# FAMILY LAW DIGEST

# COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

James M. Zarones Editor

## **NOTES**

<u>**Draft**</u>: This is a first draft. Please report any mistakes to James Zarones at James Zarones @ gmail.com.

<u>Citations</u>: All citations are to direct quotes unless preceded by <u>See</u>. Explanatory text followed by <u>See</u> may contain original language from the court. Therefore, you should never cite directly from the digest. Always check the official reporter to ensure that you do not accidentally plagiarize a court.

<u>Slip Opinions</u>: All citations to Supreme Court decisions after 1997 are to the slip opinions. Therefore, you should not cite directly from this digest. Check the official reporter because the Court often makes minor changes to slip opinions before they are published.

<u>Accuracy of Citations</u>: The citations in the digest have not been reviewed for errors. Therefore, they should always be checked against the official reporters.

**Editor's Notes**: These are the personal opinions of James M. Zarones. The opinions of the Editor do not necessarily represent the opinions of the judiciary.

<u>Scope</u>: This digest was prepared by reviewing all Commonwealth Supreme Court cases, all cases appearing in the Commonwealth Reporters, some Trust Territory cases, and all Superior Court cases available online.

**Date**: This version of the digest was published on January 15, 2014.

#### **FOREWORD**

For the first time in the history of the Commonwealth the entirety of our family case law has been collected and analyzed for the people of the Northern Mariana Islands. It is my sincere hope that this digest will help the courts, the legislature, and the people of the Commonwealth improve the family law of the Northern Mariana Islands.

The Family Court, which is a division of the Superior Court, was established by Public Law 9-51 on September 13, 1995. Since that time, the Family Court has heard thousands of cases and created a significant body of precedent. Local practitioners should always take care to draw upon local precedent because the history and the law of the Commonwealth are unique.

I would like to thank my former law clerk, James M. Zarones, for putting this digest together. Shortly after beginning his work at the Family Court we began talking about the creation of a family law digest. I did not believe that James would have enough time during work hours to complete the project. I was right. Although James did some of the research for this digest during work hours, a majority of the work was done on his own free time. I couldn't be happier with the final product and I am looking forward to working with James on an updated version in 2014.

Kenneth L. Govendo ASSOCIATE JUDGE

FAMILY COURT DIVISION

### **Table of Contents**

ADOF	'TION	1
•	BEST INTERESTS OF THE CHILD	1
•	CUSTOMARY ADOPTION	1
•	JURISDICTION	2
•	IMMIGRATION	3
•	TERMINATION OF PARENTAL RIGHTS	3
ALIM	ONY	4
•	CIRCUMSTANCES TO MAKE ALIMONY AWARD	
•	DURATION	
•	INTERPRETATION OF 8 CMC § 1311	
•	RETROACTIVE SUPPORT	
ANNU •	JLMENTBURDEN OF PROOF	
•	GROUNDS	6
•	NOT DISCRETIONARY	6
•	PROPERTY	6
APPE	ALS	6
•	ALIMONY	6
•	CHILD SUPPORT	7
•	MARITAL PROPERTY ACT	7
•	MARITAL WASTE	8
•	PROPERTY SETTLEMENT AGREEMENT	8
ATTO	RNEY FEESAUTHORITY TO AWARD	
•	BAD FAITH	
•	DISCRETION	
•	GENDER DISCRIMINATION	
•	REASONABLENESS	
•	UNIFORM PARENTAGE ACT	
RECT	INTEREST OF CHILD	
• DEST	FACTORS	
_	CENEDALI V	ın

CHIL:	D CUSTODY BEST INTERESTS OF CHILD	
•	BURDEN OF PROOF	11
•	CHILD'S PREFERENCE	11
•	FACTORS	11
•	INTERPRETATION OF 8 CMC § 1311	13
•	TEMPORARY TO PERMENANT ORDER	13
CHIL:	D SUPPORTAMOUNT	
•	DEFENSE	14
•	DURATION	14
•	FOREIGN JUDGMENTS	15
•	FRAUDULENT TRANSFERS	15
•	GENERALLY	15
•	INDIGENCE	17
•	INTERPRETATION OF 8 CMC § 1311	17
•	MODIFICATION	17
•	PURPOSE/POLICY	17
CIVII •	PROCEDURECOMMONWEALTH RULES OF CIVIL PROCEDURE	
•	CONTINUANCE	18
•	COUNTERCLAIMS NOT ALLOWED	18
•	GUARDIAN AD LITEM	18
•	NOTICE REQUIRED	18
•	PLEADINGS	19
COM!	MON LAW MARRIAGEMONWEALTH FAMILY PROTECTION ACT OF 1986FLICT OF LAWSOMARY LAWADOPTION	19 21 21
•	CAROLINIAN CUSTOMS (GENERALLY)	21
•	CHAMORRO CUSTOMS (GENERALLY)	22
•	DIVORCE	22

NEW CUSTOMS	22
PARTIDA	23
PATTE PAREHO	25
PRECEDENT INAPPLICABLE	25
DISCRIMINATION	25
DIVORCE	26
CHILDREN	26
CRUELTY	26
DATE OF SEPARATION	26
PLEADINGS	26
DOMESTIC AND FAMILY VIOLENCE PREVENTION ACT	26
FAMILY HOME	27
GUARDIANSHIP	
JURISDICTION	
CHILDREN	28
FOREIGN JURISDICTIONS	28
PERSONAL JURISDICTION	28
RESIDENCY	29
PARENTAL CARE	30
PATERNITY	30
CUSTOMS	30
• DEFENSE	30
GENERALLY	31
• PROBATE	31
PURPOSE/POLICY	32
POWER OF ATTORNEY	32
PROPERTY (DATE OF SEPARATION)	
PROPERTY (FIDUCIARY DUTY)	
PROPERTY (MARITAL TRUSTS)	
PROPERTY CHARACTERIZATION	
ANNULMENT	35
BURDEN OF PROOF	35
COMMINGLE/TRANSMUTE	35
DEGREE/INTANGIBLE PROPERTY	36
FUTURE WAGES	37

GENERALLY	37
• GIFT	38
INSURANCE POLICIES	38
PATTE PAREHO	39
PRENUPITAL AGREEMENT	39
PRESUMPTIONS	39
RECOVERY OF MARITAL PROPERTY	40
RETROACTIVE APPLICATION OF MPA	40
SEPARATE PROPERTY	40
TRACING	41
PROPERTY DISTRIBUTION  • ADULTERY CANNOT ALTER PROPERTY DIVISION	
EQUITABLE DIVISION	42
INTERPRETATION OF 8 CMC § 1311	42
RETIREMENT ACCOUNTS	42
VALUATION PRIOR TO DISTRIBUTION	43
PROPERTY VALUATION • CORPORATIONS	
DATE OF VALUATION	43
GENERALLY	43
REVISION OF DECREE  • CHILD SUPPORT AND SPOUSAL SUPPORT CAN BE MODIFIED	
GENERALLY NOT PERMITTED	44
SETTLEMENT AGREEMENTS  • CHARACTERISTICS OF SETTLEMENT AGREEMENTS	
• CONTRACT	45
MODIFICATION	45
TORTS	45

#### **ADOPTION**

#### BEST INTERESTS OF THE CHILD

In determining what is in the child's best interest, the trial court may consider a variety of factors, including: (1) the fundamental relationship of the child and the natural parents; (2) the interests of the adoptive parents; (3) the child's age; (4) the extent of the bond or potential bond between each natural parent to the child; (5) the fitness or unfitness of either natural parent, taking into account whether the child was abandoned, neglected, or physically or mentally abused; (6) whether either parent is a habitual user of alcohol or drugs; (7) whether either parent is a convicted felon where the nature of the crime is inconsistent with being a fit parent; (8) the extent of the bond, or potential bond, between the adoptive parents and the child; and (9) the ability of the natural parents and the ability of the adoptive parents to provide adequate and proper love, care, attention, and guidance to the child. In re Adoption of D.D.V., 2007 MP 31 ¶ 6 (citing In re Adoption of Olopai, 2 NMI 91, 103-104 (1991)).

**Editor's Note:** A smart attorney will pay close attention to the location of the adoptive parents in a contested adoption. If the parents propose to take a Chamorro or Carolinian child from the Commonwealth, then the attorney should argue that the Court must also consider that the child may lose its culture and language.

Factors to be considered when determining the best interest of a child in an adoption proceeding are: "(1) the age of the child; (2) the extent of the bond, or potential bond, between each natural parent to the child; (3) the fitness of unfitness of either or both natural parents, taking into account whether the child has been abandoned, neglected, subjected to cruelty, both mental and/or physical; whether each parent is a habitual user of alcohol or drugs; (4) whether either parent has been convicted of a felony where the nature of the crime is inconsistent with being a fit parent, etc.; (5) the extent of the bond, or potential bond, between the adoptive parents and the child; (6) and the ability of the natural parents to provide adequate and proper love, care, attention, and guidance to the child." In re Adoption of Olopai, 2 NMI 91, 104 (1991) (numeration added and punctuation altered).

#### **CUSTOMARY ADOPTION**

Neither *Rofag* nor *Amires* establish fixed elements that must be satisfied to justify a mwei mwei finding. Instead, they provide a list of non-exclusive factors to guide lower courts when evaluating mwei mwei adoption claims. In re Estate of Malite, 2011 MP 4 ¶ 12.

The trial court is at liberty to consider additional factors, established by expert testimony, along with the *Rofag* factors to determine whether a mwei mwei adoption has occurred. In re Estate of Malite, 2011 MP  $4 \ \P 14$ .

The trial court must consider the totality of the circumstances when making a mwei mwei adoption determination. In re Estate of Malite, 2011 MP 4 ¶ 14.

The party raising the adoption claim in customary adoption cases bears the burden of proof. In re Estate of Malite, 2011 MP 4 ¶ 32.

While most adoptions occur between relatives, it is practicality which developed this trend into custom. "With only one recorded exception, all adoptions take place between relatives." <u>In re the Estate of Amires</u>, 1997 MP 8 ¶ 20 (quoting A. Spoehr, Saipan: The Ethnology of a War-Devastated Island, 41 Fieldiana: Anthropology (Chicago 1954), at 356).

Spoehr is not accurate, however, when he writes that "only babies may be adopted." [A. Spoehr, Saipan: The Ethnology of a War-Devastated Island, 41 Fieldiana: Anthropology (Chicago 1954), at 357] Rofag accurately states that "[n]ormally, the child to be adopted is a baby, but there is evidence that a child who is nine, ten, or eleven years old could be customarily adopted, depending upon the circumstances." In re the Estate of Amires, 1997 MP 8 ¶ 20 (citing Estate of Rofag, 2 NMI 18, n.3 (1991)).

Accordingly, we conclude that the preponderance of the evidence standard is consistent with legislative intent in establishing claims of customary adoption. <u>In re Estate of Rofag</u>, 2 NMI 20, 29 (1991).

#### <u>IURISDICTION</u>

The statutory definition of "resident" set forth in 8 CMC § 1401(i) does not include intent as an element. In re Adoption of Y.M.F.V., 2011 MP 7 ¶ 9.

The one year residency requirement for an adoption has no intent element and time can accrue to satisfy this requirement even if the child is in the CNMI on a tourist visa. In re Y.M.F.V., 2011 MP  $7 \P 10$ .

It is error for a Court to address the merits of an adoption petition if the residency requirement hasn't been met. <u>In re Adoption of Y.M.F.V.</u>, 2011 MP 7 ¶ 12.

The Court refused to grant an adoption when the child had been absent from the jurisdiction for over five years. See In re the Adoption of R.N.D., Civil No. 08-0152 (NMI Super. Ct. May 19, 2008) (Order Denying Adoption).

The Court reviewed the age requirement imposed by 8 CMC § 1403 and held that there are three categories of persons permitted to petition the Court for leave to adopt: "(a) Any individual who is a resident of the Commonwealth, not married; (b) Any person married to the legal father or mother of the minor child; or (c) A husband and wife jointly." The Court held that these are the only three categories of individuals allowed to petition the Court for leave to adopt. See In re the Adoption of Briones, Civil No. 97-0037 (NMI Super. Ct. June 5, 1998) (Order Denying Petition to Adopt at 2).

The Court held that every petitioner in a petition to adopt must be at least ten years older than the minor child. The Court denied the petition to adopt because the petitioner-wife was only four years older than the minor child, although the petitioner-husband was more than ten years older than the minor child. <u>In re the Adoption of Briones</u>, Civil No. 97-0037 (NMI Super. Ct. June 5, 1998) (Order Denying Petition to Adopt).

#### **IMMIGRATION**

Adoption should not be used to circumvent immigration law. <u>In re the Adoption of D.D.V. and A.D.V.</u>, Civil No. 06-0147 (NMI Super. Ct. May 15, 2006) (Order Denying Petition for Adoption) (reversed on appeal).

[A] sham adoption takes place when a close relative seeks to adopt a minor, usually a niece or nephew, whose natural parents are still alive and likely cohabitating with the adoptive parents. In re the Adoption of D.D.V. and A.D.V., Civil No. 06-0147 (NMI Super. Ct. May 15, 2006) (Order Denying Petition for Adoption at 5) (reversed on appeal).

#### **TERMINATION OF PARENTAL RIGHTS**

**Editor's Note:** Olopai is a case filled with unnecessary dicta. The termination of parental rights holding was dicta. Read the dissent in this case and look to United States Supreme Court cases for guidance. I do not believe that the dicta in Olopai will receive positive treatment in the future from the Commonwealth Supreme Court.

The court does not have to find a parent unfit to terminate their parental rights in an adoption case. Instead, the Court should look to the child's best interest. See In re Adoption of Olopai, 2 NMI 91 (1991).

[T]he burden of proof necessary in a proceeding to terminate parental rights is clear and convincing evidence. In re Adoption of Olopai, 2 NMI 91, 100 (1991).

The Court found that evidence of abandonment had not been established by clear and convincing evidence when father lived with children for three years, visited the children or attempted to visit with the children on several occasions, and one of the visits took place five months before the petition to terminate parental rights. See In re Adoption of Olopai, 2 NMI 91, 100-101 (1991).

In an adoption proceeding or a proceeding to terminate parental rights, "it is the interests of the child that should be paramount." In re Adoption of Olopai, 2 NMI 91, 102 (1991).

[T]he best interest of the child is the paramount criteria to consider in a proceeding to terminate the parental rights of a parent or parents. <u>In re Adoption of Olopai</u>, 2 NMI 91, 102 (1991).

The interests of the adopting parents, although not fundamental unless and until the adoption is granted, should be considered. <u>In re Adoption of Olopai</u>, 2 NMI 91, 103-104 (1991).

#### **ALIMONY**

#### **CIRCUMSTANCES TO MAKE ALIMONY AWARD**

Since the law of the Commonwealth is broad, and our statute provides for alimony when the Court deems it is in the "best interests" of the parties, the trial court judge is given discretion to award alimony, if any, and to determine an equitable amount. In the absence of statutory guidance to the contrary, we find no error in the Superior Court's interpretation of Commonwealth law on what circumstances to consider in awarding alimony. Thornburgh v. Thornburth, 1997 MP 27 ¶ 11.

We recognize that "rehabilitative" alimony is normally awarded in no-fault divorce jurisdictions. However, the divorce laws of the Commonwealth are based upon the more traditional, fault principles of divorce law. That is, before no-fault, "alimony was viewed as part of the husband's continuing obligation to support his wife (based on the view that marriage was a sacrament and thus indissoluble) and as a punishment for the breakdown of the marriage." Thornburgh v. Thornburth, 1997 MP 27 ¶ 12 (citing Phyllis D. Coontz, Alimony Awards and the Search for Equity in the No-Fault Divorce Era, 18 Just Sys. J. 103, 104 (1995)).

**Editor's Note:** The Commonwealth has since become a jurisdiction that recognizes fault and no-fault divorces.

Under no-fault jurisdiction when the grounds for divorce shifted from blame to incompatibility, alimony became a conditional means of support until the disadvantaged spouse, typically the wife, became self-sufficient. Thornburgh v. Thornburth, 1997 MP 27 ¶ 12 (citing Phyllis D. Coontz, Alimony Awards and the Search for Equity in the No-Fault Divorce Era, 18 Just Sys. J. 103, 105 (1995)).

Awarding "rehabilitative" alimony in a fault jurisdiction does not amount to an abuse of discretion as the trial court judge under 8 CMC  $\S$  1311 is given wide discretionary authority to award spousal support in the "best interests" of the parties. Thornburgh v. Thornburth, 1997 MP 27  $\P$  13.

#### **DURATION**

Where husband secreted assets and divested himself of title to prevent a full accounting of the marital property, the court found it equitable to award wife permanent support in lieu of dividing a portion of the marital property. <u>Akter v. Ali</u>, 98-0234 (NMI Super. Ct. November 29, 2002) (Order Following Bench Trial at 13).

**Editor's Note:** Fraudulent transfers of marital property can be voided.

The Court ordered spousal support to continue for the duration of the wife's life, when the marriage had lasted for over twenty years, the children were all emancipated, and it was determined that the wife's income was not sufficient to meet her monthly expenses. Hanan v. Hanan, Civ. No. 93-643 (NMI Super. Ct. December 1, 1994) (Decree of Divorce: Equitable Distribution of Marital Estate at 18).

**Editor's Note:** Clients should always be informed of the possibility of a permanent alimony award in situations such as this one.

#### INTERPRETATION OF 8 CMC § 1311

Both Rita and the trial court reasoned that *Taisacan* was decided before 8 CMC § 1311 was enacted. However, this statute is an exact carry-over from the Trust Territory Code and an interpretation by the High Court of that statute is instructive. <u>Reyes v. Reyes</u>, 2001 MP 13 ¶ 15 (citing <u>Robinson v. Robinson</u>, 1 N.M.I. 81, 88 (1990)).

#### RETROACTIVE SUPPORT

The Court held that it could order retroactive temporary spousal support after the decree of dissolution had been entered in the case. The Court reasoned that the decree had not resolved the property distribution, child custody, or child support, and therefore the divorce case was still pending before the Court. In addition, the Court held that under 8 CMC § 1311 the Court could award temporary spousal support as it deemed justice and the best interests of all concerned required it. Bellas v. Sablan-Bellas, Civil No. 97-141 (NMI Super. Ct. August 24, 1998) (Pre-Trial Order and Order Awarding Temporary Spousal Support).

#### ANNULMENT

#### **BURDEN OF PROOF**

The party that initiates an annulment proceeding bears the burden of proving that the marriage is not valid due to some legal deficiency. See Islam v. Islam, 2009 MP 17 ¶ 12.

#### **GROUNDS**

A bigamous relationship occurs when a person, already married, engages in a marital agreement with a second spouse before the prior marriage has ended. Such relationships are wholly null and void. It is clear that the existence of a bigamous relationship constitutes grounds for annulment in the C.N.M.I. because bigamy makes the marriage "void," and thus falls within the grounds articulated in [8 CMC §] 1321. Vidal v. Stephanson, Civil No. 92-1537 (NMI Super. Ct. December 19, 1994) (Decision and Order Granting Annulment at 7) (citations omitted).

#### **NOT DISCRETIONARY**

[I]f the party seeking an annulment demonstrates that the parties did not meet the legal requirements for marriage, the trial court must grant a petition for annulment, and may not in the alternative grant a divorce. Islam v. Islam, 2009 MP 17 ¶ 29.

#### **PROPERTY**

Clearly, [8 CMC §] 1311 empowers the Court to equitably distribute property from an annulled marriage in which both parties have an interest. <u>Vidal v. Stephanson</u>, Civil No. 92-1537 (NMI Super. Ct. December 19, 1994) (Decision and Order Granting Annulment at 11).

The Court held that 8 CMC § 1832 authorizes the Court to distribute property under the Marital Property Act when a marriage is void or voidable. <u>See Vidal v. Stephanson</u>, Civil No. 92-1537 (NMI Super. Ct. December 19, 1994) (Decision and Order Granting Annulment at 11-12).

The Court held that the husband "would be unjustly enriched if he were allowed to avoid the marital property laws of the C.N.M.I. by concealing a material fact from [his wife] concerning his prior marriage to [another woman]. In other words, equity command[ed] that [his wife] receive any property that would have been marital property but for her estranged spouse's decision to enter into marriage with her before his marriage to [another woman] had ended." The Court then applied the Marital Property Act as if the marriage of the parties had been valid. Vidal v. Stephanson, Civil No. 92-1537 (NMI Super. Ct. December 19, 1994) (Decision and Order Granting Annulment at 12).

#### **APPEALS**

#### ALIMONY

It is well-settled in American jurisprudence that the amount of an award of maintenance, spousal support, or alimony is within the sound discretion of the trial court and its determination will not be disturbed on appeal absent a showing of manifest abuse of

discretion, or the decision is contrary to the manifest weight of the evidence. Washburn v. Washburn, 677 P.2d 152, 158 (Wash. 1984) (internal citations omitted); Ahlo v. Ahlo, 619 P.2d 112, 177 (Haw. Ct. App. 1980). The burden is on the appellant to show that the court abused its discretion. Thornburgh v. Thornburth, 1997 MP 27 ¶ 3 (citing Fowler v. Fowler, 272 P.2d 546, 548 (Cal. Dist. Ct. App. 1954)).

#### CHILD SUPPORT

The first issue before this Court is whether the trial court correctly calculated the child support award. We review a trial court's orders made under 8 CMC § 1311 for abuse of discretion. *See Robinson v. Robinson*, 1 N.M.I. 81, 86 (1990). We will not reverse unless the record is devoid of competent evidence to support the trial court's decision. A judgment will not be disturbed when there is any reasonable evidence to support it. *See id.* at 89. Santos v. Santos, 2000 MP 9  $\P$  2.

#### MARITAL PROPERTY ACT

This Court reviews the trial court's orders made under the MPA for abuse of discretion and will not reverse an order unless the record is devoid of any reasonable evidence to support it. Reyes v. Reyes, 2004 MP 1 ¶ 35.

Appellate review of property characterization will be bifurcated for the typical asset. The Court will review de novo if the asset belongs to one spouse individually or to them jointly. Second, determine whether the trial court abused its discretion when it assigned or divided that asset based on equitable considerations. However, when dealing with a mixed asset the court must first determine whether the separate and marital components of the mixed asset are severable. See Sattler v. Mathis, 2006 MP 6 ¶ 11.

The Court will determine on a *de novo* basis whether the retirement benefit was correctly categorized as separate, marital, or mixed. Then, if the retirement benefit is found to be mixed property, the Court must review the trial court's apportionment of it into marital and separate shares, as well as the trial courts division of the marital share, on a deferential abuse of discretion basis. See Sattler v. Mathis, 2006 MP 6 ¶ 16.

The division of marital property is subject to the broad discretion of the trial court, whose determinations will be upheld on appeal unless there is a clear showing of an abuse of discretion. Reyes v. Reyes, 2004 MP 1 ¶ 3 (citations omitted).

[The] Court reviews the trial court's orders made under 8 CMC §§ 1811, *et seq.* the Commonwealth Marital Property Act of 1990 ("MPA"), for abuse of discretion. Reyes v. Reyes, 2004 MP 1  $\P$  3.

#### MARITAL WASTE

As the party claiming harm from marital waste, Brian carries the burden of demonstrating that the record supports his contentions and must reference specific portions of the record in support of his complaints on appeal. Reves v. Reves, 2004 MP 1 ¶ 32.

The lack of evidence presented to support Brian's theories of marital waste of the Twin Bear income or any evidence at all of Jeannette's mishandling of marital funds, prevents this Court from finding that marital waste occurred. Reves v. Reves, 2004 MP 1 ¶ 32.

The trial court's broad discretion in dividing marital property, including a determination whether marital waste took place, will be upheld unless there is a clear showing of an abuse of discretion. Reyes v. Reyes, 2004 MP 1 ¶ 33.

Without specific evidence to support claims of misuse, dissipation or gross mismanagement of marital assets, this Court will not overturn the lower court. Reyes v. Reyes, 2004 MP 1  $\P$  33.

The trial court's broad discretion in dividing marital property, including a determination whether marital waste took place, will be upheld unless there is a clear showing of an abuse of discretion. Reves v. Reves, 2004 MP 1 ¶ 33.

#### PROPERTY SETTLEMENT AGREEMENT

The trial court's interpretation of a settlement agreement is a question of law reviewable by the Supreme Court de novo. Ada v. Calvo, 2012 MP 11 ¶ 10.

#### ATTORNEY FEES

#### **AUTHORITY TO AWARD**

**Editor's Note:** A client that has no control over the marital property still has a right to an equal or equitable share of that property. Therefore, if the client cannot pay attorney fees when the case has commenced, then the client's attorney should file a motion for attorney fees. The fees can be deducted from the client's share of the property distribution when the divorce is finalized.

The Court held that the power to award attorney fees was rooted in the common law and that attorney fees could be awarded even when there are statutes governing the award of attorney fees. The Court held that in making an award of attorney fees, the principal consideration is the relative financial resources of the parties. In addition, the Court should consider whether the parties have acted in good or bad faith. <u>Akter v. Ali</u>, 98-0234 (NMI Super. Ct. November 29, 2002) (Order Following Bench Trial at 17) (citations omitted).

#### **BAD FAITH**

A court may award attorney's fees when a party's bad faith actions compel it to make an equitable exception to the American Rule. Reyes v. Reyes, 2004 MP 1 ¶ 81.

It was not error for the trial court to award attorney's fees to wife in a divorce when the trial court determined that the husband delayed litigation, failed to disclose assets, and did not promptly respond to discovery requests. See Reyes v. Reyes, 2004 MP 1  $\P$  83.

#### **DISCRETION**

A court abuses its discretion in refusing to award attorney fees when the asking party clearly has no funds to pay the fees, and the party was successful in her action for child custody and support. Pille v. Sanders, 2000 MP 10 ¶ 25 (Citations omitted).

It is well-settled in American jurisprudence that the amount of an award of maintenance, spousal support, or alimony is within the sound discretion of the trial court and its determination will not be disturbed on appeal absent a showing of manifest abuse of discretion, or the decision is contrary to the manifest weight of the evidence. Washburn v. Washburn, 677 P.2d 152, 158 (Wash. 1984) (internal citations omitted); Ahlo v. Ahlo, 619 P.2d 112, 177 (Haw. Ct. App. 1980). The burden is on the appellant to show that the court abused its discretion. Thornburgh v. Thornburth, 1997 MP 27 ¶ 3 (citing Fowler v. Fowler, 272 P.2d 546, 548 (Cal. Dist. Ct. App. 1954)).

#### **GENDER DISCRIMINATION**

An award of attorney's fees based solely on gender is untenable discrimination based on sex in direct violation of the CNMI Constitution. Reyes v. Reyes, 2004 MP 1 ¶ 81.

#### **REASONABLENESS**

When determining the reasonableness of an attorney's fees award, the court needs sufficient details to evaluate the reasonableness of time incurred. Reyes v. Reyes, 2004 MP 1 ¶ 84.

#### **UNIFORM PARENTAGE ACT**

In proceedings under the Uniform Parentage Act, the court may order reasonable fees of counsel, experts, and the child's guardian ad litem, and other costs of the action and pretrial proceedings, including blood and genetic tests, to be paid by the parties in proportions and at times determined by the court. Pille v. Sanders, 2000 MP 10 ¶ 25 (citing 8 CMC § 1716).

Absent an award of attorney fees, a child might be deprived of the very protection which the paternity and child support statutes seek to afford him. <u>Pille v. Sanders</u>, 2000 MP 10 ¶ 25.

#### BEST INTEREST OF CHILD

#### **FACTORS**

In determining what is in the child's best interest, the trial court may consider a variety of factors, including: (1) the fundamental relationship of the child and the natural parents; (2) the interests of the adoptive parents; (3) the child's age; (4) the extent of the bond or potential bond between each natural parent to the child; (5) the fitness or unfitness of either natural parent, taking into account whether the child was abandoned, neglected, or physically or mentally abused; (6) whether either parent is a habitual user of alcohol or drugs; (7) whether either parent is a convicted felon where the nature of the crime is inconsistent with being a fit parent; (8) the extent of the bond, or potential bond, between the adoptive parents and the child; and (9) the ability of the natural parents and the ability of the adoptive parents to provide adequate and proper love, care, attention, and guidance to the child. In re Adoption of N.I.L.S., 2007 MP 31 ¶ 6 (citing In re Adoption of Olopai, 2 NMI 91, 103-04 (1991)).

#### **GENERALLY**

[E]nsuring the safety and wellbeing of the parties' children is of the utmost importance in divorce proceedings. Reyes v. Reyes, 2004 MP 1 ¶ 22.

#### **CHILD CUSTODY**

#### BEST INTERESTS OF CHILD

[8 CMC § 1311] is a carry over from the days of the Government of the Trust Territory of the Pacific Islands. The language of the provision cited above is exactly the same now as it was when it was first codified in the Trust Territory Code. As such, the interpretation of such a provision by the High court of the Trust Territory of the Pacific Islands will be helpful. As far back as 1959, in <a href="Yamada v. Yamada">Yamada</a>, the Trial Division of the High Court interpreted this statute to mean that the custody of children, in an action for divorce, is controlled primarily by the best interests of the children. 2 TTR 66. Throughout the days of the High Court, both Trial and Appellate Divisions were consistent in this interpretation. In one of its last cases, the Appellate Division of the High Court, in <a href="Eram v. Threadgill">Eram v. Threadgill</a>, 8 TTR 345 (1983), again recognized the standard enunciated in <a href="Yamada">Yamada</a>. The dissent in the <a href="Eram">Eram</a> case also recognized such standard. <a href="Robinson v. Robinson">Robinson</a>, 1 NMI 83, 88 (1990).

[W]hether the court is considering a modification of custody or proposed removal from the Commonwealth, the best interests of the children are paramount considerations in the court's determination. Villagomez v. Villagomez, Civil No. 99-0004 (NMI Super. Ct. May 23, 2001) (Order Granting in Part Motion to Modify Child Custody and Child Support ¶ 15).

We, therefore, hold that the applicable standard in custody and visitation rights issues is that the best interests of the child control. This is not to say that the interests of all concerned should not be considered. The courts must take into account the interests of all concerned. Not only does the statute require this, but also, it is just and proper. For example, the interests of the parents are also important. Our courts should highly regard the natural relationship of love and affection which normally exists between parents and children. Robinson v. Robinson, 1 NMI 83, 88-89 (1990).

#### **BURDEN OF PROOF**

The court is persuaded that [a custodial parent], in seeking to modify the custody arrangement from joint legal and physical custody to sole custody, bears the burden of showing a material change of circumstances such that the best interests of the children require such action. Villagomez v. Villagomez, Civil No. 99-0004 (NMI Super. Ct. May 23, 2001) (Order Granting in Part Motion to Modify Child Custody and Child Support ¶ 15).

The court held that "in order to prevail on a motion to remove the minor children from the Commonwealth, the relocating parent must first satisfy the court that he or she has a legitimate reason for leaving the Commonwealth *and then* demonstrate that it is in the children's best interests to live with that parent in the new location." <u>Villagomez v. Villagomez, Civil No. 99-0004 (NMI Super. Ct. May 23, 2001) (Order Granting in Part Motion to Modify Child Custody and Child Support ¶ 15) (citations omitted).</u>

#### **CHILD'S PREFERENCE**

When a child is of sufficient age, intelligence, and discretion to exercise an enlightened judgment, his or her wishes, though not controlling, may be considered by the court, with other relevant factors in determining child custody rights. A child's preference, however, "is entitled to less weight in a modification action than would be given in an original custody proceeding." <a href="Villagomez v. Villagomez">Villagomez v. Villagomez</a>, Civil No. 99-0004 (NMI Super. Ct. May 23, 2001) (Order Granting in Part Motion to Modify Child Custody and Child Support ¶ 25) (internal citations omitted).

#### **FACTORS**

The court will weigh the following factors "and their impact on all members of the family, including the extent to which the compelling interests of each member of the family are accommodated: (1) the extent to which the move is likely to improve the quality of life for both the children and the custodial parent; (2) whether the custodial

parent's motives are honorable, and not designed to frustrate or defeat visitation rights accorded to the noncustodial parent; (3) whether, if permission to remove is granted, the custodial parent will comply with any substitute visitation orders issued by the court; (4) the integrity of the noncustodian's motives in resisting the motion for permission to remove, and to what extent, if any, the opposition is intended to secure a financial advantage in the form of ongoing support obligations or otherwise; (5) whether, if removal is allowed, there will be a realistic opportunity for the noncustodial parent to maintain a visitation schedule that will adequately foster and preserve the parental relationship with the noncustodial parent. Villagomez v. Villagomez, Civil No. 99-0004 (NMI Super. Ct. May 23, 2001) (Order Granting in Part Motion to Modify Child Custody and Child Support ¶ 20) (citing D'Onofrio v. D'Onofrio, 365 A.2d 27 (N.J. 1976); Schwartz v. Schwartz, 107 Nev. 378, 383, 812 P.2d 1268, 1271 (1991).).

The court may also consider any number of additional factors that may be helpful in reaching an appropriate decision. For example, in determining whether, and the extent to which the move will likely improve the quality of life for the children and the custodial parent, the court may require evidence concerning such matters as: (1) whether positive family care and support, including that of the extended family, will be enhanced; (2) whether housing and environmental living conditions will be improved; (3) whether educational advantages for the children will result; (4) whether the custodial parent's employment and income will improve; (5) whether special needs of a child, medical or otherwise, will be better served; and (6) whether, in the child's opinion, circumstances and relationships will be improved. Brown, 670 N.W.2d at 81. The foregoing list is by no means all inclusive and only illustrates the many sub-factors that the court may, in the exercise of common sense, feel the need to pursue prior to ruling on the issue of removal. In certain instances, the court may even conclude that a professional opinion or evaluation by a psychiatrist or psychologist will be desirable in assessing the impact of the move on a child. Villagomez v. Villagomez, Civil No. 99-0004 (NMI Super. Ct. May 23, 2001) (Order Granting in Part Motion to Modify Child Custody and Child Support ¶ 21) (internal citations omitted).

In determining the potential that the removal to another jurisdiction holds for enhancing the quality of life of the parent seeking removal and of the children, courts have routinely considered several pertinent factors, including: (1) the emotional, physical, and developmental needs of the children; (2) the children's opinion or preference as to where to live; (3) the extent to which the relocating parent's income or employment will be enhanced; (4) the degree to which housing or living conditions would be improved; (5) the existence of educational advantages; (6) the quality of the relationship between the children and each parent; (7) the strength of the children's ties to the present community and extended family there; and (8) the likelihood that allowing or denying the move would antagonize hostilities between the two parties. Villagomez v. Villagomez, Civil No. 99-0004 (NMI Super. Ct. May 23, 2001) (Order Granting in Part Motion to Modify Child Custody and Child Support ¶ 25) (citations omitted).

[T]he marital status of the parents does not make any difference in determining the rights of parents in the parent and child relationship. <u>In re Adoption of Magofna</u>, 1 NMI 451, 455 (1990) (citing 8 CMC §§ 1401(a), 1702).

#### INTERPRETATION OF 8 CMC § 1311

Both Rita and the trial court reasoned that *Taisacan* was decided before 8 CMC § 1311 was enacted. However, this statute is an exact carry-over from the Trust Territory Code and an interpretation by the High Court of that statute is instructive. <u>Reyes v. Reyes</u>, 2001 MP 13 ¶ 15 (citing <u>Robinson v. Robinson</u>, 1 N.M.I. 81, 88 (1990)).

[8 CMC § 1311] is a carry over from the days of the Government of the Trust Territory of the Pacific Islands. The language of the provision cited above is exactly the same now as it was when it was first codified in the Trust Territory Code. As such, the interpretation of such a provision by the High court of the Trust Territory of the Pacific Islands will be helpful. As far back as 1959, in <a href="Yamada v. Yamada">Yamada v. Yamada</a>, the Trial Division of the High Court interpreted this statute to mean that the custody of children, in an action for divorce, is controlled primarily by the best interests of the children. 2 TTR 66. Throughout the days of the High Court, both Trial and Appellate Divisions were consistent in this interpretation. In one of its last cases, the Appellate Division of the High Court, in <a href="Eram v. Threadgill">Eram v. Threadgill</a>, 8 TTR 345 (1983), again recognized the standard enunciated in <a href="Yamada">Yamada</a>. The dissent in the <a href="Eram">Eram</a> case also recognized such standard. <a href="Robinson v. Robinson">Robinson</a>, 1 NMI 83, 88 (1990).

[8 CMC § 1311] does not leave any doubt that the trial court has discretion in entering orders regarding custody and visitation of a child. <u>Robinson v. Robinson</u>, 1 NMI 83, 89 (1990).

#### **TEMPORARY TO PERMENANT ORDER**

Trial Court did not err when it reduced husband's visitation with child after full trial on the merits. A Court has to exercise its discretion when issuing a temporary order without the benefit of a full trial. After the trial the Court is in a better position to determine the issue of custody and may increase or decrease visitation with the minor child. See Robinson v. Robinson, 1 NMI 83, 88 (1990).

#### CHILD SUPPORT

#### <u>AMOUNT</u>

In determining child support, the primary focus is on the needs of the child, and the court may order a parent to pay an amount reasonable or necessary for the child's support after considering the relevant factors. Santos v. Santos, 2000 MP 9  $\P$  13 (citations omitted).

The amount of child support depends on many factors, including the children's needs and the parents' financial resources, however, a court should not order a party to pay more for expenses than he or she can afford. Santos v. Santos, 2000 MP 9 ¶ 14 (citations omitted).

If the record establishes that the trial court considered all relevant factors in fashioning the child support award, and that the award was not unreasonable under the circumstances, then the reviewing court will not disturb the child support award. Santos v. Santos,  $2000 \text{ MP } 9 \P 14$  (citations omitted).

In the absence of evidence that a mother's child care expenses were lower before trial, it was error for the trial court to award a lower amount of retroactive monthly child support to mother. See Pille v. Sanders, 2000 MP 10 ¶ 23.

For purposes of determining child support, it is irrelevant that Felicidad received help from her friends, as she apparently had to because Charles refused to help raise the child. We do not believe it is appropriate for Felicidad's friends to shoulder the burden of raising C.S. Accordingly, we will not discount the award of retroactive child support merely because Felicidad received support from other sources other than Charles or herself. Pille v. Sanders, 2000 MP 10, n. 3 (citing Fowhand v. Piper, 611 So. 2d 1308, 1312 (Fla. Dist. Ct. App. 1992)).

#### **DEFENSE**

[T]he defense of laches is unavailable to an alleged father in a paternity action in that laches cannot be imputed to the child during its minority. <u>Ada v. Ogo</u>, 1 CR 1044, 1048 (Dist. Ct. App. Div. 1984). **Editor's Note**: This case was published before the passage of the Uniform Parentage Act.

#### **DURATION**

It is well settled that child support payments are for the benefit of more than one child and that the emancipation of one child does not automatically affect the liability of the parent for the full amount. Reyes v. Reyes, 2004 MP 1  $\P$  25.

The costs associated with raising children are not static and the needs of one child can be vastly different than the next. Reyes v. Reyes, 2004 MP 1  $\P$  25.

[T]he continual rise in the cost of living, inflation, and other factors should mitigate pro rata reductions if a single child reaches majority. Unforeseen costs such as medical or dental expenses necessitate that child support not be based on penurious rules. Reyes v. Reyes, 2004 MP 1  $\P$  25 (citations omitted from direct quote).

**Editor's Note:** Look to the policy behind child support if you are attempting to terminate it.

#### **FOREIGN JUDGMENTS**

Father was ordered to pay child support by Superior Court of Guam. Father later moved to California. Pursuant to California's URESA statute, the child support case was transferred to California. The California court determined the father's arrearage and set a child support obligation different from the child support order from Guam. The child support order from California did not mention the child support order from Guam. The case eventually ended up in the Commonwealth Superior Court. The Commonwealth Superior Court found that the court order from California did not modify or alter the father's child support obligation under the prior Guam decree. See Roberto v. Roberto, Civ. No. 90-724 (NMI Super. Ct. July 30, 1993) (Decision and Order Awarding Child Support Pursuant to 8 CMC § 1511 et seq).

Father was ordered to pay child support by Superior Court of Guam. Father later moved to California. Pursuant to California's URESA statute, the child support case was transferred to California. The California court determined the father's child support arrearage. The Commonwealth Superior Court held that the mother was bound by the adjudication of arrearages by the California Court because (1) the California Court made explicit findings to support the determination of arrearages; (2) mother did not appeal the decision of the California court. See Roberto v. Roberto, Civ. No. 90-724 (NMI Super. Ct. July 30, 1993) (Decision and Order Awarding Child Support Pursuant to 8 CMC § 1511 et seq).

#### **FRAUDULENT TRANSFERS**

Judgment was entered against Defendant in a California court for substantial amounts of child support, spousal support, and attorney fees. Defendant transferred his real property and assets to his children and relatives. The Court found that the transfers were fraudulent and held that the transfers were void. <u>Sullivan v. Tarope, et al.</u>, Civ. No. 98-1293 (NMI Super. Ct. March 19, 2003).

#### **GENERALLY**

It was error for the trial court to award nominal rent to the husband when the mother was given the continued use of the marital residence primarily for the benefit of the minor children. The husband's maintenance and upkeep of the family home is mainly for the children's benefit and is based on his duty as a parent to support his children. Allowing the husband to charge the wife rent in this situation would be inconsistent with the Commonwealth's strong interest in protecting children. See Reyes v. Reyes, 2004 MP 1 ¶ 20.

The trial court did not abuse its discretion when it refused to credit the husband for temporary child support payments made after one of the children reached the age of majority during the temporary child support period. See Reyes v. Reyes, 2004 MP 1 ¶ 26.

Absent specific statutory authority, a court granting a divorce has no authority to establish a trust upon the property of one of the parties, to secure alimony or child support payments. Reyes v. Reyes, 2001 MP 13 ¶ 13. (Citations removed from direct quote).

A trial court abuses its discretion as to a child support award when it fails to consider the financial impact of the amount of time the non-custodial spouse will spend with the child. Santos v. Santos, 2000 MP 9 ¶ 14 (citations omitted).

If there is no need for child support, it is irrelevant that a party can afford to pay it. See Santos v. Santos, 2000 MP 9 ¶ 14.

Allowing a parent to escape responsibility for supporting his children improperly places the financial burden on the Commonwealth and its taxpayers. Pille v. Sanders, 2000 MP  $10 \ \ 22$ .

While setting child support is not mandatory, it is an "integral part of paternity proceedings instituted under" the [Uniform Parentage] Act. <u>Francis v. Welly</u>, 1999 MP 26 ¶ 14.

It is well settled that, in the absence of specific statutory authority, a court granting a divorce has no authority to establish a trust upon the property of one of the parties to secure payments of alimony or amounts decreed for child support. <u>Taisacan v. Manglona</u>, 1 CR 813, 816 (Dist. Ct. App. Div. 1983) (citations omitted).

[I]t has universally been held that the court is without authority to give the property of the father to the children. <u>Taisacan v. Manglona</u>, 1 CR 813, 817 (Dist. Ct. App. Div. 1983) (citations omitted).

A father of children is under no obligation to settle any property upon his children, or to deed them an interest in any asset. On the contrary, he may by will or deed or other voluntary act disinherit a child if he sees fit to do so. The general rule is that in granting a divorce a court has no authority under the relevant statute to decree that a part of the property of the husband shall be the sole property of his children. <u>Taisacan v. Manglona</u>, 1 CR 813, 817 (Dist. Ct. App. Div. 1983) (quoting <u>Giambrocco v. Giambrocco</u>, 161 Col. 510, 423 P.2d 328 at 330 (1967)).

[W]hatever power the court has to afford protection to children in a divorce suit is derived from statute, and is limited in making provision for their support and education during their minority. <u>Taisacan v. Manglona</u>, 1 CR 813, 817 (Dist. Ct. App. Div. 1983) (citations omitted). **Editor's Note**: This case was interpreting 39 TTC 103, which was the predecessor to the modern statute in the Commonwealth.

#### **INDIGENCE**

We therefore hold an indigent party seeking to enforce a judgment establishing paternity and setting child support is entitled to court-appointed counsel. This right to counsel furthers the Commonwealth's compelling interest in protecting children, by providing a means by which children may enforce their right to child support. Francis v. Welly, 1999 MP 26 ¶ 15.

Once a court appoints counsel in a paternity proceeding instituted under the Uniform Parentage Act, it may seek reimbursement from the father pursuant to 8 CMC § 1716. See Francis v. Welly, 1999 MP 26 n. 3.

#### INTERPRETATION OF 8 CMC § 1311

Both Rita and the trial court reasoned that *Taisacan* was decided before 8 CMC § 1311 was enacted. However, this statute is an exact carry-over from the Trust Territory Code and an interpretation by the High Court of that statute is instructive. *See Robinson v. Robinson*, 1 N.M.I. 81, 88 (1990). Reyes v. Reyes, 2001 MP 13 ¶ 15.

#### **MODIFICATION**

[S]ubsequent obligations incurred as a result of one's remarrying by itself will not be sufficient to permit a decrease in the child support obligations under the first marriage. Babuata v. Babuata, 2 CR 949, 950 (Trial Ct. 1987) (citing generally Annot., 89 ALR 2d 106. et seq). Editor's Note: In this case the father remarried, had a second child with his new wife, and then got divorced. The Court held that he could not use the second divorce and the new child as a basis for reducing his child support obligation. This case is well decided and comports with most jurisdictions in the United States.

#### **PURPOSE/POLICY**

To minimize the disruption to a child's life brought on by divorce, a child support award seeks to provide the children with the same or similar standard of living they would have enjoyed had the marriage not dissolved. Reyes v. Reyes, 2004 MP 1 ¶ 25.

A child support award is designed to provide the children, as closely as possible, with the same standard of living they would have enjoyed had the marriage not dissolved. <u>Santos v. Santos</u>, 2000 MP 9 ¶ 13 (citations removed).

**Editor's Note:** This citation could be used to argue that child support should cease when the child leaves the custodial parent's home to attend college.

#### **CIVIL PROCEDURE**

#### **COMMONWEALTH RULES OF CIVIL PROCEDURE**

The court has adopted the Commonwealth Rules of Civil Procedure which govern procedure in suits of a civil nature. Com R. Civ. P. 1. Family law cases are civil in nature and are governed by the civil rules. <u>Santos v. Santos</u>, 2001 MP 12 ¶ 10. (citing <u>In re the Adoption of Magofna</u>, 1 NMI 449 (1990)).

#### **CONTINUANCE**

It was error for the trial court to refuse to grant father a continuance when father was only informed of the adoption hearing several days before the trial. The inconvenience to the petitioners was meaningless when compared to the prejudice suffered by father. See In re Adoption of Olopai, 2 NMI 91, 97 (1991).

#### COUNTERCLAIMS NOT ALLOWED

The Court held that Defendant's tort counterclaims must be brought separately from the action for divorce. Defendant counterclaimed for the torts of battery and intentional infliction of emotional distress. The Court dismissed the counterclaims, without prejudice, because the Defendant was entitled to a jury trial on those matters, but not for the divorce. The dismissal was pursuant to NMI R. Civ. P. 41(b)(3), (c). See Reyes v. Reyes, 97-0167 (NMI Super. Ct. October 22, 1998) (Written Decision Following Oral Ruling) (reversed on separate grounds).

#### **GUARDIAN AD LITEM**

Rule 17(c) exists "because the courts are ultimately the guardians of minors, and a guardian ad litem is an officer and agent of the court charged with protecting a minors' rights. Aldan v. Pangelinan, 2011 MP 10  $\P$  14.

#### **NOTICE REQUIRED**

8 CMC § 1725(e) "requires notice . . . of the proceeding to terminate parental rights." <u>In</u> re Adoption of Olopai, 2 NMI 91, 99 (1991).

Generally, the respondent in a termination of parental rights case will have twenty days to file an answer. There may be situations where an earlier hearing is justifiable, but even then "he hearing can only go forward "after a party has made an appropriate motion and the matter is heard after due notice." <u>In re Adoption of Olopai</u>, 2 NMI 91, 99-100 (1991).

#### **PLEADINGS**

The plaintiff is not required to serve the defendant with a property declaration when serving the summons and complaint. Under the general rule of pleadings, what is required in a complaint and summons includes a statement of jurisdiction, a short and plain statement of the claim, and a demand for judgment. Santos v. Santos, 2001 MP 12.

#### **COMMON LAW MARRIAGE**

According to Chamorro Custom, the few common-law marriages that have existed here in the past have never been regarded as marriages by Chamorros. Alexander Spoehr, Saipan: The Ethnology of a War Devastated Island., 251 (1954). This non-recognition of common-law marriages seems to have resulted from the Chamorro view of a "Catholic marriage ceremony as an essential sanction for the existence of a marriage." *Id.* When the legislature decided that the date of the marriage should serve as the proper determination date, the legislature contemplated the date of the marriage ceremony, and not the date that a common-law marriage may have begun. <u>Hofschneider v. Hofschneider</u>, Civ. No. 91-994 (NMI Super. Ct. March 9, 1994) (Order) (reversed on different grounds).

**Editor's Note:** Spoehr's book is sixty years old. It was written in a time of great turmoil. An attorney attempting to establish common law marriage in the Commonwealth should consider arguing that it is common enough to be considered a custom in the Commonwealth.

#### COMMONWEALTH FAMILY PROTECTION ACT OF 1986

The court's finding of a family relationship and residential relationship between the parties presents a question of fact reviewed under the clearly erroneous standard. Olupomar v. Mahora, 2001 MP 17 ¶ 2 (citing Pangelinan v. Itaman, 4 N.M.I. 114 (1994)).

Whether a restraining order complies with the terms of the Family Protection Act is a question of law, reviewed *de novo*. *See Norita v. Norita*, 4 N.M.I. 381 (1986), *Commonwealth v. Kaipat*, 2 N.M.I. 322, 327-28 (1991) (holding that the correct interpretation and application of a statute is a question of law). <u>Olupomar v. Mahora</u>, 2001 MP 17 ¶ 2.

The vital functions of the Family Protection Act cannot be fulfilled without the proper scope of the Act defined. The lower court misinterpreted the scope and definitions contained in the Family Protection Act, which, if not corrected by this Court is likely to be repeated. Lastly, absent extraordinary circumstances, there is no readily available way

for a party to appeal the issuance of a TRO before it expires. <u>Olupomar v. Mahora</u>, 2001 MP 17 ¶ 12.

Under the Family Protection Act, for "abuse" to be actionable, it must be between family members who "reside together or who formerly resided together." <u>Olupomar v. Mahora</u>, 2001 MP 17 ¶ 14.

The lower court found that [Mrs. Olupomar] "is married to Mr. Olupomar and that Mr. Olupomar is related by blood and Carolinian custom" to [Ms. Mahora] to justify the establishment of a family relationship under the Act. *Olupomar v. Mahora*, FCDFP Action No. 00-0127 (N.M.I. Super. Ct. June 20, 2000). However, the Family Protection Act pertains to "persons related by blood, marriage, or customary affinity as brothers, sisters, children, spouses, or parents." Thus, even though OLUPOMAR and MAHORA are, perhaps, related by blood or custom, their relationship is not as "brothers, sister, children or parents." <u>Olupomar v. Mahora</u>, 2001 MP 17 ¶¶ 16-17.

Public policy supports upholding the scope of the Family Protection Act. If the Family Protection Act were to be read to extend to all disagreements, its purpose would be thwarted because no benefit to the "family unit" would be gained. Olupomar v. Mahora, 2001 MP 17 ¶ 19.

Whether a restraining order complies with the terms of the Family Protection Act is a question of law, reviewable de novo. <u>Norita v. Norita</u>, 4 NMI 381, 383 (1996) (citing <u>Commonwealth v. Kaipat</u>, 2 NMI 322, 327-28 (1991)).

Ex parte practice, and the orders which may be obtained on an ex parte basis, should be subjected to careful control by the courts. Because of its non-adversarial nature, there is always a danger of misuse of an ex parte application. At the same time, ex parte restraining orders fulfill a vital function in assuring the safety of citizens, especially in the context of the Family Protection Act. Norita v. Norita, 4 NMI 381, 385 (1996).

The Family Protection Act provides more specific ex parte procedures than Com. R. Civ. P. 65(b). Norita v. Norita, 4 NMI 381, 385 (1996).

The plain terms of [the Family Protection Act] mandate that the Superior court must calendar a hearing on a petition alleging abuse within ten days of the filing of the petition. Norita v. Norita, 4 NMI 381, 385 (1996).

A temporary restraining order expires ten days after the date of its issuance if no hearing is held within ten days of the filing of a petition. See Norita v. Norita, 4 NMI 381, 385-386 (1996).

#### **CONFLICT OF LAWS**

The Court applied the Restatement (Second) of Conflicts of Law § 283 (1989) where the wife alleged that she married her husband in Bangladesh and that they had adopted a child in Bangladesh. The husband argued that they had never married or adopted a child. Akter v. Ali, 98-0234 (NMI Super. Ct. November 29, 2002) (Order Following Bench Trial).

#### **CUSTOMARY LAW**

#### ADOPTION

The sum of our statements regarding poksai and pineksai reveals two important and incontrovertible points: (1) pineksai who are raised as natural and legitimate children are customary adopted children; and (2) the Chamorro custom for such pineksai to receive property from their adoptive parents is embodied in the statutory language of 8 CMC § 2918(a). In re Macaranas, 2003 MP 11 ¶ 17.

#### **CAROLINIAN CUSTOMS (GENERALLY)**

This Court recognizes that the word "Refaluwasch" is a more accurate word than "Carolinian" to refer to persons of Carolinian descent who have settled in the Northern Mariana Islands. <u>In re Estate of Amires</u>, 1997 MP 8 n.1 (citing Carolinian-English Dictionary, compiled by Jackson, F. & J. Marck, Univ. Of Hawaii (1991) at 58 & 145).

To determine when land becomes Refaluwasch land the Court must look to how the family treated the land after the male owner's death. The determinative time is at the death of the male owner. See In re Estate of Amires, 1997 MP 9 ¶¶ 25-26.

Traditional Carolinian land tenure is matrilineal, [] and land descends by the minimeal lineage, i.e., mother to daughter []. The land under this tenure system is collectively owned and controlled by females. In re Estate of Rangamar, 4 NMI 72, 76 (citing Alexander Spoehr, Saipan: The Ethnology of a War-Devastated Island at 333, 335, 363 (Chicago Natural History Museum, Fieldiana: Anthropology, vol. 41, 1954).

We now hold that where the history of the land in an estate, to which the probate code is inapplicable, or the activities of the heirs in relation to the land, are consistent with Carolinian land custom, that custom would be applied and the female heirs will hold title. Otherwise, where the land is not family land or the females consented to treatment inconsistent with Carolinian land custom, the court may allow the division of the property among individual male and female heirs. In re Estate of Rangamar, 4 NMI 72, 77 (1993) (citing Tarope v. Igisaiar, 3 CR 111, 117-118 (NMI Trial Ct. 1987)).

Only where the original owner clearly decides to depart from Carolinian customary law may a devise to an heir stand. <u>In re the Estate of Rita Kaipat</u>, 3 NMI 495, 498 (1992) (citing Estate of Lorenzo Igitol, 3 CR 907 (NMI Super. CT. 1989)).

#### **CHAMORRO CUSTOMS (GENERALLY)**

It is correct that, under Chamorro custom, separate property brought into a marriage by one spouse remains that spouse's separate property during the marriage. <u>In re Estate of Ayuyu</u>, 1996 MP 19 ¶ 20.

It is concluded that the established Chamorro custom of omitting the spouse from taking iyon manaina shows an intent to keep the real property in the famiy, provide for the issue (as well as the life estate for the spouse) and to avoid the possibility of the surviving spouse from dissipating the assets in some manner. In re the Estate of Camacho, 1 CR 396, 404 (Trial Ct. 1983).

[N]owhere in our analysis of <u>Deleon Guerrero</u> did we suggest or imply that Chamorro custom provides for reciprocal application as between surviving husband and wife. <u>In re Estate of Aldan</u>, 1997 MP 3 ¶ 13 (citing <u>In re Estate of Deleon Guerrero</u>, 1 NMI 301 (1990)).

#### **DIVORCE**

Until recent decades, there was no divorce among the Chamorros as we understand it today. Although separations between spouses did occur, they were infrequent. A. Spoehr, Saipan: the Ethnology of a War Devastated Island 266-67 (Chicago Natural History Museum, 1954; hereafter "Spoehr"). There was therefore no occasion in Chamorro society to consider the ownership and distribution, upon divorce, of property acquired by a husband and wife during marriage. Ada v. Sablan, 1 NMI 417, 423 (1990).

#### **NEW CUSTOMS**

We agree that custom over time may gradually change by a uniform and common change in practice. However, such changes are neither "legally binding [n]or accepted customs until they have at least existed long enough to have become generally known and have been peaceably and fairly uniformly acquiesced in by those whose rights would naturally be affected." In re Estate of Rangamar, 4 NMI 72, 77 (1993) (quoting Lalou v. Aliang, 1 TTR 94, 99-100 (Trial Div. 1954).

Mere agreement to new ways of doing things by those to be benefitted without the consent of those to be adversely affected, will not of itself work a sudden change of customary law. <u>In re Estate of Rangamar</u>, 4 NMI 72, 77 (1993) (quoting <u>Lalou v. Aliang</u>, 1 TTR 94, 100 (Trial Div. 1954)).

[T]he existence of a custom is a mixed question of law and fact which is freely reviewable, the "clear error" standard of Federal Rule of Civil Procedure 52(a) governs

the review of factual findings concerning the execution of a partida pursuant to custom. In re the Estate of Taisakan, 1 CR 328, 332 (Dist Ct. App. Div. 1982) (citing <u>Lajutok v. Kabua</u>, 3 TTR 630, 634 (H.C. App. Div. 1968).

A custom is generally defined as a law established by long usage and is such usage as by common consent and uniform practice has become the law of the place, or of the subject matter, to which it related. <u>In re the Estate of Camacho</u>, 1 CR 396, 402 (Trial Ct. 1983) (citing Lalou v. Aliang, 1 TTR 94 (Tr. Div. 1954)).

There is clearly no long usage or practice of distributing community property all to the surviving spouse. Even if one could say that this is a new custom since the concept of community property itself is new, neither witness could state that such a custom has been practiced. In re the Estate of Camacho, 1 CR 396, 402 (Trial Ct. 1983).

[W]here there is customary law not in conflict with the statutory law, the court will apply the former. In re the Estate of Eduardo Calub Refugia, 1 CR 220, 221 (Trial Ct. 1981).

Our courts may take judicial notice of a firmly established custom. Lajutok v. Kabua, 3 TTR 630, 634 (App. Div. 1968).

#### **PARTIDA**

Although the affidavit made by Jose and Yvonne do not state the time place or members present when the partida was made, when viewed in a light most favorable to Jose, the affidavits suggest there was a partida. As explained in our holding from *Cabrera*, summary judgment is not proper here because there is enough evidence from the affidavits, viewed in a light most favorable to the non-moving party to show that a material fact is in dispute, i.e. the existence of a partida. <u>Sullivan v. Tarope</u>, 2006 MP 11 ¶ 49.

[I]n <u>Palacios v. Coleman</u>, the court noted that when the property descends to the children, there is a corresponding custom which requires the children to support their widowed mother during her lifetime. This requirement puts the burden on the children, who receive the father's land, to provide the care and support that the father previously gave to the mother. <u>In Re Estate of Aldan</u>, 1997 MP 3 ¶ 11 (citing <u>Palacios v. Coleman</u>, 1 CR 34, 36 (D.N.M.I. 1980)).

Normally, all land, including the wife's, is distributed during a partida. <u>Estate of Ayuyu</u>, 1996 MP 19 ¶ 21 (citing <u>Blas v. Blas</u>, 3 T.T.R. 99, 108-09 (T.T. High Ct., Tr. Div. 1966).

[U]nder Chamorro customary law, parents may retain possession of and control over land that they have distributed by partida. Upon the death of the parent or parents, sole possession and control transfers automatically to the child designated to receive that land. In re Estate of Ayuyu, 1996 MP 19 ¶ 29 (citing Estate of Seman, 4 NMI 129, 132 n.12 (1994) (citation omitted); Blas v. Blas, 3 T.T.R. 99, 109 (T.T. High Ct., Tr. Div. 1966)).

The parties have asserted that Antonio died intestate. By necessary implication, this means that no form of customary testamentary distribution applies. The forms of customary distribution that we have recognized are partidas and testamentos. See In re Estate of Deleon Castro, 4 NMI 102, 110 (1994). In re Estate of Barcinas, 4 NMI 149, 152 (1994).

[T]he distribution of land by partida is not a "gift." Rather, it is the mechanism under which succession to family land under Chamorro customary law is effectuated. <u>In re Estate of Seman</u>, 4 NMI 129, 132 (1994) (citing <u>In re Estate of Deleon Castro</u>, 4 NMI 102, 110 (1994) (citing Alexander Spoehr, Saipan: The Ethnology of a War-Devastated Island at 136-37 (Chicago Natural History Museum, Fieldiana: Anthropology, vol. 41, 1954).

[I]n determining whether there has been a partida, a court will first look to the formal elements of a partida as set forth in *Blas*. However, where evidence of such elements is lacking, the court may examine the case before it with respect to its particular circumstances and need not apply a rigid set of requirements. <u>In re Estate of Seman</u>, 4 NMI 129, 132 (1994).

A testamento is a written partida which "preserves in writing the intent and directions of the male head of the family in regard[] to distribution of the family's property. <u>In re Estate of Deleon Castro</u>, 4 NMI 102, 110 (1994) (citing <u>In re Estate of Torres</u>, 1 CR 237, 244 (D.N.M.I. App. Div. 1981)).

We hold that under Chamorro custom, a testamento entered jointly by husband <u>and</u> wife may not be altered by a survivor wife and that any property distributed thereunder vests to the devisee upon the death of the father. <u>In re the Estate of Torres</u>, 1 CR 239, 245 (Dist Ct. 1981).

Although <u>Blas v. Blas</u>, 3 TTR 99, 108-109 (H.C. Tr. Div. 1966) discusses what purports to be the "ideal" partida execution procedure, the requirements for execution are inherently flexible. <u>In re the Estate of Taisakan</u>, 1 CR 328, 333 (Dist Ct. App. Div. 1982) (citing <u>Muna v. Muna</u>, 7 TTR 632, 634 (H.C. App. Div. 1978); A. Spoer, Saipan: The Ethnology of a War-Devastated Island 363-366 (1954); R. Emerick, <u>Land Tenure Patterns in the Marianas</u>, printed in Land Tenure Patterns in the Trust Territory of the Pacific Islands 225-227 (1958) (noting the assimilation into Carolinian custom of Chamorro customary practices of land tenure and inheritance)).

Once a court identifies the applicable custom, its determination of whether the decedent made a partida pursuant to custom necessarily entails a careful assessment and balancing of documentary and testimonial evidence. <u>In re the Estate of Taisakan</u>, 1 CR 328, 334 (Dist Ct. App. Div. 1982).

The court below accepted without citation of authority the parties' stipulation that under Carolinian custom the owner of land may divide the land by partida distribution and that partida execution requirements are the same under Carolinian custom and Chamorro

custom. The sections of the Spoehr and Emerick commentaries cited in the text support the stipulation as to the similarity of partida custom. <u>In re the Estate of Taisakan</u>, 1 CR 328, n. 5 (Dist Ct. App. Div. 1982) (citations omitted).

Under Chamorro custom a father should at some time before his death, call his family together and designate a division of all family lands and ancestoral [sic] lands, including those brought in by the wife, among his children. This is usually with the consent of the wife and children, but the father's word is not to be disputed though he is expected to act fairly under Chamorro standards. This "partida" is a serious and important matter in which all members of the family are expected to participate and take note. The father may turn over formal ownership and control at once or he may retain ownership and control until some later date or until he dies. Pangelinan v. Tudela, 1 CR 709, 710-711 (Dist Ct. 1983) (citing Blas v. Blas, 3 TTR 108 (1966)).

#### PATTE PAREHO

Following the direction of the equal protection clause of the Commonwealth Constitution, Article I, Section 6, patte pareho recognizes that both spouses have an equal ownership interest in any property acquired during marriage unless it is shown that such property belongs solely to one party and that marital property is subject to equitable distribution on divorce. Reyes v. Reyes, 2004 MP 1 ¶ 27.

Patte pareho is a Chamorro custom giving both spouses an equal ownership interest in property acquired during marriage. Reves v. Reves, 2004 MP 1 n.6.

#### PRECEDENT INAPPLICABLE

If Chamorro customary law applies when applying probate law, U.S. statutory law precedents do not apply. <u>In re Estate of Aldan</u>, 1997 MP 3 ¶ 15.

#### DISCRIMINATION

Discrimination based on sex is prohibited unless it is justified by a compelling state interest. Therefore, any court decision in a family law context that relies on the proper role of a man or a woman probably runs afoul of Article I, § 6. See Ada v. Sablan, 1 NMI 417 (1990).

Wife could not be denied interest in marital property on the basis of her gender. This case judicially created a form of community property. See Ada v. Sablan, 1 NMI 417 (1990).

#### **DIVORCE**

#### **CHILDREN**

The children of divorcing parents are subject to all applicable court orders. Aldan v. Pangelinan, 2011 MP 10 6.

#### **CRUELTY**

This Court relies on the body of case law which is committed to the rule that in deciding allegations of cruelty and personal indignities, the court must apply a subjective rather than an objective test and consider the effect of conduct and words upon the aggrieved party. Sattler v. Mathis-Sattler, Civ. No. 02-0412 (NMI Super. Ct. November 5, 2003) (Order Granting Plaintiff's Absolute Divorce at 5).

It is well settled that there can be cruel and inhuman treatment without physical violence. What constitutes cruel and inhuman treatment must be determined by the facts of the given case. <u>Sattler v. Mathis-Sattler</u>, Civ. No. 02-0412 (NMI Super. Ct. November 5, 2003) (Order Granting Plaintiff's Absolute Divorce at 5).

#### DATE OF SEPARATION

Determining a separation date requires close inspection of the parties' conduct, as many marriages are on the rocks for protracted periods of time and it may be many years before the spouses decide to formally dissolve their legal relationship. Reyes v. Reyes, 2004 MP 1 ¶ 12 (citations omitted).

#### **PLEADINGS**

Relief shall not be granted on an unpled ground absent express or implied consent in divorce proceedings. Olaitman v. Emran, 2011 MP 8 ¶ 7.

#### DOMESTIC AND FAMILY VIOLENCE PREVENTION ACT

For the foregoing reasons, we hold that the trial court violated appellant's substantive due process rights by preventing him from commencing an eviction action when it was his legal right to do so. The trial court made no finding of abuse, yet abridged the appellant's property interests pursuant to 8 CMC § 1916, a statute designed to protect individuals from domestic abuse. This abridgment, therefore, amounted to an arbitrary deprivation of the defendant's property interests. <u>Castro v. Castro</u>, 2009 MP 8 ¶ 30.

#### **FAMILY HOME**

It was error for the trial court to award nominal rent to the husband when the mother was given the continued use of the marital residence primarily for the benefit of the minor children. The husband's maintenance and upkeep of the family home is mainly for the children's benefit and is based on his duty as a parent to support his children. Allowing the husband to charge the wife rent in this situation would be inconsistent with the Commonwealth's strong interest in protecting children. See Reyes v. Reyes, 2004 MP 1 ¶ 20.

The overarching consideration of th[e] Court in determining the propriety of [the mother's] continued occupancy of the family home is protecting the best interests of the children. Reyes v. Reyes, 2004 MP 1 ¶ 18.

[I]t is improper to condition the occupancy of the family home by a spouse who is the primary caregiver to a couple's children on that spouse remaining single. Reyes v. Reyes, 2004 MP 1 ¶ 18.

#### **GUARDIANSHIP**

Rule 17(c) exists "because the courts are ultimately the guardians of minors, and a guardian ad litem is an officer and agent of the court charged with protecting a minors' rights. Aldan v. Pangelinan, 2011 MP 10 ¶ 14.

The Court held that the trial court must appoint a guardian ad litem or craft an order that adequately protects a minor or incompetent adult's interests. If it does not, then the trial court must make findings of fact that justify its decision. See Aldan v. Pangelinan, 2011 MP 10 ¶ 16.

**Editor's Note**: Counsel should be wary of relying on an order that "adequately protects a minor or incompetent adult." It seems likely that the trial court in this case believed that it was adequately protecting the minor children. It may not always be clear when a person needs protection and hindsight will be 20/20. When in doubt, appoint a guardian ad litem.

Where guardian of children signed property deed conveying children's property interest, her signature was sufficient to convey all right, title, and interest in the property of the children. See In the Matter of the Estate of Faisao, 3 CR 885, 888 (Super. Ct. 1989).

#### **JURISDICTION**

#### **CHILDREN**

The jurisdiction that a court possesses over a divorcing couples minor children does not end when the divorce is finalized, but rather, the court retains continuing jurisdiction over the children as needed. Aldan v. Pangelinan, 2011 MP  $10 \, \P \, 7$ .

#### FOREIGN JURISDICTIONS

The Full Faith and Credit for Child Support Orders Act supersedes inconsistent law in the Commonwealth. The Court was deprived of jurisdiction to alter a child support order originating from Ohio when the obligee continued to reside in Ohio. See Cundiff v. Wilgus, Civil No. 08-0566 (NMI Super Ct. June 1, 2009) (ORDER GRANTING PETITIONER'S MOTION TO DISMISS RESPONDENT'S COUNTERCLAIMS AND DENYING PETITIONER'S MOTION TO DISMISS RESPONDENT'S AFFIRMATIVE DEFENSES)

While a court may not direct another jurisdiction to determine the title to real property located outside the forum state, it can enter orders which would require a party to execute a transfer of such property. <u>Akter v. Ali</u>, Civ. No. 98-0234 (NMI Super. Ct. November 29, 2002) (Order Following Bench Trial at 11) (citations omitted).

The Court stayed divorce proceedings when the wife filed for divorce in Texas prior to the husband filing for divorce in the Commonwealth. <u>See Markoff v. Markoff</u>, Civ. No. 12-0008 (NMI Super. Ct. April 9, 2012) (Order Granting Stay).

#### PERSONAL JURISDICTION

A person submits themselves to in personam jurisdiction of the Commonwealth Superior Court by filing a petition for divorce. <u>Akter v. Ali</u>, 98-0234 (NMI Super. Ct. November 29, 2002) (Order Following Bench Trial at 10) (citing 7 CMC § 1102) (remaining citations omitted).

When a Court has in personam jurisdiction over each of the parties, it has the power to deal with all aspects of the division and distribution of the parties' property authorized under local statues, and its orders can be enforced by contempt powers. <u>Akter v. Ali</u>, Civ. No. 98-0234 (NMI Super. Ct. November 29, 2002) (Order Following Bench Trial at 10) (citations omitted).

[T]he Court does not need to have personal jurisdiction over both parties to grant a divorce decree. A forum where either spouse is domiciled can grant a valid divorce decree, even though the other spouse is absent and not subject to jurisdiction. <u>Banes v.</u>

Banes, Civ. No. 11-0257 (NMI Super. Ct. October 13, 2011) (ORDER DENYING RESPONDENT'S MOTION TO DISMISS at 4).

The negotiation and signing of a prenuptial agreement in the Commonwealth that was intended to govern property rights and that contained a choice of law provision designating Commonwealth law was sufficient to establish personal jurisdiction over both parties. See Banes v. Banes, Civ. No. 11-0257 (NMI Super. Ct. October 13, 2011) (ORDER DENYING RESPONDENT'S MOTION TO DISMISS at 4-5).

The Court found that marrying and living together as husband and wife in the Commonwealth was a sufficient basis for personal jurisdiction over both parties. See Banes v. Banes, Civ. No. 11-0257 (NMI Super. Ct. October 13, 2011) (ORDER DENYING RESPONDENT'S MOTION TO DISMISS at 9).

#### RESIDENCY

[T]his court has always construed the term "resided in" as specified in 39 TTC § 202 as requiring a permanent, fixed abode – a domicile. This is not a mere temporary or special purpose home but with a present intention of making it his/her home unless and until something, which is uncertain and unexpected, shall happen to induce the person to adopt some other permanent home. It is a place which the person intends to return and from which he has no present plans to depart. Manansala v. Manansala, 1 CR 161, 162 (Trial Ct. 1981).

The court holds that so long as an alien plaintiff in a divorce action evidences a good faith intent to make the Commonwealth his/her residence, has no residence elsewhere, and who has lived at least two years in the Commonwealth, the Court will consider the residency requirement of 39 TTC § 202 to have been met. Manansala v. Manansala, 1 CR 161, 163-164 (Trial Ct. 1981).

The operative issue in determining whether a court has jurisdiction to enter an order for child support is not the residence of the child, but the court's jurisdiction over the defendant. Akter v. Ali, 98-0234 (NMI Super. Ct. November 29, 2002) (Order Following Bench Trial at 16) (citations omitted).

The Court was deprived of jurisdiction and could not enter a decree of divorce because neither party met the residency requirement of 8 CMC § 1332 (1993). Specifically, the Court found that marrying a person and living in the Commonwealth did not establish residency because it does not show intent to remain in the Commonwealth permanently. Further, the Court was persuaded by the Respondent's testimony that he did not consider the Commonwealth his place of residence. The Petitioner did not meet the residency requirement because she had not lived in the Commonwealth for the statutorily required two years. See Allan-Agoncillo v. Agoncillo, Civ. No. 93-0765 (NMI Super. Ct. October 12, 1993) (Denial of Petition for Divorce).

Absence from the jurisdiction for more than a year did not change wife's domicile in the Commonwealth. <u>See Agwo v. Agwo</u>, Civ. No. 04-0444 (NMI Super. Ct. March 11, 2005) (Order Granting Plaintiff's Motion for Partial Summary Judgment on Jurisdiction).

<u>Editor's Note</u>: *Agwo* was poorly decided. An attorney should not cite this case unless the situation has become dire.

The Court was precluded from exercising jurisdiction when the Plaintiff did not meet the residency requirements. See Muna v. Muna, Civ. No. 05-0027 (NMI Super. Ct. May 16, 2005) (Order Dismissing Plaintiff's Complaint for Divorce Based on Jurisdiction).

## PARENTAL CARE

Parents are . . . chargeable with the duty of exercising ordinary care in the protection of their minor children. Mendiola v. Government of the Northern Mariana Islands, 1 CR 81, 85 (Dist. Ct. 1980).

The law does not impose arduous duty [sic] on a parent to watch over her child every moment of every day for that would obviously be unreasonable and impractical, and at variance with ordinary practice in the world in which we live. A line needs to be drawn between providing adequate supervision, and allowing the child freedom to grow and learn. Mendiola v. Government of the Northern Mariana Islands, 1 CR 81, 86 (Dist. Ct. 1980).

Father did not agree to enroll child in private school. Private school could not seek reimbursement for tuition from father when mother was the one that enrolled the child in the school. <u>Sister Remedios Early Childhood Development Center v. Taisacan</u>, SC 00-1391 (NMI Super. Ct. February 27, 2002) (Decision and Order Following Trial).

## **PATERNITY**

#### **CUSTOMS**

Traditions and bloodline are not considered by the paternity presumption in the UPA. <u>In re Estate of Tudela</u>, 4 NMI 1, 5 (1993).

#### **DEFENSE**

The defendant alleged that the Plaintiff has fraudulently conceived the minor child at issue in the case. The Court held that the defendant in a paternity action could not raise the defense of fraud and deceit (in the conception) when determining paternity and child support obligations. However, the Court allowed the defendant to raise the defense of fraud and deceit for the specific purpose of safeguarding the "interest[s] of the child on

the issue of the payment and handling of child support and other matters directly or indirectly affecting any benefits, rights, or obligations adjudicated or ordered pursuant to the UPA provisions." <u>Pille v. Sanders</u>, Civil No. 96-856 (NMI Super. Ct. December 15, 1997) (Written Decision Following Oral Ruling at 5-6) (reversed on different grounds).

### **GENERALLY**

[A] party seeking to enforce a judgment establishing paternity and setting child support engages in "further proceedings" under the [Uniform Parentage] Act, and is therefore entitled to appointment of counsel. <u>Francis v. Welly</u>, 1999 MP 26 ¶ 14.

We interpret "any other court" to include a family court, juvenile court, probate court, and so forth. <u>In re the Estate of Deleon Guerrero</u>, 3 NMI 255, n. 1 (1992) (interpreting the Uniform Paternity Act 8 CMC § 1708).

We note that the UPA . . . modified the Mansfield Rule and recognizes that the natural father of a child, under certain circumstances, may be different from the husband of the child's mother or what is stated (or not stated) in the child's birth certificate. <u>In re the</u> Estate of Deleon Guerrero, 3 NMI 255, 266 (1992).

Testimony that one is born out of wedlock (i.e. a bastard) is usually the basis of a parentage action. If so proven, the court orders that a new birth certificate be issued. <u>In rethe Estate of Deleon Guerrero</u>, 3 NMI 255, 260 (1992) (citing 8 CMC § 1715(b)).

The Court does not construe the phrase "all other evidence" under 8 CMC § 1712(e) to include evidence of fraud and deceit by a parent of the minor child. Pille v. Sanders, Civil No. 96-856 (NMI Super. Ct. December 15, 1997) (Written Decision Following Oral Ruling at 4) (reversed on different grounds).

#### PROBATE

The CNMI Probate Code expressly allows an heir proceeding to determine the legal heirs or successors of a decedent. Estate of De Leon Guerro v. Quitugua, 2000 MP 1 ¶ 17.

[T]he establishment of paternity after the alleged father's death must be done within the purview of the probate code and not the UPA as well. The UPA "contemplates that the alleged father is still alive [and] will be made a party to the action or given notice of the action." In re Estate of Deleon Guerrero, 3 NMI 253, 260 (1992). As such he could then rebut the presumption of paternity under 8 CMC § 1704. In re Estate of Tudela, 4 NMI 1, 5 (1993).

[T]he UPA should not be used to circumvent the traditional disposition of land in the CNMI, traditions embodied in the underlying purposes and policies of the probate code. In re Estate of Tudela, 4 NMI 1, 5 (1993) (citing 8 CMC § 2104(a)).

This section does not permit joinder of a UPA paternity action with a probate proceeding. The reason for this is because UPA actions may be brought only while the alleged or presumed father is alive and could be made a party or given notice thereof. A thorough review of all the sections would indicate that the UPA contemplates the bringing of an action while the presumed or alleged father is alive and could be made a party to or given notice of the action. Although a UPA case may be joined with a divorce or support case where the father is alive, it could not be joined with a probate case because the father is deceased. DQ In re the Estate of Deleon Guerrero, 3 NMI 255, n. 2 (1992) (interpreting the Uniform Paternity Act 8 CMC § 1708).

[H]eirship claims may be entertained as part of a probate proceeding and are not necessarily excluded by the UPA, a law enacted after the Probate Code. Our Probate Code expressly allows for an heirship proceeding to determine the legal heirs or successors of a decedent. DQ In re the Estate of Deleon Guerrero, 3 NMI 255, 260 (1992) (citing 8 CMC § 2202(a)).

[I]t is held that Article I, Section 6 of the Constitution of the Northern Mariana Islands prohibits the disinheritance of decedent's illegitimate daughter. <u>In re the Estate of Eduardo Calub Refugia</u>, 1 CR 220, 224 (Trial Ct. 1981).

#### PURPOSE/POLICY

The purpose of the paternity statute is to compel the father of an illegitimate child to bear the expenses of childbirth and child support so that the mother will not be solely responsible for that support and so that the child will not be a financial burden on the state. Pille v. Sanders, 2000 MP 10 ¶ 18.

The judicial decree of paternity is merely a procedural prerequisite to enforcement of the duty of support owed to the child. The decree does not create, but only defines the pre-existing duty: "[a]lthough there was no obligation to support one's illegitimate child at common law, the moral obligation has always existed. The purpose of [the Uniform Parentage Act] creating a paternity action is to convert a moral obligation into a legal right. The duty of a natural father to support his child begins when the child is born." Pille v. Sanders, 2000 MP 10 ¶ 19 (quoting Ellison v. Walter ex rel. Walter, 834 P.2d 680, 683-684 (Wyo. 1992)).

## **POWER OF ATTORNEY**

The sister of decedent used a general power of attorney to change the decedent's life insurance beneficiaries. The Court stated that "[n]arrow construction of a general power [of attorney] is supported by the weight of authority. Matagolai v. Pangelinan, 3 CR 592, 600 (Dist. Ct. App. Div. 1988) (citing Rest. 2d, Agency §§ 34, 37) (remaining citations omitted).

A general discretion vested in the agent is not unlimited, but rather must be exercised in a reasonable manner and 'cannot be resorted to in order to justify acts which the principal could not be presumed to intend, or which would defeat and not promote the apparent end or purpose for which the power was given. Matagolai v. Pangelinan, 3 CR 592, 600 (Dist. Ct. App. Div. 1988) (citations omitted).

# PROPERTY (DATE OF SEPARATION)

The House Committee on Judiciary and Government Operations added [the] definition of "date of separation" to the draft of the Marital Property Act in order to reflect its concern "with the common practice in the Commonwealth of parties separating and living apart after the breakdown of the marriage without recourse to the court procedures of either legal separation or divorce." <u>Hanan v. Hanan</u>, Civ. No. 93-643 (NMI Super. Ct. December 1, 1994) (Decree of Divorce: Equitable Distribution of Marital Estate at 7) (citing House Standing Committee Report No. 7-17A at 5 (Sept. 4, 1990).

[T]he fact that the parties maintain separate residences does not determine the [date of separation]. Rather, a court must look to the parties' conduct to see whether it evidences a "complete and final break" in the marital relationship. <u>Hanan v. Hanan</u>, Civ. No. 93-643 (NMI Super. Ct. December 1, 1994) (Decree of Divorce: Equitable Distribution of Marital Estate at 8) (citing <u>In re Marriage of Von Der Nuell</u>, 28 Ca. Rptr. 2d 447, 448 (Cal. App. 1994).

Relevant evidence [for determining the date of separation] can include the filing of joint tax returns, joint attendance of social functions, joint visits or vacations, and efforts at reconciliation. As one court put it, "many marriages are on the rocks for protracted periods of time and it may be many years before the spouses decide to formally dissolve their legal relationship." <u>Hanan v. Hanan</u>, Civ. No. 93-643 (NMI Super. Ct. December 1, 1994) (Decree of Divorce: Equitable Distribution of Marital Estate at 8) (citing <u>In re Marriage of Von Der Nuell</u>, 28 Ca. Rptr. 2d 447, 450 (Cal. App. 1994).

If one spouse believes the marriage is still functional, and conducts herself accordingly without the other informing her of the contrary, then she is continuing to contribute to the marital community, even if that contribution is limited to keeping herself emotionally available to the other spouse. As long as a spouse continues such contributions, she is entitled to her share of her spouse's property. <u>Hanan v. Hanan</u>, Civ. No. 93-643 (NMI Super. Ct. December 1, 1994) (Decree of Divorce: Equitable Distribution of Marital Estate at 10).

In *Hanan v. Hanan*, Civ. No. 93-0643 (N.M.I. Super. Ct. Dec. 1, 1994) (Decree of Divorce: Equitable Distribution of Marital Estate at 8), citing *In re Marriage of Von Der Nuell*, 28 Cal. Rptr. 2d. 447, 448 (Cal. Ct. App. 1994), however, the court recognized that the mere fact that the parties have lived separately and apart does not constitute a "separation" for purposes of the Marital Property Act. <u>Akter v. Ali</u>, 98-0234 (NMI Super. Ct. November 29, 2002) (Order Following Bench Trial at 11-12).

## **PROPERTY (FIDUCIARY DUTY)**

It is well established that the relationship between a husband and wife is a fiduciary relationship, and that in marriage, each spouse owes a fiduciary duty to the other when dealing with marital property, including the marital property under his or her control or management. Reyes v. Reyes, Civil No. 97-0167 (NMI Super. Ct. December 27, 2000) (Order at ¶ 84) (citing 8 CMC § 1814(a)).

It is well established that a fiduciary relationship exists between husband and wife and that each owes a duty to the other, including the duty to properly manage marital property under his or her control. Reves v. Reves, 2004 MP 1 ¶ 31.

The potentially devastating, long-term economic consequences from a breach of fiduciary duty to one's spouse are distinct from adultery. Adultery, on its own, does not provide a compelling reason for making an unequal disposition of community property. Reyes v. Reyes, 2004 MP 1 ¶ 29.

The effect of marital infidelity is distinguishable from a breach of fiduciary duty or the squandering of marital assets, which may affect the distribution of marital assets and require restitution to the estate to mitigate one party's misdeeds. Reyes v. Reyes, 2004 MP 1 ¶ 30.

It follows that the victim of a breach [of fiduciary duty] may seek damages from the breaching party. In the Northern Mariana Islands, a remedy is provided to the claimant spouse for breach of the duty of good faith resulting in damage to the claimant spouse's present undivided one-half interest in marital property. Reyes v. Reyes, 2004 MP 1 ¶ 30. In the relationship between husband and wife there is a fiduciary duty to manage and control marital property, and recovery by one spouse against the other is proper for any breach of that duty. Reyes v. Reyes, 2004 MP 1 ¶ 70 (citing 8 CMC § 1814(a)).

# **PROPERTY (MARITAL TRUSTS)**

When a marital trust ends, the property in it should revert to its owners. <u>See Reyes v.</u> Reyes, 2001 MP 13 ¶ 16.

Marital property transferred into a trust remains marital property. <u>See Reyes v. Reyes</u>, 2001 MP 13 ¶ 16.

Spouses can agree that marital property will not revert to the parties when the trust ends. Instead, they can agree that the property is to be divided among the children. See Reyes v. Reyes, 2001 MP 13  $\P$  16.

## PROPERTY CHARACTERIZATION

#### **ANNULMENT**

Editor's Note: The <u>Hanan</u> case is an excellent example of annulment and the tracing of property/determination of marital or separate. <u>Hanan v. Hanan</u>, Civ. No. 93-643 (NMI Super. Ct. December 1, 1994) (Decree of Divorce: Equitable Distribution of Marital Estate)

The Court had "jurisdiction to distribute as marital property all property owned by the parties which would have been marital property if the Act had been in force when the property was acquired." <u>Hanan v. Hanan</u>, Civ. No. 93-643 (NMI Super. Ct. December 1, 1994) (Decree of Divorce: Equitable Distribution of Marital Estate at 6)

#### BURDEN OF PROOF

The party claiming that the funds in the business accounts belong to him or third parties has the burden of proving to the trial court that the funds derived from his separate assets. See Reyes v. Reyes, 2004 MP 1 ¶ 37.

## **COMMINGLE/TRANSMUTE**

If funds originating from separate property are commingled with marital funds to the extent that the party claiming them as separate can no longer trace those funds, then the funds become marital property and are subject to equal distribution on divorce. 8 CMC § 1829(a). Reyes v. Reyes, 2004 MP 1 ¶ 58.

[M]ixed property results from a combination of marital and separate property. *See* 8 CMC § 1829(a). Reyes v. Reyes, 2004 MP 1 ¶ 61.

Reclassification of separate property to marital property, or transmutation, occurs when a spouse evidences intent to make a gift to the marriage by significantly changing the character of the property at issue into marital property, and may be effected by an agreement between the parties or by [their] affirmative act or acts. Reyes v. Reyes, 2004 MP 1 ¶ 64 (citations omitted).

[T]he character of separate property is lost when the property is improved with marital funds and there is no effort to segregate the land from marital assets. However, constructing improvements on separately owned land does not, in and of itself, lead to transmutation when individual ownership may still be traced. (Citations in the middle of the quote removed) Reyes v. Reyes, 2004 MP 1 ¶ 64.

Transmutation of separate property to marital property also occurs when a spouse demonstrates intent to make a gift of separate property to the marriage by significantly changing its character. Reves v. Reves, 2004 MP 1 ¶ 75.

The sole property of wife became marital property where (1) she placed her husband's name on the title to the property; (2) she was advised not to place husband's name on the title by an attorney; and (3) she used marital funds to pay mortgage, repairs, and renovations. Reyes v. Reyes, Civil No. 97-0167 (NMI Super. Ct. December 27, 2000) (Order at ¶¶ 23-26).

Permitting a spouse to manage marital property does not transmute the property to separate property. Reyes v. Reyes, Civil No. 97-0167 (NMI Super. Ct. December 27, 2000) (Order at ¶ 26) (citing 8 CMC § 1821(f)).

Reclassification of individual property to marital property only occurs when the commingling process renders the identity of the individual property lost and no longer identifiable. Simply constructing improvements on separately owned family land does not, in and of itself, accomplish this result. Reyes v. Reyes, Civil No. 97-0167 (NMI Super. Ct. December 27, 2000) (Order at ¶ 71) (citing Santos v. Santos, 2000 MP 9) (additional citations omitted).

When marital property is used to contribute capital to individual property, the marital estate is entitled to compensation and has a right to an equitable lien against that property even though the property's character has not changed. <u>Vidal v. Stephanson</u>, Civil No. 92-1537 (NMI Super. Ct. December 19, 1994) (Decision and Order Granting Annulment at 22) (citations omitted).

## **DEGREE/INTANGIBLE PROPERTY**

Thus, a law degree and a license to practice law can be said to be inherently unique to the holder because they terminate at death of the holder, are not transferable, inheritable, or easily subject to valuation as are other more conventionally understood forms of property. Therefore, the Court agrees with the majority of jurisdictions holding that a professional degree and license do not constitute property subject to distribution upon marriage dissolution, but recognizing that equity, where proper, will compensate the non-degreed spouse who assisted the student spouse acquire his degree or license. Accordingly, this Court concludes that the MPA does not apply with respect to such degree or license. Woodruff v. Woodruff, Civil No. 97-51 (NMI Super. Ct. August 18, 1998) (Order at 6).

The Court determined that a law degree is not property. However, the Court held that it had the authority, pursuant to 8 CMC § 1311, "to consider all relevant factors in fashioning such equitable relief in the form of spousal support, as would reimburse or equitably compensate plaintiff for her efforts and contributions that went to the support of the family and defendant while he acquired his law degree and license. For example, such factors may include, but are not limited to: (1) the relative earning abilities of the parties, including a spouse's enhanced earning capacity by virtue of a professional degree or license; (2) [t]he ages, and the physical and emotional conditions of the parties; (3) [t]he retirement benefits of the parties; (4) [t]he expectancies and inheritances of the parties;

(5) [t]he duration of the marriage; (6) [t]he extent to which it would be inappropriate for a party, because he will be custodian of a minor child of the marriage, to seek employment outside the home; (7) [t]he standard of living the parties were accustomed to during the marriage; (8) [t]he parties' level of education; (9) [t]he relative assets and liabilities of the parties; (10) [t]he property brought into the marriage by either party; and (11) [t]he contribution of a spouse as homemaker. Woodruff v. Woodruff, Civil No. 97-51 (NMI Super. Ct. August 18, 1998) (Order at 10-11).

#### **FUTURE WAGES**

Without the years of employment during marriage Elliot would be far less likely to receive raises in later years which increase his benefits at retirement. These raises in later years are attributable in part to the years worked during marriage, and thus in part a marital asset. See Sattler v. Mathis, 2006 MP 6 ¶ 29.

#### **GENERALLY**

Property classification is governed by the Commonwealth Marital Property Act of 1990, codified at 8 CMC §§ 1811–1834, and is modeled after the Uniform Marital Property Act ("UMPA"). Olaitiman v. Emran, 2011 MP 8 n.14.

A clear aim of the MPA is ensuring that each spouse has an undivided one-half interest in marital property. Reyes v. Reyes, 2004 MP 1 ¶ 27.

Also clear in Commonwealth law is that each spouse is entitled to an undivided one half interest in all income generated during the marriage. 8 CMC § 1820(d). Reyes v. Reyes, 2004 MP 1 ¶ 31.

All property of spouses is considered marital property, subject to specific statutory exceptions. 8 CMC § 1820. One exception to the above rule is that property owned by a spouse before the marriage is individual property. 8 CMC § 1820(f); *see Ada v. Sablan*, 1 N.M.I. 415, 423-24 (1990) (acknowledging similar Chamorro custom). Another exception is that property acquired by a spouse during the marriage is individual property if acquired by gift or disposition at death from a third party, or in exchange for or with the proceeds of other individual property. 8 CMC § 1820(g). A combination of marital and other property is presumed marital property unless the component of the mixed property which is not marital property can be traced. 8 CMC § 1829(a). Santos v. Santos, 2000 MP 9 ¶ 17.

Neither Commonwealth written law nor Chamorro customary law are instructive as to how a party may adequately trace a portion of marital property to his own individual property. Santos v. Santos, 2000 MP 9 ¶ 18.

When the Northern Mariana Islands was a district of the Trust Territory, it was not a community property jurisdiction. See In re Estate of Aldan, 1997 MP 3 ¶ 16 (citing Blas v. Blas, 3 TTR 99 (Tr. Div. 1966)).

The initial assumption for the accumulation of community property is that both spouses equally exerted their efforts in its acquisition. This is true even if the wife is the homemaker and the husband is the wage earner. The presence of the wife in the home, tending the house, taking care of the children, preparing the food, etc., allows the husband to devote his time to acquiring money to make purchases. Thus, both the husband and wife, in the true sense of a community (family) effort are given equal credit for the assets acquired during the marriage. Consequently, each own an undivided one-half of the community property and on the death of one of the spouses, the survivor retains his or her one-half. In re the Estate of Camacho, 1 CR 396, 402-403 (Trial Ct. 1983) (partially overturned in that the Commonwealth did not recognize community property law at the time of this decision).

### **GIFT**

Property obtained through a quitclaim deed that is not a gift or inheritance, received during the course of a marriage is marital property subject to equal division on divorce. 8 CMC § 1820(b). Reyes v. Reyes, 2004 MP 1 ¶ 66.

The act of placing husband's name on the title to real property "created a presumption of gift that can only be overcome by clear and convincing evidence that she did not intend to transfer ownership." Reyes v. Reyes, Civil No. 97-0167 (NMI Super. Ct. December 27, 2000) (Order at ¶ 26).

The court found that the placement of separate funds into a joint bank account that could be drawn on by either party was sufficient to show a gift of separate funds to the marital estate. Reyes v. Reyes, Civil No. 97-0167 (NMI Super. Ct. December 27, 2000) (Order at ¶ 75).

#### **INSURANCE POLICIES**

In community property states, policies of life insurance which insured the life of the husband and which are paid for out of community property funds, are characterized as community property. Matagolai v. Pangelinan, 2 CR 1122, 1127 (Trial Ct. 1987) (partially reversed on appeal because the Commonwealth did not recognize community property at the time).

Insurance policy taken out during marriage and paid for with community funds was community property. Each spouse owned one-half of the proceeds of the life insurance policy. Matagolai v. Pangelinan, 2 CR 1122, 1128 (Trial Ct. 1987) (partially reversed on appeal because the Commonwealth did not recognize community property at the time).

Where wife did not sign change of beneficiary form on life insurance policy, any attempted change or rescission of wife's interest was ineffective. <u>Matagolai v. Pangelinan</u>, 2 CR 1122, 1128 (Trial Ct. 1987).

**Editor's Note:** Community property had not been fully established in the Commonwealth when *Matagolai* was decided.

In some, if not many cases, proceeds from a life insurance policy may be the only asset of any significance from a marriage. Should one spouse be able to divest the surviving spouse of all the proceeds, the basic policy and intent of providing for the surviving spouse as indicated by prior case law and the legislature in enacting the probate code would be defeated. Matagolai v. Pangelinan, 2 CR 1122, 1129 (Trial Ct. 1987).

#### PATTE PAREHO

In *Ada v. Sablan*, this Court defined the patte pareho doctrine and overruled the antiquated common-law principle that all property acquired during marriage belonged to the husband separately. Reyes v. Reyes, 2004 MP 1 ¶ 27.

Following the direction of the equal protection clause of the Commonwealth Constitution, Article I, Section 6, patte pareho recognizes that both spouses have an equal ownership interest in any property acquired during marriage unless it is shown that such property belongs solely to one party and that marital property is subject to equitable distribution on divorce. Reyes v. Reyes, 2004 MP 1 ¶ 27.

Patte pareho is a Chamorro custom giving both spouses an equal ownership interest in property acquired during marriage. Reyes v. Reyes, 2004 MP 1 n.6.

#### PRENUPITAL AGREEMENT

Title 8 CMC § 1830 requires that a property agreement between spouses be (1) in writing, and (2) fairly and equitably disclose and distribute the marital assets of the parties. <u>Hanan v. Hanan</u>, Civ. No. 93-643 (NMI Super. Ct. December 1, 1994) (Decree of Divorce: Equitable Distribution of Marital Estate at 7)

## **PRESUMPTIONS**

It is well established that all property acquired during marriage is presumed to be marital property and the party seeking to exclude that property from equal division on divorce has the burden of overcoming this presumption by tracing assets to their separate source. Reyes v. Reyes,  $2004 \text{ MP } 1 \P 36$ .

The presumption [of marital property] is nearly conclusive and may only be overcome by clear and convincing evidence with any doubts to be resolved in favor of a finding of marital property. Reyes v. Reyes, 2004 MP 1 ¶ 36.

Self-serving statements are not enough to overcome the presumption towards classifying property as marital. Reves v. Reves, 2004 MP 1 ¶ 36.

[M]ixed property (a combination of marital and other property) is presumed to be marital property unless the component of the mixed property claimed to be separate property can be traced. Reyes v. Reyes, 2004 MP 1 ¶ 40.

The party claiming separate ownership of property is charged with the burden of proving that the property is indeed separate and failure to do so results in a finding of marital property. Reyes v. Reyes, 2004 MP 1 ¶ 40.

Adding a spouse's name to the title of property creates a presumption of a gift to the marital estate that only clear and convincing evidence of intent not to include property in the marital estate will overcome. Reyes v. Reyes, 2004 MP 1 ¶ 77.

Also instructive is that an account held jointly with a third person does not, on its own, determine that the account is not marital property. Reyes v. Reyes, 2004 MP 1 ¶ 36.

The "presumption of marital property is [] a foundation of family law in the Commonwealth." <u>Hanan v. Hanan</u>, Civ. No. 93-643 (NMI Super. Ct. December 1, 1994) (Decree of Divorce: Equitable Distribution of Marital Estate at 8) (citing <u>Ada v. Sablan</u>, 1 NMI 415, 428 (1990); 8 CMC § 1813(a).

#### RECOVERY OF MARITAL PROPERTY

Wife knew of husband's mistress and knew that husband was spending significant amounts of money on the mistress. The Court found that the wife's failure to bring suit to recover the spent money within the statutory time period was inexcusable. Reyes v. Reyes, Civil No. 97-0167 (NMI Super. Ct. December 27, 2000) (Order at ¶ 84).

#### RETROACTIVE APPLICATION OF MPA

The history of the [Marital Property] Act contains substantial evidence of a legislative intent to avoid the creation of a retroactive marital property statute by deferring the classification of property acquired by a couple prior to the existence of the Act until death or dissolution of the marriage. Vidal v. Stephanson, Civil No. 92-1537 (NMI Super. Ct. December 19, 1994) (Decision and Order Granting Annulment at n. 8) (citing House Committee on Judiciary and Governmental Operations, Rep. No. 7-17A, 7th N.M.C.L., (Sept. 4, 1990).

#### SEPARATE PROPERTY

In 1971, real property purchased by a husband, with the husband's money during the marriage, and where the certificate of title listed only the husband's name, such property belonged to that husband. In re Estate of Aldan, 1997 MP 3 ¶ 9.

The Court interpreted the Marital Property Act of 1990 and its classification of marital property. The Court determined that appellant acquired a property interest when he received his homestead permit prior to his marriage. Therefore, appellant acquired the

homestead as his individual property. <u>Hofschneider v. Hofschneider</u>, 4 NMI 277, 279 (1995).

#### **TRACING**

Editor's Note: The <u>Hanan</u> case is an excellent example of annulment and the tracing of property/determination of marital or separate. <u>Hanan v. Hanan</u>, Civ. No. 93-643 (NMI Super. Ct. December 1, 1994) (Decree of Divorce: Equitable Distribution of Marital Estate)

The tracing of separate assets may only be met by strong and nearly conclusive evidence that the funds used to open each bank account at issue may be traced to initial infusions of separate property. Reyes v. Reyes, 2004 MP 1 ¶ 37.

To trace the separate portion of a mixed property, a party must prove the claimed separate portion is identifiably derived from separate asset. This process involves two steps. First, the party must identify a portion of the mixed property. Second, the party must directly trace that portion to a separate asset. *See Barker v. Barker*, 500 S.E.2d 240, 246 (Va. Ct. App. 1998). The party claiming a separate interest in mixed property bears the burden of proving retraceability. *See id.* Santos v. Santos, 2000 MP 9 ¶ 18.

## PROPERTY DISTRIBUTION

#### ADULTERY CANNOT ALTER PROPERTY DIVISION

The potentially devastating, long-term economic consequences from a breach of fiduciary duty to one's spouse are distinct from adultery. Adultery, on its own, does not provide a compelling reason for making an unequal disposition of community property. Reyes v. Reyes, 2004 MP 1 29.

The effect of marital infidelity is distinguishable from a breach of fiduciary duty or the squandering of marital assets, which may affect the distribution of marital assets and require restitution to the estate to mitigate one party's misdeeds. Reyes v. Reyes, 2004 MP 1 ¶ 30.

[T]he trial court did not abuse its discretion in declining to include adultery as a pertinent factor in the division of marital assets. Reyes v. Reyes, 2004 MP 1 ¶ 30.

#### **EQUITABLE DIVISION**

Within the dictates of the MPA, the trial court has broad discretion in dividing marital property on divorce. Reyes v. Reyes, 2004 MP 1 ¶ 27.

**Editor's Note:** The key words here are "within the dictates of the MPA." The Court actually has very little discretion in dividing marital property. The division must be equal unless the Court has justifiable reasons for unequally dividing the property. The Court's true discretion lies in *how* it comes to an equal division of marital property.

Marital property should be divided equally unless there are strong circumstances that warrant an unequal division, such as fraud or waste. <u>Hee v. Oh</u>, 2011 MP 18 ¶ 9 (citing Reyes v. Reyes, 2004 MP 1 ¶¶ 27-33).

**Editor's Note:** Here, the Supreme Court has made it clear that the trial court does not have the authority to divide property unequally in the absence of significant reasons for doing so. Appeal from an unequal property division that is not adequately supported by findings of fact carries a very high likelihood of success.

The trial court's broad discretion in dividing marital property, including a determination whether marital waste took place, will be upheld unless there is a clear showing of an abuse of discretion. Reyes v. Reyes, 2004 MP 1 ¶ 33.

## **INTERPRETATION OF 8 CMC § 1311**

**Editor's Note:** The Marital Property Act will generally control property characterization, valuation, and distribution. 8 CMC § 1311 should only be relied upon to support general assertions and precedent.

8 CMC § 1311 "by its terms grants the court broad authority to dispose of either or both parties" interest in any property." Reyes v. Reyes, 2001 MP 13 ¶ 13 (citing <u>Taisacan v. Manglona</u>, 1 CR 812, 816 (Dist. Ct. App. Div. 1983).

Both Rita and the trial court reasoned that *Taisacan* was decided before 8 CMC § 1311 was enacted. However, this statute is an exact carry-over from the Trust Territory Code and an interpretation by the High Court of that statute is instructive. Reyes v. Reyes, 2001 MP 13 ¶ 15 (citing Robinson v. Robinson, 1 N.M.I. 81, 88 (1990)).

### **RETIREMENT ACCOUNTS**

Determining whether to make a present or future disbursement from a retirement account should be made on a case-by-case basis as the trial court will need to examine the equitable considerations of the litigants. See Sattler v. Mathis, 2006 MP 6 ¶ 27.

The retirement benefit was correctly deemed mixed property, so the trial court *must* utilize the 8 CMC § 1828(b) statutory fraction in allocating the benefit between marital

and separate property shares. The marital share is that amount resulting when the entire benefit is multiplied by a fraction; the numerator of which is that length of time between the last to occur of the determination date, the employment date, or the marriage date and the date of separation; and the denominator of which is the total length of employment. Sattler v. Mathis, 2006 MP 6 ¶ 33.

[N]othing precludes the trial court from distributing the marital share in a retirement benefit unequally to offset the unequal distribution of other marital assets. Division of marital assets is left to the equitable consideration of the trial court and will be reviewed on a deferential basis. Sattler v. Mathis, 2006 MP  $6 \, \P \, 34$ .

### **VALUATION PRIOR TO DISTRIBUTION**

All marital property in dispute must be valued prior to distribution. Without proper valuation, the trial court would have no ability to equitably divide marital property between the parties when the value of a particular asset is not particularly clear. Hee v. Oh, 2011 MP 18  $\P$  10.

## PROPERTY VALUATION

#### **CORPORATIONS**

Valuation of closely held corporations must be supported by specific findings of fact. Hee  $\underline{v}$ . Oh, 2011 MP 18 ¶ 11.

The following factors provide a useful starting point for analyzing the value of a closely held corporation: 1) The nature of the business and the history of the enterprise from its inception; 2) The economic outlook in general and the condition and outlook of the specific industry in particular; 3) The book value of the stock and the financial condition of the business. 4) The earning capacity of the company. 5) The dividend-paying capacity. 6) Whether or not the enterprise has goodwill or other intangible value. 7) Sales of the stock and the size of the block of the stock to be valued. 8) The market price of stocks of corporations engaged in the same or a similar line of business having their stocks traded in a free and open market. Hee v. Oh, 2011 MP 18 ¶ 16.

### **DATE OF VALUATION**

In the equitable distribution of marital properties, a property is to be valued as close as practicable to the date of trial. Reves v. Reves, 2004 MP 1 ¶ 73.

#### **GENERALLY**

All marital property in dispute must be valued prior to distribution. Without proper valuation, the trial court would have no ability to equitably divide marital property

between the parties when the value of a particular asset is not particularly clear. Hee v. Oh, 2011 MP 18  $\P$  10.

### REVISION OF DECREE

#### CHILD SUPPORT AND SPOUSAL SUPPORT CAN BE MODIFIED

In *Weathersbee*, this Court held that 8 CMC § 1311 clearly permits a court to revise a decree as to custody or child or spousal support. Reyes v. Reyes, 2001 MP 13 ¶ 17.

If the Property Division Order is either a spousal or child support award under Section 1311, then the trial court did have authority to prospectively revise the property division. Reyes v. Reyes, 2001 MP 13 ¶ 17.

#### GENERALLY NOT PERMITTED

6 CMC § 1311 does not grant the trial court authority to modify a marital property distribution integrated into a divorce decree. <u>Ada v. Calvo</u>, 2012 MP 11 ¶ 17.

[A]bsent an express provision or legislative authority to the contrary, Section 1311 does not permit a court to retroactively modify such a decree. Reyes v. Reyes, 2001 MP 13 ¶ 17.

Accordingly, we find that because 8 CMC  $\S$  1311 only applies to custody and support awards, it may not apply to the trust. As such, we agree that the trial court did not have the authority to modify the property division order pursuant to Section 1311. Reyes v. Reyes, 2001 MP 13  $\P$  19.

We agree with the majority view that, absent an express provision to the contrary, and absent express legislative authorization, retroactive modification of a spousal support decree should not be permitted. Weathersbee v. Weathersbee, 1998 MP 14  $\P$  6.

## SETTLEMENT AGREEMENTS

#### CHARACTERISTICS OF SETTLEMENT AGREEMENTS

Marital property settlement agreements can be separated into three categories based on the level of connection between property distribution provisions and provisions for spousal or child support. *Adams v. Adams*, 177 P.2d 265, 267 (Cal. 1947). The first type of marital property settlement agreement includes agreements where property distribution provisions are entirely separate from support provisions. *Id.* When the support and distribution provisions are entirely separate, the trial court retains authority to modify the support provisions but not the property distribution provisions. *Id.* In the second type of

agreement, "the support and maintenance provisions are not in the nature of alimony but are part of the division of property." *Id.* (internal quotation marks omitted). When support provisions are part of the property distribution, the trial court may not modify the terms of the agreement without the consent of the parties unless there was fraud in the creation of the agreement. *Id.* The third category of agreement involves agreements where one spouse waives entitlement to support in return for a more favorable property distribution. *Id.* at 268. Like agreements that fall within the second category, a court may not modify the terms of this third type of agreement since to do so would "chang[e] basically the agreement of the parties as to the division of their property." *Id.* Ada v. Calvo, 2012 MP 11 ¶ 11.

The labels given by parties to a section of a separation agreement are not dispositive as to the character of that particular section. <u>Ada v. Calvo</u>, 2012 MP 11 ¶ 13.

#### CONTRACT

Once entered, marital property settlement agreements are enforceable as contracts. <u>Ada v.</u> Calvo, 2012 MP ¶ 19.

#### **MODIFICATION**

6 CMC § 1311 does not grant the trial court authority to modify a marital property distribution integrated into a divorce decree. <u>Ada v. Calvo</u>, 2012 MP 11 ¶ 17.

Trial courts may modify the property distribution terms of a marital property settlement agreement over the objection of one of the parties to the agreement when presented with evidence of exceptional circumstances including: (1) fraud; (2) a contractual provision allowing modification; (3) overreaching; or (4) a scrivener's error. Ada v. Calvo, 2012 MP 11 ¶ 20 (internal citations omitted).

## **TORTS**

The Court concluded as a matter of law that the husband's negligence was imputable to his wife "because under community property law, if either spouse was contributorily negligent in causing injury to the other, no recovery was permitted by the injured spouse against the thirty party tortfeasor, in order to prevent the negligent spouse from 'profiting' by his own wrong, since the recovery would be community property. San Nicholas v. Government of the Commonwealth of the Northern Mariana Islands, 1 CR 146, 158 (Dist. Ct. 1981) (citing Restatement (Second) of Torts § 487 and accompanying Comment c; Nekai v. Nekai, 4 TTR 388, 391).