IN THE SUPREME COURT OF GUAM
TERRITORY OF GUAM

RAMON T. TOPASNA, ALBERT TOPASNA
and ERNEST CHARGUALAF,
Petitioners,

vs.

SUPERIOR COURT OF GUAM,
Respondent

vs.

PEOPLE OF THE TERRITORY OF GUAM,
Real Party In Interest.

Supreme Court Case No. WRP96-001
Superior Court Case No. CF0459-95

OPINION

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Petition for a Writ of Prohibition
Argued and Submitted October 16, 1996
Agana, Guam

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BEFORE: PETER C. SIGUENZA, Chief Justice, JANET HEALY WEEKS, Associate Justice, and MONESSA G. LUJAN, Associate Justice.

LUJAN, Associate Justice:

[1] There are currently pending before Respondent Superior Court of Guam, two criminal actions entitled People of the Territory of Guam v. Ramon T. Topasna, Criminal Case No. CF-32-96, and People of the Territory of Guam v. Ramon T. Topasna, Albert Topasna and Ernest Chargualaf, ("Petitioners") Criminal Case No. CF-42-96. On May 2, 1996, Presiding Judge of the Respondent Court appointed Judge Miguel Demapan, a Judge from the Superior Court of the Commonwealth of the Northern Mariana Islands, to preside over the two cases because there were no judges of the Superior Court of Guam available to hear the actions. Both trials were scheduled before Judge Demapan. CF-42-96 was originally set for September 3, 1996 and CF-32-96 was scheduled to trail the CF-42-96 trial.

[2] On August 23, 1996 Petitioners filed their motion to disqualify Judge Demapan on the basis that his appointment by the Presiding Judge was invalid. The motion was denied by Decision and Order filed September 6, 1996.

[3] Petitioners filed a petition for a writ of prohibition restraining Respondent from scheduling further proceedings before Judge Demapan and on September 13, 1996 this court issued an Order Directing Issuance of Alternative Writ of Prohibition and an Alternative Writ of Prohibition ordering the Respondent to desist from taking further action in the two proceedings. On September 30, 1996 this court issued an Order directing answer to Respondent Superior Court, and the Real Party in Interest, the Territory of Guam. The Order further set oral arguments for October 16, 1996.

I.

[4] This court has jurisdiction over original proceedings for prohibition pursuant to 7 Guam Code Annotated § 3107(b)(1994). A writ of prohibition "arrests the proceedings of any tribunal, corporation, board, or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." 7 GCA § 31301 (1993). In this case Petitioners contend that Respondent exceeded its jurisdiction in appointing Judge Demapan to hear the case.

[5] Writs of prohibition may be issued only "where there is not a plain, speedy, and adequate remedy in the ordinary course of law." 7 GCA § 31302 (1993). The issuance of a writ of prohibition is a "drastic remedy to be used in extraordinary situations." *Territory of Guam v. District Court of Guam*, 641 F.2d 816, 820 (9th Cir. 1981). It may be used to review an order upholding the qualifications of a judge presiding over a trial. *Connelly v. United States District Court*, 191 F.2d 692 (9th Cir. 1951); *LeLouis v. Superior Court of Kern County*, 209 Cal. App. 3d 669 (Cal. Ct. App. 1989); *Missouri ex. rel. McGaughey v. Grayston*, 163 S.W.2d 335 (Mo. 1942). As stated by the Ninth Circuit in *Connelly*, "[t]he writ of prohibition aids this appellate jurisdiction of ours by preventing a useless appeal in the event of a conviction in a prosecution, presided over by a trial judge exercising a jurisdiction he does not possess." 191 F.2d at 693 n.1. The issue presented to the court, namely the jurisdiction of Judge Demapan to hear the cases, is appropriately reviewed by writ of prohibition in order to protect the court's appellate jurisdiction and effectuate supervisory jurisdiction over Respondent. While the order denying Petitioners' motion to disqualify Judge Demapan may be eventually appealable, an appeal after trial, in the case, does not constitute a plain, speedy and adequate remedy.

[6] Although the Real party in interest contends that the failure of Petitioners to raise their objection to Judge Demapan before he issued several pre-trial rulings constitutes a waiver, the disqualification of a judge pro tempore is a jurisdictional defect which cannot be waived, *Lee v. Texas*, 555 S.W.2d 121 (Tex. Crim. App. 1977).

II.

[7] The question of whether the Presiding Judge of the Superior Court possessed the authority to appoint Judge Demapan to sit as a temporary judge of the Superior Court is essentially a question of statutory construction and interpretation. The Petitioners contend that 7 GCA § 6108 (1993) was in effect on May 2, 1996 when Judge Demapan was first appointed and should have governed the appointment of pro tempore judges of the Superior Court of Guam. Under § 6108, judges pro tempore are appointed by the Chief Justice. The Real party in interest contends that 7 GCA § 6108 was not in effect on May 2, 1996 and that the prior law relating to designated judges, Pub. L. No. 21-003, Section 4, authorized the appointment of Judge Demapan by the Presiding Judge.

[8] Petitioners' motion to disqualify Judge Demapan, filed in Respondent court, was denied on the basis that the Chief Justice's power to appoint a temporary judge could be exercised only after the Chief Justice certified, pursuant to 7 GCA § 1103(e)(1995) that the Supreme Court was ready to assume jurisdiction[1]. As such certification occurred on July 26, 1996, the court below found that it was necessary to apply provisions regarding temporary judicial appointments in effect prior to the operation of Division 1 of Title 7 GCA, i.e. Pub. L. No. 21-003. Respondent also ruled that although § 1103(c)provided: "[f]or the purpose of the appointment of Justices and Judges, this division shall go into effect upon approval by the legislature of the Rules, as provided in paragraph (d), infra," this effective date provision did not apply to the appointment of temporary Superior Court judges.

[9] Pub. L. No. 21-147, subsequently codified as Division 1 of Title 7 was enacted on January 4, 1993 The Act, however, contained several effective date provisions. Division 1 of Title 7 sets forth the procedures for appointing temporary judges. *See*, 7 GCA §§ 3103, 6108. In order to resolve the question of the appointment of Judge Demapan, it is necessary to address the issue of when such provisions of Title 7, Division 1 came into effect. The effective date provisions for Pub. L. No. 21-147 are codified at 7 GCA § 1103. Except for certain sections pertaining to judicial retirement which took effect upon enactment, § 1103(a) specified that no portions of Division 1 of Title 7 would take effect until May 1, 1993. Section 1103(c), however, specified that the provisions of Division 1 pertaining to appointment of Justices and Judges would not go into effect until after approval of the Rules by the legislature as provided in paragraph (d). By its terms, § 1103(c) referred to the appointment of Supreme Court justices and Superior Court judges and was not limited to the appointment of Supreme Court justices as the Respondent court ruled. Where statutory language is plain, unambiguous and admits of only one interpretation, resorting to statutory interpretation is not necessary. *Rubin v. United States*, 449 U.S. 424, 101S.Ct. 698 (1981). Such interpretation is unnecessary here. It is clear that § 1103(c) specified the effective date for those portions of Division 1 of Title 7 which relate to the appointment of all Justices and Judges.

[10] The next question is when did the legislature approve the Rules as provided in § 1103(d)? This court takes judicial notice of Pub. L. 23-34 by which the Guam Legislature approved and passed into law the Rules of Appellate Procedure for the Supreme Court of Guam. Public Law 23-34 was enacted on June 28, 1995 and the Rules became effective 60 days thereafter. Once the Rules became effective, § 1103(d) authorized the Governor to appoint the Justices and Judges authorized by Title 7. Appointments to the Supreme Court were made by the Governor and the Justices were sworn into office on April 21, 1996.[2]

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[1] 7 GCA § 1103(e) provides, "[f]or the purposes of hearing appeals and matters within the original jurisdiction of the Supreme Court of Guam, this Title shall take effect upon certification by the Chief Justice to the Governor, to the Judge of the District Court of Guam, and to the Legislature, that the Supreme Court of Guam is fully ready to accept the jurisdiction conferred upon it."

[2] 7 GCA § 1103(d) actually set forth two separate rounds of legislative approval. The second round was originally intended to occur after the Supreme Court Justices reviewed the Rules and involved submitting such Rules to the Legislature for approval pursuant to the Administrative Adjudicative Law ("AAL"). 7 GCA § 1103(d). However, the second round was removed by Pub. L. No. 22-96 which specifically exempted the Rules from the AAL requirement. Pub. L. No. 22-96 has not been expressly repealed and Pub. L. No. 23-34, section, 3 did not implicitly repeal Pub. L. No. 22-96 as Pub. L. No. 23-34 merely

[11] The event triggering the appointment powers of the Chief Justice was the legislative approval of the Rules which occurred in June, 1995. When the Chief Justice assumed office on April 21, 1996 he became the head of the judicial branch and was able as such head to exercise the appointment of temporary judges authorized by Division 1 of Title 7 Guam Code Annotated.[3]

[12] Notwithstanding the clear language of § 1103(c) and the assumption of office by the Chief Justice, Respondent found that Public Law 21-003 remained in effect and authorized the appointment of Judge Demapan by the Presiding Judge. Specifically, Respondent held that "in order for the Supreme Court to have any power, inherent or otherwise, it must first certify that it is ready to assume its original jurisdiction." Under this theory, the Chief Justice would also be without the authority to hire personnel, secure funding or initiate other administrative matters necessary to establish the Supreme Court and make it operational. There is no indication that the Legislature intended that the Chief Justice would take office but be prohibited from discharging his duties as head of the judicial branch unless and until the Supreme Court certified it could accept original and appellate jurisdiction as specified in § 1103(e). In fact, the legislature contemplated by the enactment of § 1103(d) that the Supreme Court justices would review and approve or modify the Rules previously approved by the Legislature in Public Law 23-34, prior to certification. Section 1103(e) must be read as the final step in the assertion of the Supreme Court's jurisdiction rather than the beginning point of the Supreme Court's exercise of power.

[13] Once the Chief Justice assumed office, the authority of the Presiding Judge to appoint temporary judges ceased. Public Law 21-003 Section 4 provided that the Presiding Judge could appoint as temporary judges, judges from other jurisdictions including the CNMI. Public Law 21-126, Section 6 authorized appointment by the Presiding Judge of active members of the Guam Bar Association who have been residents of Guam for at least 5 years and have practiced law in Guam for at least 7 years. Title 7 GCA § 6108, however, placed appointing authority with the Chief Justice and required that judges pro tempore meet the same qualifications as regularly appointed Superior Court judges. As § 6108 addressed the appointment of temporary judges, Public Law 21-3 Section 4 and Public Law 21-126 Section 6 were repealed by implication. While repeals by implication are disfavored, such repeal may be found when a later statute, covers the whole situation of an earlier one and is clearly intended as a substitute. *Foreman v. U.S.*, 60 F.3d 1559, 1563 (Fed. Cir. 1995) (quoting *Randall v. Loftsgaarden*, 478 U.S. 647, 661, 106 S.Ct. 3143, 3151-52 (1985)(citations omitted.))

[14] It is clear that 7 GCA § 1103(c) specifies the governing effective date for those portions of Division 1 of 7 Guam Code Annotated which relate to the appointment of Justices and Judges. This court holds that 7 GCA § 6108 was effective on April 21, 1996, the date the Chief Justice assumed office. The appointment of Judge Demapan by the Presiding Judge of Respondent court on May 2, 1996 was, therefore, invalid and in excess of his jurisdiction. As Judge Demapan does not meet the same qualifications as regularly appointed Guam Superior Court judges, as required by § 6108, he is ineligible to serve as a judge pro tempore.

[15] The petition for a peremptory writ of prohibition restraining and prohibiting Respondent court from scheduling further proceedings in the actions entitled CF32-96 and CF42-96 before Judge Miguel Demapan is granted and the writ ordered issued.

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restated § 1103(d) for the limited purpose of amending the time when the Governor may appoint the Justices and Judges authorized by Pub. L. No. 21-147 to make such time consistent with effective date of the Rules.

[3] *See* 1985 Comments following 7 Guam Code Ann. § 2101 ("the purpose of this Chapter and of the whole Act is to create not only a Supreme Court of Guam for appeals and review, but to create a judicial systems with the Supreme Court at its head. Therefore, the Supreme Court of Guam will handle all of those matters customarily handled by state supreme courts, including attorney admission and discipline, court rules and court administration."