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

JUAN SABLAN REYES,
Plaintiff-Appellant

v.

RITA BENAVENTE REYES,
Defendant-Appellee

Appeal No. 98-040
Civil Action No. 92-1082

MANDATE

Pursuant to Rule 41 of the Rules of Appellate Procedure, this mandate is issued in the above-captioned matter. The lower court's decision in denying Appellant's motion to modify or set aside the Property Division Order is hereby **ORDERED and ADJUDGED AFFIRMED.**

ISSUED this 28th day of September, 2001.

CRISPIN M. KAIPAT
Clerk of Court

By: [signature]
for Charlene C. Teregeyo
Deputy Clerk

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

JUAN SABLAN REYES,
Plaintiff-Appellant

v.

RITA BENAVENTE REYES,
Defendant-Appellee

Cite as: ***Reyes v. Reyes, 2001 MP 13***

Appeal No. 98-040
Civil Action No. 92-1082

JUDGMENT

¶ 1 Pursuant to Rule 36 of the Rules of Appellate Procedure, judgment is hereby entered. The lower court's decision in denying Appellant's motion to modify or set aside the Property Division Order is **AFFIRMED**.

Entered this 19th day of July, 2001.

Cris M. Kaipat, Clerk of Court

FOR PUBLICATION

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

JUAN SABLAN REYES,
Plaintiff-Appellant

v.

RITA BENAVENTE REYES,
Defendant-Appellee.

OPINION

Cite as: *Reyes v. Reyes*, 2001 MP 13
Appeal No. 98-040/Civil Action No. 92-1082
Argued on July 21, 2000

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BEFORE: ALEXANDRO C. CASTRO, Associate Justice, TIMOTHY H. BELLAS, JUAN T. LIZAMA, Justices *Pro Tem*

CASTRO, Associate Justice:

¶1 This is an appeal from the Superior Court's order denying Appellant Juan Sablan Reyes' ("Juan") motion to modify or set aside a judgment dividing marital property from his marriage to Appellee Rita Benavente Reyes ("Rita"). On appeal, Juan claims the trial court should have granted his motion and revised the marital property distribution because Juan did not consent to it and, therefore, the order transferring Juan's property is void. We have jurisdiction pursuant to Article IV, Section 3 of the Constitution of the Commonwealth of the Northern Mariana Islands, as amended,[1] and 1 CMC § 3102. We find that Juan did consent to the marital property distribution and hold that while the portion of the trial court judgment which purported to transfer the legal ownership of Juan's property pursuant to 8 CMC § 1311 was voidable, it was not void. As such, we affirm the denial of the motion to modify or set aside the judgment by the trial court.

ISSUES PRESENTED AND STANDARDS OF REVIEW

¶2 The first issue before this Court is whether the trial court correctly found that Juan consented to the Property Division Order, specifically, that portion of the order establishing a trust. We review a court's factual findings for clear error, and will not reverse unless we are left with a firm and definite conviction that a mistake has been made. *See Santos v. Santos*, App. No. 98-029 (N.M.I. Sup. Ct. May 10, 2000) (Opinion at 2).

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[1] N.M.I. Const. art. IV, § 3 was amended by the passage of Legislative Initiative 10-3, ratified by the voters on November 1, 1997 and certified by the Board of Elections on December 13, 1997.

¶3 The second issue is whether the trial court could have granted relief from the Property Division Order, and under what authority it could have done so. The trial court believed the applicable rule was Rule 60(b) of the Commonwealth Rules of Civil Procedure, because it believed it did not have authority under 8 CMC § 1311. As this issue is one of statutory interpretation, our review is *de novo*. *See Hofschneider v. Hofschneider*, 4 N.M.I. 277, 278 (1995).

FACTUAL AND PROCEDURAL BACKGROUND

¶4 Juan and Rita were divorced on June 2, 1993. The parties set a hearing on Rita's motion concerning a proposed distribution settlement on February 25, 1997, but this date was extended so Juan's counsel could notify him. On March 12, 1997 Juan's counsel appeared and consented to Rita's proposed distribution. After informing Juan's counsel that he would have thirty days to object to the proposed order after it was entered, the court filed and served a draft order on May 1, 1997 and signed the order on May 22 of that year.

¶5 At issue herein is the provision of the property division order which establishes a trust for the benefit of Juan's and Rita's four children. The court appointed Antonio Muna as trustee of certain marital property, to be responsible for paying marital debts including taxes and administrative expenses, discharging liens or encumbrances on the marital property, allocating debts from the marriage, and assuming other duties enumerated in the court's order. The trust included six properties plus accounts receivable from Rainbow Construction Company. *See Reyes v. Reyes*, Civ. No. 92-1082 (N.M.I. Super. Ct. May 22, 1997) (Order on Division of Marital Property, Child Custody, and Child Support at 5-7) ("Property Division Order"). The court concluded that, upon a final accounting, the funds and land remaining in the trust will be

placed in trust for the benefit of the children, to be divided equally when the youngest child reaches 22 years of age. *See id.* at 7. This is essentially what Rita proposed in her moving papers, which she served on Juan's attorney. *See* Memorandum in Support of Division of Marital Property, Child Custody, and Child Support, Supplemental Excerpts of Record ("S.E.R.") at 11, 16-17, 23.

¶6 Almost one year later, through the same counsel he had when the court issued its Property Division Order, Juan objected to said Order. His excuse for the delay was that he had lost contact with his attorney. He did not claim he was unaware of or disagreed with the proposed distribution, and he did not object at subsequent hearings concerning the trusteeship.

¶7 In denying Juan's motion to set aside the judgment, the trial court first determined that, under 8 CMC § 1311, property divisions are final and not subject to modification. *See Reyes v. Reyes*, Civ. No. 92-1082 (N.M.I. Super. Ct. Oct. 7, 1998) (Decision and Order Denying Motion to Set Aside Judgment at 2) ("Order Denying Motion"). The court held that the only way to challenge a court order dividing marital property is by motion for relief from a judgment or order under Commonwealth Rules of Civil Procedure, rule 60(b) ("Rule 60(b)"). *See id.* at 2-3. The court then found Juan had offered no argument to satisfy his burden under Rule 60(b), so as to justify relief from the Property Division Order. *See id.* at 4. Among other things, the trial court rejected Juan's claim that he lost contact with his attorney, finding any loss of contact was due to Juan's own inexcusable neglect. *See id.* at 3. As there was no violation of Juan's rights, the court concluded that 8 CMC § 1311 authorized it to divide the marital property in any appropriate manner, including establishing a trust for the children of the marriage and providing for later distribution of the trust property. *See id.* at 4.

¶8 Juan timely appealed.

ANALYSIS

I. Whether Juan Consented to the Property Division Order

¶9 According to the record, although Juan himself did not appear at the hearing regarding marital property distribution, his attorney did appear and consent to the distribution on Juan's behalf. The hearing addressed Rita's Motion for Division of Marital Property, Child Custody, and Child Support. The Property Division Order adopts the trust suggested in Rita's moving papers. Rita served these papers on Juan's attorney, the same attorney handling the instant appeal. *See* Memorandum in Support of Division of Marital Property, Child Custody, and Child Support, S.E.R. at 11, 16-17. Additionally, the trial court found Juan did not object to the terms of the trust at subsequent hearings concerning the trusteeship.

¶10 The trial court rejected Juan's claim that he lost contact with his attorney, finding that any loss of contact was due to Juan's own inexcusable neglect in not notifying his attorney of his change of address and contact information during a period when Juan should have known significant decisions regarding his property rights could be made. There is no other evidence in the record on appeal to justify Juan's failure to maintain contact with his attorney, or to suggest Juan's attorney did not have authority to act on his behalf.

¶11 Juan presents no case law to suggest that his attorney could not act on his behalf. He presents no other facts to suggest the trial court erred in its evaluation of the facts.[2] We find that Juan was afforded his full due process rights by the trial court. Accordingly, since Juan did not

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[2] Juan counsel's suggestion at oral argument that he did not consent to the Order on behalf of his client directly contradicts the procedural and factual history of this matter.

demonstrate excusable neglect or that the judgment of the trial court was void under Rule 60(b), the trial court's judgment will be affirmed based, additionally, on Juan's consent of the order, as discussed below.

II. Whether the Trial Court Could Have Granted Relief from the Property Division Order

¶12 Rita notes that Juan does not raise the issue of whether the trial court could have modified the Order pursuant to the authority of 8 CMC § 1311 in his appeal and argues that the trial court correctly applied Rule 60(b), citing *Weathersbee v. Weathersbee*, App. No. 97-048 (N.M.I. Sup. Ct. Nov. 17, 1998) at 3-5. While this Court will generally dismiss issues that are not discussed and supported in a party's brief, as they are deemed waived and no longer before the Court for decision, *In re Blankenship*, 3 N.M.I. 209, 216 (1992), we are inclined to address the issue in this appeal as it is one of first impression and a discussion is useful for future lower court application and interpretation of 8 CMC § 1311.

1. Authority to Modify Property Division Order Under 8 CMC § 1311

¶13 Absent specific statutory authority, a court granting a divorce has no authority to establish a trust upon the property of one of the parties, to secure alimony or child support payments. *See Taisacan v. Manglona*, 1 CR 812, 816 (Dist. Ct. App. Div. 1983). If a statute exists, the question becomes whether the power was properly exercised, and in this determination the trial court has a large measure of discretion in determining whether the trust is necessary and proper. *See id.*

8 CMC § 1311 provides:

In granting or denying an annulment or a divorce, the court may make such orders

> for custody of minor children for their support, for support of either party, and for the disposition of either or both parties' interest in any property in which both have interests, as it deems justice and the best interests of all concerned may require. While an action for annulment or divorce is pending, the court may make temporary orders covering any of these matters pending final decree. Any decree as to custody or support of minor children or of the parties is subject to revision by the court at any time upon motion of either party and such notice, if any, as the court deems justice requires.

8 CMC § 1311. Thus, the statute by its terms grants the court broad authority to dispose of either or both parties' interest in any property. *See Taisacan v. Manglona*, 1 CR at 818.

¶14 The next question, then, is whether the trust provision of the Property Division Order reflects a valid exercise of the court's statutory power. *See id.* In *Taisacan*, the court observed that its power to protect children of a divorce, under a statute substantially similar to Section 1311,[3] is limited to making provision for the children's support and education during their minority. *See id.* at 817. However, the *Taisacan* court found the trust was not imposed for the sole benefit of the children during their minority, because the divorce decree already provided for child support, and the trust by its terms was imposed for the benefit of not only the children of the marriage, but also for their grandfather, his wife, and their grandchildren. The court therefore found the trust was essentially an attempt to give the children outright a part of their father's property. Such a trust exceeded the scope of 8 CMC § 1311. *See id.* at 818-19; *id.* at 817 (reasoning that father is not required to convey property to his children; indeed, he may voluntarily disinherit children instead).

¶15 Both Rita and the trial court reasoned that *Taisacan* was decided before 8 CMC § 1311 was enacted. However, this statute is an exact carry-over from the Trust Territory Code and an

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[3] The statute at issue in *Taisacan* provided that "the court may make such orders for custody of minor children for their support, . . . and for the disposition of either or both parties' interest in any property in which both have interests, as it deems justice and the best interests of all concerned may require." 39 TTC 103; *see Taisacan v. Manglona*, 1 CR at 818.

interpretation by the High Court of that statute is instructive. *See Robinson v. Robinson*, 1 N.M.I. 81, 88 (1990).

¶16 According to *Taisacan*, when a trust ends, the property should revert to the original owners. *See* 8 CMC § 1820(e) (providing that marital property transferred to trust remains marital property). However, both spouses may agree that the property be divided among the children. *See* 8 CMC § 1821(b). In this case, the critical issue of whether Juan agreed to the trust has been answered in the affirmative. As such, by his own consent, Juan's property reverts to his children when the trust ends.

> Parties by their stipulation may in many ways make the law for (their) legal proceeding, which not only binds them, but which the courts are bound to enforce. They may stipulate away statutory and even constitutional rights, and, may to a large extent chart their own procedural course through the courts.

Cerbone v. Cerbone, 428 N.Y.S.2d 777 (N.Y. Civ. Ct. 1979) (internal citations omitted).

¶17 The trial court did not believe it had authority under 8 CMC § 1311 to modify or set aside the Property Division Order. In *Weathersbee*,[4] this Court held that 8 CMC § 1311 clearly permits a court to revise a decree as to custody or child or spousal support. *See id.* at 3. However, absent an express provision or legislative authority to the contrary, Section 1311 does not permit a court to retroactively modify such a decree. *See id.* Moreover, the language of Section 1311 only refers to modification of custody or child or spousal support and is noticeably silent as to modification of property division orders.

¶18 If the Property Division Order is either a spousal or child support award under Section 1311, then the trial court did have authority to prospectively revise the property division. The Order is entitled "Order on Division of Marital Property, Child Custody, and Child Support."

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[4] This Court did not issue its decision in *Weathersbee* until shortly after the trial court issued its Order Denying Motion.

The purpose of the trust in question is to pay marital debts, administrative expenses, and discharge liens and encumbrances upon marital property. *See* Property Division Order at 5. The Property Division Order does not require the trustee to make spousal or child support payments. In fact, a separate portion of the order gives Rita sole custody, as well as full responsibility for maintenance and welfare of the one minor child of the marriage. *See id.* at 3. The order takes Rita's and the child's financial needs into consideration in distributing the marital property. *See* Property Division Order at 3-4.

¶19 Accordingly, we find that because 8 CMC § 1311 only applies to custody and support awards, it may not apply to the trust. As such, we agree that the trial court did not have the authority to modify the property division order pursuant to Section 1311. The appropriate standard for granting relief is therefore set forth in Rule 60(b).

2. Authority to Grant Relief from Property Division Order Under Rule 60(b)

¶20 The trial court believed the only procedure for seeking relief from a judgment or order is by motion pursuant to Commonwealth Rules of Civil Procedure, rule 60(b), which provides:

> On motion and upon such terms as are just, the court may relieve a party or party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . . ; (3) fraud . . . ; (4) the judgment is void; (5) the judgment has been satisfied . . . ; (6) any other reason justifying relief from the operation of the judgment. . . .

Com. R. Civ. P. 60(b).

¶21 In refusing to grant relief from the Property Division Order, the trial court rejected Juan's argument that the order was inequitable because he was not awarded a house. *See* Order Denying

Motion at 3. The trial court also rejected Juan's claim that he lost contact with his attorney. *See* Order Denying Motion at 4. The court found no other grounds for granting relief.

A. Juan Has Failed To Demonstrate Excusable Neglect

¶22 Rule 60(b)(1) authorizes relief from judgment taken through excusable neglect and is a remedial rule which normally receives a liberal construction from courts who are concerned that cases not be decided in default against parties who are inadvertently absent; but liberal construction is usually reserved for instances where error is due to failure of attorneys or other agents to act on behalf of their clients, not where the client's own inaction is at fault. *See Greenspan v. Bogan, C.A.*, 492 F. 2d 375 (Mass. 1974); *Montecillo v. Di-All Chemical Co.*, Appeal No. 97-020, slip op. (N.M.I. Nov.23, 1998). We review a trial court's denial of a Rule 60(b)(1) motion for abuse of discretion. *See Aldan-Pierce v. Mafnas*, App. No. 97-008 (N.M.I. Sup. Ct. Apr. 26, 1999) (Opinion at 2).

¶23 As noted by the trial court, Juan's claim that his attorney did not follow his wishes because Juan lost contact with his attorney and his failure to communicate with his counsel for almost one year do not constitute foreseeable neglect as contemplated by Rule 60(b)(1). *See U.S. v. RG&B Contractors, Inc.*, 21 F. 3d 952 (9th Cir. 1994); *MPLC v. Kan Pacific Saipan, Ltd.*, 1 N.M.I. 431, 435, 437-38 (1990). We therefore find that the trial court did not abuse its discretion by denying Juan's motion to set aside the property judgment.

B. Judgment is Not Void, But is Voidable

¶24 Rule 60(b)(4) provides for relief from void judgments. When a motion is made under Rule 60(b)(4), there is no question of discretion on the part of the court. *Chambers v. Armontrout*, 16 F. 3d 257, 260 (1994). Our review of the trial court's denial of the Rule 60(b)(4) motion is, therefore, *de novo*. *See Hofschneider v. Hofschneider*, 4 N.M.I. 277, 278 (1995). We disagree with Juan's contention that the trial court order was void. In our view, the order was merely voidable.

¶25 The rule is firmly entrenched in the Commonwealth, as it is elsewhere, that the validity of a judgment depends on the court's jurisdiction of the person and the subject matter of the issue it decides, and a judgment rendered without jurisdiction is void and may be attacked directly or collaterally. *See Sablan v. Iginoef*, 1 N.M.I. 190 (1990), *appeal dismissed, Sablan v. Manglona*, 938 F.2d 970 (9th Cir. 1991); RESTATEMENT (SECOND) OF JUDGMENTS §§ 5 and 7 (1980). Here, it is clear that the lower court had jurisdiction in the fullest sense, not only of the subject matter of the action but also of the parties, both of whom appeared in court and sought relief for a divorce and for permanent orders relating to division of property, alimony, and child support.

¶26 The fact that the order was not void does not mean that it was not subject to correction if erroneous or irregular by reason of improper application of procedural or substantive law. The distinction between void and voidable judgments has been refined, as follows:

> Judgment may be irregular, erroneous or void. An irregular judgment is one rendered contrary to the method of procedure and practice allowed by the law in some material respect. An erroneous judgment is one rendered in accordance with the method of procedure and practice allowed by the law, but contrary to the law. Irregular and erroneous judgments necessarily retain their force and have effect until modified by the

> trial court in consequence of its authority in certain circumstances, or until vacated pursuant to new trial procedures...or until reversed by an appellate court in review proceedings. Such judgments are subject only to direct attack; they are not vulnerable to collateral assault. A void judgment is a simulated judgment devoid of any potency because of jurisdictional defects only, in the court rendering it. Defect of jurisdiction may relate to a party or parties, the subject matter, the cause of action, the question to be determined, or the relief to be granted. A judgment entered where such defect exists has neither life nor incipience, and a court is impuissant to invest it with even a fleeting spark of vitality, but can only determine it to be what it is--a nothing, a nullity. Being naught, it may be attacked directly or collaterally at any time.

McLeod v. Provident Mut. Life Ins. Co. of Philadelphia 526 P.2d 1318, 1320-1321 (Colo. 1974) (internal citations omitted).

Based on the foregoing, it is unquestionable that the trial court's decision ordering the marital property of Juan to be distributed to his children when they reach the age of 22 was an erroneous judgment. *See Taisacan v. Manglona*, 1 CR 812, 816 (Dist. Ct. App. Div. 1983). However, *Taisacan* must be interpreted with caution as it presents a problem of interpretation due to the imprecise language used when discussing the impropriety of the judgment entered. Specifically, the language of the *Taisacan* court characterized the order in question as 'beyond the jurisdiction of the court'. Interpreted without consideration to the nature of the appellate proceedings in which the issue was analyzed, the language used by the *Taisacan* court would appear to suggest a lack of jurisdiction and resulting voidness of the judgment, as opposed to mere error in the application of the law to the issues of the case, resulting only in voidability.

"Jurisdiction should be distinguished from the exercise of jurisdiction. The authority to decide a case at all, and not the decision rendered therein, is what makes up jurisdiction; and when there is jurisdiction of the person and subject matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction." *McLeod* at 1322.

¶27 In sum, because the lower court judgment was voidable, rather than void, the requirements of Rule 60(b)(4) are not met and this Court is precluded from overturning the lower court's erroneous order.

CONCLUSION

¶28 We thereby AFFIRM the lower court's decision denying Juan's motion to modify or set aside the Property Division Order.

ALEXANDRO C. CASTRO, Associate Justice

TIMOTHY H. BELLAS, Justice *Pro Tem*

JUAN T. LIZAMA, Justice *Pro Tem*