IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

DANIEL J. SULLIVAN,
Plaintiff-Appellee,

v.

JOSE T. TAROPE, YVONNE I. TAROPE,
MARIE JO ESPIRITU TAROPE, AND
LANI LANE ESPIRITU TAROPE
Defendants-Appellants.

Supreme Court Appeal No. 03-0018-GA
Superior Court Case Nos. 98-1293, 98-1294, 98-1295

OPINION

Cite as: *Sullivan v. Tarope,* 2006 MP 11

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Saipan, Northern Mariana Islands

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FOR PUBLICATION

BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ROBERT J. TORRES, Justice *pro tempore;* RICHARD H. BENSON, Justice *pro tempore*

DEMAPAN, Chief Justice:

¶ 1 In this appeal, Defendant-Appellant Jose T. Tarope and co-defendants/appellants Yvonne I. Tarope, Marie Jo Espiritu Tarope, and Lani Lane Espiritu Tarope, appeal the Superior Court's order granting summary judgment in favor of Plaintiff-Appellee Daniel J. Sullivan (Sullivan). This court finds that Jose is estopped from challenging the divorce judgment of the Superior Court of the State of California, but summary judgment should not have been granted without an evidentiary hearing regarding the disputed existence of a partida. Thus, we AFFIRM in part and REVERSE in part and REMAND for trial.

I.

¶ 2 Jose and his second wife, Francisca A. Mullins[1], were married in October 1982 in Saipan and have three children. Francisca filed for divorce in Saipan in 1988. She left Saipan later that year and moved to San Diego, California with their three children.

¶ 3 Francisca lived temporarily at her sister's residence until she found her own place several months later. Francisca received public assistance from the State of California since Jose apparently provided no financial assistance for the children's support. Jose visited the family in San Diego and attempted to reconcile with Francisca sometime between May and June 1989 but Francisca refused.

¶ 4 The divorce action in Saipan was later set for trial and Francisca returned to Saipan to attend the proceeding. In the interest of their children, however, she reconciled with Jose

[1] We refer to the parties by their first name rather than Husband or Wife not out of familiarity or disrespect, but for ease of reference and to assist the reader.

on the condition that they would make their family home in San Diego. Jose agreed, and they both signed a stipulation for dismissal of the divorce petition.

¶ 5 Jose and Francisca then leased out their family home in Saipan. In September of 1989, they entered into a rental agreement for a residence in San Diego. Francisca went to this home immediately, while Jose went to Saipan to arrange for the shipment of their personal items and vehicle to San Diego. Jose joined Francisca in San Diego later that month.

¶ 6 While in California, Jose obtained a California driver's license. He was also listed as the operator of their car in an insurance policy issued in California. In December of 1989, Jose found a job in San Diego where he worked for about a month. Account statements from their bank account were mailed to a San Diego address until October of 1990.

¶ 7 In January of 1990 Francisca visited the Philippines. She alleges that Jose joined her there at a later date and that Jose's marital infidelity caused a dispute leading to the final breakup of the marriage. She returned to San Diego later that year without Jose.

¶ 8 Jose alleges that when he left San Diego in January of 1990, he intended never to return there. He has not been to San Diego since January of 1990 and insists that he has resided in and has been domiciled in Saipan since that time.

¶ 9 In October of 1990, Francisca filed for divorce in California. At that time, Francisca knew Jose was not in California and she indicated she did not know a specific address where Jose could be found. She filed a *Declaration in Support of Publication of Summons* with the California Court seeking service of the divorce summons by publication wherein she states:

> I, FRANCISCA TAROPE, declare as follows:

> [Husband] does not reside in the state of California, but resides in Saipan with frequent trips to the Philippines. His exact address is unknown, and he would be very difficult to locate. I therefore request publication.
>
> I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct. Executed this 20th day of September, 1990.

¶ 10 The California Court allowed service by publication, and service was made by publishing a notice in a San Diego newspaper. The California Court entered a default judgment (California Judgment) granting the divorce, effective June 28, 1991, and ordering child support payments in the amount of $3591.00 per month, commencing May 1, 1991.

¶ 11 On August 22, 1991, Jose applied for a CNMI marriage license to marry Maribeth Dela Cruz Espiritu. Jose submitted an affidavit along with the application for marriage license and swore that his marriage to Francisca was dissolved by "[d]ivorce or legal dissolution duly entered according to the laws of the State of California on 6/28/91." Jose attached a copy of the California Judgment to his affidavit. After obtaining the marriage license, Jose married Maribeth, his third wife.

¶ 12 In 1991, Francisca lived briefly in Florida and received public assistance while she was there. Florida initiated an action in the CNMI against Jose for reimbursement under the Uniform Reciprocal Enforcement of Support Act (URESA). The Florida URESA petition was forwarded to the CNMI Office of the Attorney General for prosecution along with a copy of the California Judgment. The petition was filed in the CNMI Superior Court as Civil Action No. 91-1129. Jose was personally served with the petition and summons but he failed to respond or appear at the hearing. Consequently, the court entered a default judgment against him

¶ 13 In 1995, Jose suffered a heart attack. Due to his ailing health, Jose alleges that at some point after this heart attack he gave all of his land by partida[2] to three of his daughters, Yvonne a daughter from his first marriage and Lani and Mari Jo, daughters from his third marriage

¶ 14 In 1996, Francisca retained Sullivan to collect child support in accordance with the California Judgment. Jose was personally served with a *Notice of Delinquency*, which listed the outstanding amounts and interest due under the California Judgment. On that same day, Jose sent a letter to Francisca and their three children who were living in California at that time. In this letter, Jose explained his inability to pay the back child support and Francisco's attorney fees, his poor health condition, and his love and affection towards his children.

¶ 15 The California Court in December 1996 ordered Jose to pay $301,266.20 in child support and interest, penalties of $135,093.42, costs in the amount of $319.09, and $218,179.81 in attorney's fees to Sullivan. *See Francisca A. Tarope v. Jose T. Tarope*, DN 61200 (Cal. Dec. 19, 1996) (Findings and Order After Hearing) ("Support Judgment").

¶ 16 In January 1997, Jose executed Deeds of Gift, conveying title to all of his real property to his three daughters. Jose deeded Tract 22628-E-1 to Lani, who was about three years old at the time of the conveyance, Tract 1691-2 to Marie Jo, who was five years old at the time, and Tract 22886 to Yvonne who was over eighteen. These deeds were all executed without valuable consideration. After these deeds were executed, Jose

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[2] Generally, a partida is a Chamorro custom whereby "the father calls the entire family together and outlines the division of the property among his children." *In re Estate of Deleon Castro*, 4 N.M.I. 102, 110 (1994) (*citing* ALEXANDER SPOEHR, SAIPAN: THE ETHNOLOGY OF A WAR-DEVASTATED ISLAND 136-37 (Chicago Natural History Museum, Fieldiana: Anthropology, vol. 41, 1954)).

continued to exercise control over the properties and kept the rental income generated from the properties.

¶ 17 The delivery of the deeds of gift from Jose to his daughters meant that Jose had no other land or non-exempt assets in his name. Neither he nor his wife Maribeth was employed, and the only income he received was from the rental of the properties previously conveyed to his daughters.

¶ 18 Seeking to enforce and collect the Support Judgment, Sullivan filed it in the CNMI Superior Court as a foreign judgment pursuant to 7 CMC §§ 4401-4408 and moved for an Order in Aid of Judgment. *See Sullivan v. Tarope*, Civ. No. 98-0151 (NMI Super. Ct. 1998). After a hearing on the motion, the Superior Court granted Sullivan's Motion for a Writ of Execution on various properties, including the three tracts previously conveyed to his daughters.

¶ 19 Sullivan then filed three complaints against Jose and each of the co-defendants/appellants Yvonne, Marie Jo, and Lani, to set aside Jose's conveyance of the properties by deeds of gift to each of them as being fraudulent and therefore null, void, or without effect. *See Sullivan V. Tarope*, Civ. No. 98-1293 (N.M.I. Super Ct.) ("C.A. 98-1293"), *Sullivan v. Tarope*, Civ. No. 98-1294 (N.M.I. Super. Ct.) ("C.A. 98-1294"), *Sullivan v. Tarope*, Civ. No. 98-1295 (N.M.I. Super. Ct.) ("C.A. 98-1295"). In each complaint, Sullivan alleged that Jose fraudulently conveyed his property less than three weeks after the issuance of the California order that required Jose to pay the attorney's fees. The Superior Court later consolidated the three complaints for further proceedings.

¶ 20 Jose and his three daughters filed identical answers to each of these complaints, claiming that the original California Judgment was invalid because the California court

had no jurisdiction over Jose. They argued that Jose was never served personally or by any other method and that he never appeared in person or by attorney in the action.

¶ 21 Sullivan moved for partial summary judgment on the issue of whether the California Court had jurisdiction over Jose when it entered the California Judgment ordering him to pay child support and whether Jose was validly served with process in that case according to the laws of California. Jose and his three daughters filed a cross-motion to dismiss the action on the grounds that the California Court lacked personal jurisdiction over Jose because his contacts with California failed to satisfy the "minimum contacts" test and that the child support order was therefore invalid and unenforceable.

¶ 22 The Superior Court ruled that the California Court had jurisdiction and granted Sullivan's Motion for Partial Summary Judgment and denied Defendant's Motion to Dismiss. *See Sullivan v. Tarope,* Civ. No. 98-1293D (N.M.I. Super. Ct. Aug. 29, 200) (Order Re. Plaintiff's Motion for Summary Judgment and Defendant's Motion to Dismiss). The court explained that service was adequate and that there were sufficient contacts between Jose and California for the California Court to assert jurisdiction over him. *Id*. at 5-11.

¶ 23 Sullivan thereafter moved for summary judgment asking the Superior Court to declare the deeds of gift from Jose to his three daughters void as a matter of law, thus permitting the properties to be subject to execution. Sullivan argued that there was no genuine issue of material fact in dispute and that the transfers were done to defraud Jose's creditors, which included Sullivan and Francisca.

¶ 24 Jose and his daughters countered by arguing that Jose's conveyances were made by a partida and therefore summary judgment should not be awarded because genuine issues

of material fact were in dispute. In support of their contention that the transfers were made by a partida, they submitted affidavits by Jose and Yvonne that made a general claim that Jose performed the Chamorro custom of partida.

¶ 25 The Superior Court struck these affidavits as being too conclusive and containing no factual support for the claim that the transfers were made by a partida. The court accordingly found there was no genuine issue as to whether there was a partida and granted summary judgment. The court went on to determine that there was no genuine issue that the transfers constituted fraud on Jose's creditors under common law and granted summary judgment on that issue, thereby voiding Jose's transfers to his three daughters. Jose and his daughters subsequently appealed to this Court.

II.

¶ 26 This Court has jurisdiction pursuant to Article IV, Section 3 of the Commonwealth Constitution and 1 CMC § 3102(a).

III.

¶ 27 The standard of review for determining whether the California Court had personal jurisdiction over Jose is a question of law, subject to *de novo* review. *Montecillo v. Di-All Chemical Co.*, 1998 MP 15 ¶ 1, 5 N.M.I. 185, 186; *Rajapaksha v. Jayaweera*, 1997 MP 13 ¶ 3, 5 N.M.I. 87, 88. ,

The trial court's grant of summary judgment in favor of Sullivan is also subject to *de novo* review. *Rayphand v. Tenorio*, 2003 MP 12 ¶ 3.

IV.

A. The Validity of the California Judgment.

¶ 28 Jose argues that the original California Judgment ordering him to pay child support is void for lack of personal jurisdiction. He bases this argument on what he claims to be an abridgment of his Fourteenth Amendment due process rights. Specifically, Jose argues that Francisca's attempts to notify him of the 1991 divorce proceedings fell short of the requirements announced by the U.S. Supreme Court in *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). There the Court stated "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id*. at 314, 70 S.Ct. at 657. We need not address this issue, however, because we hold that Jose is estopped from challenging the validity of the 1991 California child support order.

¶ 29 Although we base our holding today on equitable principles, Jose's legal argument is not lost on this Court. Indeed, it is true that a lack of personal jurisdiction renders a court order void. This concept was well established in common law, but it was not until the enactment of the Fourteenth Amendment that the United States Supreme Court determined personal jurisdiction to be a requirement of federal constitutional law binding on the states:

> Prior to the Fourteenth Amendment an exercise of jurisdiction over persons or property outside the forum State was thought to be an absolute nullity, but the matter remained a question of state law over which this Court exercised no authority. With the adoption of that Amendment, any judgment purporting to bind the person of a defendant over whom the

> court had not acquired in personam jurisdiction was void within the State as well as without.

Hanson v. Denckla, 357 U.S. 235, 249-50, 78 S.Ct. 1228, 1237-1238, 2 L.Ed.2d 1283 (1958) (citation ommited).

So fundamental are jurisdictional requirements that case law is replete with language that sounds of indignation at the idea of upholding a void judgment in the face of a motion to vacate. *See e.g. U.S. v. Indoor Cultivation Equipment from High Tech Indoor Garden Supply*, 55 F.3d 1331, 1317 (7th Cir. 1995) ("If the underlying judgment is void, it is a *per se* abuse of discretion for a district court to deny a movant's motion to vacate the judgment…") (citation omitted); *Orner v. Shalala*, 30 F.3d 1307, 1310 (10th Cir. 1994) (When a judgment is void, a FRCP 60(b)(4) motion to dismiss "is not a discretionary matter; it is mandatory.") (citation omitted); *Hengel v. Hyatt*, 252 N.W.2d 105, 106 (Minn. 1977) ("It is elementary that a motion to vacate a judgment for lack of jurisdiction merely asserts that the judgment is void and involves no question of discretion. … [I]t must be set aside without regard to such factors as the existence of a meritorious defense.") (citation omitted).

¶ 30 A void judgment may be attacked in one of two ways; directly or collaterally. A direct attack often comes in the form of a motion to vacate, which, in the CNMI, like many other U.S. jurisdictions using adopted or adapted versions of the Federal Rules of Civil Procedure, is a Rule 60(b)(4) motion requesting relief from a judgment or order. A collateral attack, by contrast, involves the party against whom the judgment was entered requesting in a subsequent proceeding that the judgment not be upheld. This case involves a collateral attack, since Jose is asking this Court to refuse to uphold and enforce the 1991 California Judgment. That said, due to our jurisdiction's lack of case law on the

subject, a general discussion of the court's role when faced with an allegedly void judgment is in order prior to analyzing the specifics of the current case.

¶ 31 Directly attacking a judgment gives the issuing court the option to rescind its judgment even after it has become final. Com. R. Civ. P. 60(b) states that "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding [if] … (4) the judgment is void." However, the rule makes relief contingent on filing the motion "within a reasonable time, and for reasons (1), (2), and (3) [mistake …; newly discovered evidence …; fraud …] not more than one year …" *Id*. This wording clearly requires a Rule 60(b)(4) motion to vacate a void judgment be brought "within a reasonable time," but the special prominence given to jurisdictional requirements has led most courts to find that there is no such time limit to bring a motion to vacate a void judgment. *See Harrison Living Trust v. Nevada State Bank*, 112 P.3d 1058, 1060 (Nev. 2005) (noting "that the majority rule permits an attack on a void judgment at any time …"). This is true even when the party against whom the void judgment was entered could, but for a lack of diligence, have brought a motion to vacate earlier. *Id*. Thus, it is commonly held that a void judgment may not be resurrected through latches. *U.S. v. One Toshiba Color Television*, 213 F.3d 147, 157 (3rd Cir. 2000) ("[N]early overwhelming authority exists for the proposition that there are no time limits with regards to a challenge to a void judgment because of its status as a nullity; thus laches is no bar to recourse to Rule 60(b)(4)."") (citing seven other circuits as following this proposition).

¶ 32 Rule 60(b) also allows for another distinct mechanism for seeking relief from a judgment. In exempting them from its time limitation, Com. R. Civ. P 60(b) recognizes

the equitable remedy of "independent actions." "This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to grant relief to a defendant not actually personally notified as provided by law …" *Id.* The "independent action" exception must be understood in its historical context. As the U.S. Supreme Court describes:

> In the years following the adoption of the [Federal] Rules [of Civil Procedure] … courts differed over whether the new Rule 60(b) provided the exclusive means for obtaining postjudgment relief, or whether the writs that had been used prior to the adoption of the Federal Rules still survived. This problem, along with several others, was addressed in the 1946 amendment to Rule 60(b). … The new Rule … made clear that nearly all of the old forms of obtaining relief from a judgment, i.e., *coram nobis, coram vobis, audita querela*, bills of review, and bills in the nature of review, had been abolished. The revision made equally clear, however, that one of the old forms, i.e. the "independent action," still survived. …
>
> The "independent action" sounded in equity. While its precise contours are somewhat unclear, it appears to have been more broadly available than the more narrow writs that the 1946 amendment abolished.

U.S. v. Beggerly, 524 U.S. 38, 43-45, 118 S.Ct. 1862, 1866-67,141 L.Ed.2d 32 (1998). Understood in these terms, Rule 60(b) was not intended to provide additional means of attacking judgments, but "merely reserve[d] whatever power federal courts had prior to the adoption of Rule 60 to relieve a party of a judgment by means of an independent action according to traditional principles of equity." *Stonger v. Sorrell*, 776 N.E.2d 353 (Ind. 2002) (citation omitted).

¶ 33 Despite the fact that the U.S. Supreme Court in *Beggerly* described the contours of the independent action as unclear, the five part test laid out by the Eighth Circuit in 1903 is still viewed by at least some courts and commentators as a valid description of an independent action. *See e.g. Bankers Mortg. Co. v. U.S.*, 423 F.2d 73, 79 (5th Cir. 1970); 11 CHARLES ALLAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE

AND PROCEDURE § 2868 (2d ed. 1995); AM. JUR. 2D *Judgments* § 874. The Eighth Circuit's test requires a showing that:

> (1) a judgment which ought not, in equity and good conscience, to be enforced; (2) a good defense to the alleged cause of action on which the judgment is founded; (3) fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense; (4) the absence of fault or negligence on the part of the defendant; and (5) the absence of any adequate remedy at law.

National Sur. Co. v. State Bank of Humboldt, Neb., 120 F. 593, 599 (1903).

In the current case, it is doubtful whether the independent action exception is any help to Jose. He bases his claim on due process lack of jurisdiction, whereas an independent action operates only to cure "fraud, accident, or mistake which prevented the defendant in the judgment from obtaining the benefit of his defense." *Id*. However, at least one court has noted that an independent action is the proper vehicle by which to directly challenge a judgment after the time limit has expired. In *Goland v. Central Intelligence Agency*, 607 F.2d 339, 372 (D.C. Cir. 1978) the court dealt with a possible Rule 60(b)(6) motion, which grants relief from a judgment based on "any other reason justifying relief from the operation of the judgment." There, the Court noted that "[t]he one-year limit on certain of the rule 60(b) motions is not applicable to the independent action, leaving it, apart from collateral attack, as the only manner of obtaining relief from a judgment in those cases where the 60(b) motion has become time barred." *Id*. at 373. Even if we were to find that jurisdictional defects could be remedied through an independent action, which we are not convinced, the doctrine would be inapplicable here. Independent actions may be barred through laches. *U.S. v. Buck*, 281 F.3d 1336, 1342 (10th Cir. 2002); *Sronger*, 776 N.E.2d at 356. Jose's lack of diligence in challenging the California support order in

a timely fashion would preclude him from any independent action relief he might otherwise be entitled.

¶ 34 The other way to challenge a void order, and the one we are faced with today, is a collateral attack. Collateral attacks, like Rule 60(b)(4) motions, are not limited by a reasonable time standard. As with Rule 60(b)(4) motions, the logic underlying a collateral attack on a void judgment is that the judgment, being a nullity, never had any judicial effect. And there is an even stronger rationale to dispense with any timeliness standard when dealing with collateral attacks. Rule 60(b)'s language gives the court *discretion* to relieve a party from its judgment upon a motion brought within a reasonable time. This grant of discretionary power results in an argument that motions under this section should be timely if courts are to be expected to exercise this discretion favorably to the moving party. Stated alternatively, an unreasonably delinquent movant has no reason to expect the court to provide relief under a discretionary rule. Indeed, some courts have similarly held. *See e.g. Harrison Living Trust*, 112 P.3d at 1061 (finding that the express language of Nevada's Rule 60(b), also based on the federal rules, allowed timeliness of the motion to be considered as it pertains to movant's diligence); *Corathers v. Facemire*, 404 S.E.2d 769, 771 (W. Va. 1991) (holding that a 28 year delay was not timely under West Virginia's almost identical version of rule 60(b)).

¶ 35 Only a small minority of jurisdictions impose time limits on 60(b)(4) motions to vacate, and their logic is even less persuasive with collateral attacks. Since Rule 60(b) defines the framework by which a direct attack on a void judgment may be entertained, it supersedes any countervailing common law doctrine.[3] Whatever modifications rule 60(b)

[3] Although, as the case law demonstrates, much weight is given to the common law understanding of void judgments when interpreting the requirements of Rule 60(b).

may make to common law methods of direct attack, collateral attacks are not so limited. They may be brought at any time without need to adhere to the dictates of Rule 60(b). *See e.g. Dill v. Berquist Construction Company*, 24 Cal.App.4th 1426, 1444 (1994) (indicating that even if a direct attack on a void judgment was deemed untimely, a collateral attack would be permissible because it is not restrained by a time limit.) Refusing to uphold a void judgment is not an act of judicial discretion; it is mandatory. The passage of time, in and of itself, does not alter this.

¶ 36 Similar reasoning dictates that laches would not provide a way around a collateral attack any more than it would defeat a Rule 60(b)(4) motion. If a judgment is a nullity, it is not rectified simply by the passage of time. Nor does an unwarranted delay in challenging its validity render it valid. *See Kao Hwa Shipping Co., S.A. v. China Steel Corp.*, 816 F. Supp. 910, 913 (S.D.N.Y. 1993) ("as a void judgment cannot acquire validity by way of laches, a judgment may be attacked as void at any time."); *In re Center Wholesale, Inc.*, 759 F.2d 1440, 1448 (9th Cir. 1985) ("[A] void judgment cannot acquire validity because of laches on the part of the judgment debtor …") (citation omitted). However, simply because one equitable principle is inappropriate for relief does render others equally impotent.

¶ 37 It is well established that by accepting the benefits of a void judgment, a party may not later challenge that judgment's validity. *Black v. Black*, 1 P.3d 1244, 1250 (Wyo. 2000); *York v. Stubbs*, 969 S.W.2d 223, 225 (Mo. 1998); *Wohlegmuth v. Ocean Club*, 695 A.2d 354, 350 (N.J. App. 1997); *Estate of Tapp v. Tapp*, 569 S.W.2d 281, 285 (Mo. App. 1978) (collecting cases*); Edwards v. Edwards*, 176 S.E.2d 123, 125 (S.C. 1970); *Svatonsky v. Svatonsky*, 389 P.2d 663, 665 (Wash.1964); *Security-First National Bank of Los*

Angeles v. North Dakota Children's Home Society, 85 N.W.2d 553, 563 (N.D. 1957); *Burgess v. Nail*, 103 F.2d 37, 44 (10th Cir. 1939) (collecting cases); *Mohler v. Shank's Estate*, 61 N.W. 981, 984 (Iowa 1895); *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 66 (1982). The acceptance of benefits doctrine is not a form of judicial alchemy and does not transform a void judgment into a valid one. "Rather, it imposes a personal disability on the party challenging the decree. It precludes the party from presenting evidence to overcome the presumption of regularity." *McDougall v. McDougall*, 961 P.2d 382, 384 (Wyo. 1998).

¶ 38 Estoppel based on acceptance of benefits, deriving from equity, is premised on the notion that it would be unfair to allow a party who has benefited from a judgment to turn around and attack the judgment's validity when that party is thereby forced to undergo some detriment. Since this is our fist occasion to examine the acceptance of benefits doctrine, we must look first to the Restatement in formulating the appropriate rule. 7 CMC § 3401 (the Restatement's articulation of the common law controls in cases where there is no contrary written or customary law); *see also Manglona v. Commonwealth*, 2005 MP 15 ¶ 19.

¶39 The RESTATEMENT (SECOND) OF JUDGMENTS provides two criteria for acceptance of the benefits estoppel: 1) with actual notice of the judgment, the party now attacking it had previously treated the judgment as valid; and 2) due to reliance on the judgment, the non-attacking party will suffer some detriment if relief is granted. *Id*. at § 66. This Restatement section deals specifically with relief from default judgments, but the case law makes no clear distinction between relief from judgments entered in default or otherwise. The Restatement's reasoning for narrowing the doctrine to default judgments may be based

on the difference between judgments void for lack of personal jurisdiction and those void for lack of subject matter jurisdiction. Specifically, since personal jurisdiction can be waived whereas subject matter jurisdiction cannot, acceptance of benefits can be understood as a post-judgment waiver of any defense based on a lack of personal jurisdiction. If jurisdiction can be waived from the outset, it can be waived at any point, even after the judgment is entered. A lack of subject matter jurisdiction, however, can not be remedied by a party's consent. Thus, the post-judgment waiver rationale would not be applicable. Since default judgments often result from proceedings that lack personal jurisdiction, but where a party fails to challenge, it stands to reason that this type of judgment is generally the type susceptible to an acceptance of the benefits estoppel argument.

¶ 40 Regardless of the Restatement's reasoning, the U.S. Supreme Court has drawn a clear distinction between federal judgments void for lack of subject matter jurisdiction and those void for lack of personal jurisdiction. The Court based this distinction on the fact that while federal subject matter jurisdiction is a requirement of Aritlce III of the U.S. Constitution – and for lower federal courts a statutory requirement – personal jurisdiction flows from the Due Process Clause and protects an individual's liberty interest. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701-03, 102 S.Ct. 2009, 2104 L.Ed.2d 492 (1982). While subject matter jurisdiction is a constitutional prerequisite which cannot be waived, "the requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue." *Id.* at 704, 2009 S.Ct. at 2105.

¶ 41 The Restatement would seem to limit the acceptance of benefits estoppel doctrine to default judgments, and the Court in *Bauxites* would seem to limit it to personal jurisdic-

tion, but we need not worry with these distinctions here. The judgment Jose seeks to vacate was entered in default, and his argument for vacatur is premised on a lack of personal jurisdiction. As with federal personal jurisdiction, personal jurisdiction before any state court or any Commonwealth court is founded upon due process concerns, and is equally susceptible to waiver and estoppel. Whatever restrictions the Restatement and *Bauxites* may put on estoppel, they do not limit this Court's authority to estop Jose from attacking the California Judgment. Rather, the current case falls squarely within the legal parameters which bound, and the policy considerations which found, the acceptance of benefits estoppel doctrine.

¶ 42 In his often cited article *Estoppel Against Jurisdictional Attack on Decrees of Divorce*, Professor Homer Clark notes that two of the most common factors giving rise to acceptance of benefits estoppel in instances of divorce are: 1) acquiescence in a divorce which one knows to be infirm for lack of jurisdiction; and 2) remarriage. 70 Yale L.J. 45, 48-49 (1960). Foreshadowing the U.S. Supreme Court's reasoning in *Bauxites*, Clark asserts that courts are correct to disallow estoppel when a divorce is void for lack of subject matter jurisdiction, *Id*. at 62, yet his examination of the then-current case law found "broad acceptance of the estoppel doctrine" among courts faced with invalid divorces. *Id*. at 49. Succinctly stated, he found the doctrine applicable "if the person attacking the divorce is, in doing so, taking a position inconsistent with his past conduct, or if the parties to the action have relied upon the divorce, and if, in addition, holding the divorce invalid will unset relationships or expectations formed in reliance upon the divorce …" *Id*. at 57.

¶ 43 Based on the above discussion, Jose is estopped from attacking the April 18, 1991 California Judgment. It is undisputed that by August 22, 1991 Jose knew of the divorce and the child support terms he now wishes to avoid. Rather than object to the judgment, however, he accepted it as valid in order to get remarried. To allow him to challenge the order's validity now, in a suit brought many years later to enforce payment of back child support, would be an affront to justice. Indeed, it would be so egregious to allow Jose to escape paying child support based on a jurisdictional flaw that he effectively acquiesced in, that if the doctrine of acceptance of benefits were not already well established, this Court might have to pioneer it.

B. Further fact-finding is necessary to determine if a partida exists.

¶ 44 Sullivan contends that Jose's conveyances of all of his property to his three daughters, without valuable consideration, and without relinquishing possession and control over the properties, after the entry of the California Judgment, were fraudulent. Jose and the other co-appellants counter that Jose previously gave his land by partida and thus, summary judgment should be denied as there are genuine issues of material facts in dispute.

¶ 45 To support their claims that a partida occurred, Yvonne[4] and Jose[5] provided the Superior Court with affidavits regarding the partida.

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[4] Yvonne Tarope declared the following in her affidavit:

1. I am one of the defendants in this action.
2. I am the oldest daughter of Jose T. Tarope.
3. My father gave me Tract Number 22886.
4. My father before [sic] giving me the deed of gift performed a partida.
5. The land given to me will be under my care under Carolinian custom.
6. As the oldest daughter of Jose T. Tarope, I will be culturally responsible for my younger sisters upon the death of my father.
7. I was given Tract Number 22886 without any knowledge of the claim of the California lawyer in this case.

[5] Jose declared in his affidavit that:

¶ 46 The Superior Court ruled that "[i]n their affidavits, Jose and Yvonne made a general claim that Jose performed the Chamorro custom of *partida*, but they failed to state any facts that a partida was performed in a manner consistent with the law of *partida*." *Sullivan v. Tarope*, Civ. No. 98-1293D (N.M.I. Super. Ct. Mar. 19, 2003) (Order Granting Plaintiff's Motion for Summary Judgment at 7). The Superior Court further held that "[t]he affidavits did not state the time, place, or members present when the '*partida*' was made. Both affidavits simply made general conclusive statements that Jose conducted a *partida* without any proper factual support." *Id*. The court concluded that "[i]n the absence of any factual evidence supporting Defendants' claim of *partida*, the court finds that Defendants failed to show that there are genuine issues of material facts." *Id*. at 8. Thus, the Superior Court struck Jose's and Yvonne's affidavits pursuant to Common-

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1. I am the father of the defendants in this action: Yvonne I. Tarope, Lani Lane Espiritu Tarope and Marie Jo Espiritu Tarope.
2. Yvonne I. Tarope is the daughter from my first marriage.
3. Lani Lane Espiritu Tarope and Marie Jo Espiritu Tarope are my daughters from my third marriage.
4. Lani Lane Espiritu Tarope and Marie Jo Espiritu Tarope are minors without any means of support.
5. I am of both Chamorro and Carolinian descent.
6. I practice both Carolinian and Chamorro customs.
7. In 1995, I suffered a heart attack.
8. Due to my ailing health in 1995, I performed the Chamorro custom of partida.
9. I divided my lands as follows:
   Tract Number 22628-E-1 to Lani Lane Espiritu Tarope
   Tract Number 1691-2 to Marie Jo Espiritu Tarope
   Tract Number 22886 to Yvonne I. Tarope
10. I memorialized the oral partida by deeds of gift which are now in question.
11. I gave the Lot 22886 to Yvonne I. Tarope because she is my oldest daughter.
12. I gave the land to my daughters in conformity with the Carolinian custom of matrilineal inheritance.
13. Yvonne I. Tarope is my oldest daughter and will take care of her half sisters, Lani Lane Espiritu Tarope and Marie Jo Espiritu Tarope in accordance with Carolinian custom.
14. I did not give any land to my children with Francis A. Mullins Tarope because she took a lot of money when she left me to go to the United States.
15. The marital properties and my lands were never the subject of any court hearing in California.
16. At the time, I performed my partida, I did not do it to deprive the plaintiff of his attorney's fees for a default divorce in the exorbitant sum of over $200,000.00.
17. The land was given to my children based on Chamorro custom.

wealth Rule of Civil Procedure 56 (e) and granted summary judgment in favor of Sullivan.

¶ 47 This Court has previously touched upon this issue in *Cabrera v. Heirs of De Castro*, 1 N.M.I. 172 (1990). In *Cabrera*, the trial court granted summary judgment to the heirs of De Castro and concluded that Cabrera failed to raise a genuine issue of fact regarding a partida. The trial court in *Cabrera* "decided that the affidavits did not rise to the level of setting forth sufficient indicia of a 'partida.'" *Id*. at 175.

¶ 48 This Court, however, held in *Cabrera* that the affidavits and pleadings did "point to the possible existence of a 'partida.'" *Id*. at 177. Furthermore, this Court noted that "[a]lthough it is true that the affidavit does not state the time, place, or members present when the 'partida' was made, the declarations made in the affidavit of Mrs. Elena Q. Sablan should be viewed in the light most favorable to the opposing party, *i.e.*, that there was a 'partida.'" *Id*. This Court concluded that:

> [T]he elements stated by the lower court necessary to prove a "partida" are elements necessary to prove an *ideal* "partida." A "partida" is inherently flexible and can be shown through ways other than through the *ideal* "partida." *See Pangelinan v. Tudela*,1 CR 708, 711 (D. NMI App. Div.1983), *aff'd*, 733 F.2d 1341 (9th Cir. 1986); and *In re the Estate of Taisakan*, 1 CR 326, 333 (D. NMI App. Div.1982). Plaintiff should be given the opportunity to prove at trial that a "partida" was made.

Id. at 178.

Based on this conclusion, this Court reversed the trial court in *Cabrera* and remanded for a trial to determine if in fact a partida took place.

¶ 49 The case at bar is analogous to *Cabrera*. The affidavits of Yvonne and Jose were struck by the Superior Court because they did not state the specifics regarding the partida and thus, concluded the Superior Court, no material facts were in dispute regarding the

partida and summary judgment was granted. Moreover, the law is well established that the trial court must review the evidence and inferences in a light most favorable to the non-moving party. *Milne v. Estate of Hillblom*, 1997 MP 11 ¶3. Although the affidavit made by Jose and Yvonne do not state the time place or members present when the partida was made, when viewed in a light most favorable to Jose, the affidavits suggest there was a partida. As explained in our holding from *Cabrera*, summary judgment is not proper here because there is enough evidence from the affidavits, viewed in a light most favorable to the non-moving party to show that a material fact is in dispute, i.e. the existence of a partida.

¶ 50 Whether or not a partida was made by Jose is a matter that remains unresolved, but a partida is "inherently flexible" and Jose should be given the opportunity to prove before the trier of fact at trial that a partida was completed.

IV.

¶ 51 The Superior Court's *Order Re Plaintiff's Motion for Summary Judgment and Defendants' Motion to Dismiss* is AFFIRMED. The Superior Court's *Order Granting Plaintiff's Motion for Summary Judgment* is REVERSED and REMANDED to the Superior Court for trial.

¶52 DATED THIS 18th DAY OF APRIL, 2006.

/s/ `

MIGUEL S. DEMAPAN
Chief Justice

/s/ `

ROBERT J. TORRES
Justice P*ro Tempore*

/s/ `

RICHARD H. BENSON
Justice P*ro Tempore*

IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

DANIEL J. SULLIVAN,

Plaintiff-Appellee,

v.

JOSE T. TAROPE, YVONNE I. TAROPE, MARIE JO ESPIRITU TAROPE, AND LANI LANE ESPIRITU TAROPE,

Defendants-Appellants.

SUPREME COURT APPEAL NO. 03-0018-GA
Superior Court Civil Action Nos. 98-1293, 98-1294, 98-1295

JUDGMENT

¶ 1 **THIS CAUSE** came on to be heard from the Commonwealth Superior Court and was duly argued and submitted.

¶ 2 Accordingly, the Superior Court's Order *Re Plaintiff's Motion for Summary Judgment and Defendants' Motion to Dismiss* is **AFFIRMED**. *The Superior Court's Order Granting Plaintiff's motion for Summary Judgment* is **REVERSED** and **REMANDED** to the Superior Court for trial.

Entered this 18th day of April, 2006.

/s/_____`
CRISPIN M. KAIPAT
Clerk of Court