-spouse or alternate payee is entitled to receive the segregated amounts set aside during the initial eighteen month period if he or she presents the plan with a DRO, "or modification thereof[,]" determined to be a QDRO. 29 U.S.C. § 1056(d)(3)(H)(iii); see also Directors Guild, 234 F.3d at 422.

Third, "the statute also provides with particularity the circumstances in which the putative alternate payee loses the right to hold up payment of benefits to the participant or his [or her] designated beneficiary." Directors Guild, 234 F.3d at 422. The statute requires that the segregated amounts be paid to the "default" beneficiary (such as a current spouse) if the DRO's status is still in doubt after eighteen months. 29 U.S.C. § 1056(d)(3)(H)(iii)(II). The statute cannot provide for the "loss" of the alternate payee's right to hold up payment of

benefits if it did not contemplate the alternate payee's right to do so in the first place.

Finally, the statute expressly provides that "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) (emphasis added). By so doing, ERISA contemplates that such an order might change the identity of the beneficiary. Accordingly, the provisions of ERISA specifically permit a state court to order payment of pension benefits to an alternate payee such as an ex-spouse after the initial payout of benefits has begun.

The foregoing provisions, in our view, as with the specificity and substantive requirements needed to qualify a DRO as a QDRO, effectuate the goal of ERISA to provide certainty for pension plan administrators concerning their obligations. Rather than having to factor in continued uncertainty over which beneficiary to pay and over the amounts payable, 29 U.S.C. § 1056(d)(3)(H) provides plan administrators with a bright line (the eighteen-month time period) to guide them in administering benefits. The provision is decidedly not concerned with identifying who, among competing claimants, is entitled to the benefits under state law.

In support of her contention that ERISA requires the vesting of benefits with her at Alfred's retirement, Louan relies primarily upon Hopkins v. AT&T Global Information Solutions Co., 105 F.3d 153 (4th Cir. 1997), Rivers v. Central and South West Corp., 186 F.3d 681 (5th Cir. 1999), and Samaroo. Rivers relied solely on the rationale in Hopkins without analysis. See Rivers, 186 F.3d at 683-84. Samaroo, which appears to rely secondarily on Hopkins, see Samaroo, 193 F.3d at 190, is a case in which the belatedly-entered DRO conflicted with one of the substantive requirements to create a QDRO and will be discussed infra. In addition, the New Jersey appellate court in Ross stated, subsequent to Hopkins, that "[n]o federal case has allowed a QDRO to be entered after a participant's death." Ross, 705 A.2d at 797. Because Hopkins appears to have been somewhat influential with other courts, we will review its analysis in detail.

Paul and Vera Hopkins were divorced in 1986 following a twenty-six-year marriage. Hopkins, 105 F.3d at 154. Although Paul's pension was deemed a marital asset, the divorce decree did not award Vera a portion of Paul's pension; instead, Paul was ordered to pay alimony. Id. After the divorce, Paul married Sherry, to whom he apparently remained married at the time of the appellate court's decision. Id. To collect the alimony, Vera obtained a judgment allowing her to attach Paul's wages. Id.

This collection method apparently worked well initially but lost its effectiveness when Paul retired in 1993. Id.

At his retirement, Paul and Sherry received his pension benefits as a QJ&SA, a form of benefit that, as discussed earlier, permitted Paul to receive a fixed income for life and Sherry to receive at least 50% of that income if Paul died before her. See id. at 154-55. After Paul began receiving retirement benefits, Vera obtained a judgment in state court against him for past-due alimony and sought to qualify the state court's DRO as a QDRO in order to collect the money out of the proceeds of Paul's pension benefits. Id. at 155. The state court subsequently divided the DRO into two orders, the first ordering payments to Vera from the pension benefits (pension order) and the second ordering payments to Vera from Sherry's surviving spouse benefits (surviving spouse order). Id. The pension plan conceded that the pension order was a valid QDRO, but maintained that the surviving spouse order was not a valid QDRO because the benefits had already vested in Sherry when Paul retired. Id. The United States Court of Appeals for the Fourth Circuit agreed. See id. at 157. In so doing, the court offered the following rationale, which, for the reasons discussed herein, we do not find to be persuasive.

First, the court in Hopkins looked to the definition of a QDRO. As noted earlier, 29 U.S.C. § 1056(d)(3)(B)(i) 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[.]

(Emphasis added.) Focusing on the phrase "with respect to a participant[,]" the court reasoned that, because Sherry was a "beneficiary" and not a "participant," the DRO obtained by Vera could not be enforced against Sherry's interests. See Hopkins, 105 F.3d at 156-57. The court apparently viewed this as evidence that the surviving spouse benefits vested in Sherry when Paul retired.

In our view, however, the court misread the statute by failing to give effect to the words "with respect[.]" If Congress had wanted to limit the effect of a QDRO to benefits designated only for participants, the statute plainly would have defined a QDRO as a DRO that "assigns to an alternate payee the right to[] receive all or a portion of the benefits payable to a participant under a plan[.]" Congress did not write the statute in this manner. "It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (internal quotation marks and citations omitted). "'Benefits payable with respect to a

participant' are, quite evidently, different from 'benefits payable to a participant.'" Directors Guild, 234 F.3d at 423. This understanding is confirmed by ERISA's definition of the term "participant":

> The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

29 U.S.C. § 1002(7) (emphasis added). Because a participant is any present or former employee or union member whose eligibility for benefits may trigger the eligibility of beneficiaries, those beneficiaries can reasonably be said to receive their benefits "with respect to" the participant. Directors Guild, 234 F.3d at 424; see also Dorn, 211 F.3d at 943 n.11 ("Use of the phrase 'with respect to' makes clear that alienability under a QDRO is not limited to those benefits that are 'payable to' a participant, i.e., only the participant's life annuity, but may also make other plan benefits, such as the surviving spouse's annuity available to an alternate payee."). Accordingly, the phrase "benefits payable with respect to a participant" does not provide support for the conclusion in Hopkins that ERISA forbids alienation of benefits from the present spouse after the date of a participant's retirement.

The court in Hopkins also pointed out that, following ERISA's enactment in 1974, regulations provided that surviving

spouse benefits were payable only if the surviving spouse was married to the participant both on the date of the participant's retirement and on the date of the participant's death. See Hopkins, 105 F.3d at 156 (citing 26 C.F.R. § 1.401(a)-11(d)(3)(i), (ii), (iii) (1977); see also ERISA (1974) § 205(d), 88 Stat. 863 (effectively requiring a participant and spouse to have been married for at least a one-year period ending on the date of the participant's death in order for the spouse to collect surviving spouse benefits). However, following enactment of the REA in 1984, surviving spouse benefits may be paid to a spouse who was married to a participant on the date of the participant's retirement, regardless of whether that spouse is married to the participant on the date of the participant's death. See REA (1984) § 205(f), 98 Stat. 1432, (now codified at § 29 U.S.C. § 1055(f)). The court in Hopkins found this change to be significant, reasoning that "the change in ERISA's marriage requirement [brought on by the REA] is evidence that the [s]urviving [s]pouse [b]enefits vest in the spouse married to the participant on the date of retirement." Hopkins, 105 F.3d 156.

The above statement, however, does not provide very strong evidence of the proposition it seeks to support. In contrast, there is a far more compelling explanation for the aforementioned change in the marriage requirement: it was necessary to implement the REA's goal of ensuring that former

spouses are not "cut off" from retirement benefits. As long as ERISA continued to require that a surviving spouse be married to the participant at the time of the participant's death, ex-spouses would not be able to receive any such benefits. Termination of the marriage-at-death requirement eliminated this problem. Thus, we do not find the change in ERISA's marriage requirement to be persuasive authority for the proposition that benefits vest in the current spouse at the time of the participant's requirement.

Similarly, the court in Hopkins also found it to be significant that the REA made it more difficult to replace a joint and survivor annuity with another form of benefit. See Hopkins, 105 F.3d at 156-57. Originally, ERISA required that pension plans offer the participant an opportunity to waive his or her right to receive a QJ&SA in favor of some other form of benefit within a "reasonable period" before the annuity starting date, as defined by regulations to be promulgated by the Secretary of the Treasury. ERISA (1974) § 205(e), 88 Stat. 863. Following adoption of the REA, a participant can only waive this right during the ninety-day period prior to retirement and can only do so with the written consent of the participant's current spouse. See REA (1984) §§ 205(c)(2)(A) and 205(c)(6)(A), 98 Stat. 1430-31 (subsequently codified at 29 U.S.C. §§ 1055(c)(2)(A) and 1055(c)(7)(A)). The court reasoned that

these changes, which provided more protection to current spouses, were "further evidence that the participant's spouse at the time of retirement has a vested interest in the [s]urviving [s]pouse benefits." See Hopkins, 105 F.3d at 157.

Again, the court's rationale provides, at best, weak evidence in support of the foregoing conclusion. The REA also amended ERISA's waiver provision to require the spouse's consent be in writing and the spouse's signature be witnessed by a plan representative or notary public. REA (1984) § 206(c)(2)(A) (now codified, with minor changes, at 29 U.S.C. § 1055(c)(2)(A)). The evident purpose of this provision is to: (1) protect spouses in general (note that some current spouses will become ex-spouses); and (2) protect pension plans against the subsequent claims of spouses by providing a definitive procedure to verify that they have, in fact, waived their entitlement to certain pension benefits. Furthermore, the REA provides that "[a]ny consent by a spouse [for waiver of the QJ&SA or QPRA] shall be effective only with respect to such spouse." 29 U.S.C. § 1055(c)(2) (emphasis added). Because ERISA provides that a QDRO may require a former spouse to be treated "as a surviving spouse for purposes of section 1055[,]" 29 U.S.C. § 1056(d)(3)(F)(i), the fact that a current spouse has waived the right to a QJ&SA or QPRA does not necessarily mean that a former spouse has waived his or her right to do so. Consequently, contrary to the reasoning in Hopkins, it

cannot be said that the REA's changes to ERISA's waiver provisions provide significant support for the proposition that benefits vest in a current spouse.

Finally, the court in Hopkins reasoned that vesting surviving spouse benefits in the participant's current spouse on the day the participant retires "balances the competing interests of the former and current spouses" inasmuch as "[a] former spouse's interest in the [s]urviving [s]pouse [b]enefits can be protected simply by obtaining a QDRO before the participant retires." Hopkins, 105 F.3d at 157. We do not find this rationale persuasive because, as discussed earlier, nothing in ERISA suggests that the law is concerned with "balancing" the competing interests of current and former spouses. Instead, ERISA leaves this task to state domestic relations law as long as the law does not interfere with the administration of pension plans.

Based on the foregoing, we do not find the conclusion in Hopkins that surviving spouse benefits vest in the participant's current spouse at the time of retirement to be persuasive. Accordingly, we decline to follow the rationale of Hopkins and hold that surviving spouse benefits did not vest in Louan upon Alfred's eligible retirement date of December 1, 1997.

2. Vesting of Benefits in Current Spouse upon Death of Participant

Louan also relies upon Samaroo to support her contention that surviving spouse benefits vested in her when Alfred died. In Samaroo, the participant, Winston, and his ex-spouse, Louise, were divorced in 1984. Samaroo, 193 F.3d at 186. The divorce decree provided Louise with a right to receive a portion of Winston's pension benefits when Winston began to receive them, but did not expressly provide that Louise should receive survivor benefits. See id. at 187. Winston died three years later while still actively employed and without having remarried. See id. at 187-88. As a consequence, there were no survivor benefits payable to anyone at the time of Winston's death. See id. at 188. When the pension plan refused to provide Louise with survivor benefits because they were not expressly mentioned in the divorce decree, Louise returned to state court and had the decree amended nunc pro tunc to expressly provide for these benefits. See id. at 187-88. After Louise joined the pension plan as a defendant and apparently sought to enforce the amended decree as a QDRO, the plan removed the case to federal court. See id. at 187-88.

Relying primarily on the substantive requirements of 29 U.S.C. § 1056(d)(3)(D)(ii), the United States Court of Appeals for the Third Circuit held that the amended decree was not a valid QDRO because it required the pension plan to pay "increased

benefits" beyond those that the plan was obligated to pay upon Winston's death. See Samaroo, 193 F.3d at 189-91. The court reasoned that

> successful operation of a defined benefit plan requires that the plan's liabilities be ascertainable as of particular dates. The annuity provisions of a defined benefit plan are a sort of insurance, based on actuarial calculations predicting the future demands on the plan. Some annuity participants will die without ever receiving a payment and some participants will receive payments far in excess of the value of their contributions. The fact that some participants die without a surviving spouse to qualify for benefits is not an unfair forfeiture, as [Louise] contends, but rather part of the ordinary workings of an insurance plan. Allowing the insured to change the operative facts after he has lost the gamble would wreak actuarial havoc on administration of the Plan.

Id. at 190. Consequently, the holding of Samaroo may be consistent with the goal of ERISA's QDRO provisions: to enable pension plan administrators to predict their obligations and, thus, to protect the actuarial soundness of pension plans. Samaroo suggests that a determination whether a belated DRO requires the payment of "increased benefits" is made by comparing the benefits payable pursuant to the DRO with the benefits that a plan would have had to pay on either the earlier of the participants's retirement or death.[16]

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[16] Directors Guild, on the other hand, appears to frame the issue differently. As previously indicated, the reasoning in Directors Guild is that an initial DRO creates an "interest" that places a pension plan on notice of a potential future obligation. By implication, an initial DRO allows a plan to project its potential obligation and, therefore, does not require the payment of "increased benefits" in contravention of 29 U.S.C. § 1056(d)(3)(D)(ii). Under the reasoning of Directors Guild, it would appear that a belated QDRO could require a plan to pay greater monthly benefits than the amount that would have been payable upon the earlier of the participant's death or retirement, as long as the plan was effectively served with "notice" of the potential "interest" by receipt of an earlier DRO.

(continued...)

Although Samaroo may be consistent with our interpretation of ERISA, it does not provide support for Louan's position in this case. Louan does not argue that the family court's DRO required the Fund to pay "increased benefits" beyond those it would have been expected to pay on January 17, 1998, the date of Alfred's death. Nor does the record contain any evidence demonstrating that the DRO required the Fund to pay "increased benefits" in comparison to its obligations on this date.[17] Accordingly, we hold that the rationale of Samaroo is not applicable to this case and that the rights to surviving spouse benefits did not vest in Louan upon Alfred's death.[18]

F. Whether the Amended Decree Interferes with Louan's Entitlement to the "Segregated Amounts" under 29 U.S.C. § 1056(d)(3)(H)

Louan also contends that the family court's DRO interferes with her entitlement to the "segregated amounts"

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[16](...continued)
Additionally, in Patton, the United States District Court for the District of Colorado agreed with the dissent in Samaroo that a pension plan is not forced to pay "increased benefits" when a state court order is issued nunc pro tunc to a point in time before the participant's death because, under state law, the order is retroactive to that time, and federal courts are obligated to give effect to state court orders pursuant to the Full Faith and Credit Act, 28 U.S.C. § 1738 (2000). Patton, 179 F. Supp.2d at 1236-37.

As will be seen, it is not necessary to resolve the competing interpretations of Directors Guild or Patton and Samaroo in this case.

[17] The record is also devoid of any indication that the Fund was required to pay "increased benefits" in comparison to its obligation on December 1, 1997, the date of Alfred's eligibility for retirement.

[18] In Hogan v. Raytheon, Co., 302 F.3d 584 (8th Cir. 2002), the United States Court of Appeals for the Eighth Circuit similarly held that a DRO may be qualified posthumously.

payable to her pursuant to 29 U.S.C. § 1056(d)(3)(H). See supra at 47. The relevant portion of subparagraph (H) states:

> (iii) If within the 18-month period described in clause (v)--
>
> (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.
>
> (iv) Any determination that an order is a qualified domestic relations order which is made after the close of the 18-month period described in clause (v) shall be applied prospectively only.
>
> (v) For purposes of this subparagraph, the 18-month period described in this clause 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.

(Emphasis added.) In this case, the November 17, 1999 DRO provides that Margot should receive benefits as a QPRSA beginning February 1, 1998, which is when the "18-month period" described in clause (v) begins to run. Therefore, pursuant to clause (iv), any determination by the Fund that the amended DRO is a QDRO made after August 1, 1999 -- eighteen months from February 1, 1998 -- can have prospective effect only. Accordingly, because the family court's DRO itself was not entered until November 17, 1999, any subsequent determination by the Fund that the DRO is a QDRO can have prospective effect only as of the date of such subsequent determination. Consequently, notwithstanding the language of the DRO, under ERISA, the Fund is only obligated to pay the amounts ordered by the DRO to Margot as of the date that it qualified the DRO.

Louan submits that, pursuant to 29 U.S.C. § 1056(d)(3)(H)(iii)(II), the Fund is required to pay any segregated amounts attributable to the period before it qualified the DRO to her. Louan is correct. However, we do not believe that this conclusion mandates that the DRO be vacated because it interferes with Louan's right to the segregated amounts. It simply means that, because the amended DRO was entered after August 1, 1999, under ERISA, its "qualification" as a QDRO is enforceable only "prospectively." In other words, federal law preempts the amended DRO to the extent that the DRO's language suggests that benefits can be paid to Margot retroactive to February 1, 1998. ERISA mandates no more than this "prospective" requirement. In all other respects, the DRO is enforceable. Therefore, although we agree with Louan that she is entitled to the aforementioned "segregated amounts," we disagree that the amended DRO interferes with her rights under ERISA. As long as the DRO is given prospective effect only as of the date it is qualified by the Fund, Louan will receive exactly what she is entitled to under ERISA. Accordingly, we hold that the family court's amended DRO does not interfere with Louan's right to the "segregated amounts" payable to her pursuant to 29 U.S.C. § 1056(d)(3)(H).[19]

[19] In its amicus brief, the Fund suggests that the application of 29 U.S.C. § 1056(d)(3)(H) is more difficult in practice than in theory. The Fund appears to seek guidance as to which dollar amount, and to whom, it owes the (continued...)

IV. CONCLUSION

Based on the foregoing, we hold that: (1) this court has jurisdiction in this case because Louan's notice of appeal was timely filed; (2) Louan is estopped from claiming that she was not a proper party to this case for the purpose of defending her claim to survivor's benefits from the Fund; (3) although the family court's finding of fact concerning the date that Margot received notice from the Fund that the decree did not meet the requirements of a QDRO is clearly erroneous, such was not reversible error; (4) neither (a) the language of the 1989 divorce decree, nor (b) Hawai‘i Revised Statutes § 580-56, deprived the family court of jurisdiction to amend the decree; (5) the family court's November 17, 1999 DRO amending the initial

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[19](...continued)
benefits attributable to the time period before it apparently qualified the DRO. Because of the unusual circumstances of this case, the Fund is correct as to the difficulty of implementing the law because the dollar amount of monthly benefits payable under the 100% Contingent Annuitant Option chosen by Louan is likely to be different from the dollar amount of monthly benefits payable as a QPRSA to Margot. This issue, however, is not properly before this court. It bears repeating that the federal issue in this case is limited to whether the family court erred in entering a DRO that interfered with Louan's vested rights or Louan's rights to certain segregated monies pursuant to 29 U.S.C. § 1056(d)(3)(H). As indicated above, the family court did not err. The interpretation of the law by which we have reached this conclusion, however, suggests that the Fund should pay to Louan either: (1) (a) the benefits attributable to the 100% Contingent Annuitant Option from the period November 1, 1997 through November 17, 1999, plus (b) the benefits attributable to the monthly benefits that would have been payable to Margot as specified in the DRO from November 18, 1997 until the date of the Fund's qualification of the DRO, plus (c) interest; or (2) (a) the benefits attributable to the 100% Contingent Annuitant Option from the period November 1, 1997 through January 31, 1998, plus (b) the benefits attributable to the monthly benefits that would have been payable to Margot as specified in the DRO from February 1, 1998 until the date of the Fund's qualification of the DRO, plus (c) interest; or (3) (a) the 100% Contingent Annuitant Option from the period November 1, 1997 until the date of the Fund's qualification of the DRO, plus (b) interest.

decree did not interfere with Louan's vested rights under the Employee Retirement Income Security Act (ERISA), because she had none; and (6) the family court's November 17, 1999 DRO does not interfere with Louan's rights to pension benefits payable before the date that the Fund qualifies the DRO. Accordingly, because, under ERISA, the DRO can have prospective effect only, we affirm the family court's November 17, 1999 order amending the initial divorce decree and its December 17, 1999 order denying Louan's motion for reconsideration.

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