NOT FOR PUBLICATION

NO. 24353

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

STATE OF HAWAIʻI, by Mark Bennett,[1] its Attorney General, and ROBERT C. CHING and ELSIE LEE CHING and GARY O. GALIHER and DIANE T. ONO, Plaintiffs-Appellees, v. ROSEMOND KEANUENUE NALUAI PETTIGREW, Defendant-Appellant, and HEIRS OF KUKAHI, LOUISE MILILANI NALUAI HANAPI, FRANK KAWAIKAPUOKALANI HEWETT, RAE M. GATES, RAPHAEL NALUAI, ELIZABETH BECKLEY, RACHEL JETER, FLORENCE CRAIN, LORITA LOONEY, WILLIAM OGAN, MARY MORGAN, WILLIAM WILLINGHAM, JOSEPH WILLINGHAM, MARY M.N. PETTIGREW, FRANCES K.J. PETTIGREW, KYLE K. PETTIGREW, MICHAEL K. PETTIGREW, PATRICK K. PETTIGREW, HENRIETTA NALUAI HOLLINGER, ARTHUR HOLLINGER, EUGENE KANAE, DAVID WILLINGHAM, GLENN K.K. KANAE, HERMAN KANAE, JONATHAN K. KANAE, JR., BRUCE K. WILLINGHAM, MARIA KANAE, BOY KANAE, JOHN DOES 17-100, MARY ROES 14-100, UNKNOWN OWNERS AND CLAIMANTS, AND ALL PERSONS INTERESTED IN ANY MANNER, OR WHO MAY CLAIM ANY INTEREST IN THE PREMISES DESCRIBED HEREIN OR ANY PART THEREOF, Defendants

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT
(CIVIL NO. 400(2))

MEMORANDUM OPINION
(By: Burns, C.J., Foley, J., and Circuit Judge Alm in place of Watanabe, J., recused)

Defendant-Appellant Rosemond Keanuenue Naluai Pettigrew (Rosemond Pettigrew) appeals from the June 6, 2001 "Order on Motion to Set Aside the Civil No. 400 [January 23, 1963]

[1] At the time this case arose, Shiro Kashiwa was the Attorney General of the State of Hawaiʻi. Pursuant to Hawaiʻi Rules of Civil Procedure (HRCP) Rule 43(c)(a), relating to the substitution of parties, the current Attorney General, Mark Bennett, has been substituted as the named party to this case.

Judgment" (June 6, 2001 Order) entered in the Circuit Court of the Second Circuit, Judge Shackley F. Rafetto presiding. This June 6, 2001 Order denied "Defendants Rosemond K. Pettigrew and Mary M. K. Kauhola's [January 24, 1995] Motion to Set Aside Judgment, and for Leave to File Responsive Pleading to Complaint for Partition and Application for a Boundary Certificate" (January 24, 1995 Motion). We affirm.

I. BACKGROUND

On June 7, 1848, Mahele Award 10 of an ahupua‘a[2] of Moloka‘i land was made to Hanakaipo (Hanakaipo Ahupua‘a) and Hawai‘i's government.

On March 13, 1852, Royal Patent (RP) No. 4829 of a kuleana[3] of Moloka‘i land was made to Kupihea (Kupihea Kuleana). On July 19, 1860, Land Commission Award (LCA or LCAw) No. 4891 of the land involved in RP No. 4829 was made to Kupihea.

On October 13, 1959, in "Civil No. 208" "BEFORE THE COMMISSIONER OF BOUNDARIES IN AND FOR THE SECOND JUDICIAL COURT OF THE STATE OF HAWAII", Plaintiff-Appellee State of Hawai‘i (the State), Plaintiffs-Appellees Robert C. Ching and Elsie Lee Ching (the Chings), and Joseph K. Napapa (Napapa) petitioned "for the

[2] An "ahupua‘a" is a "[l]and division usually extending from the uplands to the sea[.]" Mary Kawena Pukui & Samuel H. Elbert, Hawaiian Dictionary 9 (rev. ed. 1986).

[3] In this context, a "kuleana" is a "small piece of property, as within an *ahupua‘a*". Hawaiian Dictionary, supra, at 179.

determination and certification of boundaries of the Ahupua‘a of Ahaino 1st, Island of Molokai", the Hanakaipo Ahupua‘a. This petition stated, in relevant part, as follows:

> 1. That the subject land was awarded by name only under Mahele Award 10 to Hanakaipo, an undivided one-half (½) interest, and the other undivided one-half (½) interest to the Hawaiian Government . . . .
>
> 2. That a description by metes and bounds of the outside boundaries of the subject land is attached herewith and made a part hereof . . .
>
> 3. That the State of Hawaii is the owner of an undivided one-half (½) interest through the title of the Hawaiian Government.
>
> 4. That [the Chings] claim a portion of the other one-half (½) undivided interest of Mahele Award 10 to Hanakaipo, as acquired by deed from [Napapa]; and [Napapa] claims the remaining undivided one-half (½) interest of Mahele Award 10 to Hanakaipo.
>
> 5. The lands adjoining the subject land are as follows:
>
> (a) To the north is the Ahupuaa of Ahaino 2nd, Land Commission Award 8660 to E. Kuakamauna and is alleged to be owned by Zelie D. Fernandez; Henry N. Duvauchelle and Margaret T. Duvauchelle, husband and wife; Byron Meurlott; and Laura B. J. Smith; each individual, and husband and wife, owning an undivided one-fourth (1/4) interest.
>
> (b) To the south is the Ahupuaa of Kupeke, Land Commission Award 8524-B, Apana 1 to Peke, alleged to be owned by Namahala Buchanan Estate, Limited, seven-ninth (7/9); Emma B. Steward, one-ninth (1/9); William K. Buchanan, one-ninth (1/9); all being undivided interests.
>
> (c) There is also adjoining and within the subject land a kuleana under Royal Patent 4829, Land Commission Award 4891, Apana 2 to Kupihea,[4] and is alleged to be owned by Rachael Naluai; Peter Naluai; William Naluai; Carlos Naluai; Elizabeth Beckley; Rachael Ogan; Henrietta Hollinger; and Louise Torres; and also individually claimed by Harry W. Larson as to the whole.
>
> (d) To the east is the ocean and to the west is land owned by the State of Hawaii, one of the petitioners.
>
> 6. No inquiry or determination as to the boundaries of Kuleanas located within or partly within the subject land is sought by this petition except as where the boundaries of such Kuleanas may affect the boundaries of the subject land.

[4] This is the Kupihea Kuleana.

> 7. That attached herewith and made a part hereof is a map or tracing . . . showing the location, natural topographical features and other features and triangulation stations of the subject land.
>
> WHEREFORE, Petitioners pray that the petition be set for hearing and that notice be given to Petitioners and the owners of adjoining lands, and any other interest parties, as required by law, and that upon such hearing the matter herein presented and involved be fully investigated, heard and determined, and that the boundaries of said Ahupuaa of Ahaino 1st be determined and certified to in accordance with the facts and laws applicable.

(Footnote added.)

According to the February 8, 1960 "Affidavit of Barbara Y. Suzuki", notice of the Civil No. 208 hearing, scheduled to take place on March 15, 1960, was sent by registered mail, return receipt requested, to all known adjoining landowners, including: Rachael Naluai,[5] Peter Naluai, Carlos Naluai, Elizabeth Beckley, Rachael Ogan, Henrietta Hollinger, Juanita R. T. Pettigrew, John Raymond Torres, and Harry W. Larson.

On April 4, 1960, the Commissioner of Boundaries of the Second Judicial Circuit filed a document stating, in relevant part, as follows:

[5] In a January 19, 1995 affidavit, Defendant-Appellant Rosemond K. N. Pettigrew (Rosemond Pettigrew) reports that this Rachael Naluai is her great-grandmother.

CERTIFICATE OF BOUNDARIES NO. 235
SECOND JUDICIAL CIRCUIT, STATE OF HAWAII

. . . .

JUDGMENT

. . . .

IT IS HEREBY ADJUDGED, DETERMINED AND CERTIFIED that the true and lawful Boundaries of the Ahupuaa of Ahaino 1st (Mahele Award 10), Island of Molokai, County of Maui, State of Hawaii, be and the same are hereby certified to be as follows:

(Revised February 1960)

AHUPUAA OF AHAINO 1ST
Island of Molokai

. . .

TOTAL AREA OF AHUPUAA		285.00 ACRES
Area of Grants	18.00 Acres	
Area of L.C. Awards	7.92 Acres[6]	
County Tank Site	0.01 Acre	25.93 Acres
NET AREA TO APPLICANTS		259.07 ACRES

(Footnote added.)

Certificate of Boundaries No. 235 determined and certified the boundaries of the ahupua‘a of Ahaino 1st and that only 7.92 acres of Land Commission Awards were within it. According to then applicable Revised Laws of Hawaii (RLH) § 234-8 (1955), "Any party deeming himself aggrieved by the decision of the commissioner may appeal therefrom to the supreme court within thirty days from the rendition of the decision[.]" No appeal of Certificate of Boundaries No. 235 was filed.

[6] These land commission awards (LCAs) appear to include LCA No. 4891 to Kupihea (Royal Patent No. 4829), LCA No. 4122 to Kahaule, and LCA No. 3911 to Naone.

The instant Civil No. 400 case began on October 29, 1962, when the State and the Chings filed a Complaint against the "Heirs of Kukahi"[7] and against all unknown owners, claimants, and persons interested in any manner or who may claim an interest in the following three parcels within the Ahupua‘a of Ahaino 1st: Parcel C (0.34 acres), Parcel D (92.68 acres)[8], and Parcel E (163.97 acres) (total 256.99 acres) (collectively, "the Three Parcels").[9] The Complaint did not specifically name any of the "Heirs of Kukahi". The State and the Chings alleged their co-ownership of the Three Parcels and requested partition between them.

On October 29, 1962, the court filed an order stating

> that all persons having an interest in the premises described in the Complaint filed herein whose names are unknown or who if known do not reside within the State of Hawaii or cannot for any reason be served with process shall have notice of the Complaint for partition filed herein by publication of summons in the Maui News, a newspaper having a general circulation in the Second Circuit and printed and published in Wailuku, County of Maui, once a week in each of four successive weeks, the first publication to be not

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[7] Kukahi is in the middle of the alleged chain of title (of the ahupua‘a of Ahaino 1st), from Hanakaipo (the original grantee of the ahupua‘a of Ahaino 1st via Mahele Award 10) to the Chings. Kukahi is not in the alleged chain of title from Kupihea, the original awardee of the Kupihea Kuleana (Royal Patent No. 4829), to Rosemond Pettigrew.

[8] The subdivision map states that Parcel D is:

Gross Area	110.44 Acs.
Less Grant 1129, Apanas 1 and 2 to Kahaole	17.76 "
NET AREA	92.68 Acs.

[9] In 1961, the Ahupua‘a of Ahaino 1st on the Island of Moloka‘i was subdivided into parcels A (Nahiole Fish Pond), B (0.27 acre oceanfront), C (0.340 acre oceanfront), D (92.68 acres) and E (163.97). LCA No. 4891 to Kupihea (Royal Patent No. 4829), LCA No. 4122 to Kahaule (Royal Patent 3497, and LCA No. 3911 to Naone (Royal Patent 3496) are all within parcel E.

> less than six weeks prior to the return date stated in the notice, as provided for by Section 337-5, Revised Laws of Hawaii 1955.[10]

(Footnote added.) The summons was published once a week for four consecutive weeks and informed readers that a hearing on the partition was to be held on December 20, 1962. No one responded to the summons or filed an answer to the Complaint within the allocated time.

On January 23, 1963, Judge Takashi Kitaoka entered a "Decree Determining Title and Ordering Partitioning of Real Property" (1963 Decree) deciding that the State was the owner of an undivided one-half (½) interest in the Three Parcels and the Chings were the owners of the other undivided one-half (½) interest in the Three Parcels. This 1963 Decree decided that the State's ownership was "by virtue of the Great Mahele approved on June 7, 1848" and that the Chings' chain of title started with title "to Hanakaipo in and by Mahele Award 10[.]"

Upon his death, Hanakaipo's undivided one-half (½) interest passed to his widow, Piena. Piena conveyed her interest to Lilia K. Kalua (Kalua) on March 24, 1876. On May 20, 1878,

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[10] The subject of Revised Laws of Hawai‘i (RLH) Chapter 337 (1955) is the "Partition of Real Estate". RLH § 337-5 (1955) states, in relevant part:

> **Summons, service, publication.** . . . All persons having any interest therein whose names are unknown . . . shall have notice of the suit by publication of the summons in at least one newspaper published in the Territory and having a general circulation in the circuit within which the property is situated, in such manner and for such time as the court may order, but not less than once in each of four successive weeks, the first publication thereof to be not less than six weeks prior to the return day stated therein.

Kalua and her husband conveyed their interest to Joseph Lima (Lima). On December 14, 1878, Lima and his wife conveyed their interest to Kukahi. Upon Kukahi's death, Kukahi's interest passed to Mary Kaleo Napapa Kim (Kim). Upon Kim's death on March 6, 1943, Kim's interest passed via Second Circuit Probate No. 4537 to Joseph K. Napapa (Napapa). On October 30, 1952, Napapa conveyed his interest to Josephine J. Redmon (Redmon). On March 15, 1957, Redmon, who was by that time remarried and named Josephine J. Michael, conveyed her interest back to Napapa. On March 18, 1957, Napapa conveyed his interest to the Chings.

The 1963 Decree "ORDERED, ADJUDGED AND DECREED" that:

1. The State "is the owner in fee simple of an undivided one-half (½) interest in and to" the Three Parcels.

2. The Chings "are the owners in fee simple of the other and remaining undivided one-half (½) interest in and to the [Three Parcels], as tenants by the entirety."

3. The State shall convey to the Chings title to Parcels C and D, the Chings shall convey to the State title to Parcel E, and the State shall "convey and set aside a non-exclusive perpetual right of way not less than 30 feet in width, in favor of said Parcel D to provide the same with access to and from a Government Road, through, over and across such portion of said Parcel E as [the State and the Chings] shall mutually determine and agree."

The chain of title to the Kupihea Kuleana started with Kupihea and allegedly then passed to Mose Naluai,[11] to Haua and her husband Kahoʻowaha, to W.P.H. Kaleiahihi a.k.a. Peter M. Naluai, to his wife Rachael E. Naluai and their nine children, as follows: Moses K., Peter K., William H., Raphael K., Carlo C., Elizabeth K., Henrietta P., Rachael H., and Louise P. a.k.a. Phoebe Antoinette Torres.[12]

Allegedly, when Rachael E. Naluai died, her interest passed to/through the two children of her deceased daughter Louise P., as follows: (a) to Juanita Torres Pettigrew, married to Francis, and their children Frances, Kile, Michael, Patrick, Rose (Rosemond Pettigrew), Namahana, Defendant Mary Margaret K. Naluai Kauhola (Mary Kauhola), married to Raymond, and Defendant Louise Mililani Naluai Hanapi (Louise Hanapi), married to Alapai; and (b) to John R. Torres. On August 30, 1989, John R. Torres quitclaimed his interest to Rosemond Pettigrew.

The January 24, 1995 Motion filed by Rosemond Pettigrew and Defendant Mary Kauhola in Civil No. 400 asked that the 1963 Decree be set aside pursuant to Hawaiʻi Rules of Civil Procedure

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[11] The deed from Kupihea and his wife Hana Kupihea is to "P. M. Naluai". It appears that Mose Naluai is also known as P.M. Naluai. The probate of Mose Naluai's will states that the property being passed is the land purchased from Kupihea. When Mose Naluai died in 1885, he passed the land to his mother Haua.

[12] The Petition for Probate of [Rachael E. Naluai's] Will appears to identify daughter Louise P. as "Phoebe Antoinette Torres".

(HRCP) Rule 55(c) (2000)[13] or BDM, Inc. v. Sageco, Inc., 57 Haw. 73, 549 P.2d 1147 (1976),[14] or be declared void pursuant to HRCP 60(b)(4) (2003).[15] The January 24, 1995 Motion also asked the court to allow the movants, as the "Naluai Heirs", to become parties and assert their claims to the Three Parcels.[16] In this January 24, 1995 Motion, Rosemond Pettigrew and Mary Kauhola contended that the Naluai heirs were improperly served by publication and argued, in relevant part, as follows:

> Naluai Heirs contend that the default as [sic] was improper as against them because [the State and the Chings] had not complied with the constitutional and statutory prerequisites to service of process by publication and thus that this Court did not have personal jurisdiction over Naluai Heirs when the default was entered. . . .
>
> . . . .
>
> . . . Because the present action involves both an action for partition and a petition to establish boundaries, adjoining landowners must necessarily be joined in order to effectuate a final decision which will be binding on all parties with interests to be affected.
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> . . . .

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[13] HRCP Rule 55(c) (2000) states: "For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b)."

[14] Under the BDM, Inc. v. Sageco, Inc. test, a motion to set aside a judgment should be granted if it can be shown "(1) that the nondefaulting party will not be prejudiced by the reopening, (2) that the defaulting party has a meritorious defense, and (3) that the default was not the result of inexcusable neglect or a wilful act." 57 Haw. 73, 77, 549 P.2d 1147, 1150 (1976).

[15] HRCP Rule 60(b)(4) (2000) states: "On 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 for the following reasons . . . (4) the judgment is void."

[16] Thereafter, this case was involved in nondispositive appeals Nos. 18966 and 21637.

> . . . A party seeking leave to serve unidentified parties by publication must first comply with the requirements of Hawaii Revised Statutes (HRS) § 634-23, and of Rule 17(d)(1), HRCP. These requirements are: (1) the exercise of "due diligence," HRS § 634-23(2), and "good faith effort," Rule 17(d)(1), to identify all parties who should be joined; and (2) that the party seeking service by publication set forth by affidavit "facts based upon the personal knowledge of the affiant concerning the methods, means, and attempts made to locate and effect personal service on the defendant [and] any other pertinent facts," HRS § 634-23(2), and "set forth with specificity all actions already undertaken in a diligent and good faith effort to ascertain the person's full name and identity." HRCP Rule 17(d)(1).
>
> . . . .
>
> . . . Both RLH § 230-31 and HRCP Rule 17(d)(1) . . . establish that the requirement that a plaintiff set forth by affidavit the particular steps he or she has taken to accomplish his or her duty of due diligence is an **independent** requirement with which plaintiffs must comply.

(Emphasis in the original; footnotes omitted.)

On January 30, 1995, Defendant Louise Hanapi (1) joined in support of the January 24, 1995 Motion and (2) moved to add Plaintiffs-Appellees Gary O. Galiher (Galiher) and Diane T. Ono (Ono) as parties because they had acquired the interest of the Chings in Parcel D. Thereafter, Galiher and Ono participated in the proceedings.

In their Memorandum in Support of Motion, Rosemond Pettigrew and Mary Kauhola argued, in relevant part, as follows:

> This case is an action to partition certain portions of the ahupuaʻa of Ahaino 1 on the island of Molokaʻi totaling 0.340 acres (Parcel "C"), 92.68 acres (Parcel "D"), and 163.97 acres (Parcel "E") (collectively "the Properties"), together allegedly constituting Mahele Award 10 to Hanakaipo.
>
> . . . Naluai Heirs claim ownership of undivided interests in the Properties as heirs of the grantees of Kupihea, the recipient of both a Palapala Hoʻoko[17] [sic] in 1853 as well as Royal Patent

[17] In this context, "palapala hoʻokō" means a "certificate of title". Hawaiian Dictionary, supra, at 309.

No. 4829[18] on July 19, 1860";

. . . .

The testimony recorded in the Native Register for LCA 4891 states:

> I [Kupihea] have a claim for land in the Ahupuaa of Ahaino on the island of Molokai. Napuluelua is the name of this ili[19] of Ahaino.[20] Ahaino 1, which belongs to Kanelauwahine, is the Ahupuaa located on the East. Kahiki, which be[l]ongs to Kahaule, is the ili located on the West. I have had possession of this claims [sic] since ancient times. The width is 44 fathoms.[21] The length runs from the seashore along the land to the mountains. . . .

Kupihea received Royal Patent 4829 in Ahaino on July 19, 1860. . . .

Hanakaipo had in fact already given the ʻili of Napuluelua to Kupihea. . . . Subsequently, a Māhele [sic] Award was made in the name of Hanakaipo on January 15, 1862. . . . Thus, while Hanakaipo's name appeared on the face of Māhele [sic] Award 10, the award was on behalf of Kupihea, as an assign, as the testimony to LCA 4891 indicates.

. . . .

Additionally, Kupihea's claim before the Land Commission in 1848 was for an ʻili that ran from the mountains to the sea. . . . While the Land Commission finally awarded Kupihea an area comprising the current LCA [Land Commission Award] 4891 on May 22, 1849, the additional area claimed was subject to claims by Hanakaipo as part of Māhele [sic] Award 10. Thus, the Land Commission Award did not resolve Kupihea's claim to the lands now contained in Māhele [sic] Award 10.

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[18] The land involved in Land Commission Award 4891 is the land involved in Royal Patent No. 4829 and is on the makai (ocean) part of the ahupuaʻa of Ahaino 1st. It consists of approximately 3.520 acres or 153,324 square feet. Ahaino 1st consists of approximately 285 acres.

[19] As used, an "ʻili" is a subdivision of an ahupuaʻa. Hawaiian Dictionary, supra, at 97.

[20] Rosemond Pettigrew's quotation of Kupihea's claim differs slightly from the translation provided by Jason Achiu of the Hawaii State Archives. Mr. Achiu's translation begins: "I [Kupihea] have a claim in the Ahupuaa of Ahaino 2, on the Island of Molokai. Napulu 2 is the name of this ili."

[21] A "fathom" is defined as, "A nautical measure of six feet in length. Occasionally used as a superficial measure of land and in mining, and in that case it means a square fathom or thirty-six square feet." Black's Law Dictionary 608 (6th ed. 1990). An area "44 fathoms" is 1584 square feet or .036362 acre.

(Footnotes added.)

In 1865, Kupihea deeded land to Rosemond Pettigrew's ancestor, Mose Naluai (M. Naluai or P. M. Naluai). The land conveyed was described as follows:

> [T]hat entire parcel of land at Ahainoiki and all that parcel of land of Kuheke situated on the Island of Molokai, the parcels confirmed to and in Land Commission Award 4891 and 4892, the boundaries are described for the said parcels. Parcel 1. In the Ili of Paina
>
> North 50 1/4 West 9 chains 65 perches along Keaupuni
>
> South 70 " " Konohiki
>
> " 44 1/4 East 9 " 30 " " Pahee
>
> North 48 3/4 " 86 1/2 " " Loko
>
> " 24 1/2 " 65 " " "
>
> until the place of beginning 153 Fathoms[22]
>
> Parcel 2 Ahainoiki Ili of Kapulu
>
> Beginning in the South East corner and extending
>
> South 42 1/2 West 3 chains 12 perches along Kae
>
> North 2 1/4 " 61 " " Konohiki
>
> " 39 1/2 " 1 chain 41 " " "
>
> " 53 3/4 " 1 " 24 " " "
>
> South 57 1/4 84 " " "
>
> North 50 1/4 " 8 chains 43 " " Kahaulo
>
> " 3 1/2 East 2 " 70 " " Konohiki
>
> South 55 " 13 " 60 " " Kuakamauna
>
> until the place of beginning 3 acres 629 fathoms[23] - parcel 2

[22] An area 153 fathoms is 5,508 square feet or 0.126445 acre. It appears the number of fathoms here should have been 1,153.

[23] An area 629 fathoms is 22,644 square feet or 0.519832 acre.

1153 fathoms[24] - parcel 1

All of the two parcel contains 4 acres, 572 fathoms.[25]

To and within these parcels contains four acres and five hundred and seventy-two fathoms, a little more or less.

(Footnotes added.) This deed does not mention Mahele Award 10 or any claim by Kupihea to the ahupua‘a involved in Mahele Award 10.

On August 30, 1989, John R. Torres quitclaimed to Rosemond Pettigrew the following:

FIRST: All of that certain parcel of land situate at Puina, Island of Molokai, State of Hawaii, being a portion of the land described in and covered by Land Commission Award Number 4891, Royal Patent No. 4829, Apana 2, and thus bounded and more particularly described as follows:

APANA 2 - AHINO [sic], ILI KEPULU

. . . .

AREA: 3.520 ACRES or 153,324 SQ. FT.

SAVE AND EXCEPT therefrom the following parcels of lands, to-wit:

Royal Patent Grant No. 829 to Kanewahine at Ahaino, Molokai, Hawaii, being Parcel 2, dry land.

. . . .

THIS PARCEL: 0.140 ACRES, 6102 SQ. FT.

All of that certain parcel of land being all of that certain portion of land described in Apana 2, Royal Patent 4829, Kuleana 4981 [sic], to Kupihea, situate, lying and being wholly mauka[26] of the Government Main Road in Ahaino, Island of Molokai, State of Hawaii, known and distinguished on the Taxation Map, Second Division, State of Hawaii, as Parcel 49 of Zone 5, Section 7, Plat 06, containing an area 1.10 acres, more or less.

SECOND: All of that certain parcel of land situate at Ahaino, Ili Kahiki, Island of Molokai, State of Hawaii, being a portion of the land described in and covered by Land Commission Award Number

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[24] An area 1,153 fathoms is 41,508 square feet or 0.952891 acre.

[25] An area "3 acres 629 fathoms" plus "1153 fathoms" equals an area 4.472723 acres. An area "4 acres, 572 fathoms" equals an area 4.472727 acres.

[26] In this context, "mauka" is the same as "uka", which is defined as "towards the mountain". Hawaiian Dictionary, supra, at 242, 365.

> 4122, Royal patent No. 3497, and to Kahaule thus bounded and more particularly described as follows:
>
> . . . .
>
> AREA: .0380 ACRES
>
> SAVE AND EXCEPT therefrom that certain parcel of land being all of that certain portion of land described in Royal patent 3497, Kuleana 4122, to Kahaule, situate, lying and being wholly mauka of the Government Main Road at Ahaino, Island of Molokai, State of Hawaii, and distinguished on the Taxation Map, Second Division, State of Hawaii, as Parcel 48 of Zone 5, Section 7, Plat 96, containing an area of 1.52 acres, more or less.

On April 5, 2001, Rosemond Pettigrew filed a motion for a hearing on her January 24, 1995 Motion. In an accompanying memo, she stated, in relevant part, as follows:

> The State of Hawaii claims a ½ undivided interest in the properties through the Mahele of 1848 (R2), in which ½ [of] the ahupua'a of Ahaino 1st was set aside for the government (R18). Robert C. Ching and Elsie Lee [C]hing . . . allege ownership of the remaining ½ interest . . . .
>
> [Rosemond Pettigrew] claims ownership of undivided interest of the same properties as the heirs [sic] of the grantees of Kupihea and Haua Nui Kanewahine, the recipients of both a Palapala Ho'oko [sic] (LCAw 4891) on March 13, 1852, as well as RP 4829 dated July 19, 1860 (R45) of which awards and claims described through testimonies and surveys that said properties are physically located in the land division known as *Ahaino 2*. [Rosemond Pettigrew] also claims ownership of these same properties as the heirs and grantees of *Kahaule*, the recipient of LCAw 4122, RP 3497 (dated March 13, 1852) and Royal Patent Grant 1129, apanas[27] 1 and 2, of which awards and grants describe through testimo[n]ies and surveys that said properties are physically located in the land division knowns [sic] as *Ahaino 2*.

Rosemond Pettigrew's memo sought relief on the following grounds: (1) the State, the Chings, Galiher, and Ono failed to carry their burden in establishing quiet title[28] to the

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[27] In this context, an "apana" is a "land parcel". Hawaiian Dictionary, supra, at 28.

[28] Civil No. 400 was not a quiet title action. It was a partition action that decreed title. The distinction will be discussed infra, section III.A.2.a.

Three Parcels; (2) the 1963 Decree was void because of defective service of process and lack of personal jurisdiction; (3) the State and the Chings did not have quiet title before "adjudicating boundaries, partitioning, subdividing and showing up in Court . . . to quiet the title"; (4) the 1963 Decree was void because the State and the Chings did not apply for a boundary certificate; (5) the Circuit Court of the Second Circuit did not have subject matter jurisdiction to quiet the title of the Three Parcels; and (6) the court, the State, the Chings, and the title insurance companies conspired to deprive Rosemond Pettigrew of her property under color of state law.

The June 6, 2001 Order denied the January 24, 1995 Motion and stated: "The Naluai family had the required notice in the Civil No. 400 quiet title case[29] and have therefore presented no valid basis to set aside the Civil No. 400 Judgment."

In her opening brief in this appeal, Rosemond Pettigrew states, in relevant part, as follows:

> [Rosemond Pettigrew] has introduced as evidence in this case, legally cognizable paper title to the subject property and the native testimonies of the description of the pertinent boundaries.[30] Also submitted as evidence is a tax payment history to present and a history of [Rosemond Pettigrew's] predecessors mortgaging, leasing and deeding the subject property in fee simple.[31] [Rosemond Pettigrew] has also introduced into evidence a

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[29] See supra n.28.

[30] Rosemond Pettigrew introduced evidence of legally cognizable paper title to her part of the Kupihea Kuleana, not to parcels C, D and E.

[31] The only evidence that Rosemond Pettigrew submitted with relation to her predecessors' tax payment history included route slips for property

historical document indicating Appellees' [sic] Boy Scouts, Galiher and Ono and Appellee Chings predecessor in interest, Kukahi's, petition for a certification of boundaries in 1879.

[Rosemond Pettigrew's] predecessor (Kukahi) applied for a certification of boundaries for Mahele Award 10 which was described as being one-half of Ahaino and never received an award for certification of the boundaries through this adjudication. Appellees' chain of title begins and ends in 1879 and the Second Circuit Court is not requiring Appellees' [sic] to produce legally cognizable paper to the subject property.

In precedent Hawaii case law it has been state[d] that, [one] contesting a government claim on the ground of inclusion of the claimed land in an award by name should produce evidence "that the [name of the land awarded] as known and understood at the time of either the Mahele or of the land commission award included [the land claimed by the government]," and that: ["]the question would be what passed by the award rather than what was referred to in the Mahele." In Re Pa Pelekane, 21 Haw. 175, 185 (1912).

The name of the lands awarded [Rosemond Pettigrew's] predecessors on LCAw 4891, RP 4829 is Kupeke and Ahaino. Legally, Appellees' [sic] State, Boy Scouts, Galiher, Ono and Chings, are precluded from claiming any portion of Ahaino or Kupeke. Appellees' [sic] allege the LCAw 4891, RP 4829 consist of a total of 4 acres and have disparaged Appellants [sic] title to over a thousand acres and interfered with the contract between Appellants predecessors, the Hawaiian government, the Board of Commissioners Court to Quiet Land Titles, and all of the Native Tenants that were awarded kuleana's [sic] in the land divisions known as Kupeke and Ahaino.

[Rosemond Pettigrew's] award of LCAw 4891 is prior to any awards in these land divisions and all titles and awards located in Kupeke and Ahaino are derived through this award.

LCAw 4891 is an award derived from the first Mahele which took place between the King and his principle chiefs. The adjudication that took place in Kupeke and Ahaino on May 22, 1849, is bound by the doctrine of res judicata and collateral estoppel and Appellees' [sic] State, Chings, Boy Scouts, Galiher and Ono are precluded from re-adjudicating a land commission award long adjudicated.

Civil No. 400 is a "state action under color of state law"

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identified as Zone 5, Section 7, Plat 06, Parcels 20 and 21. These two parcels refer to LCA Nos. 4122 (to Kahaule) and 4891 (to Kupihea), not to Mahele Award 10. In fact, depending upon which map in the record you utilize, parcels 20 and 21 amount to at most 3.9 acres. Some documents show that parcel 20 (LCA No. 4122) has an area of 0.50 acres, and parcel 21 (LCA No. 4891) has an area of 3.40 acres, where others show that parcel 21 has an area of either 2.72 acres or 1.664 acres. While parcels 20 and 21 may be included within the 7.92 acres of LCA's included within the 285 acre ahupuaʻa of Ahaino 1st, there is no evidence that they are included within the 259.07 acres conveyed by Mahele Award 10.

filed by Appellees' [sic] State, Department of Land and Natural Resources (DLNR) and on behalf of other "state actors" to re-adjudicate Appellants LACw 4891 under color of state law and award Appellee Chings a "Decree Determining Title" to [Rosemond Pettigrew's] property.

Appellees' [sic] State, Chings, Boy Scouts, Galiher and Ono have failed to carry its [sic] burden of proof to establish quiet title in themselves to the disputed property and the judgment and Decree Determining Title in Civil No. 400 is not a binding precedent on the scope of the award made by the LCAw 4891, RP 4829, whereas Appellees' lack standing to readjudicate [Rosemond Pettigrew's] certificate of award and royal patent to Kupeke and Ahaino.

Again, [Rosemond Pettigrew] has been deprived of her property without due process and just compensation in violation of the 14th Amendment to the U.S. Constitution and Article 5 of the State of Hawaii Constitution.

VI. ARGUMENT

. . . .

1. THE LOWER COURT LACKED JURISDICTION OVER THE SUBJECT MATTER

. . . Appellee State and predecessor of Appellees' [sic] Boy Scouts, Galiher and Ono subdivided Appellant's LCAw 4891 (Ahaino) into many parcels (Registered Map 4101-A) but, only brought Parcels C, D and E into Civil No. 400. Appellees' [sic] did not have legally cognizable paper title to Mahele Award 10 prior to the 1880 petition by Kukahi to the Boundary Commissioner (Petition No. 64) to certify the boundaries of Ahaino. Appellee Chings, Boy Scouts, Galiher and Ono, predecessor, Kukahi, did not receive a certification of boundaries during this adjudication in 1880 and Appellees' [sic] cannot rebut the evidence submitted by [Rosemond Pettigrew] by contradicting evidence of where they got their purported title. If Appellees' predecessors did not own the subject property and the Court in Civil No, 400 did not have jurisdiction over the subject matter pursuant to Statute (HRS 664-6), then it seems reasonable that the Court lacked jurisdiction over the subject matter contained in the Decree Determining Title and Ordering Partitioning of the Real Property in Civil No. 400.

. . . .

. . . On July 19, 1860, the Hawaiian government issued Royal Patent 4829 confirming the award LCAw 4891 to Kupihea for the lands named Kupeke and Ahaino. Appellee's [sic] purported predecessor, Hanakaipo received no award from the Board of Commissioners Court to any property in Ahaino, which was patented or conveyed by deed from the King or government with the boundaries being described therein and Appellees' [sic] necessarily had to file their complaint pursuant to the controlling statute, RLH 1955, Chapter 234-6 (HRS 664) as expressly provided by law.

> . . . .
>
> C. DEPRIVATION OF PROPERTY UNDER COLOR OF STATE LAW
>
> Appellees' have disparaged [Rosemond Pettigrew's] legally cognizable paper title to over one thousand acres contained in LCAw 4891, RP 4829 for the lands named Kupeke and Ahaino.

(Record citations omitted; footnotes added.)

In their answering brief, Galiher and Ono describe Rosemond Pettigrew's position as follows:

> [Rosemond Pettigrew] claims that the 1963 Judgment should be set aside because, not she, but her family, the Naluai family, should have been served and joined as parties in this case. To prevail on that claim, at a minimum, she must show that the Plaintiffs in Civil No. 400, the State and Robert Ching and Elsie Ching, knew or should have known that her family had a claim or interest in Mahele Award 10. But she does not claim that she or her family have any claim or interest in Mahele Award 10. Nowhere in her Opening Brief does she say that she has any deed to Mahele Award 10 nor does she say that she inherited any interest in Mahele Award 10. She says that Mahele Award 10 was never granted out by the government, and thus it does not exist. Rather she says that she owns all of the Ahupuaa of Ahaino 1st, where Mahele Award 10 is located, because she owns Land Commission Award (LCAw) 4891 to Kupihea. She says that LCAw 4891 is a Grant of all of Ahaino 1st. The Appellant [sic] will show that LCAw 4891 is an award of only 3.519832 acres of land in Ahaino. Thus [Rosemond Pettigrew] cannot prevail in this Appeal.
>
> . . . [T]he Decree filed on January 23, 1963 . . . shows that the Plaintiffs, the State of Hawaii, and Robert and Elsie Ching proved that they owned Parcels C, D and E of Mahele Award 10, and those three (3) parcels were then partitioned, Parcel E to the State and Parcels C and D to the Chings. The parcel which is the subject of this appeal is Parcel D, and is now owned by Plaintiffs Appellees Gary Galiher and Diane Ono.
>
> . . . .
>
> Kupihea, the Awardee of LCAw 4891 and [Rosemond Pettigrew's] predecessor in interest, made a claim in Ahaino on January 11, 1848 . . . . Kupihea said he had a claim <u>in</u> the Ahupuaa of Ahaino 2." Kupihea said he had a claim <u>in</u> Ahaino, he did not say that he claimed all of Ahaino. A copy of LCAw 4891 is attached to [Rosemond Pettigrew's] Motion as Exhibit 34 and a copy of the Royal Patent is attached as Exhibit 3. A Survey description of LCAw 4891 is attached to [Rosemond Pettigrew's] Motion as Exhibit 2, and shows that Apana 2 of LCAw 4891 contains three (3) acres

> and 629 fathoms.[32] Thus the Award made on Kupihea's claim is LCAw 4891, Apana 2 in Ahaino 1st, containing 3.519832 acres. . . .
>
> . . . .
>
> Even if [Rosemond Pettigrew] is an owner of record of LCAw 4891, she is not an owner of record of Mahele Award 10. Civil No. 400 concerned Mahele Award 10, not LCAw 4891.
>
> The land in Civil No. 400 is Mahele Award 10, parcels C, D and E. . . . [Rosemond Pettigrew] says that Mahele Award 10 does not exist. She says: "Appellees' purported predecessor, Hanakaipo received no award from the Board of Commissioners Court to any property in Ahaino . . ." However, Mahele Award 10 does exist and its location is confirmed by Boundary Certificate No. 235.

(Footnote added.)

In her appeal, Rosemond Pettigrew first argues that the court (a) was wrong when it decided that adequate notice was given to Pettigrew and her predecessors and (b) lacked subject matter jurisdiction in Civil No. 400 to partition the Three Parcels because the court did not have statutory "jurisdiction to adjudicate title or award a decree determining title."

Rosemond Pettigrew next argues that the court violated her due process rights when it made a radical departure from past judicial decisions. Rosemond Pettigrew argues this constitutes an unlawful taking without just compensation because the court's "unpredictable changes of state law" did not "recognize 'valid existing vested rights.'"

Rosemond Pettigrew's third argument is that the "lower court intentionally, with reckless error, malice and discriminatory animus, conspir[ed] with the Appellees' [sic] and

[32] LCAw 4891, Apana 2 in Ahaino is 3 acres and 629 fathoms and 629 fathoms is 0.519832 acre. Thus, LCAw 4891:2 is approximately 3.519832 acres.

others to deprive [her] of her property, liberty, right to petition the Hawaii courts for redress of grievance, equal rights and protection of the laws[.]" Rosemond Pettigrew does not state how or when the court conspired with the Appellees, but she does accuse the Appellees of disparaging her "legally cognizable paper title to over one thousand acres contained in LCAw 4891[.]" Rosemond Pettigrew also asserts that the circuit court has denied her "Constitutional right to introduce evidence of legally cognizable title to [her] property, to call witness's [sic] to testify upon [her] behalf, and denied [her] right to jury instructions for protection of property."

Finally, Rosemond Pettigrew argues that she

> has not been allowed to petition the Hawaii Courts for redress of grievance for the deprivation of our [sic] property. [Rosemond Pettigrew] has legally cognizable paper title to the subject property. [Rosemond Pettigrew's] family has paid taxes on this property from before 1850 to present. [Rosemond Pettigrew] resides on this property and holds it in my [sic] possession. [Rosemond Pettigrew] has suffered damages in fact from the oppression by the Hawaii Courts because of my Hawaiian ancestry and true ownership of the subject property.

Galiher and Ono counter that: (1) the court had jurisdiction over all parties with an interest in Mahele Award 10; (2) the court had subject matter jurisdiction to quiet the title; (3) Rosemond Pettigrew did not have standing to challenge the 1963 Decree; (4) the court should not "consider facts incorporated by reference"; (5) the State and the Chings have a Boundary Certificate Judgment; (6) Rosemond Pettigrew's claims of deprivation of property under color of state law are without

merit; (7) Rosemond Pettigrew's claim of continuing violations are without merit; and (8) relief under HRCP Rule 55(c) is not available to Rosemond Pettigrew.

II. STANDARDS OF REVIEW

A. Denial of a HRCP 60(b)(4) Motion

Generally, an order denying a motion for relief from a judgment made pursuant to HRCP Rule 60(b) is reviewed on appeal under the abuse of discretion standard. Hawai‘i Hous. Auth. v. Uyehara, 77 Hawai'i 144, 147, 883 P.2d 65, 68 (1994). However, with respect to motions under HRCP 60(b)(4), which allege that a judgment is void, this court has declared, "[t]he determination of whether a judgment is void is not a discretionary issue. It has been noted that a judgment is void only if the court that rendered it lacked jurisdiction of either the subject matter or the parties or otherwise acted in a manner inconsistent with due process of law." Citicorp Mortgage, Inc. v. Bartolome, 94 Hawai‘i 422, 428, 16 P.3d 827, 833 (App. 2000)(quoting In re Hana Ranch Co., Ltd., 3 Haw. App. 141, 146, 642 P.2d 938, 941-42 (1982)). "Moreover, '[i]n the sound interest of finality, the concept of void judgment must be narrowly restricted.'" Id. (quoting Dillingham Inv. Crop. v. Kunio Yokoyama Trust, 8 Haw. App. 226, 233, 797 P.2d 1316, 1320 (1990)).

B. Questions of Constitutional Law/Due Process

"Hawai‘i appellate courts review questions of constitutional law, e.g., questions regarding procedural due process, *de novo*, under the right/wrong standard. Under the right/wrong standard, this court examines the facts and answers the question without being required to give any weight to the trial court's answer to it." State v. Adam, 97 Hawai‘i 475, 481, 40 P.3d 877, 883 (2002) (quoting Bank of Hawai‘i v. Kunimoto, 91 Hawai‘i 372, 387, 984 P.2d 1198, 1213 (1999) (citations, brackets, and quotation marks omitted)).

C. Denial of a HRCP Rule 55(c) Motion

"An application under [HRCP] Rule 55(c) to set aside a default entry or judgment is addressed to the sound discretion of the [circuit] court." 10A Wright, Miller & Kane, Federal Practice and Procedure: Civil § 2693 at 91-92 (3d ed. 1998). "The judge's determination normally will not be disturbed on appeal unless the appellate court finds an abuse of discretion[.]" Id. at 93; see Hawaii Carpenters' Trust Funds v. Stone, 794 F.2d 508, 511-512 (9th Cir. 1986) (citations omitted). "To constitute an abuse of discretion, a court must have clearly exceeded the bounds of reason or disregarded rules or principles of law or practice to the substantial detriment of a party litigant." Amfac, Inc. v. Waikiki Beachcomber Inv. Co., 74 Haw. 85, 114, 839 P.2d 10, 26 (1992) (citation omitted).

"[D]efaults and default judgments are not favored and . . . any doubt should be resolved in favor of the party seeking relief, so that, in the interests of justice, there can be a full trial on the merits." Lambert v. Lua, 92 Hawai‘i 228, 235, 990 P.2d 126, 133 (App. 1999) (quoting BDM, Inc. v. Sageco, Inc., 57 Haw. 73, 76, 549 P.2d 1147, 1150 (1976)). The Hawai‘i Supreme Court has stated that:

> [i]n general, a motion to set aside a default entry or a default judgment may and should be granted whenever the court finds (1) that the nondefaulting party will not be prejudiced by the reopening, (2) that the defaulting party has a meritorious defense, and (3) that the default was not the result of inexcusable neglect or a wilful act. The mere fact that the nondefaulting party will be required to prove his [or her] case without the inhibiting effect of the default upon the defaulting party does not constitute prejudice which should prevent a reopening.

BDM, 57 Haw. at 77, 549 P.2d at 1150; see Rearden Family Trust v. Wisenbaker, 101 Hawai‘i 237, 65 P.3d 1029 (2003).

III. DISCUSSION

A. Setting Aside the 1963 Decree

Rosemond Pettigrew's primary argument is that the 1963 Decree should be set aside because it is void. Noting that HRCP Rule 60(b) permits the court to "relieve a party or a party’s legal representative from a final judgment, order, or proceeding[,]" Galiher and Ono question whether Rosemond Pettigrew qualifies as "a party or a party's legal representative" to have standing to challenge the 1963 Decree on the basis of HRCP Rule 60(b)(4).

The Chings, Galiher, and Ono properly raised this issue. Even had they not done so, "[t]he question of whether [a party] has standing to bring the action or to appeal its dismissal may be raised *sua sponte* by the court having jurisdiction over the case." Waikiki Discount Bazaar, Inc. v. City and County of Honolulu, 5 Haw. App. 635, 640, 706 P.2d 1315, 1319 (1985)(citing Sec'y of State of Md. v. Joseph H. Munson Co., 467 U.S. 947 (1984)).

1. *Standing*

Rosemond Pettigrew was not a "party" to the original action. The question is whether she is "a party's legal representative." Nothing in the HRCP specifically defines "a party's legal representative," and no court in the state judiciary has yet interpreted the meaning of the term. However, the similarity of HRCP Rule 60(b)(4) to Rule 60(b)(4) of the Federal Rules of Civil Procedure (FRCP), motivates us to examine how the term has been interpreted in FRCP Rule 60(b)(4).

"It has been said that the term [party's legal representative] has no fixed and unyielding meaning in law, but as ordinarily employed in its general use is sufficiently broad to include any person who stands in the place and stead of a decedent in respect to property[.]" 47 Am. Jur. 2d *Judgments* § 759 (1995). The Court of Appeals for the Tenth Circuit explained that a party's "'legal representative' . . . is one who by

operation of law is tantamount to a party in relationship to the matter involved in the principal action." W. Steel Erection Co. v. United States, 424 F.2d 737, 739 (10th Cir. 1970). The Eleventh Circuit expanded upon this definition to state that a party's legal representative is one "whose legal rights [are] otherwise so intimately bound up with the [party's] that their rights [are] directly affected by the final judgment." Kem Mfg. Corp. v. Wilder, 817 F.2d 1517, 1520 (11th Cir. 1987). Based upon these interpretations, we can safely conclude that in an action for the partition of real estate, an HRCP Rule 60(b)(4) "party's legal representative" includes the subsequent owner of the party's interest in the real estate.

Rosemond Pettigrew alleged and presented evidence that the

> Naluai Heirs['] claim runs from Kupihea to Mose Naluai through a deed in 1865. . . . Mose Naluai's estate then named Haua as the Administrix [sic] and Heir to his estate, . . . , and Haua and her husband, Kahoʻowaha, then deed the land to W.P.H. Kaleiahihi aka P. M. Naluai. . . . P. M. Naluai's Probate then passes LCA 4891 through Rachel [sic] Naluai, his wife, as Administrix [sic] of his estate, to their nine children and Rachel [sic] Naluai. The Will of Rachel [sic] Naluai passed to her grandchildren, John R. Torres and Juanita R. K. Pettigrew, her interest in Ahaino and . . . other land she owned. . . . John R. Torres then deeds to [Rosemond Pettigrew] by deed dated August 30, 1989.

Although Rosemond Pettigrew alleges that she has an interest in the Kupihea Kuleana from her grandmother (Louise P. a.k.a. Phoebe Antoinette Torres) and her mother (Juanita), she did not present evidence that the interests of her grandmother and mother passed to her. On the other hand, she did present evidence of her

acquisition of the interest of her mother's brother, John Torres who acquired his interest from his grandmother, Rachael H., who was identified as an adjoining landowner and was sent personal service in Civil No. 208. Thus, there is evidence that Rosemond Pettigrew stands in the shoes of a party in Civil No. 208. The issue is whether she stands in the shoes of a party in Civil No. 400. The general question is whether Rosemond Pettigrew's predecessors in interest were "unknown defendants" in Civil No. 400. The specific question is whether Rosemond's predecessors in interest were necessary and proper parties to Civil No. 400.

Rosemond Pettigrew contends that because her predecessors in interest were adjoining landowners, they were necessary and proper parties to Civil No. 400 and were required to be notified by personal service.[33] Galiher and Ono respond

[33] Although service of process in Civil No. 400 was by publication, the State, the Chings and Galiher and Ono have demonstrated that Rosemond Pettigrew's alleged predecessors in interest, including her mother and great grandmother, were identified and sent personal service by registered mail in Civil No. 208, which determined the boundaries for the land involved in Civil No. 400. The State, the Chings, Galiher and Ono argue that because Rosemond Pettigrew's mother was served in the Boundary Certificate proceeding, she was therefore a party and principles of *res judicata* and collateral estoppel preclude her from challenging any of the issues decided by the Boundary Certificate Judgment. While there are no cases on point from Hawai'i, there is precedent concluding that the judgment in a boundaries case is *res judicata* as to title in a subsequent action. See Hodson v. Hammer, 229 Minn. 389, 394, 39 N.W.2d 601, 603 (1949); 12 Am. Jur. 2d, *Boundaries* § 124 (1997). Regardless, it is *res judicata* as applied to Rosemond Pettigrew on the issue of the boundaries of Mahele Award 10, since 1) there was a decision on the issue of boundaries, 2) there was a final judgment on the merits, and 3) the same parties are involved. See Caires v. Kualoa Ranch, Inc., 6 Haw. App. 52, 55, 708 P.2d 848, 850-51 (1985). Further, no one appealed the boundary certificate decision. This has the effect of saying that Mahele Award 10 has been certified as to all of Ahaino 1st except for the preexisting grants and LCAs.

that (1) the notice by publication afforded the original defendants was authorized by RLH § 242-2.1 (Supp. 1959), and (2), in 1962, when Civil No. 400 was filed, the RLH did not require plaintiffs to join adjoining landowners as defendants, so notice by publication was a statutorily acceptable method of process for unknown parties who may have had a claim. We agree with (2).

RLH § 242-2.1 pertains to quiet title actions, while Civil No. 400 was a partition action brought under RLH Chapter 337 (1955). RLH Chapter 337 (1955) governs the "Partition of Real Estate" and states, in relevant part, as follows:

> **§ 337-2. Necessary parties; intervenors; unknown owners.** Every person having any legal estate in the property, in fee or as a tenant for life or for years, or any vested estate in dower or by curtesy [sic], or having any vested or contingent legal estate or interest in reversion or remainder as far as known to the petitioner, or in any mortgage, on record, upon all or any part of the property, shall be made party to the suit. . . .
>
> . . . .
>
> All persons interested in any manner or who may claim an interest in the premises whose names are unknown to the petitioner, may be made parties to the suit by the name and description of unknown owners and claimants, and may be designated by fictitious names, and when their true names become known the same may be inserted as though correctly stated in the first instance.
>
> . . . .
>
> **§ 337-5. Summons, service, publication.** The summons shall be directed to all persons named in the petition, and generally to all persons, known or unknown, having or claiming to have any legal or equitable right, title or interest in the premises described in the petition or any part thereof or any lien or other claim with respect thereto, and may be served as provided by law. All persons having any interest therein whose names are unknown . . . shall have notice of the suit by publication of the summons in at least one newspaper published in the Territory and having a general circulation in the circuit within which the property is situated, in such manner and for such time as the court may order, but not less than once in each of four successive weeks, the first publication thereof to be not less than six weeks prior to the return day stated therein. . . .

. . . .

§ 337-7. Powers of the court. The court shall have power to hear, investigate and determine any and all questions of conflicting or controverted titles or claims either as to the whole of the property or as to any share or interest therein, either with or without the intervention of a jury, as hereinafter provided; to remove clouds upon the title of the property or any share or interest therein; to vest titles by decrees, without the form or necessity of conveyance by minors or unknown or absent owners; . . . .

. . . .

§ 337-15. Conveyances and payments in partition; possession and guaranty. The title of every claimant to any share or interest in the property shall be shown to the satisfaction of the court before any conveyance in partition is made to such party of the portion or portions of the land allotted to such share or interest, or before payment to him of the corresponding portion of the proceeds of sale thereof, as the case may be; . . . . In either case, if no claim to the land or fund is made by any other party within the ten years, and successfully established, the title and right of the possessory holder shall become absolute as by prescription, subject to any legal suspension or extension of the prescripted period in favor of any person under any legal disability as in other cases of prescription.[34]

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[34] The entirety of RLH § 337-15 (1955) states as follows:

§ 337-15. Conveyances and payments in partition; possession and guaranty. The title of every claimant to any share or interest in the property shall be shown to the satisfaction of the court before any conveyance in partition is made to such party of the portion or portions of the land allotted to such share or interest, or before payment to him of the corresponding portion of the proceeds of sale thereof, as the case may be; provided, that in any case where the legal title of a claimant to any particular share or interest has not been shown to the satisfaction of the court but the claimant has color of title thereto and such claim is not controverted, and the court has in the general partition made an allotment of a portion or portions of the land, or in the case of a sale in partition has allotted a part of the proceeds in respect of such share, for the benefit and account of the legal owner or owners of such share under the provisions of section 337-10, the court may authorize such claimant to enter into and take possession of the portion or portions of land so allotted on account of such share, or to receive such share of proceeds, upon the claimant first giving security in such form and amount as is satisfactory to the court that in the event that any other person or persons prosecute any adverse claim thereto in the action within ten years after the filing of the court's order (of which order a certified copy shall be recorded in the bureau of conveyances in Honolulu) and prove such adverse claim, the claimant as such possessor holder, or his heirs or assigns, will surrender the possession of the land to the legal owner or owners thereof and account and make restitution for the rents, issues and profits thereof, or, as to such fund that he or his heirs,

Clearly, Rosemond Pettigrew's argument that, at the time Civil No. 400 was decided, adjoining landowners were necessary and proper parties in a partition action is not supported by the

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executors or administrators will refund and repay the same to the court or to its order with legal interest thereon. In either case, if no claim to the land or fund is made by any other party within the ten years, and successfully established, the title and right of the possessory holder shall become absolute as by prescription, subject to any legal suspension or extension of the prescripted period in favor of any person under any legal disability as in other cases of prescription.

The subject of currently applicable Hawaii Revised Statutes (HRS) Chapter 668 is the "PARTITION OF REAL ESTATE". HRS § 668-15 (1993) states as follows:

> **Conveyances and payments in partition; possession and guaranty.** The title of every claimant to any share or interest in the property shall be shown to the satisfaction of the court before any conveyance in partition is made to the party of the portion or portions of the land allotted to the share or interest, or before payment to the party of the corresponding portion of the proceeds of sale thereof; provided that in any case where the legal title of a claimant to any particular share or interest has not been shown to the satisfaction of the court but the claimant has color of title thereto and the claim is not controverted, and the court has in the general partition made an allotment of a portion or portions of the land, or in case of a sale in partition has allotted a part of the proceeds in respect of the share, for the benefit and account of the legal owner or owners of the share under section 668-10, the court may authorize the claimant to enter into and take possession of the portion or portions of land so allotted on account of the share, or to receive such share of proceeds, upon the claimant first giving security in such form and amount as is satisfactory to the court that in the event that any other person or persons prosecute any adverse claim thereto in the action within ten years after the filing of the court's order (of which order a certified copy shall be recorded in the bureau of conveyances in Honolulu) and prove such adverse claim, the claimant as the possessory holder, or the claimant's heirs or assigns, will surrender the possession of the land to the legal owner or owners thereof and account and make restitution for the rents, issues, and profits thereof, or, as to such fund that the claimant or the claimant's heirs, or personal representatives will refund and repay the same to the court or to its order with legal interest thereon. In either case, if no claim to the land or fund is made by any other party within the ten years, and successfully established, the title and right of the possessory holder shall become absolute as by prescription, subject to any legal suspension or extension of the prescriptive period in favor of any person under any legal disability as in other cases of prescription.

applicable statutes.

Assuming Rosemond Pettigrew was a person who had an alleged interest in the Civil No. 400 land, the plaintiffs and the court involved in Civil No. 400 did not know and did not have reason to know that she had an alleged interest. RLH § 337-5 required the plaintiffs in Civil No. 400 to provide such persons with "notice of the suit by publication of the summons in at least one newspaper published in the [State] and having a general circulation in the circuit within which the property is situated, . . . not less than once in each of four successive weeks." Clearly, HRS § 337-5 authorized notice of the suit to Rosemond Pettigrew by such publication.

The final question is whether RLH Chapter 337 (1955) provided constitutionally acceptable notice to a person having an alleged interest where the plaintiffs and the court did not know and did not have reason to know that the person had an alleged interest. The answer is yes.

In Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 317 (1950), the United States Supreme Court stated, in relevant part, that

> [t]his Court has not hesitated to approve of resort to publication as a customary substitute in another class of cases where it is not reasonably possible or practicable to give more adequate warning. Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights. . . .
>
> Those beneficiaries represented by appellant whose interests

> or whereabouts could not with due diligence be ascertained come clearly within this category. As to them the statutory notice is sufficient. However great the odds that publication will never reach the eyes of such unknown parties, it is not in the typical case much more likely to fail than any of the choices open to legislators endeavoring to prescribe the best notice practicable.

The original defendants (original defendants) in Civil No. 400 included the "Heirs of Kukahi, John Doe 1 to John Doe 100, Mary Roe 1 to Mary Roe 100, Unknown Owners and Claimants, and All Persons Interested in Any Manner, or Who May Claim Any Interest in the Premises Described Herein or Any Part Thereof". No defendant was specifically identified and all defendants were served by publication. Pursuant to RLH § 337-5, the court in Civil No. 400 authorized the Chings and the State to serve a summons upon all unknown claimants by publication. No unknown claimant appeared or filed an answer, so "each and all of the Defendants [were] deemed to be and held in default[.]"

Thus, if Rosemond Pettigrew or any of her alleged predecessors in title stands in the shoes of unknown claimant-party in Civil No. 400, they stand in the shoes of a defaulted unknown claimant-party. In Hawai‘i, it has been held that once a party is adjudged in default, the defaulted party has "no further standing to contest the factual allegations of plaintiff's claim for relief." Bank of Hawaii v. Horwoth, 71 Haw. 204, 216, 787 P.2d 674, 681 (1990)(quoting 10 Wright, Miller & Kane, Federal Practice and Procedure § 2688 (1983)). Consequently, Rosemond Pettigrew, as legal representative of a defaulted unknown claimant-party or claimants-parties, is also precluded from

challenging the claims of the State and the Chings regarding boundaries, ownership, and title.

2. *Void Judgment*

If Rosemond Pettigrew stood in the shoes of a defaulted unknown claimant-party in Civil No. 400, Rosemond Pettigrew had standing to set aside the default in only one of two ways: (1) by demonstrating that the default judgment against the original defendants was void, or (2) by satisfying the standard set forth in BDM.

Rosemond Pettigrew's primary ground for setting aside the 1963 Decree is that it was void under HRCP Rule 60(b)(4). To succeed, Rosemond Pettigrew must have demonstrated that "the court that rendered [the 1963 Decree] lacked jurisdiction of either subject matter or the parties or otherwise acted in a manner inconsistent with due process of law." Citicorp Mortgage, 94 Hawai‘i at 430, 16 P.3d at 835. Such a determination "is not a discretionary issue." Id. In other words, it is a question of law.

a. Due Process Rights

As previously mentioned, in Civil No. 400, none of the original defendants were specifically identified and all defendants were served by publication.

Rosemond Pettigrew asserts that this service by publication was a violation of the fundamental due process rights

of the original defendants who should have been personally identified and personally served. See Mullane, 339 U.S. at 314. Rosemond Pettigrew argues based on Mullane that the notice in Civil No. 400 was required to inform her alleged predecessors in title of the partition action and allow them an opportunity to present any objections. Id. She specifically argues that, as adjoining landowners, her alleged predecessors in title were necessary and proper parties to Civil No. 400, and were required to be notified by personal service.[35]

Galiher and Ono respond that the notice by publication to the original unknown claimants was authorized by RLH Chapter 242 (1955), amended in 1959 as RLH § 242-2.1. Moreover, Galiher and Ono contend that in 1962, when Civil No. 400 was originally filed, the RLH did not require plaintiffs to join adjoining landowners as defendants, so notice by publication was a statutorily acceptable method of process for unknown claimants. However, the question remains whether the RLH's requirements in 1962 in and of itself provided a constitutionally acceptable method of notice under Mullane. Galiher and Ono must still demonstrate that the notice by publication in Civil No. 400 satisfied constitutional specifications.

RLH § 242-2.1, which pertains to quiet title actions, is different from the partition action in Civil No. 400 brought

[35] See supra n.33.

under RLH Chapter 337. The applicable statute that the court relied upon in Civil No. 400 is RLH § 337-5 (1955) and it applied to notice in actions for the partition of real estate.[36] Although a partition action is distinguishable from a quiet title action in that a partition action "is based on the theory of common title, rather than on disputed ownership[,]"[37] 59A Am. Jur. 2d Partition § 4 (2003), RLH § 337-7 provided that a court sitting in a partition action can indeed vest title by decree. Further, RLH § 337-15 provided that if no one challenges the decree of title within ten (10) years, title "shall become absolute."

RLH § 337-5 required the Chings and the State to serve a summons upon all unknown claimants by publication "in at least one newspaper published in the [State] and having a general circulation in the circuit within which the property is situated . . . not less than once in each of four successive weeks." The specific requirements of RLH § 337-5 have not been expounded upon, but in 1968, the Supreme Court of Hawai‘i construed the service by publication requirements of section 242-2.1 RLH (1955), which dealt with similar actions to quiet title. The Supreme Court held that service of process by publication applied "only to persons who cannot be found." In the Matter of

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[36] See supra n.10.

[37] RLH § 337-1 (1955) states that a partition action is between "two or more persons [that] hold or are in possession of real property as joint tenants or tenants in common[.]"

Vockrodt, 50 Haw. 201, 204, 436 P.2d 752, 754 (1968). Thus, in instances where potential parties cannot be found, "employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." Id. at 205 n.5 (quoting Mullane, 339 U.S. at 317).

As stated earlier, to be constitutional, Mullane requires that notice be "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." 339 U.S. at 314. RLH § 337-2 (1955) defined the necessary parties to an action for partition. In pertinent part, RLH § 337-2 stated that

> [e]very person having any legal estate in the property, in fee or as a tenant for life or for years, or any vested estate in dower or by curtesy, or having any vested or contingent legal estate or interest in reversion or remainder as far as known to the petitioner, or in any mortgage, on record, upon all or any part of the property, shall be made party to the suit.

Therefore, at the time Civil No. 400 was decided, Rosemond Pettigrew's argument that adjoining landowners were necessary and proper parties in a partition action was not supported by RLH § 337-2. RLH § 337-2 went further to describe the procedure regarding unknown claimants. It stated that "[a]ll persons interested in any manner or who may claim an interest in the premises whose names are unknown to the petitioner, may be made parties to the suit by the name and description of unknown owners and claimants, and may be designated by fictitious names[.]"

In Civil No. 400, the State and the Chings presented the court with a complaint listing the known chain of title from Hanakaipo to the Chings. None of those listed in the known chain of title were ancestors of Rosemond Pettigrew. Therefore, Rosemond Pettigrew's ancestors were not known parties having an interest in Mahele Award 10, and there was no requirement to personally apprize them of the action in Civil No. 400. Moreover, because RLH § 337-2, the United States Constitution and the Hawai‘i Constitution did not require adding adjoining landowners as necessary parties, the original published summons listing the potential defendants in Civil No. 400 as "Heirs of Kukahi, John Doe 1 to John Doe 100, Mary Roe 1 to Mary Roe 100, Unknown Owners and Claimants, and All Persons Interested in Any Manner, or Who May Claim Any Interest in the Premises Described Herein or Any Part Thereof" was in conformance with Mullane and the governing law at the time. It follows that service of process by publication to Rosemond Pettigrew's ancestors and to adjoining landowners was constitutionally and statutorily permissible.

b. Subject Matter Jurisdiction

Rosemond Pettigrew's next argument in support of her point that the 1963 Decree was void is that the court in Civil No. 400 did not have subject matter jurisdiction over the partition action. Rosemond Pettigrew argues that the Circuit Court of the Second Circuit did not have statutory "jurisdiction to adjudicate title or award a decree determining title." This argument is based on the assertion that the State and the Chings did not have a certification of boundaries for Mahele Award 10. Rosemond Pettigrew asserts that, absent a boundary certificate, the State and Chings did not have clearly established title to warrant the court entertaining the partition action. We disagree.

As Rosemond Pettigrew correctly states, the Supreme Court of Hawai‘i declared in Kealamakia v. Unknown Heirs of Kamoehalau that "[p]roperty cannot be partitioned unless its title has been clearly established." 68 Haw. 429, 431, 717 P.2d 516, 517 (1986). The Supreme Court relied upon HRS § 668-15 (1976), which was the revised version of the law relied on in Civil No. 400, namely, RLH § 337-15 (1955). In pertinent part, RLH § 337-15 states: "The title of every claimant to any share or interest in the property shall be shown to the satisfaction of the court before any conveyance in partition is made[.]" Thus, under RLH § 337-15, the State and the Chings were merely required

to establish a chain of title to the satisfaction of the court. This was accomplished two-fold. First, in 1959 in Civil No. 208, the State and the Chings petitioned the court for "the determination and certification of boundaries of the Ahupuaa of Ahaino 1st." In April 1960, the court filed its judgment titled "Certificate of Boundaries No. 235", which determined the boundaries of Mahele Award 10 with a one-half (½) undivided interest vested in the Hawaiian Government and a one-half (½) undivided interest vested in Hanakaipo. Second, upon receiving the Certificate of Boundaries No. 235, the State and the Chings were able to establish a chain of title that extended from Hanakaipo directly to the Chings. In doing so, the State and the Chings met the requirements of RLH § 337-15 by showing to the satisfaction of the court that they had title to the property.

Once it was shown to the satisfaction of the court that the State and the Chings had a shared interest in the property, the court had jurisdiction to hear the partition action and to decree title. The Supreme Court of Hawai‘i held in Kealamakia that "our legislature has empowered a court in a partition proceeding to adjudicate any and all issues relating to the title of the property before it." 68 Haw. at 431, 717 P.2d at 517. In support of this holding, the supreme court cited HRS §§ 668-7(1) and (2), which are the amended versions of RLH § 337-7. The applicable portion of RLH § 337-7 states that "[t]he court shall

have power to hear, investigate and determine any and all questions of conflicting or controverted titles or claims either as to the whole of the property or as to any share or interest therein[.]" Moreover, in a partition action, the court has the power "to vest titles by decrees[.]" Id. The State and the Chings brought Civil No. 400 with the express "desire to have a partition made of the said real property according to their respective rights and interests[,]" under the authority of RLH Chapter 337. Based upon the plain language of RLH § 337-7, the court in Civil No. 400 did indeed have jurisdiction to hear the partition action and to vest title by decree.

Finally, RLH § 337-15 states in pertinent part that "if no claim to the land or fund is made by any other party within the ten years, and successfully established, the title and right of the possessory holder shall become absolute as by prescription[.]" In this instance, the 1963 Decree was filed on January 23, 1963. Rosemond Pettigrew's first challenge to this 1963 Decree was filed on January 24, 1995. The thirty-two year time distance between the 1963 Decree and the original motion to set aside clearly exceeds the ten (10) year limitation set by RLH § 337-15. Consequently, the title that the Chings and the State received under the 1963 Decree became absolute on January 23, 1973.

3. *Motion for Relief Under HRCP Rule 55(c)*

As stated earlier, the denial of a motion for relief from a judgment made pursuant to HRCP Rule 55(c) is reviewed on appeal under the abuse of discretion standard. See Hawaii Carpenters' Trust, 794 F.2d at 511-512. As a general rule, a circuit court will grant a motion to set aside a judgment if it decides "(1) that the nondefaulting party will not be prejudiced by the reopening, (2) that the defaulting party has a meritorious defense, and (3) that the default was not the result of inexcusable neglect or a wilful act." BDM, 57 Haw. at 77, 549 P.2d at 1150. Thus, if the nonmoving party can prove the nonexistence of any of these three requirements, a court does not abuse its discretion when it denies the motion to set aside. See The Nature Conservancy v. Nakila, 4 Haw. App. 584, 591, 671 P.2d 1025, 1031 (1983). With these conditions in mind, we decide that the circuit court did not abuse its discretion in handing down its June 6, 2001 Order. In making this decision we look at the issues through the eyes of the circuit court utilizing the BDM lens.

The first issue the circuit court had to resolve is whether or not the State, the Chings and Galiher and Ono would be prejudiced by reopening Civil No. 400, which was resolved in 1963. Over thirty-eight years had passed between the decision in Civil No. 400 and the June 6, 2001 Order. In that time, the statute of limitations had run, the property had changed hands

twice, witnesses and parties had passed on, and memories of the parties most likely had deteriorated. Consequently, it is probable that relitigating the issues first presented in 1962-63 will prejudice the many parties who relied on the judgment in Civil No. 400. See 11 Wright, Miller & Kane, Federal Practice and Procedure: Civil § 2857 at 260-62 (2d ed. 1995).

The next question the circuit court had to determine is whether or not Rosemond Pettigrew's predecessors in interest had a meritorious defense to the default judgment. It is clear by our discussion above that the answer is no. The purported defense of Rosemond Pettigrew's predecessors in interest is that the 1963 Decree was void[38] because (1) it was the result of a due process violation and (2) the court in Civil No. 400 did not have personal and subject matter jurisdiction. As explained in Section III.A.2 above, these arguments have no merit.

The third and final issue the circuit court had to resolve was whether or not the default was the result of inexcusable neglect. When a default judgment is being attacked as void, there is typically no time limit in bringing a motion to set aside pursuant to HRCP 60(b)(4). See 11 Wright, Miller &

[38] Typically, when a default judgment is attacked as being void, the moving party is not required to demonstrate that it has a meritorious defense. Stafford v. Dickison, 46 Haw. 52, 63, 374 P.2d 665, 672 (1962); 11 Wright, Miller & Kane, Federal Practice and Procedure: Civil § 2862 at 322-23 (2d ed. 1995). In cases where the party's only defense is that the judgment is void, the trial court will not use the BDM test to determine whether it should grant relief from the default judgment. It will conduct an inquiry identical to what we posed in section III.A.2. However, we will continue to review whether the circuit court properly applied the BDM test to the arguments asserted by Rosemond Pettigrew.

Kane, Federal Practice and Procedure: Civil § 2862 at 324 (2d ed. 1995). Notwithstanding this general rule, in Hawai‘i there may be a time limit on challenging a judgment based on HRCP 60(b)(4) if "exceptional circumstances" exist. Int'l Sav. & Loan Ass'n, Ltd. v. Carbonel, 93 Hawai‘i 464, 469, 5 P.3d 454, 459 (App. 2000); Calasa v. Greenwell, 2 Haw. App. 395, 398, 633 P.2d 553, 555 (1981). In the present case, the original motion to set aside the default judgment was filed in 1995, thirty-two (32) years after the 1963 Decree. In January of 1995, Rosemond Pettigrew stated in an affidavit that she became aware of the judgment in Civil No. 400 in 1986 "but never read it until June of 1994." She also stated that she did not do anything about Civil No. 400 when she initially became aware of it "because she was not financially capable of learning the legalities of how to right the wrong[.]" Based upon the record, it is clear that Rosemond Pettigrew did not act with reasonable diligence in challenging the 1963 Decree. She admitted that she was aware of the judgment in Civil No. 400 for nearly nine (9) years before filing the original motion to set aside. While this lapse may not in itself qualify as an exceptional circumstance, the fact that none of Rosemond Pettigrew's predecessors in interest attempted to challenge the 1963 Decree for thirty-two (32) years would. "Moloka‘i is a small island whose population in 1980 was 6,049,[39]

[39] According to the U.S. Census Bureau, Moloka‘i's population as of 2000 was 7,404. Hawai‘i State Department of Business, Economic Development & Tourism, *Hawaii State Data Center Report 2000-3, Table 8 - Population,*

and . . . the majority of Molokaʻi's residents are part-Hawaiian, who have lived there a long time, know each other well, and have deep knowledge of each other's ancestral roots." Hustace v. Kapuni, 6 Haw. App. 241, 249-50, 718 P.2d 1109, 1115 (1986). With this in mind, it would be quite an exceptional circumstance if none of Rosemond Pettigrew's predecessors in interest were aware of the 1963 Decree.

Because the three requirements of the BDM test were not met, we conclude that the court did not abuse its discretion in denying the motion to set aside the 1963 Decree.[40] Nature Conservancy, 4 Haw. App. at 591, 671 P.2d at 1031.

B. Departure From Hawaiʻi Precedent

Rosemond Pettigrew next argues that the "court erred when it made a radical departure from past judicial decisions by disregarding evidence and Hawaii precedent case law[.]" Rosemond Pettigrew does not indicate where in the record the alleged error occurred or where in the record an objection was made to the alleged error. According to Hawaiʻi Rules of Appellate Procedure (HRAP) Rule 28(b)(4) (2000), "[p]oints not presented in accordance with this section will be disregarded[.]" As a

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Households and Families, for Islands and Census Tracts: 2000, available at http://www.hawaii.gov/dbedt/census2k/pop_2000_ct.pdf.

[40] Even if, assuming *arguendo*, the thirty-two (32) year lapse in challenging the 1963 Decree is not an exceptional circumstance, the court still did not abuse its discretion in denying the motion to set aside because 1) the statute of limitations set forth in section 337-15 of RLH 1955 had run and 2) the parties would nonetheless be prejudiced by opening up a case that they have relied on for forty (40) years.

result, this argument is disregarded.

C. Deprivation of Property and Continuing Violations

Rosemond Pettigrew's final argument is that

> Appellees' [sic] have disparaged [her] legally cognizable paper title to over one thousand acres contained in LCAw 4891, RP 4829 for the lands named Kupeke and Ahaino. Appellees have interfered with the contract and adjudication between [her] predecessors and the Hawaiian government. . . . In this prosecution the lower court in this action denied [her] the Constitutional right to introduce evidence of legally cognizable title to [her] property, to call witness's [sic] to testify upon [her] behalf, and denied [her] right to jury instructions for protection of property. . . .
>
> [She] submits that the record, along with the evidence and pleadings in the lower Court, has established that the lower court intentionally, with reckless error, malice and discriminatory animus, conspir[ed] with Appellees' [sic] and others to deprive [her] of her property, liberty, right to petition the Hawaii courts for redress of grievance, equal rights and protection of the laws [and] to harass same into giving up these rights and privileges . . . .
>
> . . . .
>
> [She] has not been allowed to petition the Hawaii Courts for redress of grievance for the deprivation of our property. [She] has legally cognizable paper title to the subject property. . . . [She] resides on this property and holds it in [her] possession. [She] has suffered damages in fact from the oppression by the Hawaii Courts because of [her] Hawaiian ancestry and true ownership of the subject property.

Rosemond Pettigrew does not indicate where in the record the alleged errors occurred, or where in the record objections were made to the alleged errors. Based on HRAP Rule 28(b)(4), we disregard these points.

IV. CONCLUSION

Accordingly, we affirm the June 6, 2001 "Order on Motion to Set Aside the Civil No. 400 Judgment" denying the January 24, 1995 motion to set aside the January 23, 1963 "Decree Determining Title and Ordering Partitioning of Real Property."

DATED: Honolulu, Hawai‘i, April 23, 2004.

On the briefs:

Rosemond K. N. Pettigrew,
pro se Plaintiff-Appellant.

Chief Judge

Tom C. Leuteneker
(Carlsmith Ball LLP)
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Associate Judge

Associate Judge