IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

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PATRICK LOPEZ,
Petitioner/Plaintiff-Appellant,

vs.

STATE OF HAWAIʻI,
Respondent/Defendant-Appellee.

SCWC-11-0000512

CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS
(CAAP-11-0000512; CIV. NO. 09-1-1613)

February 12, 2014

DISSENTING OPINION BY ACOBA, J.

Statutes cannot conceive of every possible contingency, because it is in the nature of life that not all circumstances can be foreseen. Where a circumstance would not have plausibly been contemplated by the legislature, as judges, we are left to fill the gap between the statute and the unexpected event. In doing so, we must rely upon established notions of justice and thus strive for the result that is fair and balanced.

It is fair that an attorney, as should anyone else who performs work, be properly paid for his or her labor. The

benefit of support flowing to the child in this case would not have existed but for the attorney's efforts. That the attorney should be fairly compensated and that the child should receive the product of the lawyer's effort strikes a true balance that is in the public interest and wholly consonant with established legal principles.

Under the majority's decision, counsel is deprived entirely of any compensation for the work he did and of reimbursement for advances he made to cover the costs of the suit that ultimately benefitted the child. That result is neither fair nor balanced. The outcome is not in the public interest or compelled by any constitutional principle. Therefore, I must respectfully dissent.

I.

A.

On June 30, 2008, the law firm of Eric A. Seitz (Seitz) entered into an attorney's contingency fee contract with Petitioner/Plaintiff-Appellant Patrick Lopez (Lopez). The contract provided that Seitz was entitled to one-third of any recovery and was entitled to assert a lien for that amount upon any judgment or settlement.[1]

[1] The contingency fee agreement stated as follows:

For our professional fees we have agreed that our law firm will receive one-third (33-1/3%) of any recovery obtained

(continued...)

On July 13, 2009, Seitz sued Respondent/Defendant-Appellee the State of Hawaiʻi (the State) on behalf of Lopez, in the circuit court of the first circuit[2] (the court). On May 18, 2010, the Child Support Enforcement Agency (CSEA) notified Seitz that due to Lopez's failure to pay child support, CSEA held a lien pursuant to HRS § 576D-10.5 (Supp. 1997)[3] "upon all of

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[1](...continued)

whether by judgment, settlement, or otherwise, or such fees that may be awarded by a Court, at my sole discretion. My firm shall have and hereby is given a lien for its fees, costs, and expenses upon any judgment or settlement and is authorized to deduct such fees, costs, and expenses therefrom and to pay the balance to you.

(Emphases added.)

[2] The Honorable Patrick W. Border presided.

[3] HRS § 576D-10.5 provided in relevant part as follows:

(a) Whenever any obligor through judicial or administrative process in this State or any other state has been ordered to pay an allowance for the support, maintenance, or education of a child, or for the support and maintenance of a spouse or former spouse in conjunction with child support, and the obligor becomes delinquent in those payments, a lien shall arise on the obligor's real and personal property and the obligor's real and personal property shall be subject to foreclosure, distraint, seizure, and sale, or notice to withhold and deliver, which shall be executed in accordance with this section or applicable state law. No judicial notice or hearing shall be necessary prior to creation of such a lien.

. . . .

(c) The child support order or judgment filed through judicial or administrative proceeding in this State or any other state shall be recorded in the bureau of conveyances. The recordation of the order or judgment in the bureau of conveyances shall be deemed, at such time, for all purposes and without further action, to procure a lien on land registered in the land court under chapter 501. The lien shall become effective immediately upon recordation of the child support order and shall attach to all interest in real or person property then owned or subsequently acquired by

(continued...)

Lopez's personal and real property including a settlement or other funds which you are now holding or will be holding in the future for Lopez." The lien, in the amount of $23,969.99, was recorded on September 15, 1997.

Lopez's suit was referred to the Court Annexed Arbitration Program. On July 21, 2010, the arbitrator awarded Lopez $9,000.00. Seitz requested the State to pay Lopez the amount due in compliance with the terms of the arbitration award, and stated that the firm would retain the amount owed to the law firm, but pay the remainder to the CSEA. Seitz also asked that the State file an interpleader action with the court in the event it refused to pay. The State took the position that it was not required to satisfy the judgment because "the CSEA lien against [Lopez] has priority over all other liens." The State agreed to file an interpleader request with the court. However, an interpleader request was never filed.

On January 14, 2011, Lopez filed a Motion for Issuance of Writ of Execution/Mandamus with the court, requesting that the

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[3](...continued)

> the obligor including any interests not recorded with the bureau of conveyances or filed in the land court.
>
> . . . .
>
> (e) Any lien provided for by this section shall take priority over any lien subsequently acquired or recorded except tax liens.

(Emphases added.)

State pay to Lopez the amount due. The State filed an opposition memorandum, arguing that pursuant to HRS § 507-81 (Supp. 2004) (a)-(c)[4], and HRS § 576D-10.5, the CSEA lien had priority over

[4] HRS § 507-81 provided as follows:

a) An attorney has a lien upon:
(1) Actions, suits, and proceedings after commencement of the action;
(2) Judgments, decrees, orders, settlements, and awards entered by the court in favor of the client; and
(3) Any proceeds paid in satisfaction of the judgment, decree, order, settlement, or award.

(b) The lien shall be for:
(1) The fees and compensation specifically agreed upon with the client;
(2) The reasonable value of the services of the attorney, if there is no fee agreement;
(3) Any costs advanced by the attorney; and
(4) Any fees or commissions taxed or allowed by the court.

(c) Except for tax liens, prior liens of record on the real and personal property subject to the lien created by this section, and as provided in section (d), the attorney's lien is superior to all other liens.

(d) When the attorney's lien attaches to a judgment, settlement, or decree allowing or enforcing a client's lien, the attorney's lien has the same priority as the client's lien with regard to personal or real property subject to the client's lien.

(e) The attorney's lien on a judgment, decree, order, settlement, or award remains valid as long as the judgment, decree, order, settlement, or award remains valid.

(f) To be enforceable under this section, a notice of claim of the attorney's lien shall be filed:

(1) Before the complaint is dismissed by stipulation;
(2) Before the complaint is dismissed by order of the court; or
(3) Not later than one year after entry of final judgment is filed and disposition of any appeal thereof.

(g) Except as provided by subsections (i) and (j), the attorney's lien is not affected by a settlement between the

(continued...)

Seitz's attorney's lien. Therefore, the State requested that the court deny Lopez's motion and "order that the State pay all judgment proceeds . . . directly to the [CSEA.]" The CSEA filed a substantive joinder in the State's opposition. Lopez filed a Reply arguing that the CSEA lien did not attach to the portion of the judgment owed to Seitz, because Seitz's lien created a property interest in the judgment and therefore the money owed to Seitz was not Lopez's property. Seitz also asserted that public policy favored giving attorneys' liens priority "over other judgment creditors' liens." On May 31, 2011, the court issued an

[4](...continued)

> parties to the action, suit, or proceeding before or after the judgment, decree, order, or award.
>
> (h) Except as provided by subsections (I) and (j), a party to the action, suit, or proceeding or any other person shall not have the right to discharge or dismiss any judgment, decree, settlement, or award entered in the action, suit, or proceeding until the lien and claim of the attorney for fees based thereon is satisfied in full.
>
> (I) A judgment debtor may pay the full amount of a judgment or decree into court, and the clerk of the court shall thereupon fully satisfy the judgment or decree on the record, and the judgment debtor shall be thereby released from any further claims thereunder.
>
> (j) If more than one attorney from the same firm appears of record for a party, the satisfaction of the lien created by this section by one of the attorneys is conclusive evidence that the lien is fully satisfied.
>
> (k) Attorneys have the same right and power over actions, suits, proceedings, judgments, decrees, orders, settlements, and awards to enforce their liens as their clients have for the amount due thereon to them.

(Emphases added.)

Order denying Lopez's Motion for Issuance of Writ of Execution/ Mandamus.

B.

Lopez appealed the Order denying his Motion for Issuance of Writ of Execution/Mandamus to the Intermediate Court of Appeals (ICA). In his Opening Brief, Lopez argued, inter alia, that attorneys have a property interest in judgments awarded to their clients, and that property interest was protected by the due process clause in Article I, Section 5 of the Hawaiʻi Constitution. Lopez's Reply Brief stated that "[Lopez] is asserting both [the] substantive and procedural due process rights of his attorneys in his challenge to HRS § 567D-10.5 as applied by the [S]tate in this case."

The ICA affirmed the court's order denying Lopez's Motion for Issuance of Writ of Execution/Mandamus. Lopez v. State, No. CAAP-11-0000512, 2012 WL 5520465 at *2 (Haw. App. Nov. 13, 2012) (mem.). The ICA did not discuss Lopez's due process arguments.

C.

Lopez filed an Application for Writ of Certiorari, asking, inter alia, whether the ICA gravely erred in concluding that HRS § 507-81 did not "provide a superior or separate right for an attorney's property interest in a judgment over a prior recorded lien." Lopez again asserted that "constitutional

considerations" such as an attorney's property interest in a judgment, supported satisfying an attorney's lien prior to payment of the CSEA lien.

In its Response, the State contended that "[Lopez's] substantive due process claim is [] frivolous" because "[t]he only property interest [Lopez's] attorney presently has is in the form of a lien." According to the State, under HRS § 507-81(c), prior recorded liens are accorded priority over attorneys' liens established by HRS § 507-81. The State asserted that giving priority to the CSEA lien "did not mean that [Lopez's] attorney lost his property interest; it means only that his property interest was itself a limited one" because it was "subordinate to CSEA's lien."

II.

Article I, section 5 of the Hawaiʻi Constitution provides that "[n]o person shall be deprived of life, liberty, or property without due process of law." The provision thus protects individuals deprived of a "property" interest by state action. See Doe v. Doe, ("Doe") 116 Hawaiʻi 323, 333, 172 P.3d 1067, 1077 (2007) ("'To state a claim under the fourteenth amendment [to the United States Constitution], a litigant must assert that some state action has deprived the litigant of a constitutionally protected 'liberty' or 'property' interest.'" (quoting Child Support Enforcement Agency v. Doe, ("CSEA v. Doe")

109 Hawaiʻi 240, 247, 125 P.3d 461, 468 (2005))); see also, Slupecki v. Admin. Dir. of Courts, 110 Hawaiʻi 407, 412, 133 P.3d 1199, 1205 (2006) (recognizing the guarantee in art. I, section 5 of the Hawaiʻi Constitution that "no person shall be deprived of life, liberty, or property without due process of law.").

This court has recognized that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Sandy Beach Def. Fund v. City & Cnty. of Honolulu, 70 Hawaiʻi 361, 377, 773 P.2d 250, 260 (1989) (internal quotation marks and citation omitted). Further, "[a] person's interest in a benefit constitutes a 'legitimate claim of entitlement' if it is supported by contractual or statutory language that might be invoked at a hearing." Alejado v. City & Cnty. of Honolulu, 89 Hawaiʻi 221, 227, 971 P.2d 310, 316 (App. 1998) (quoting Perry v. Sindermann, 408 U.S. 593, 601 (1972)) (other citation omitted).

In this case, Seitz contractually agreed to represent Lopez on a contingency fee basis, and thus his claim of entitlement is supported by contract. Seitz's fees were, in effect, wages or earnings for the firm's labor on the case. Such fees are "property" for due process purposes. See e.g., Sniadach v. Family Fin. Corp., 395 U.S. 337, 338-39 (1969) (applying

procedural due process analysis to process for garnishment of wages). Hence, Seitz's attorney's fee consisting of one third of the tort recovery against the State was "property," and thus subject to the protection of the due process clause.

III.

A.

Contingency fee agreements afford access to the courts, most commonly for those individuals who otherwise would not be able to afford counsel. "A contingent fee contract has been defined as a fee agreement under which the attorney will not be paid unless the client is successful." Robert L. Rossi, Attorneys' Fees § 2:1; see also Black's Law Dictionary 362 (9th ed. 2009) (defining a contingent fee as "[a] fee charged for a lawyer's services only if the lawsuit is successful or is favorably settled out of court"); Hawaiʻi Rules of Professional Conduct (HRPC) Rule 1.5(c) ("A fee may be contingent on the outcome of the matter for which the service is rendered[.]"). Consequently, "[m]ost commonly, the attorney, as compensation for services rendered in litigating the client's claim, is to receive a stipulated percentage or portion of the recovery in the event of a successful prosecution or defense of the action." Rossi, Attorney's Fees § 2.1 (emphases added); see also Black's Law Dictionary 362 ("Contingent fees are usually calculated as a percentage of the client's net recovery[.]").

Allowing the attorney to receive only a "portion of the recovery" is consonant with the purpose of contingency agreements. The purpose of the contingency fee system is to allow access to the courts for those who could not otherwise afford an attorney by "pay[ing] the lawyer out of any recovery." Arthur Andersen & Co. v. Perry Equipment Corp., 945 S.W.2d 812, 818 (1997) (emphasis added); see also Rossi, Attorney's Fees 2.3; Victor E. Schwartz & Christopher E. Appel, Exporting United States Tort Law: The Importance of Authenticity, Necessity, and Learning from our Mistakes, 38 Pepp. L. Rev. 551, 565 (2011) (noting that "contingency fees can have a worthy purpose, namely providing access to the legal system regardless of a person's ability to pay"); David A. Root, Note, Attorney Fee-Shifting in America: Comparing, Contrasting and Combining the "American Rule" and "English Rule", 15. Ind. Int'l § Comp. L. Rev. 583, 593 (2005) ("[T]he major purpose of the contingency fee was to provide open access to the courts for all people, regardless of their financial station."); cf. HRPC Rule 1.8 cmt. (stating that a lawyer can advance court costs and litigation expenses, regardless of whether those funds will be repaid, because such advances are "virtually indistinguishable from contingency fees and help ensure access to the courts"). In other words, in a contingency fee contract, the lawyer is awarded a portion of the recovery because it is assumed that the client lacks sufficient

assets with which to pay the attorney. See Arthur Andersen, 945 S.W.2d at 818.

Similarly, the American Bar Association (ABA) Model Code of Professional Responsibility recognizes that historically, contingency fees were allowed because "(1) they often . . . provide the only practical means by which one having a claim against another can economically afford, finance, and obtain the services of a competent lawyer to prosecute his claim, and (2) a successful prosecution of the claim produces a res out of which the fee can be paid." Model Code of Prof'l Responsibility EC 2-20 (1980). While "it is not necessarily improper" to do so, "a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee." Id.

Clients who agree to be represented on a contingency basis generally lack the funds to pay an attorney personally. See William B. Hairston, III, The Ranking of Attorney's Liens Against Other Liens in the United States, 7 J. Legal Prof. 193 (1983) ("If the attorney is unable to recover his fee out of [the] judgment, then he will probably go uncompensated since a client, with so much debt that creditors are even attaching possible judgments of that client, is probably 'judgment proof.'"). Inasmuch as attorneys generally enter into contingent fee agreements with clients who could not otherwise afford their

services, a personal suit against a client to recover the amount owed as a contingency fee is likely to be futile.

In addition, suits against clients can be extremely damaging to an attorney's professional reputation. See Zach Elsner, Comment, Rethinking Attorney Liens: Why Washington Attorneys are Forced into "Involuntary" Pro Bono, 27 Seattle U. L. Rev. 827, 828 (2004) (noting that "filing suit against a client may damage the attorney's reputation," and that no attorney "wants to be known as [an] attorney who sues their clients."); see also R. J. Robertson, Jr., Attorney's Liens in Illinois: An Analysis and Critique, 30 S. Ill. U. L.J. 1, 1 (2005) ("[S]uing a client is not attractive from a public relations perspective."). Thus, as a practical matter, once the judgment is exhausted, any remaining attorney's lien will be abrogated. See Elsner, Rethinking Attorney Liens, 27 Seattle U. L. Rev., at 844 n.128 ("For practical reasons, a reasonable attorney would not likely assert a lien against a former client who is unable to pay."). In practice, attorneys simply do not sue their clients to recover contingent fees if funds from the judgment are exhausted. See id.

Finally, because contingency fee-based clients generally do not have the ability to pay for attorneys' fees, to require an attorney to assert a lien against those clients when the entire judgment or settlement received from the lawsuit is

depleted places those attorneys in an ethically compromising position. The ABA advises that an attorney "should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client." Model Code of Prof'l Responsibility, EC 2-23. "The same standard should be applied in determining whether or not to exercise an attorney's lien." ABA Comm. on Ethics & Prof'l Responsibility, Informal Op. 1461 (1980) (withdrawn on other grounds by Informal Op. 86-1520 (1986)). "Financial inability of the client to pay the amount owing," on a lien, however, "does not constitute fraud or gross imposition by the client." Id.

Therefore, an attorney is not "ethically justified" in asserting a lien when the client is financially unable to pay. Under such circumstances, the ABA advises the attorney to forego the lien. Id.; see also Jenkins v. Weinshienk, 670 F.2d 915, 920 (1982) (stating that "[a]n exception [to asserting an attorneys' lien] is also recognized when the client is financially unable to post a bond or pay . . . ."). Generally, contingency-based clients are unable to pay attorneys' fees, and as an ethical matter, attorneys would have no recourse to obtain compensation for their services if the recovery is entirely consumed by the creditor, even where the recovery was the product of the attorney's work. Consequently, the attorney's right to a lien is

effectively extinguished, both ethically and as a practical matter.[5]

B.

The contingency fee contract provided that in the action filed on behalf of Lopez "in connection [with] an injury suffered to [his] right hand at the Halawa Correctional Facility last year," "[f]or our professional fees we have agreed that our law firm will receive one-third [] of any recovery obtained[.]" [RA at 51] Seitz's firm was granted "a lien for its fees, costs, and expenses upon any judgment or settlement." (Emphasis added.) This appears to be standard language in continency fee contracts. For example, the sample contingency fee contract offered by the State Bar of California states that the attorney will have a lien that "will attach to any recovery [the c]lient may obtain, whether by arbitration award, judgment, settlement, or otherwise." The State Bar of California, Sample Written Fee Agreement Forms, at 26, available at http://www.calbar.ca.gov/Attorneys/Forms.aspx.

The maxim of expressio unius est exclusio alterius applies to the interpretation of contractual terms. Plumbers &

[5] The lien must be paid out of the res created through the successful prosecution of a claim. See Model Code of Prof'l Responsibility EC 2-20 ("Public policy properly condemns contingent fee arrangements in criminal cases, largely on the ground that legal services in criminal cases do not produce a res with which to pay the fee."). Where no such res remains, the attorney's lien is effectively null.

Steamfitters Local No. 150 Pension Fund v. Vertex Const. Co., Inc., 932 F.2d 1443, 1449 (11th Cir. 1991); see also Smart v. Gillette Co. Long-Term Disability Plan, 70 F.3d 173, 179 (1st Cir. 1995). By providing that Seitz's firm had a lien on any "judgment or settlement," the contingency fee contract indicated that the lien would extend only to a judgment or settlement, seemingly, the standard provision in such contingency contracts.

IV.

Here, as said, the State claimed the entirety of the settlement proceeds under the CSEA lien. Thus, inasmuch as a contingency fee lien would not survive an extinguishment of the settlement proceeds, the lien statutes HRS §§ 576D-10.5 and 507-81 would have no relevance to the circumstances here. As an ethical and practical matter, in contingency fee cases, attorneys cannot lien their clients' property or bring suit against their clients once the judgment proceeds are exhausted, for the reasons indicated previously. Nothing indicates Lopez is able to pay Seitz the value of his fees or to reimburse Seitz for costs advanced. ABA Model Code of Prof'l Responsibility EC 2-20 ("A lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a reasonable fixed fee.") Accordingly, Seitz must forego his lien. See id., at EC 2-23.

As noted supra, State action resulted in the elimination of Seitz's fees and lien. Accordingly, the State's action deprived Seitz of the vested property interest that the fees represented. The State's refusal to release that part of the settlement proceeds to satisfy Seitz's attorney's fees by applying HRS § 576D-10.5(e) and HRS § 507-81 is fundamentally unfair because the lien statutes assume the continuing existence of the right to lien property of a client that may come into existence in the future. As noted, however, the contingency-fee based attorney's lien was abrogated upon the State's forfeiture of the settlement proceeds because there was no longer a judgment and therefore nothing for the attorney's lien to attach to. Enforcing priorities among liens under the statutes cited by the State and the majority is meaningless if there is no lien that Seitz could enforce beyond the settlement proceeds in the first place. Accordingly, Seitz's due process right to property, i.e. his fees, under the Hawaiʻi Constitution, was violated.

V.

A.

Recognizing that an attorney's lien itself constitutes a "property interest" is consistent with the legislative history of HRS § 507-81, which as noted, provides the basis for attorneys' liens generally. In promulgating HRS § 507-81, the

legislature affirmed that one purpose of HRS § 507-81 was to "clarify an attorney's property interest in settlements and awards." H. Stand. Comm. Rep. No. 1016-04, in 2004 House Journal, at 1814. The committee explained that HRS § 507-81 "vest[ed] attorneys with clear property interests." Id. (emphasis added). Other courts have also explicitly held that an attorney's lien is a property right. See Reed v. Garner Industries, Inc., 832 S.W.2d 945, 948 (Mo. Ct. App. 1992) ("An attorney's lien upon a cause of action [gives] a property right [to] the attorney."); cf. LMWT Realty Corp. v. Davis Agency Inc., 649 N.E.2d 1183, 1186 (N.Y. 1995) (holding that a lien created pursuant to a contingent fee agreement gives an attorney a "vested property interest"). However, such considerations do not apply if the attorney may only look to the proceeds of the recovery to satisfy his fees. Unlike other lienors, the contingency-fee based attorney cannot retain lien rights into the future in the hope that the debtor will obtain assets that may be liened. The majority maintains that the legislature did not intend to grant an attorney an "exclusive property interest that is therefore not subject to any prior recorded liens." Majority opinion at 26 (emphasis in original). However, Seitz had a "property interest" in the fees for purposes of the due process

clause of the Hawaiʻi Constitution, separate and apart from any purported right to place a lien on the recovery.

B.

The purpose of HRS § 576D-10.5, to obtain additional monetary funds for the State, is promoted when attorneys sue on behalf of child support obligors. If a suit is successful, some or all of the child support could be paid. See note 3, supra. On the other hand, this interest is diminished when attorneys are not able to obtain fees earned by their representation from a fund that they brought into existence. Cf. Cetenko v. United California Bank, 30 Cal. 3d 528, 536 (1982) (noting that discouraging attorneys from initiating suits on behalf of clients who owe debts "would be detrimental not only to prospective litigants, but to their creditors as well").[6] This case is not about choosing between paying an attorney[7] or paying for child support; rather, the statutory scheme as applied by the State and the majority fails both the attorney and the child support system generally. Allowing rightful remuneration to the attorney for

[6] At oral argument, Seitz explained that due to the CSEA's interpretation of HRS §§ 576D-10.5 and 507-81, his firm had discontinued its representation of prospective clients who are the subject of CSEA liens.

[7] The amount of attorney's fees would be constrained by HRPC Rule 1.5(a) which states, "[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." In contingency fee cases, "the risk of no recovery and the conscionability of the fee in light of the net recovery to the client" must be considered. HRPC Rule 1.5(a)(8).

services already performed preserves opportunities for the recovery of child support monies.[8]

VI.

The majority states that Seitz had "constructive notice of the CSEA lien insofar as the administrative order regarding Lopez's child support debt was filed in the Bureau of Conveyances before the attorneys entered into a contingency agreement with Lopez." Majority opinion at 30. Similarly, at oral argument, the State contended that Seitz had notice of the CSEA lien because it was recorded.

However, from a factual standpoint, it is evident that Seitz did not have actual notice that the firm would not receive any fees from their representation, because had the firm known this, it would not have entered into a contingency fee contract with Lopez. See footnote 6, supra. Second, neither the State nor the majority cite any authority in support of their assertion that Seitz would have had "constructive notice" that the firm would not be able to recover its contingency fee. Black's Law Dictionary defines "constructive notice" as "notice arising by presumption of law from the existence of facts and circumstances that a party had a duty to take notice of, such as a registered deed or a pending lawsuit, notice presumed by law to have been

[8] Of course, if the amount recovered were sufficient to cover the child support component in this case and the attorney's fees no dispute would arise.

acquired by a person and thus imputed to that person." Black's Law Dictionary 1164.

In this case, there can be no constructive notice imputed to Seitz that the firm would not receive payment. The contingency fees were in effect extinguished by the State's assertion of the CSEA lien. There is no "presumption of law" that the lien statute would have to be applied to foreclose contingency-based fees when such fees could not be the subject of the lien statutes in the first place. Respectfully, under the circumstances, it cannot be assumed that Seitz had constructive notice, where, as explained supra, the State was seemingly acting against the public's interest in promoting the recovery of child support by precluding Seitz's recovery of the fees he earned and the costs he advanced.

VII.

Under the interpretation by the State and the majority, attorneys are not entitled to compensation for their labor, even when the State may be able to ultimately increase the amount accruing to child support beneficiaries through the labor of such attorneys. This cannot, under any conceivable factual scenario, be said to further the public interest.

The majority contends that "it would be improper for this court to rely on policy principles to reach [an interpretation contrary to the language or legislative history of

HRS § 576D-10.5 or HRS § 507-81]," majority opinion at 31. However, Seitz's "policy principles" actually point to the lack of a rational basis for the operation of HRS § 576D-10.5(e) and HRS § 507-891(c) in this case. Despite the fact that, as the majority points out, "'neither the courts nor the administrative agencies are empowered to rewrite statutes to suit their notions of sound public policy when the legislature has clearly and unambiguously spoken,'" majority's opinion at 32 (alteration omitted) (quoting State v. Harada, 98 Hawaiʻi 18, 50, 41 P.3d 174, 206 (2002) (Acoba, J., concurring and dissenting)), courts are empowered to hold that the government's action violates the due process rights of an individual. The law must afford a remedy for the deprivation of that right, for a "right" that lacks a remedy is no right at all.

For that reason, I must respectfully dissent.

/s/ Simeon R. Acoba, Jr.