STATEMENT OF FACTS

A black sand beach is located just outside of Hilo, Hawaii. The public has traditionally had continual access to this beach. Recently, however, a Canadian couple built a home near the beach. The Canadian couple also put up fences that block continuous public access to the beach. Inserted in the fences are walk-through gates which are closed at sunset and some days are not opened.

The land on which the Canadian couple have set their home and the surrounding lands were once part of an old sugar mill property. Maps dating back to the 1880s noted public beach access along this property. In addition, the county included the beach access in a 1970 survey. The Canadian couple had notice of the public's prescriptive rights of beach access when they purchased their property.

QUESTION PRESENTED

What is the status of the law in Hawaii concerning public beach access over the fenced-in property?

DISCUSSION OF AUTHORITY

I. Overview of the Law

As a general rule, beaches in Hawaii are publicly accessible regardless of ownership. *See Hawaii County v. Sotomura*, 55 Haw. 176, 182, 517 P.2d 57, 61 (1973), *cert. denied*, 419 U.S. 872, 95 S. Ct. 132 (1974) (stating that because the public has long used the beaches of Hawaii, such use "has ripened into a customary right"). The boundary between private

property and the public beach along the coastline is "the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of waves." *Application of Ashford*, 50 Haw. 314, 315, 440 P.2d 76, 77 (1968); *see also* Haw. Rev. Stat. § 205A-1; Haw. Admin. R. § 13-222-2; *Diamond v. State, Bd. of Land & Nat. Res.*, 112 Hawai'i 161, 171, 145 P.3d 704, 714 (2006).

Under the public trust doctrine, beaches are classified as essential public coastal recreational resources. *See* Haw. Const. Art. 12, § 4. One fundamental objective of Coastal Zone Management Act ("CZMA"), H.R.S. §§ 205A-1, *et seq.* is to provide coastal recreational opportunities accessible to the public. H.R.S. § 205A-2(b).

Accordingly, the public has a right of access along the beaches and shorelines in the State. *See* H.R.S. §§ 115-4, 115-5. This right of access along Hawaiian shorelines "includes the right of transit along the shorelines." H.R.S. § 115-4. Moreover, the longstanding public policy of Hawaii "favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible." *Sotomura*, 55 Haw. at 182, 517 P.2d at 61-62.

Generally speaking, the counties have the primary authority and duty to develop and maintain public access to and along the shorelines. *See* H.R.S. § 115-7 ("[t]he development and maintenance of the rights-of-way and public transit corridors shall be the responsibility of the county"); *see also* H.R.S. § 46-6.5 ("[e]ach county shall adopt ordinances which shall require a subdivider or developer, as a condition precedent to final approval of a subdivision, in cases where public access is not already provided, to dedicate land for public access by right-of-way or easement for pedestrian travel from a public highway or public streets to the

land below the high-water mark on any coastal shoreline"). The State is charged with the duty to preserve and protect coastal resources within the conservation district and support public access along and below the shoreline. *See* H.R.S. §§ 171-3, 205A-1, *et seq.*

Here, it may be argued that the fence erected by the Canadian couple unlawfully obstructs the public's right of access along the shoreline in violation of H.R.S. §§ 115-4 and 115-5; *see also* H.R.S. § 115-9(a), (b) (expressly recognizing that a fence is a physical impediment that may unlawfully prevent the public from traversing a public right-of-way or beach transit corridor). Counsel could, therefore, notify the local county planning department of this violation.

A landowner or other person who commits the offense of obstructing shoreline access to public property is guilty of a misdemeanor. H.R.S. § 115-9(c). To prove such an offense, it must be shown beyond a reasonable doubt that the beach access in question is a public right-of-way or beach transit corridor. *State v. Billianor*, 120 Hawai'i 383, 205 P.3d 648 (table), 2009 WL 1060463, at *1 (Ct. App. 2009). The minimum fine for such a violation is $1,000.00 for a second conviction and $2,000.00 for any conviction after the second conviction. H.R.S. § 115-9(d). Enforcement of this provision is usually accomplished through the county planning department.

Even so, it should be recognized that in some circumstances, it may be legal for a landowner to deny public access over his or her private lands. *See Billianor*, 2009 WL 1060463, at *1. A right of privacy exists over some shoreline accesses, usually due to their creation before the CZMA public access laws. In the absence of a specific and dedicated

public access easement, a court may be unwilling to recognize a right of public beach access over such private shoreline accesses. *See In re Banning*, 73 Haw. 297, 310, 832 P.2d 724, 731 (1992) (public's right to access beaches must be "balanced against the littoral landowner's right to the enjoyment of his land").

In an attempt to balance landowners' rights of privacy and enjoyment of their land with the public's need for beach access, the Hawaii Legislature enacted Chapter 520. H.R.S. §§ 520-1, *et seq.* "The purpose of this chapter is to encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes." H.R.S. § 520-1. For purposes of these statutes, "recreational purpose" includes but is not limited to "hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing, winter sports, and viewing or enjoying historical, archaeological, scenic, or scientific sites." H.R.S. § 520-2.

This Act strives "to promote a spirit of community so that beach access will be widely available to the public[.]" Note, *In re Banning: The Hawaii Supreme Court Keeps Hawaiian Beaches Accessible*, 1 Ocean & Coastal L.J. 97, 101 (1994). By removing the possibility that landowners will lose their property if they allow public beach access across their land, the Legislature hoped to "preserve and promote the existing practice of landowners allowing the public to cross their land to access the beach." *Id.* at 106.

It is the public's use of the land and not the landowner's consent that triggers application of the Act. *Id.* at 101. Thus, the burden is on the plaintiff to establish a public

claim of ownership or use. *Id.* at 106; *see In re Banning*, 73 Haw. at 312, 832 P.2d at 732. However, the Act does not address the possible consequences a landowner might face if he or she chooses to obstruct or block public beach access over his or her property.

In the event of a dispute, to the extent possible, Hawaii courts should favor allowing public beach access over private property. *Sotomura*, 55 Haw. at 61-62, 517 P.2d at 182. In the absence of an express public access easement, this may be accomplished through the recognition of a public prescriptive easement, an implied dedication, and/or the application of custom and the traditional gathering rights of native Hawaiians.

In the present case, it is unknown whether the deed to the Canadian couple's property grants the couple complete ownership of the fenced-off beach area. It may be assumed, however, that no specific and dedicated public access easement exists.

A. Public Prescriptive Easement

Title to an easement by prescription "may be acquired 'by use and occupation for the period prescribed by law adverse to the true owner of the fee.'" *Ryan v. Tanabe Corp.*, 97 Hawai'i 305, 311, 37 P.3d 554, 560 (Ct. App. 1999) (quoting *Lalakea v. Hawaiian Irrigation Co.*, 36 Haw. 692, 706, 1944 WL 5197, at *8 (Hawai'i Terr. 1944)). To establish a prescriptive easement, the claimant must prove the same elements necessary to prove a claim of adverse possession, that is, his use and enjoyment of the property is "adverse, under a claim of right, continuous and uninterrupted, open, notorious and exclusive, and with the knowledge and acquiescence of the owner of the servient tenement" for the full prescriptive period. *Ryan*, 97 Hawai'i at 311, 37 P.3d at 560 (internal quotation marks omitted). The time

period applicable to establish an adverse possession claim in Hawaii is 20 years. *See* H.R.S. §§ 657-31.5; 669-1.

A prescriptive easement may be obtained by either a private individual or by the general public. *Interior Trails Preservation Coalition v. Swope*, 115 P.3d 527, 529 (Alaska 2005). "A prescriptive easement obtained by a private person gives only that person the right to continued use, whereas a prescriptive easement obtained by the general public gives the right of use to the public at large." *Id.* at 529-30. If a public prescriptive easement exists, the owner of the property has no right to exclude the public from using the easement. *Jones v. Halekulani Hotel, Inc.*, 557 F.2d 1308, 1311 (9th Cir. 1977).

In regard to a public prescriptive easement, the public's use of the easement must be "constant, uninterrupted, and peaceful." *Id.* at 1310 (9th Cir. 1977). In addition, the nature of the use must be such as to show the right of use was exercised without regard to the property owner's consent. *Opinion of the Justices*, 139 N.H. 82, 92, 649 A.2d 604, 610 (1994). However, the claimant "need not show continued use by himself for the prescriptive period but may tack the use by his predecessors in title." *Tanaka v. Suetoshi Mitsunaga*, 43 Haw. 119, 1959 WL 11627, at *1 (Hawai'i Terr. 1959).

"Acquiring public beach access by prescriptive easement presents difficulty because such rights are personal. Generally, easements are not granted to 'the public as a whole.'" Asami Miyazawa, *Public Beach Access: A Right for All? Opening the Gate to Iroquois Point Beach*, 30 Univ. Haw. L. Rev. 495, 499 (Summer 2008). Even so, the prescriptive use doctrine may be applied where the "stabilization of long continued property uses" supports a finding that the general public has acquired prescriptive rights over a particular way.

Elmer v. Rodgers, 106 N.H. 512, 515, 214 A.2d 750, 752 (1965); *see also* Miyazawa, 30 Univ. Haw. L. Rev. at 499.

In some instances, courts have expressly ruled that a prescriptive easement exists which grants a right of public beach access. *See Jones*, 557 F.2d at 1310-11 (concluding that public easement existed over seawall fronting hotel and adjacent to beach); *see also Elmer*, 106 N.H. at 515, 214 A.2d at 752 (determining that public had acquired right to access shore of lake by prescription); *Seaway Co. v. Attorney Gen.*, 375 S.W.2d 923, 937 (Tex. Civ. App. 1964) (granting public access to beach based on easement by prescription).

Given the fact that *Jones* is a Ninth Circuit case, a Hawaii court may be willing to find that a prescriptive easement exists in the fenced-off beach property here. The public's use of this particular stretch of beach was constant, uninterrupted, and peaceful prior to the Canadian couple's erection of the fence. *See Jones*, 557 F.2d at 1310-11.

B. Implied Dedication

An implied dedication arises upon the property owner's intent to dedicate the property and the public's acceptance of the dedication. *The King v. Cromwell*, 3 Haw. 154, 1869 WL 3883, at *4 (Hawai'i King 1869). "When there is no express offer, the offer may be implied under the circumstances and the acceptance may also be implied by the nature of the public use." *In re Banning*, 73 Haw. at 305, 832 P.2d at 729. For the court to find an implied dedication, the public use must have continued for more than 20 years. *Id.* at 309, 832 P.2d at 731; *see* H.R.S. § 657-31 ("[n]o person shall commence an action to recover possession of lands, or make any entry thereon, unless within twenty years after the right to bring the action first accrued").

An implied dedication for public beach access creates a right for the public to access beaches using coastal property owners' private properties. This approach has been taken by the California courts. *See Gion v. City of Santa Cruz*, 2 Cal. 3d 29, 43, 84 Cal. Rptr. 162, 171, 465 P.2d 50, 59 (1970) (finding implied dedication by adverse use of beach and granting easement of access for the public).

Problematically, in *In re Banning*, the Hawaii Supreme Court ruled that the "implied dedication theory set forth in *Gion* is inconsistent with the legislative purposes expressed in HRS Chapter 520[.]" *In re Banning*, 73 Haw. at 307, 832 P.2d at 730. H.R.S. § 520-1 states that the purpose of Chapter 520 is to "encourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes." The general public cannot acquire any rights by prescription in the property as a result of such use. H.R.S. § 520-7.

Pursuant to *The King*, continuous adverse public use raises an assumption of implied dedication in Hawaii[.]" *In re Banning*, 73 Haw. at 308, 832 P.2d at 730. However, this "is not a conclusive presumption." *Id.*

Pursuant to *In re Banning*, it would be difficult to persuade a Hawaii trial court to find an implied dedication of the beach area in question here. Even so, it may be noted that *In re Banning* does not completely foreclose the possibility that under the appropriate circumstances, an implied dedication of land may be found which grants the general public an easement for shoreline access. *See* 73 Haw. at 310, 832 P.2d at 731.

C. Custom & Traditional Gathering Rights

1. Common Law Custom

Under the common law doctrine of custom, a use becomes legally established where there has been a very long and common use of a defined area. Miyazawa, *supra*, 40 Univ. Haw. L. Rev. at 500. A customary right "is considered ancient if it existed prior to the beginning of a state's political history, which in Hawai'i would be 1846." *Id.* at 505. For a custom to establish a legal use, the custom must be "(1) ancient; (2) exercised without interruption; (3) peaceable and free from dispute; (4) reasonable; (5) certain; (6) obligatory; and (7) not repugnant or inconsistent with other law or customs." *Id.* at 501.

Under the appropriate circumstances, the doctrine of custom may establish public beach access. *See State ex rel. Thornton v. Hay*, 462 P.2d 671, 673 (Or. 1969) (where public had been using the dry sand recreational area for recreational purposes since the beginning of the state's political history, public had an easement established by custom to go upon and enjoy the dry sand area for recreational purposes). Although such an easement may also be established by prescription or implied dedication, "prescription applies only to the specific tract of land before the court", whereas an established custom may be "proven with reference to a larger region." *Id.* at 676.

2. Ancient Hawaiian Gathering Rights and Customs

Native Hawaiian gathering rights are constitutionally protected. Haw. Const. Art. 12 § 7; *see also* H.R.S. §§ 1-1, 7-1. In the last 40 years, Hawaiian courts have used these native Hawaiian gathering rights as a means to secure public beach access.

The earliest of these cases recognizes that "Hawaii's land laws are unique in that they are based on ancient tradition, custom, practice and usage." *Application of Ashford*, 50 Haw. at 315, 440 P.2d at 77. The location of seashore boundaries dividing private land from public beaches according to reputation and ancient tradition, custom, and practice may be fixed by the testimony of kamaaina witnesses. *Id.* at 316, 440 P.2d at 77-78; *see Palama v. Sheehan*, 50 Haw. 298, 301, 440 P.2d 95, 97-98 (1968) (permitting testimonies of kamaaina witnesses that their ancestors had used a trail through plaintiff's property to travel to establish the existence of a right-of-way). "Kama' ina," in the native Hawaiian language, means "Native-born." Miyazawa, *supra*, 30 Univ. Haw. L. Rev. at 502 n.64.

In *McBryde Sugar Co., Ltd. v. Robinson*, 54 Haw. 174, 187, 504 P.2d 1330, 1339 (1973), *appeal dismissed, cert. denied*, 417 U.S. 962, 91 S. Ct. 3164, *and cert. denied*, *Robinson v. Hawaii*, 417 U.S. 976, 94 S. Ct. 3183, *and cert. denied*, *Albarado v. Hawaii*, 417 U.S. 976, 94 S. Ct. 3183 (1974), the Hawaii Supreme Court held that as between the State and adjoining landowners, the State was the owner of water flowing in the Koula stream and Hanapepe River. The right to water was not intended to be and could not be transferred to a landowner. *Id.* at 186-87, 504 P.2d at 1339. Rather, "the ownership of water in natural watercourses streams and rivers remain[s] in the people of Hawaii for their common good." *Id.* at 187, 504 P.2d at 1339.

In reaching this decision, the *McBryde* court recognized the 1847 "Principles Adopted by the Land Commission" and the 1850 "Enactment of Further Principles" as authoritative codifications of Hawaiian land custom. *Id.* at 184-87, 504 P.2d at 1337-38; *see* Miyazawa, *supra*, 30 Univ. Haw. L. Rev. at 503. "The 1847 Principles declared that the King retained

certain sovereign prerogatives as rights for the public which he was not authorized to convey to private persons", including the authority to provide "public thoroughfares and easements by means of roads, bridges, streets, etc. for the common good." Miyazawa, *supra*, 30 Univ. Haw. L. Rev. at 503 (internal quotation marks and footnotes omitted). The 1850 Further Principles, in turn, "declared that roads be free for all, and that the people had a right to water and rights-of-way." *Id.* (internal quotation marks and footnote omitted). Thus, *McBryde* "established that beach access, if it existed as a customary right, is a public right and, like the water right, is held by the state for the public." *Id.* (internal quotation marks and footnote omitted).

In order to exercise the constitutionally protected native Hawaiian rights of gathering, the claimant must first establish that he or she qualifies as a "native Hawaiian," meaning that he or she is a descendant of native Hawaiians who inhabited the islands prior to 1778 and asserts otherwise valid customary and traditional Hawaiian rights. *Public Access Shoreline Hawaii by Rothstein (PASH) v. Hawai'i County Planning Comm'n by Fujimoto*, 79 Hawai'i 425, 449, 903 P.2d 1246, 1270 (1995), *cert. denied, Nansay Hawaii, Inc. v. PASH*, 517 U.S. 1163, 116 S. Ct. 1559 (1996); *see also State v. Hanapi*, 89 Hawai'i 177, 186, 970 P.2d 485, 494 (1998). The customary and traditional Hawaiian right asserted must predate November 25, 1892. *State v. Zimring*, 52 Haw. 472, 52 Haw. 526, 474-75, 479 P.2d 202, 204 (1970).

Secondly, "once a defendant qualifies as a native Hawaiian, he or she must then establish that his or her claimed right is constitutionally protected as a customary or traditional native Hawaiian practice." *Hanapi*, 89 Hawai'i at 186, 970 P.2d at 494. Many of these customary or traditional rights are codified in H.R.S. §§ 1-1 and 7-1. *Hanapi*, 89

Hawai'i at 186, 970 P.2d at 494. However, "the fact that the claimed right is *not* specifically enumerated in the Constitution or statutes, does not preclude further inquiry concerning other traditional and customary practices that may have existed." *Id.*; *PASH*, 79 Hawai'i at 438, 903 P.2d at 1259.

Thirdly, the claimant must show that the exercise of the right "occurred on undeveloped or less than fully developed property." *Hanapi*, 89 Hawai'i at 186, 970 P.2d at 494; *PASH*, 79 Hawai'i at 451, 903 P.2d at 1272. If property "is deemed 'fully developed,' i.e., lands zoned and used for residential purposes with existing dwellings, improvements, and infrastructure, it is *always* 'inconsistent' to permit the practice of traditional and customary native Hawaiian rights on such property." *Hanapi*, 89 Hawai'i at 186-87, 970 P.2d at 494-95. If property is less than fully developed, the court must examine "the degree of development of the property, including its current uses, to determine whether the exercise of the constitutionally protected native Hawaiian rights on the site would be inconsistent with modern reality." *Id.* at 186, 970 P.2d at 494; *see also PASH*, 79 Hawai'i at 450-51, 903 P.2d at 1271-72.

In the present case, the named plaintiff would be required to prove that the descendants of native Hawaiians have been practicing their customary rights at the beach in question. These customs may include activities such as swimming or surfing, "as long as they relate to subsistence, religious or cultural uses, and are non-commercial." Miyazawa, *supra*, 30 Univ. Haw. L. Rev. at 505; *see* Haw. Const. art. 12, § 7.

II. Standing

In order to assert a claim against the Canadian couple, the named plaintiff must have standing. Here, however, the fence-in area of the beach has not caused a particularized harm to any single person. Rather, the lack of public beach access has harmed the general public.

In determining whether a named plaintiff has standing, "the crucial inquiry . . . is whether the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of . . . [the court's] jurisdiction and to justify the exercise of the court's remedial powers on his behalf." *Hawaii's Thousand Friends v. Anderson*, 70 Haw. 276, 281, 768 P.2d 1293, 1298 (1989) (citations and internal quotation marks omitted). The Hawaii Supreme Court "has adopted a broad view of what constitutes a 'personal stake' in cases in which the rights of the public might otherwise be denied hearing in a judicial forum." *Pele Def. Fund v. Paty*, 73 Haw. 578, 593, 837 P.2d 1247, 1257 (1992), *cert. denied*, 507 U.S. 918, 113 S. Ct. 1277 (1993).

In regard to cases involving the public interest, "a member of the public has standing to sue to enforce the rights of the public even though his injury is not different in kind from the public's generally, if he can show that he suffered an injury in fact, and that the concerns of a multiplicity of are satisfied by any means, including a class action." *Akau v. Olohana Corp.*, 65 Haw. 383, 388-89, 652 P.2d 1130, 1134 (1982); *see also In re Banning*, 73 Haw. at 312, 832 P.2d at 732-33.

The injury in fact component of the standing test requires that the plaintiff show that he suffered an actual or threatened injury as a result of the defendant's wrongful conduct. *Office of Hawaiian Affairs v. Hous. & Cmty. Dev. Corp. of Hawai%7fi*, 121 Hawai'i 324,

333, 219 P.3d 1111, 1120 (2009); *Pele Def. Fund*, 73 Haw. at 593, 837 P.2d at 1258. In addition, the injury must be fairly traceable to the defendant's actions, and it must be likely that a favorable decision would provide relief for that injury. *Office of Hawaiian Affairs*, 121 Hawai'i at 334, 219 P.3d at 1121; *Pele Def. Fund*, 73 Haw. at 593, 837 P.2d at 1258.

In regard to the multiplicity of suits factor, it should be concluded that granting standing to the named plaintiff is consistent with case law involving the lowering of the standing barriers in cases of public interest because a multiplicity of suits may be avoided by the court's allowing the named plaintiff to sue. *Office of Hawaiian Affairs*, 121 Hawai'i at 335, 219 P.3d at 1123. In other words, granting a remedy to the named plaintiff would provide relief to the named plaintiff and to other similarly situated persons. *Id.* In addition, unless standing is granted to the named plaintiff on behalf of the general public, there would be no remedy for the defendant's wrongful conduct. *Id.*; *Pele Def. Fund*, 73 Haw. at 594, 837 P.2d at 1258.

Under this test, Hawaii courts have ruled that neighboring landowners have standing to enforce the rights of the general public to use a footpath for shoreline access on the property of the defendant. *In re Banning*, 73 Haw. at 312, 832 P.2d at 732. Thus, in the present case, neighboring landowners or other persons living in the general vicinity should have standing to file the contemplated lawsuit against the Canadian couple. For the reasons discussed above in regard to ancient Hawaiian gathering rights, it would be most advantageous if the named plaintiff also fits within the classification of a "native Hawaiian."