IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

BRIAN P. REYES	)	**FCD-DI Civil Action No. 97-0167**
	)	
Petitioner,	)	
	)	
v.	)	
	)	**DECISION FOLLOWING TRIAL**
JEANNETTE P. REYES,	)	
	)	
Respondent.	)	
	)	

I. PROCEDURAL BACKGROUND

This matter came before the court to determine various issues including distribution of marital property, distribution of marital obligations, child support, and spousal support. Yoon H. Chang, Esq. and Pedro M. Atalig, Esq. appeared for the Petitioner, and Stephen J. Nutting, Esq. and Sheila Bowman, Esq. appeared on behalf of the Respondent. Following the hearing, the court requested legal memoranda and proposed findings of fact and conclusions of law from the parties. Upon review of the evidence adduced at trial, consideration of the arguments and authority cited by counsel, and a review of all papers submitted, including those recently requested to supplement the record, the court issues its decision.

II. FINDINGS OF FACT

1. In its previous Order of September 8, 2000, the court determined that Petitioner Brian P. Reyes and Respondent Jeannette P. Reyes f/k/a Jeannette Lloyd were married on June 13, 1980, and that for purposes of 8 CMC § 1813(h), there was a true breakdown of the marriage and the parties never intended to resume the marriage when Petitioner filed for divorce on November 21, 1997. *See* Order and Decision (September 8, 2000). **[p. 2]**
2. Born to the marriage were four children: Joaquina P. Reyes (d.o.b. 8/25/79), Marjorie P. Reyes (d.o.b. 9/25/81), Brian P. Reyes, Jr. (d.o.b. 9/7/87) and Joshua P. Reyes (d.o.b. 6/18/93). As of the date of trial, all of the children except Joaquina resided with their

mother, Respondent Jeannette Reyes, in the marital residence in Papago. R. Proposed Findings at ¶ 2.

3. On February 2, 1998, the court issued an order allowing Respondent to occupy the Papago house.[1] Respondent retained physical custody of the minor children subject to the reasonable visitation rights of Petitioner. Judge Onerheim also awarded all rental income from an apartment complex constructed by the parties during the marriage (the "Twin Bear Apartments") to Petitioner for the support of herself and the minor children. In February of 1998, Judge Onerheim further ordered Petitioner to pay temporary child support in the amount of $1,000 monthly for the three minor children, Marjorie P. Reyes, Joshua P. Reyes, and Brian P. Reyes, Jr. The divorce in this case was granted on August 11, 1998.

A. Property Division

4. 8 CMC § 1820 creates a presumption that all property of spouses is marital property. Marital property includes "income earned or accrued by a spouse or attributable to property of a spouse during marriage." 8 CMC §1820(d). "During the marriage" means the period from the date of the marriage to the date of separation, dissolution, or the death of a spouse. 8 CMC § 1813(h). Thus, property acquired after the date of separation is not marital.

5. The court finds that during the marriage, the parties acquired numerous business properties, real properties, and other personalty. Among these assets were the following business properties:

Table A: Business Properties

Name	Description	Estimated Value
BPR Professional Services ("BPR")	Business	value disputed
Amazon Night Club	Night Club a/k/a Club 820	no evidence presented

[1] The interim rulings and the findings supporting these rulings were made by Associate Judge Virginia Sablan Onerheim.

6. During the marriage, the parties operated BPR and apartments known as the Twin Bear Apartments, discussed below. The parties are sharply divided over the value of BPR professional services and how to treat the asset.

7. On August 19, 1998, the court ordered an audit and appraisal of BPR and the parties agreed that David Burger would perform the audit and appraisal. At the time of trial, however, Respondent was unable to present evidence of valuation, claiming that Petitioner had failed to cooperate in the audit.

8. The only evidence presented at trial were a December 31, 1997 Balance Sheet and a June 30, 1998 Profit and Loss Statement that, although certified by Petitioner, was of limited value. *See* Balance Sheet, Ex. 1, Ex. A; Profit and Loss Statement, Ex. J. Respondent contends that because Petitioner did not cooperate in the audit, the only evidence that should be considered by the court is the figure on the balance sheet purporting to list owner's equity at $551,349.09. Respondent claims further that Petitioner should be charged this amount against his share of the marital estate.

9. The balance sheet was created by BPR employee Rowena Masangcay in early 1998. Ms. Masangcay testified that the amounts on the balance sheet corresponded to amounts actually held in various BPR accounts as of December 31, 1997.[2] Ms. Masangcay only commenced employment one day before the balance sheet was prepared, and she testified as to the doubtful significance of various figures. Ms. Masangcay stated that to prepare the document, she simply copied a number of figures from a previous statement prepared in June of 1997 and inserted other figures that she received from an outside accounting firm. Ms. Masangcay also testified that in preparing the document, she simply lumped the balances of all accounts into one figure, and then combined that figure with the cash on hand belonging to Petitioner.

Finally, Ms. Masangcay testified that the account balances did not include certain unspecified certificates of deposit, nor did the balance sheet list all accounts receivable. Ms. Masangcay believed that the document should be adjusted to include these amounts. **[p. 4]**

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[2] A number of these accounts are listed in Table D, *infra*.

10. Despite Petitioner's claim that the balance sheet was not accurate and could not be relied upon to value the company, he presented no evidence of value aside from 1997 income figures.[3] According to Petitioner, the total revenue for all BPR businesses in 1997 amounted to $592,058.19 (Ex. 9). Operating expenses for that same period of time, moreover, came out to $399,003.55.[4] Petitioner placed a value of $182, 265.81 on BPR which, according to him, represented the maximum combined value of all income, assets, prepaid insurance and equipment on hand, less liabilities, that should be assigned to the business. P. Amended Proposed Findings and Conclusions at ¶ 62.[5]

11. The court appreciates Petitioner's concerns with the balance sheet, but notes, on the other hand, that he certified it as accurate. The court also notes that there appear to be numerous certificates of deposit and accounts to support the conclusion that the value of cash on hand and in BPR accounts may have been significantly understated. *See, e.g.*, FSL accounts set forth in Table "D." Accordingly, the court finds that the value of BPR Enterprises, as stated in the December 31, 1997 balance sheet at $551, 349.09 is reasonable, if not conservative.[6]

12. Evidence was also presented that Petitioner commenced a business known as the Amazon Night Club ("Amazon").[7] The parties did not present any evidence valuing Amazon, nor did they provide any evidence of revenues produced. Respondent does not dispute the award of

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[3] Although Petitioner contended that the balance sheet was inaccurate because it misstated cash on hand and in bank accounts, on direct examination Petitioner testified that the amounts stated as cash on hand and in company accounts were actually wages due to employees and not available cash. Petitioner's testimony was, however, contradicted by BPR's accountant, who testified that the amounts in the accounts were funds on deposit as of December 31, 1997, and not wages due, as Petitioner testified.

[4] Based on these figures, Petitioner argues the total income for BPR in 1997 amounted to $95,591.58. The court finds no basis to sustain this conclusion, in that the difference between revenues and expenses amounted to 193,054.64.

[5] In August of 1998, and after the parties separated, Petitioner opened Reyes Planning and Consulting. According to Respondent, Reyes Planning and Consulting employs the same employees, conducts the same business, and operates out of the same location as BPR. R. Proposed Findings at 13, N. 9.

[6] The court received evidence in the form of a profit and loss statement of BPR for the first six months of 1998. Based upon this evidence, it appears that the average monthly income for this period totaled $16,232.60. If the value of the company is only $551,349.09, as stated on the balance sheet, then these figures represent a return of approximately 35% per annum on the owner's equity.

[7] Amazon has since closed and subsequently re-opened under the name of "Club 820."

this **[p. 5]** property to Petitioner, but asks the court for some "consideration" of the award in making an equitable distribution of the remaining assets. R. Proposed Findings and Conclusions at ¶ 63. In that no party has bothered to produce evidence of valuation, any effort by the court to assign a valuation would be arbitrary.

13. Set forth below are certain real properties that, unless otherwise indicated, the parties agreed should be included in the marital estate. The parties stipulated to the values assigned by an appraiser to each of the marital properties,[8] and, as a result, the court assigns to these real properties the values set forth below:

Table B - Real Property

Location	Description	Est. Value
As Lito	TR 21837-1 containing an area of 10,000 sq. m. more or less and subsequently leased to Dong Yang	$5,500
As Lito	TR 21837-3 New R2 containing an area of 15,275 sq. m. more or less	$336,000
As Lito	TR 21837-3 New 3 containing an area of 9,049 sq. more or less and leased to La Mode Garment Factory	$113,000 ($109,000 payment due)
As Lito	Lot 514 New-4 containing an area of 2,030sq. m. more or less and leased from Marcelino C. Reyes for 55 years	$125,000
As Lito	Lot 514 New-6 containing an area of 2,030 sq. m. more or less and barracks	$93,000
As Lito	Lot 514 New-7 containing an area of 2,030 sq. m. more or less and barracks	$167,000
San Vicente	Lot 578 New-5-2 containing an area of 1,537 sq. m. more or less	$64,000
Fina Sisu	TR 502 New 3-5 containing an area of 2,483 sq. m. more or less. Leased to Aqua Hills.	$1,100
Kanat Tabla	TR 22888-11 containing an area of 2,639 sq. m. more or less and containing abandoned barracks	$87,000
As Teo	Lot EA 452-3 containing an area of 1,859 sq. m. more or less (undeveloped)	$27,000

[8] The parties retained Micronesia Appraisals to value certain properties for trial. The parties stipulated to the values assigned by the appraiser to each of the marital properties. R. Proposed Findings at ¶ 14.

[p. 6]		
	TR 4425 New R/W, containing an area of approximately 316 sq. meters (no improvements)	not appraised[9]
Dan Dan Residence	Lot 010 K 220. Respondent admits that the real property is not marital property but claims an interest in the improvements as having been constructed with marital assets	disputed

14. The parties claim either that they inherited or brought to the marriage the following separate property, or marital property having a separate property component:

Table C

Name	Description	Source of Property	Value
Papago: Marital Home	Lot 0006 F 03 containing an area of 3,996 square meters now improved by five bedroom house	Juan CH Reyes: Petitioner acquired by Deed of Gift on March 25, 1980; claims land as separate property	$715,000[10]
Papago	Lot 006 F 08 containing an area of 4,948 square meters (no improvements)	Juan CH Reyes: Petitioner claims land as separate property	$59,000
Barracks: As Lito	Lot 514 New-8 containing an area of 2,030 sq. m. more or less.	Juan CH Reyes: Petitioner claims land as separate property	$167,000 (includes appraisal of Lot 514 New 7)
Twin Bear Apartments As Lito 8 units	TR 22857-9 containing an area of 1,610 sq. m, more or less, and including an eight unit apartment complex and other improvements constructed thereon.	Respondent's mother, Sabina Pangelinan: Respondent claims land and improvements as separate property	$520,000

[9] This property was not appraised as it was merely a right of way that serves as an easement to lots designated as parts of Tract 21837 and is of minimal value. R. Proposed Findings at 6, note 4.

[10] The parties expended approximately $550,000 in marital assets to construct and furnish the house. Pet. Proposed Amended Findings at ¶ 36. All monies expended to build and furnish the house came from income derived from BPR. *Id*. at ¶ 37.

As Lito	Lot No. 442-5 New-1 New R/W containing an area of 693 sq. m. more or less	Respondent claims as separate property	No appraisal
Beaverton Oregon House	Lot 64, located in the Robinson's subdivision Washington County Beaverton, Or	Respondent claims this as her separate property.	$127,000 based on tax assessment

[p. 7]

15. Except as set forth below, neither of the parties have expressed any compelling interest in the properties listed in Tables B and C above.

The Marital Residence in Papago

16. In 1984, Petitioner's father acquired a homestead to real property in Papago and in 1990, distributed one hectare portions of this property to each of his four sons. Commencing in 1992, the parties began construction of the marital residence on Lot 006 F 03, consisting of approximately 4,000 square meters at a cost of $550,000. The parties agree that all funds expended to build and furnish the marital residence came from income derived from BPR Professional Services.

17. Petitioner claims the marital residence as it sits on "family land," even though the land was acquired during the marriage and is thus presumptively marital property. Petitioner admits, however, that the improvements on inherited properties are community property and should be distributed accordingly. *See In re Guerrero Estate*, Civil Action No. 87-294 (July 27, 1994) (Slip Op. at 7-9); *Lindemann v. Lindemann*, 960 P.2d 966 (Wash.App. 1998); *Bliss v. Bliss*, 898 P.2d 1081 (Idaho 1985) (measure of the reimbursement for community expenditures on separate property is the increase in value of the property attributable thereto, not the amount or value of the community contribution).

18. Petitioner testified that the land on which the marital home sits was originally acquired by Petitioner's father by quitclaim deed dated October 16, 1984, and that the land was transferred to Petitioner by Deed of Gift on March 25, 1990. The court therefore finds that

Petitioner has adequately traced lots 006 F 03 and Lot 006 F 08 to his separate property, since his father, Juan CH Reyes, deeded the property to him.

19. Similarly, the court finds that Lot 006 F 08, adjoining the marital home, and Lots 514 New-8 and New-7 are the separate property of Petitioner, as they, too, were acquired by gift from his father, Juan CH Reyes. The improvements on Lot 514 New-8, however, are a marital asset for which each party is entitled to an undivided one-half interest. **[p. 8]**

Twin Bear Apartments

20. In 1991, the parties constructed an eight unit apartment complex on property that was Respondent's separate property. See P. Proposed Findings and Conclusions at ¶ 19; Respondent's Trial Memorandum at 5 (recognizing Twin Bear Apartments as Respondent's individual property, having been acquired from Sabina Pangelinan as a gift).

21. The apartment complex was constructed in 1991 at a cost of approximately $560,000 (Pet Amended Proposed Findings at ¶ 52). All funds used to build and furnish the apartments came from income derived from BPR (*id.* at ¶¶ 52-53) and were paid in cash.

22. Contrary to the position she is asserting regarding the marital residence, Respondent claims that she should be awarded this property, not because it was constructed upon her separate property but because it produces her only source of income at the present time (R. Proposed Findings and Conclusions at ¶ 48). Since the apartment units and the revenues generated by them are marital assets, however, each party is entitled to an undivided one-half interest therein.

The Oregon Residence

23. Respondent acquired title to a single family residence located in Beaverton, Oregon by warranty deed dated January 30, 1978, more than two years before the parties' marriage and under the name of Jeanette MTP Lloyd. Following their marriage, Respondent added Petitioner's name to the title of this property. Ex. G.

24. At trial, however, Respondent took the position that the transfer was the result of duress and coercion. Respondent testified that she had been abused during the marriage, and that her

eldest son was removed from the family by Oregon social services as the result of an assault that had been committed upon him by the Petitioner. Respondent further testified that throughout the marriage, Petitioner continually harassed her to place his name on the title and that she had no intention of making a gift to him. Respondent admitted, however, that she consulted with her attorney prior to amending the title, and that she was advised not to change the title. Although Respondent disregarded the advice of her attorney, she asks the court to treat the residence as her separate property. **[p. 9]**

25. Respondent maintains that during the marriage, the property was maintained separately from the marital estate, and that all mortgage payments, repairs, and renovations were paid from income produced by the property itself. Respondent admits, however, that during the marriage, she continued to make payments on the mortgage from revenues received from property rentals, and that during the marriage, the property increased in value with a corresponding increase in owner equity. Since marital income paid for the repairs and the mortgage, clearly the increase in value and the corresponding increase in equity was marital property.[11] Since spouses, however, are free to reclassify their separate property by gift,[12] the court finds that the Oregon residence is marital property. The court concludes that when Respondent added Petitioner to the title, she did so voluntarily and willingly. Pursuant to 8 CMC § 1823(b), the court therefore finds that Respondent freely transferred her separate property to the marital estate. See Exhibit "H."[13]

26. The court is not persuaded by Respondent's belated claims of coercion and duress advanced during the heat of this dissolution proceeding, some twenty (20) years after changing title to the house. Nor is the fact that she continued to manage the property following the title change dispositive. During their marriage, the parties apparently agreed that Respondent

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[11] *See* 8 CMC § 1820(d).

[12] *See* 8 CMC § 1823(b).

[13] Even if there were no gift of the property itself, the income produced by the Oregon residence was marital property. The use of that income for the payment of the outstanding mortgage and for repairs and maintenance arguably transmuted this separate property to marital property.

would continue to manage not only the Oregon residence but also the Twin Bear Apartment units. Permitting a spouse to manage marital property does not transmute the property to separate property. *See* 8 CMC § 1821(f) (the right to manage and control marital property does not determine the classification of property of the spouses and does not rebut the presumption of 8 CMC § 1820(b)). The act of placing Petitioner's name on the title to the Oregon Home created a presumption of a gift to the marital estate that can only be overcome by clear and convincing evidence that she did not intend to transfer ownership. *Lalime v Lalime*, 629 A.2d 59, 61 (Me. 1993). Because Respondent has failed to establish that she was forced to transfer ownership by fraud, coercion, duress, or deception, the court concludes that she intended to transfer ownership of the property. **[p. 10]** Accordingly, the court finds the Oregon Home to be a marital asset, and each party is entitled to an undivided one-half interest therein.

The La Mode Property

27. Respondent claims that in 1994, her mother, Sabina Pangelinan, approached the parties about a loan. Instead, the parties negotiated with Mrs. Pangelinan to purchase approximately 19,000 square meters of property located in As Lito. Respondent further claims that the purchase price of the property was set at $100,000, and that Mrs. Pangelinan executed an agreement to convey the property to the parties in July of 1994 (Exhibit D).[14] At trial, Respondent produced an undated document setting forth the terms of the purported purchase of Tract No. 21837-R1 in As Lito (*id.*). The purported purchase agreement, however, was never notarized, nor did either of the parties execute the conveyance.

28. Respondent further claims that in October of 1994, Petitioner began negotiating for the lease of the property to a garment factory. According to Respondent, the potential lessee was not interested in the property subject to the conveyance but sought instead to lease an adjacent property comprising approximately 9,137 square meters. Respondent contends that as a result, she successfully negotiated the purchase of three properties from Mrs. Pangelinan for

[14] The property at issue was Tract No. 21837-R1 in As Lito, described above in Table A.

the same purchase price of $100,000,[15] and that she obtained title to these properties by quitclaim deed dated November 5, 1996 (Ex. E).[16] At trial, Respondent produced a handwritten diary containing what she claimed to be payments of $58,000, made to Mrs. Pangelinan for the property during the course of the marriage, and that a balance of $42,000 remains due and outstanding (Ex. F).

29. Respondent testified that she approached her mother about leasing the land to the garment factory, but in order to do so, required clear title to the land. Respondent claims that Mrs. Pangelinan quitclaimed the property to accommodate her daughter, and that following the transfer of the **[p. 11]** property, Respondent made an initial payment for the land to her mother. Respondent further maintains that on October 14, 1997, the parties leased a portion of the As Lito properties, TR 21837-3 New-3, to La Mode Garment Factory for $350,000, for a term of fifty-five years. Of this amount, $109,000 remains outstanding. Contrary to the position Respondent asserts concerning the marital residence, Respondent proposes that she be awarded each of these properties (the "La Mode Property") in the divorce as the property is family land, was acquired from her mother, and the balance of the payment remains unpaid.

30. Petitioner denies that there was ever any agreement to purchase the La Mode Property, and claims instead that Mrs. Pangelinan offered the parties a 27,000 square meter piece of property when she was unable to repay loans of $27,000 made to her over the course of the marriage. In support of his argument, Petitioner points out that Mrs. Pangelinan transferred the property to the parties by Deed of Gift. Although Petitioner adamantly denies that any money is owed to Mrs. Pangelinan for the property, he accuses Respondent of providing a total of some $67,000 in monthly gifts of martial property to her mother, Sabina Pangelinan, without his consent or knowledge. Respondent seeks recovery of these amounts. Petitioner

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[15] The properties identified by Respondent as encompassed by this transaction were TR 21387-3 New 4, TR 21387-3 New R2, and TR 21837-3 New 3. *See* R. Proposed Findings and Conclusions at ¶ 40.

[16] The property transferred by quitclaim deed, however, included only two tracts: TR 21837-New 3, containing an area of 9,049 sq. meters, and TR 21837 R2, containing an area of 18,1890 sq. meters for a total transfer of 27, 939.0 sq. meters, more or less. *See* Ex. "E."

does not object to the award of the La Mode Property to Respondent, but contends that one-half of any remaining sums due under the La Mode lease should be distributed between the parties equally with no offset for any payment to Mrs. Pangelinan for the purchase of the Property.

31. Based upon Respondent's testimony and the testimony of Mrs. Pangelinan, the court finds that the parties did negotiate to purchase the property for $100,000.00. The court further determines that the parties have made payments totaling $58,000 to Sabina Pangelinan, and that $42,000 remains due and outstanding (Ex. F). The court concludes that with respect to the La Mode Property, one-half of any remaining sums due under the La Mode lease should be distributed between the parties equally.

The Dan-Dan Residence

32. There is really no dispute that during the marriage, Petitioner used the resources of BPR to construct the single family residence on his brother's property in Dan Dan. Nor is there any dispute **[p. 12]** that Respondent suspected that BPR resources were being utilized for the construction, or that the house was occupied since its completion by Emily Siobal and Petitioner, and their children.

33. Petitioner claims that he has no interest in the property, does not intend to purchase the property, and he simply rents the residence from his brother, Charles Reyes, for $50 monthly. Although Petitioner testified that his brother will permit him to occupy the residence until such time as he can recover the investment he made in the house, he also testified that his brother paid for all of the materials necessary to construct the residence except for the excess that he was able to salvage from other BPR projects. Although Petitioner asserts that, in any event, the total amount of labor and materials he expended in constructing the house was $12,000 in 1991, Petitioner did not produce any receipts, cancelled checks, invoices, statements of account, or evidence of any kind to support his testimony, nor has he produced any evidence that his brother paid for any of the materials. All the court has to support Petitioner's testimony as to cost, therefore, is Petitioner's eight year old memory.

34. Respondent, on the other hand, points to more than $180,000 in withdrawals from BPR accounts that were controlled by Petitioner as the source of the construction funds, and the absence of any receipts or payment records documenting any other source for constructing or financing the house. *See* Exs. K, L, and M.[17] Respondent also contends that the Dan Dan residence is either marital property, despite the record of title listing the property in the name of Petitioner's brother, or, alternatively, that she is entitled to be reimbursed for the value of the residence as a marital asset. Respondent does not dispute that the residence, to the extent that it is considered a marital asset, should be awarded to Petitioner as part of the equitable division of the marital estate. She requests, however, that Petitioner's share of the marital estate include the 1999 appraised value of the residence of $201,000.

35. The court finds that although Lot 010 K 220 is the property of Charles P. Reyes and is not property of the marital estate, the improvements constructed on the property were built with BPR **[p. 13]** resources and thus with marital assets. Accordingly, the house constructed on the property is subject to equitable distribution.

36. There are obvious difficulties, however, with valuing the Dan Dan residence. On the one hand, there is only the unsupported recollection of Petitioner as to the cost of the 1991 construction. On the other hand, the court has been presented with a property valuation performed eight years after the home was built, eight years after Respondent knew of its construction, and two years after the date of separation. The appraisal, moreover, also includes but makes no allowance for improvements to the property that were not part of the original construction and were added after the parties separated.

37. More importantly, Petitioner contends that even if Respondent were entitled to reimbursement or credit for one-half of the value of the residence, she is barred from recovery by the statute of limitations. While Petitioner concedes that under 8 CMC § 1822,

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[17] The large cash withdrawals may be otherwise explainable. Both of the parties testified that they expended some $500,000 to build the house in Papago, and some $500,000 to build the Twin Bear Apartments. In addition, they purchased numerous properties during the marriage for a cost in excess of $350,000. All of these purchases were made in cash during the time that the Dan Dan residence was constructed, with funds from the income derived from BPR.

Respondent may bring an action to recover gifts of marital property to third persons,[18] the statute entitling Respondent to do so is clear: the action must be commenced "within the earlier of one year after the other spouse has notice of the gift or three years after the gift." 8 CMC § 1822(c).

38. The evidence reflects that Respondent never bothered to file an action to recover funds allegedly gifted to Charles Reyes or Emily Siobal, and there is no evidence of record to indicate that she took any other action to preserve her rights. The fact that Respondent may have elected to forego legal action in the hope of salvaging her marriage does not toll the statute of limitations. Since Respondent failed to take action to recover the property, the court finds that the appraisal value of the house is irrelevant to these proceedings.

39. The parties also held many bank accounts in various names at different institutions. Some of the accounts were known to both parties, but Respondent claims that a significant number of the **[p. 14]** accounts, designated below as the "Unknown Accounts," were concealed from her. Set forth below are those accounts in which one or both of the parties claim an interest:

Table D: **Bank Accounts**

Name on Account	Status	Balance as of Nov. 21, 1997	Agreed Distribution, if any
Bank of Hawaii Trust Brian Jr. and Joshua 620-5594(TCD)	Known	$104,000.00	Agreed that the account should remain in trust for Children
Bank of Hawaii Trust Brian Jr. and Joshua 620-5618	Known	$118,000.00	Agreed that the account should remain in trust for Children

[18] 8 CMC § 1822 addresses gifts of marital property to third parties. In material part, the statute permits a gift of marital property to a third person by one spouse, acting alone, "only if the value of the marital property given to the third person does not aggregate more than $500 in a calendar year, or a larger amount if, when made, the gift is reasonable in amount considering the economic position of the spouses." 8 CMC § 1822(a). When, as here, a gift of marital property made by one spouse to a third party does not comply with 8 CMC § 1822 (a), the other spouse may bring an action to recover the property or a compensatory judgment in place of the property. 8 CMC § 1822(b).

Bank of Hawaii Jeanette Reyes 620-5601	Known	$40,000.00	Agreed that funds be distributed to Respondent, subject to $29,000 loan.[19]
Bank of Hawaii Jeanette Reyes 622-6367	Known	$20,000.00	Agreed that funds be distributed to Respondent as her separate property[20]
Bank of Hawaii Joshua P. Reyes 0079-244104	Known	$11,829.00 (checking)	Originally, parties appeared to agree on distribution to Respondent. Petitioner now seeks to divide funds equally and claims that the proceeds in this account came from FS&L account CK 03-632-2531, listed below
Bank of Hawaii Brian & Jeannette 6879-268771	Known	$7,000.00 (checking)	Petitioner claims funds contain proceeds from sale of his separate property, UMDA stock, and come from FS&L account SV-03-07-069807. Respondent claims an interest in funds as gift to the marital estate
[p. 15]			
Union Bank Savings Jeannette Reyes CD 093752	Known	$30,000.00	Agreed: Distribute to Respondent
Union Bank Savings Jeannette Reyes CD 564-164	Known	$7,000.00	Agreed: Distribute to Respondent
First Savings and Loan ("FSL") Brian P. Reyes CD-03-13-000440	Unknown	unknown	No agreement

[19] Petitioner characterizes this account as a joint marital account that the parties used for emergencies. Respondent claims that the account was used to secure an outstanding marital obligation of $31,000 for certain property purchased from Respondent's mother, Sabina Pangelinan. The parties nevertheless appear to agree that when the certificate of deposit matured, the loan was paid off, netting an actual value of $9,000. Pursuant to a Stipulation to Distribute Marital Funds approved by the court, the parties were authorized to divide the funds. *See* Stipulation to Distribute Marital funds dated 12/23/98.

[20] The proceeds in this account represent one-half the payment received from the La Mode lease, and each party has claimed his or her portion as separate property.

FSL Jeannette P. Reyes CD-03-10-021968	Known	Unknown	Account opened 12/27/96 with $100,000.00; no indication as to disposition of proceeds (Ex O)
FSL Brian P. Reyes SAL-73-13-000440	Unknown	$3,766.44 (10/22/97)	No agreement
FSL BPR & Associates SV-03-07-030916	Unknown	None	No agreement; account closed 7/19/95 with $82,325.59; no indication as to disposition of proceeds (Ex O)
FSL Brian P.Reyes SV-03-07-039115[21]	Unknown	None	No agreement: Account opened in 1995 and closed in March of 1996; no agreement as to proceeds
FSL Brian P. Reyes SV-03-07–51490[22]	Unknown	$51, 994.98 (July, 1997)	No agreement: Account opened on 7/18/95 with $80,000 that appears to have been transferred from account SV-03-07-039016 (Ex. O). Petitioner claims funds were transferred from SV-03-039115 when term expired
FSL Brian P. Reyes SV-03-07-054247	Unknown	$28,437.14	No agreement: Petitioner claims proceeds were held in trust for father's friend, Manabu Yamazuki, to manage apartments and have been transferred to Bank of Hawaii account 6879258679 (closed); Respondent claims interest in account (Ex R)
[p. 16] FSL Brian P. Reyes SAL-03-10–017967[23] CD - 03-10-107967	Unknown	account closed on 11/19/97 with $75,000 (Ex 4)	No agreement: Petitioner claims that the account belongs to Juan CH Reyes. Respondent claims interest in $75,000

[21] Petitioner testified that funds in this account were not his, but belonged to his father.

[22] Petitioner testified that funds in this account were not his, but belonged to his father.

[23] Petitioner testified that funds in this account were not his, but belonged to his father.

FSL BPR Prof Ser Res CD-03-10–021018	Unknown	None	No agreement: Petitioner contends funds were transferred into three CD's: $20,000 for Marjorie (CD 03-10-21140)(closed), $20,000 for Joaquina (CD 03-10-21158)(closed); and $10,000 for E. Siobal.[24] Respondent claims interest in account.
FSL BPR Prof Ser Res CD-10-021059	Unknown	$51,062.32 (11/13/97); $12,188.02 (12/10/97) (Ex. 7)	No agreement: Petitioner claims proceeds were used to pay off Joaquina P. Reyes' car loan (Ex. 7), and that remaining funds were divided equally between the parties (¶ 71). Respondent claims interest in $51,062.32
FSL Brian P. Reyes CD-03-10–021141	Unknown	$21,385.17	No agreement: Petitioner claims the funds were transferred to the Bank of Hawaii for Marjorie P. Reyes, account TCD 625-2302 (closed); Respondent claims interest in account
FSL Brian P. Reyes CD-03-10–021158	Unknown	$21,385.18	No agreement: Petitioner claims funds were transferred to the Bank of Hawaii for Joaquina P. Reyes, account 6879-217-2531 (closed); Respondent claims interest in account
FSL Brian P. Reyes SV-03-07–065979	Unknown	$15, 005 (10/31/97) (Ex. O)	No agreement: Petitioner claims account was used by BPR to pay for contractors once construction was completed; Respondent claims interest in $15,005 (Ex. R)
[p. 17]			

[24] *See* Petitioner's Comments Re: "Exhibit "A" of Order of February 22, 2000 (filed March 1, 2000) ("Pet. Comments to Ex. A"). Petitioner proffered no explanation as to the whereabouts of the funds following the closing of the accounts for Marjorie and Joaquina.

FSL Brian P. Reyes SV-03-07–068684	Unknown	$50,447.17 10/31/97 (Ex. O)	No agreement: P claims account opened with $50,000 from SV-03-07-5190 and that account belonged to Juan CH Reyes [25]
FSL Emily D. Siobal CD-03-10-023841	Unknown	$2,000	No agreement: account opened 9/15/97; Petitioner claims that funds were for the basic needs of Kristen and Kelsey Siobal.[26] Respondent claims interest in account
FSL Emily D. Siobal CD-03-10-023833	Unknown	$2,052.22	No agreement: Account opened 9/15/97; Petitioner claims funds were used for his children, Kristen and Kelsey Siobal. Respondent claims interest in account
FSL Brian P. Reyes[27] CD-03-10–024112	Unknown	$50,000 (10/31/97) (Exs. O and R)	No agreement: Petitioner testified that $10,000 went to Emily Siobal, $20,000 to Marjorie Reyes and $20,000 to Joaquina Reyes. Respondent claims interest in account
FSL Brian P. Reyes CK-05-55-632531	Unknown	$11,676.76 (11/5/97) (Ex. R)	No agreement: Account opened 10/31/97; Petitioner claims account was transferred to Joshua P. Reyes (Bank of Hawaii account 0079244104). Respondent claims interest in $11,676.65 on deposit on 11/5/97 (Ex R)
FSL Brian P. Reyes SV 03-07-069807	Unknown	$7633.15 (10/3/97)	Petitioner characterizes the $8,710.00 in this account as proceeds of certain UMDA stock that he holds as separate property, and claims the proceeds were transferred to Bank of Hawaii, account 6879-268771. Respondent claims interest in this account

[25] *See* Pet. Comments to Ex. "A," *supra* Note 9.

[26] See P.'s Resp. to Court's Request for Supplementation of Record (filed Oct. 10, 2000).

[27] Petitioner claims account belongs to Juan CH Reyes and that Ex. 4-6 proves that Juan CH Reyes withdrew funds from these accounts.

FSL CK 03-55-532645 (Twin Bear Estates)	Known	$28,632.76 (11/25/97) (Ex. 3)	No agreement
[p. 18]			
FSL Brian P. Reyes CD-03-10–025473	Unknown	Unknown	No Agreement: Petitioner claims funds as separate property; claims funds were transferred to Bank of Hawaii and represent one-half the payment received from the La Mode lease
FSL Emily D. Siobal CD 03-10-21133	Unknown	$10,692.58	No agreement: Petitioner admits giving Emily Siobal $10,000 (8/21/96)(Ex O); however, Petitioner claims that $4,000 of this came from Juan CH Reyes as a gift. Respondent claims interest in account

40. At trial, Respondent introduced correspondence from the First Savings and Loan Institute Association of America ("FSL") concerning the accounts listed above (Ex. "O"). In Exhibit R, Respondent listed each of these FSL accounts with an outstanding balance on the date closest to November 21, 1997, the date of separation.[28] Respondent claims that all accounts listed on Exhibit R are marital assets, including those alleged to include funds belonging to Juan CH Reyes, those purportedly belonging to the parties' children, as well as those titled in the name of Emily Siobal and the Siobal children. Respondent claims an interest in the outstanding balance of all accounts listed on Exhibit R which, according to Respondent, totals $296,329.52.[29]

41. Petitioner, on the other hand, disputes Respondent's accusations concerning the "secret" accounts, pointing out that as BPR's office manager, she had access to all accounts and even drew checks on them. *E.g.*, Ex. 2. With the exception of those accounts containing the

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[28] The balances reflected on Exhibit R corresponded to the statements collectively introduced as Trial Exhibit O.

[29] Respondent further contends that immediately after Petitioner committed the assault that resulted in the parties' final separation, Petitioner made multiple withdrawals of large sums of money from a number of the accounts listed in Exhibit O. Trial Exhibit S reflects a chronological listing of the withdrawals from these accounts from November 18, 1997 through December 18, 1997. These withdrawals totaled $216,326.12. Respondent testified that she did not know of the withdrawals and never received any of the funds.

proceeds from the sale of his separately-held UMDA stock,[30] the accounts held by Petitioner's father, Juan CH Reyes,[31] **[p. 19]** the accounts belonging to Emily Siobal,[32] the accounts belonging to his children,[33]and one account held in trust for a Mr. Yamazuki,[34] Petitioner does not dispute that the funds in the accounts are, or were derived from, marital property and should be divided appropriately between the parties.

A. Accounts Containing Funds Belonging to Juan CH Reyes

42. With respect to funds in the three accounts that Petitioner claims belonged to his father, Juan CH Reyes testified at trial that he did not have any joint accounts with the Petitioner, nor did he confirm that the money in the three accounts in question belonged to him. Evidence was presented, moreover, establishing that Petitioner was a signatory on all of the accounts, that the statements on these accounts were sent directly to Petitioner, that Petitioner dealt with FSL representatives concerning the accounts, and that the accounts were held in Petitioner's name. Further, funds used to open at least one of these accounts came from an account that was undeniably marital property. Account SV-03-07-051490 was opened with a deposit of $80,000 which appears to have originated from BPR account SV-03-07-030916 (Ex. O).[35] Although Petitioner first denied that a transfer was made, upon further examination, he later admitted to opening what he characterized as a joint account with his father. He also did not deny the transfer, but stated that he could not recall whether a transfer had, in fact, occurred.

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[30] *See* FSL account SV-03-07-069807 ($7,633.15) which, Petitioner contends, was transferred to Bank of Hawaii account 6879-268771, containing approximately $7,000.

[31] The accounts titled in the name of Juan CH Reyes were: SV-03-039115, SV -03-07-51490, and SAL-03-10-017967 (also referred to as CD-03-10-017967).

[32] The Siobal accounts include accounts for the children: CD-03-10-02113, CD-03-023833, and CD-03-10-023841 (Ex. O, Q, W and X).

[33] *See* FSL accounts CD-03-10-021018 (balance unknown); CD-10-021059($51,062.32); CD-03-10-021141 ($21,385.17); CD-010-021158 ($21,385.18) (hereinafter, collectively, the "Children's Accounts").

[34] *See* FSL account SV-03-07-05247.

[35] Account SV-03-07-30916 was closed on July 17, 1995, and $82,328.59 was withdrawn. Petitioner did not claim that these were anything other than marital funds or that the funds belonged to his father. Account SV-03-07-051490 was opened with $80,000 the very next day.

Moreover, Petitioner did not provide the court with any other explanation as to what happened to the finds from account SV-03-07-030916.

43. As to the other accounts allegedly containing funds belonging to Juan CH Reyes, trial testimony further established that on or about March 21, 1995, $30,000 was transferred from account SV-03-07-051490, an account opened with marital property, into account CD-03-10-017967 (Exs. O and Q). From these accounts, funds were later transferred into accounts for Emily Siobal and accounts for Kristen and Kelsey Siobal (Exs. O. Q, W and X). The fact that Petitioner failed to **[p. 20]** reveal the accounts held by his father during discovery, as well as the accounts into which funds were deposited for Emily Siobal, lends credence to the conclusion that he had an interest in these accounts which he did not want to disclose to Respondent. *See Santos v. Santos*, Appeal No. 98-029 (N.M.I. Sup. Ct. May 10, 2000).

44. The court therefore finds that FSL accounts CD 03-10-017967 ($75,000), SV 03-07-039115 (balance unknown), and SV-03-07-51490 ($51, 994.98) did not belong, as Petitioner contends, entirely to Juan CH Reyes but instead contained marital funds. Since a combination of marital and other property is presumed to be marital property unless the component of the mixed property claimed as separate property can be traced, Petitioner was charged with proving that funds belonging either to him or his father were identifiably derived from separate assets. *Santos v. Santos*, Slip Op. at 6. The court finds that Petitioner has failed to meet this burden.

45. With regard to account CD-03-10-7967, the court finds that at least $30,000 of the $75,000 in this account was marital property, even though the account was held in the name of Juan CH Reyes. As to the remaining funds in this account as well as the other accounts allegedly belonging to Juan CH Reyes, the court finds that Petitioner failed to overcome the presumption of marital property. Accordingly, the court finds that funds in FSL account CD-03-10-024112 ($50,000) were marital property.

B. Ms. Siobal's Accounts

46. Petitioner testified that three accounts, totaling $14,052.22 were opened from the Unknown Accounts as follows: (1) on or about August 20, 1996, Petitioner closed BPR Professional

Services Reserve account CD-03-10-021018 which contained marital property. Three accounts were immediately opened with these funds. One of these accounts, Petitioner testified, was transferred into a certificate of deposit for his daughter, Marjorie Reyes (CD-03-10-21140, now closed). A second account was opened for his daughter Joaquina Reyes (CD-03-10-21158, now closed). The third account, account CD-03-10-02113 in the amount of $10,000, was opened in the name of Ms. Siobal. See Ex. O and Q.

47. On or about September 5, 1995, Petitioner withdrew $4,052.22 from account CD-03-10-017967, and claimed to belong to Juan CH Reyes, but to which at least $30,000 can be traced **[p. 21]** to marital property accounts. See ¶¶ 44-46, *supra*. The same day, two accounts were opened with those funds for Ms. Siobal: account CD-03-10-02383 ($2,052.22), and CD-03-10-023841($2,000) (Exs. O, Q, W, and X).

48. The court finds that all of the funds transferred into the Siobal accounts contain marital funds and are subject to equitable distribution.

C. Accounts Belonging To or Used For the Parties' Children

49. Petitioner also claimed that a number of the FSL accounts were not marital property because they belonged to, or were used for, his and the Respondent's children (the "Children's Accounts"). *See* Note 35, *supra*. The accounts were, however, listed in the name of Petitioner or BPR Professional Services Reserve, and Petitioner maintained control over those accounts. The record further reflects no evidence that Respondent knew of these accounts, received any money from these accounts, or consented to the allocation of proceeds therein. In addition, there was no testimony that these accounts were established with any property other than marital property.

50. The court therefore finds that the Children's Accounts contain marital funds and would ordinarily be subject to equitable distribution. Since these accounts appear to have been included by the BPR accountant on the December 31, 1997 Balance Sheet (Ex.1, Ex. A),[36]

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[36] Rowena Masangcay testified that in compiling the balance sheet, she lumped the balances of all BPR accounts into one figure and then combined that figure with the cash on hand belonging to Petitioner. The Balance Sheet, moreover, lists cash on hand and in the bank at $307,201.57.

however, these accounts have already been accounted for in the marital estate. Accordingly, the court will not list them again as assets of the marital estate.

D. Account Held for Manabu Yamazuki

51. Unrebutted trial testimony and exhibits also indicate that FSL Account SV-03-07-054247 consisted of funds held in trust for Manabu Yamazuki to manage apartments, and was transferred to Bank of Hawaii account 6879258679. The court finds, therefore, that these were not marital funds.

E. Account Containing UMDA Proceeds

52. Finally, Petitioner testified that funds in FSL account SV-03-07-069807 ($8,710.00) represented proceeds of certain UMDA stock that he received prior to the marriage from his father. It is **[p. 22]** undisputed that Petitioner transferred $7,633.15 from FSL account SV-03-07-069807 to Bank of Hawaii joint checking account 6879-268771 in which Respondent claims an interest. One or both of the parties admit that the account was established for family emergencies, and Respondent thus asserts an interest in these funds as a gift to the marital estate.

53. For the same reasons articulated above concerning the Oregon Residence, the court finds that funds in this account are marital and should be divided accordingly.

F. Remaining Accounts Held in the Name of Brian P. Regis or BPR

54. The court finds that the remaining accounts, held in the name of Brian P. Regis or BPR were accounts encompassed among BPR assets and included on the balance sheet of BPR Professional Services. In assigning a value to BPR, therefore, the court included these accounts. To count these assets separately, as Respondent requests, would result in double dipping. Except as specifically set forth above, the court therefore excludes these accounts in making a distribution of the marital estate.

55. The parties also acquired additional personal property. No evidence was introduced at trial, however, as to the value of the additional personal property or to its distribution.[37]

56. At trial, both of the parties did introduce testimony concerning the disposition of marital assets and waste, each party contending that he or she should be permitted to recover unauthorized and excessive gifts made to third parties as well as what the parties claim as waste of marital property. Record evidence demonstrates, moreover, that throughout the marriage, Petitioner has provided gifts and support to Ms. Siobal, and that these gifts and support have come from the marital property of the parties.[38] Petitioner points to Respondent's failure to file any action to recover any gift of marital property and contends that her claims are now barred by the statute of limitations. Petitioner further contends that if the court considers the issues of waste or gifts, then Respondent **[p. 23]** is equally culpable. Petitioner maintains that during the marriage, Respondent transferred or made a series of loans to friends and relatives without his consent.[39] He further points to the Twin Bear Apartments which, from 1991 until approximately May of 1998, were managed by Respondent. Petitioner contends that although Respondent accumulated approximately $420,000 from the Twin Bear accounts, she never paid any rental income to Petitioner.

57. Evidence was also introduced concerning child and spousal support. Although Respondent has extensive work experience, she testified that she has not been able to find employment since she left BPR in November of 1997 and thus supports herself and the minor children from rentals received from the house in Oregon, the revenues received from the Twin Bear

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[37] It is the court's understanding that the parties have agreed upon the division of the additional personal property consisting of Petitioner's UMDA and Mobil stock, various vehicles, household furnishings and appliances, and the parties' personal effects, including jewelry, clothing, and personal items. R Proposed Findings at ¶ 84.

[38] Petitioner testified that he has provided monthly support in the approximate amount of $300 to Ms. Siobal and their children from 1990 until October of 1995, when he vacated the marital residence and moved into the Dan Dan home (Ex. BB). From October of 1995 and until the parties separated in November of 1997, this amount increased to some $1816.75 (Ex. C). Petitioner also provided Ms. Siobal with bank accounts ($14,052.22), automobiles, jewelry and other gifts which Respondent claims total in excess of $33,742.22.

[39] Petitioner claims that Respondent lent $67,000 to her mother, Sabina Pangelinan; $15,500 to her sister, Bernice Diaz; and $2,000 to Marian Tudela.

Apartments, and the $1,000 in temporary support awarded by the court. Since the trial in this matter, however, Respondent has found employment and earns a yearly salary of $35,000.

58. At the time of trial, Twin Bear Apartments was producing $3,500 per month. Respondent testified that her monthly expenses totaled $7,557.47. This figure included the expenses for herself and the children in her care, as well as the wages for the maintenance worker at Twin Bear Apartments.

59. Respondent also receives approximately $500 per month from the house in Oregon.

60. For the first six months of 1998, record evidence indicates that BPR earned a gross income of $326,358.16. After expenses, the company's net income amounted to $69,179.97 or $11,529.95 per month.

61. Included in these figures were $28,215.68 for legal fees which Petitioner expended in this action for divorce. These fees are not properly included as a cost of the business.

62. At the same time, Petitioner's income and expense declaration set forth his monthly expenses as $6,705.36 (Ex. C). From this amount, Petitioner pays for the minor children's school tuition and the support of his other children.

63. Respondent has requested spousal support of $800 per month for a period of 36 months as rehabilitative support. In addition, she asks for an award of child support in the amount of $800 **[p. 24]** per month per child, until the child receiving support reaches the age of 18 or discontinues his education, whichever should last occur.

64. The parties have stipulated that those obligations that were incurred or remained outstanding as a part of BPR or Twin Bear Apartments shall be assumed by the party awarded that asset.

65. The parties have further agreed that all other marital obligations shall be assumed by the party named on the specific loan, credit card, note, credit line, or obligation.

66. Respondent has requested attorney's fees and costs in defending against this action. Petitioner proposes that each side bear his or her own attorney's fees and costs.

III. CONCLUSIONS OF LAW

67. Before making an equitable distribution of the marital estate, the court first addresses three threshold issues:

A. *Transmutation:* Whether non-marital assets or properties acquired by gift, bequest, devise, or descent have been converted to marital property.

B. *Fault:* What role, if any, should fault play in the distribution of the marital estate.

C. *Restitution to the Marital Estate:* Whether either party should be required to reimburse the marital estate for unauthorized expenditures and/or waste.

A. Transmutation of Separately-Owned Property

68. The Commonwealth Marital Property Act provides, in material part, that all property of spouses is considered marital property, subject to specific statutory exceptions. 8 CMC § 1820. One exception to this rule is that property owned by a spouse before the marriage is individual property. 8 CMC § 1820(f); *see Ada v. Sabla*n, 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 from a third party, or in exchange for or with the proceeds of other individual property. 8 CMC § 1820(g). "Mixed" property, or a combination of marital and other property, results from the mixing of separate properties with marital properties and is presumed marital property, unless the component of the mixed property which is not marital property can be traced. 8 CMC § 1829(a). *See Santos v. Santos*, Appeal No. 98-029 (N.M.I. Sup. Ct. May 10, 2000). **[p. 25]**

69. Reclassification of property is commonly referred to as "transmutation," a legal process by which non-marital assets, or properties acquired by gift, bequest, devise or descent, may be converted into marital property. *E.g. Miller v. Miller*, 428 S.E.2d 547, 551 (W.Va. 1993). As Respondent points out, a transmutation of property occurs when the spouse contributing his or her property evidences an intent to make a gift of non-marital property to the marriage by significantly changing the character of the property at issue to marital property. *See Mayhew v. Mayhew*, 475 S.E.2d 382, 391 (W.Va. 1996).

70. The first issue to be addressed, therefore, concerns the characterization of certain family land. Respondent contends that the character of certain separately owned property (family land) was lost when the parties chose to improve those properties with marital assets or donate them to the marriage. Through transmutation, the parties contend that the marital residence in Papago and the Twin Bear apartments became marital properties. The court disagrees.

71. 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. *E.g., Santos; see also Vidal v. Stephenson*, Civil Action No. 92-1457 (N.M.I. Super. Ct. Dec. 19, 1994) (Decision and Order granting annulment). Simply constructing improvements on separately owned family land does not, in and of itself, accomplish this result. *Santos*, Slip Op. at 6-8. Pursuant to statute, the court therefore finds that the Marital Residence and the Twin Bear Apartments are mixed properties and that the parties' individual claims to separately-owned family land are valid.

72. For the same reasons, the court concludes that Lot 006 F 08, adjoining the marital home, and Lots 514 New-8 and New-7 are the separate property of Petitioner, as they, too, were acquired by gift from his father, Juan CH Reyes. The improvements on Lot 514 New-8, however, are a marital asset for which each party is entitled to an undivided one-half interest.

73. Likewise, Respondent's individual property, upon which the Twin Bear Apartments were constructed, has not been transmuted to marital property. T.R. 22857-9 is the separate property of Respondent, since the property was deeded to her by her mother, Sabina Pangelinan. The lot, therefore, can be traced as the individual property of Respondent. The improvements, on the other hand, are a marital asset in which each party is entitled to an undivided one-half interest. **[p. 26]**

74. In contrast, placing Petitioner's name on the title to the Oregon Home created a presumption of a gift to the marital estate that could only be overcome by clear and convincing evidence that she did not intend to transfer ownership. *Lalime v Lalime*, 629 A.2d 59, 61 (Me. 1993). Because Respondent failed to establish that she was forced to transfer ownership by fraud,

coercion, duress, or deception, the court has concluded that she intended to transfer the property to joint ownership.

75. Similarly, the court finds that Petitioner's transfer of his separate funds into a joint checking account that could be drawn upon by either party effectively gifted separate funds to the marital estate. Accordingly, the funds in Bank of Hawaii Account 6879-268771 are funds that will be divided equally between the parties.

B. Fault and the Equitable Distribution of the Marital Estate

76. Courts in a number of jurisdictions hold that a court should not, ordinarily, consider fault or marital misconduct in dividing property upon divorce. *See Markham v. Markham,*909 P.2d 602 (Haw. App. 1996) (in determining the division of marital property, one spouse's personal conduct or misconduct towards the other spouse is irrelevant); *In re Marriage of Griffin*, 860 P.2d 78, 79 (Mont. 1993). Where a divorce has been granted on traditional fault grounds, however, a number of jurisdictions hold that fault, including adultery, marital misconduct, the dissipation of assets, and spousal or child abuse, is a factor which the court may consider in equitably distributing marital assets and liabilities, determining alimony and custody, and awarding attorneys' fees.[40] The Commonwealth Legislature seems to have drawn a distinction between grounds for seeking or granting divorce, on the one hand, and the manner in which marital property should be divided between the respective spouses upon dissolution of the marriage, on the other. The Legislature's **[p. 27]** most recent and specific treatment of this subject is found in the Marital Property Act and is based upon the principle

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[40] *E.g. Nelson v. Nelson,* 25 S.W.3d 511 (Mo. App. 2000) (marital misconduct is not a legitimate basis for punishing a party when dividing marital property at divorce; when, however, the offending conduct places extra burdens on the other spouse, it can be considered in making a property division); *Hoffman v. Hoffman*, 727 A.2d 1003 (N.H. 1999) (among the special circumstances warranting unequal distribution of marital property at divorce are: (1) a short marriage; (2) a party's exclusive premarital possession of an asset that continues after the marriage; (3) a party's recent acquisition of an asset through a family relationship; (4) a party's need to provide a home for the minor children; (5) the need to assure each party's future security; and (6) the fault of either party); *Caron v. Manfresca-Caron,* 1997 WL 723262 (Ohio App. Nov. 20, 1997) (upon a finding of financial misconduct, the trial court has the right to fashion a "distributive" award to one party "from separate Property" for the purposes of rendering a fair and equitable division of assets between the parties to divorce). For a discussion of how two trial courts have treated this issue, *see* O'Hara, *May Fault Be Considered in Deciding Financial Issues in Divorce Cases? No, Except in Rare Cases Involving Gross and Extreme Misconduct,* 67 JUL. J. KAN. B.A. 28 (1998) and Leben, *May Fault Be Considered in Deciding Financial Issues in Divorce Cases? Yes, When a Fault-Based Divorce is Granted,* 67 JUL. J. KAN. B.A. 29 (1998).

of *patte pareho* (distribute equally). The Act clearly states that each party has an undivided one-half interest in marital property.[41] In light of the legislature's pronouncement, the court is therefore called upon to determine the ramifications, if any, of Petitioner's marital misconduct in dividing marital property.

77. Petitioner contends that the Commonwealth should not consider marital misconduct in determining equitable distribution for public policy reasons. First, to entertain allegations of spousal misconduct in a divorce proceeding would encourage the parties to bring any marital infractions to the court's attention, simply to obtain a more favorable property division. Thus, Petitioner argues, an incentive to bring false accusations would exist. Second, Petitioner points to the mental and emotional impact of dissolution upon the parties and their families, suggesting that the injection of blame into legal proceedings would only add to the trauma attending the end of a marital relationship. Finally, Petitioner points out that the Marital Property Act makes no provision for an unequal division of property based upon fault and contends that the entire concept of *patte pareho* is at odds with the idea of an unequal division of marital property based upon fault.

78. There are a number of jurisdictions which hold differently. In *In re Marriage of Sommers,*[42] for example, the Kansas Supreme Court held that when the ground for divorce is a breach of a material marital duty or obligation, fault may be considered in resolving the division of property, provided two conditions are satisfied: (1) the fault relates to the present or future financial circumstances of the parties; and (2) the case involves the truly rare and unusual situation in which the misconduct is so gross and extreme that the failure to penalize it would itself be inequitable. 246 Kan. at 657, 792 P.2d at 1010. *See also Romano v. Romano,* 632 So.2d 207 (Fla. App. 1994) (when marital misconduct results in the depletion or dissipation of marital assets, the misconduct may serve as a basis for an unequal division of marital property, or the amount **[p. 28]** dissipated can be assigned to the spending spouse as part

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[41] 8 CMC § 1820(c) provides: "Each spouse has a present undivided one-half interest in marital property, subject, however, to the restrictions of N.M.I. Const. art. XII."

[42] 246 Kan. 652, 795 P.2d 1005 (1990).

of that spouse's distribution); *Blickstein v. Blickstein*, 472 N.Y.S.2d 110, 113-14 (Sup.Ct.1984).[43]

79. New York courts have found such extraordinary circumstances where a defendant raped his minor stepdaughter,[44] and where a defendant attempted to engage a person to murder his wife and dispose of the body. *See Brancovenu v. Brancovenu*, 535 N.Y.S.2d 86, 90 (Sup.Ct.1988). Adultery, however, is not such a circumstance. *See Wakayama v. Wakayama*, 673 P.2d 1044 (Haw. App. 1983); *LeStrange v. LeStrange*, 539 N.Y.S.2d 53, 54 (1989) (finding that wife's adultery was not conduct so egregious or uncivilized as to warrant deprivation of her share of the marital property); *Nolan v. Nolan*, 486 N.Y.S.2d 415, 418 (1985) (holding that wife's adultery was insufficiently egregious to justify divestiture of her marital property interest); *Pacifico v. Pacifico*, 475 N.Y.S.2d 952, 955 (1984) (holding that defendant husband's alleged illicit relationship had no bearing on the issue of property distribution). *But see Givens v. Givens*, 599 S.W.2d 204 (Mo.Ct.App.1980) (affirming a Missouri trial court's determination that wife should be awarded marital residence because of adultery of husband which, the court concluded, had led to marital breakdown).

80. Two cases highlight the current state of the law in this area. In the first, the plaintiff alleged that the defendant had misled her into thinking he would undertake medical procedures to make him fertile after she had expressly made that a condition of her marriage to him. *McCann v. McCann*, 593 N.Y.S.2d 917, 919 (Sup.Ct.1993). The court held that the *Blickstein* standard, under which the **[p. 29]** issue of marital fault is irrelevant in

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[43] *Blickstein* articulated the situation as follows:

> [W]e conclude that, as a general rule, the marital fault of a party is not a relevant consideration under the equitable distribution law in distributing marital property upon the dissolution of a marriage. This is not to deny, however, that there will be cases in which marital fault, by virtue of its extraordinary nature, becomes relevant and should be considered. But such occasions, we would stress, will be very rare and will require proof of marital fault substantially greater than that required to establish a bare prima facie case for matrimonial relief. They will involve situations where the marital misconduct is so egregious or uncivilized as to bespeak of a blatant disregard of the marital relationship--misconduct that shocks the conscience of the court thereby compelling it to invoke its equitable power to do justice between the parties.

[44] *E.g., Vazquez v. Vazquez*, N.Y.L.J., Apr. 23, 1987, at 16 (reciting an unpublished opinion),.

determining marital property distribution unless the conduct is egregious, had not been satisfied. *Id*. at 923. In a distinguishable fact pattern, a Michigan plaintiff met with somewhat more success. In *Gubin v. Hodisev*, 494 N.W.2d 782 (Mich.Ct.App.1992), a nonresident alien married the plaintiff only to enter the country. The court held that under these circumstances, the fault clause in the Michigan equitable distribution statute could be used to allow plaintiff to recover for her time and out-of-pocket medical expenses. *Id*. at 785-86. In another case which might also be considered a sham marriage, the court allowed the wife to recover under the fault clause of an alimony statute where three weeks into the marriage, the husband, who had had another relationship prior to the marriage, announced that he had made a mistake, despite the fact that the wife had given up alimony from a former husband and had left her home and job for him. *Bridgeman v. Bridgeman*, 391 S.E.2d 367, 370 (W.Va.1990).

81. The court is mindful that there are certain provisions of the Marital Property Act that, on the surface, appear to be at odds with the concept of *patte pareho*. *See, e.g.* 8 CMC § 1831(d) (investing the court with specific authority to "award damages or any other just and equitable relief" for breach of the duty of good faith imposed by 8 CMC § 1814,[45] when there is damage to a claimant spouse's present undivided one-half interest in marital property). The court is persuaded, however, that these provisions exist to underscore the court's discretion to put together a decree that will do justice to the parties and the children of the marriage. Clearly, the award of alimony, child support, and special provisions regarding the method of property distribution are all equitable remedies available to the court in fashioning a decree appropriate to the circumstances of the case at hand. These tools do not, however, impact on the statutory mandate to award "each spouse ... a present undivided one-half interest in marital property." Given the facts of this case, the court will be required to employ some form of equitable relief for the benefit of the children in relation to the marital

[45] 8 CMC § 1814(a) provides that "each spouse shall act in good faith with respect to the other spouse in matters involving marital property or other property of the other spouse."

residence. This does not mean, however, that the court is free to disregard the **[p. 30]** mandate of the statute by awarding either spouse a lesser share of marital property than that guaranteed by statute.

C. Restitution to the Marital Estate

82. As set forth above, uncontroverted evidence at trial established that Petitioner provided gifts and support to Ms. Siobal and their children since 1990.[46] Respondent argues that even though she never brought an action to recover the value of gifts and contributions, she is entitled to recover or be reimbursed for all expenditures made by Petitioner as gifts made in violation of the $500 statutory ceiling set by 8 CMC § 1822, as a breach of fiduciary duty, and as a fraud on the community. Alternatively, Respondent urges the court to recapture these expenditures in making an equitable distribution of the properties in the marital estate.

83. Petitioner does not deny the gifts and contributions, but claims that any action to recover them had to have been commenced within the earlier of one year following notice of the gift or facts giving rise to the claim, or three years after the gift was made. *See* 8 CMC § 1822; 1831(e). Pointing to Respondent's knowledge of the relationship between Petitioner and Ms. Siobal as early as 1991, Respondent's awareness of the birth of Kelsey Siobal, and Respondent's knowledge of the construction of the Dan Dan residence as early as 1991, Petitioner maintains that Respondent has never filed an action to recover any gift of marital property. Although the Counterclaim filed by Respondent in this proceeding contains a claim for distribution of the marital estate, with the exception of a reference to the Dan Dan residence, even the Counterclaim fails to assert a cause of action to recover these gifts and contributions. See Answer and Counterclaim, ¶ 13.

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[46] Petitioner estimated that he provided support to Ms. Siobal and their minor child in the approximate amount of $300 per month from 1990 until October of 1995, the time that he moved into the Dan Dan home. If indeed support was maintained at this level, then the total support provided over this period of time would have amounted to $21,000 (Ex. BB). From October of 1995 to the time of separation in November of 1997, moreover, Petitioner estimated the amount of support to have increased to approximately $1,816.75 monthly (Ex. C). In addition, Petitioner provided Ms. Siobal and their children with bank accounts ($14,052.22), automobiles ($17,000), jewelry ($2,690.00) and other gifts. Respondent claims that marital funds expended for the support of and gifts to Ms. Siobal and their minor children total some $98, 344.22.

84. It is well established that the relationship between a husband and wife is a fiduciary relationship, and that in a marriage, each spouse owes a fiduciary duty to the other when dealing with marital **[p. 31]** property, including that marital property under his or her control or management. *E.g.*, 8 CMC § 1814(a). It is equally beyond cavil that the breach of this duty subjects the breaching party to damages. See 8 CMC § § 1821 (3) (enabling a spouse who did not consent to a conveyance or transfer of marital real property to recover the property or a compensatory judgment in place of the property); 1822(b) (enabling the claimant spouse to bring an action to recover the gift or a compensatory judgment against the donating spouse, the recipient of the gift or both); 1831(a) (providing for a remedy in favor of 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). Notwithstanding the statutorily-mandated time frames dictating the period within which such actions may be brought, however, Respondent failed to bring suit or protect her rights. Although Respondent claims that Petitioner wronged her by disposing of marital property without her knowledge, the court finds that Respondent knew Petitioner had found a mistress, knew that he gave gifts of marital property to her, knew that he built her a home, and knew that he had established a new family. Under these circumstances, Respondent's failure to take action within the period mandated by statute was inexcusable.

85. For the same reasons, Petitioner's charge that Respondent committed waste of marital property by withdrawing funds from the Twin Bear accounts and by loaning money to friends and relatives is equally untenable.

86. With regard to funds secreted in accounts under the name of Juan CH Reyes, however, as well as funds diverted from these accounts to Emily Siobal, the court makes a distinction. First, the evidence reflects that Respondent became aware of the $126,994.98 in accounts held in the name of Juan CH Reyes only during the pendency of this litigation and only after she stumbled upon them after attempting to unearth financial information during discovery. She learned of an additional $10,000 diverted to Emily Siobal the same way. Accordingly,

the court finds that Respondent is entitled to one-half of the funds diverted to these accounts or $68, 497.49. As reflected in the Judgment filed concurrently herewith, the court will treat this as a credit against any amounts owed to Petitioner based upon the distribution of the marital assets ordered herein. **[p. 32]**

III. DISTRIBUTION OF ASSETS, DEBTS, AND OBLIGATIONS

87. For the foregoing reasons, the court hereby distributes the marital properties as set forth in Exhibit "A" to the Judgment issued concurrently herewith.

IV. CHILD SUPPORT AND CUSTODY

88. In determining the amount to be paid by a parent for the support of a child, the court considers all relevant facts, including: (1) the needs of the child; (2) the standard of living and circumstances of the parents; (3) the relative financial means of the parents; (4) the earning ability of the parents; (5) the need and capacity of the child for education, including higher education; (6) the age of the child; (7) the financial resources and the earning ability of the child; (8) the responsibility of the parents for the support of others; and (9) the value of services contributed by the custodial parent. 8 CMC § 1715(e). Also to be considered is the financial impact of the amount of time the non-custodial spouse will spend with the child. *Santos v. Santos*, Slip Op. at 5-6.

89. 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. *See Santos v. Santos*, Slip Op. at 4-5. In determining child support, the primary focus is on the needs of the child. *Id.* However, a court should not order a party to pay more for expenses than he or she can afford. *Id.*

90. In the case at bar, the court had sufficient information to determine that a temporary award of $1,000 per month to the Petitioner was reasonable, based upon these factors. The court had before it the parties' financial affidavits reflecting the respective incomes of the parties, evidence of the parties' respective standards of living, evidence of their earning abilities, and their outstanding debts. Respondent, who was awarded custody of the minor children and

temporary possession of the marital residence, also testified that she required $3,242.00 to meet the monthly expenses of her family. While there was little, if any, additional testimony concerning the needs of the children apart from their expenses for private school, the court considered Petitioner's obligations to Ms. Siobal and their children, the income Petitioner derived from BPR, as well as the income derived from the Twin Bear apartments and the Oregon Home. **[p. 33]**

91. Following trial, Petitioner sought to modify the award of child support, pointing out that as of September 25, 1999, Marjorie Reyes reached the age of majority; she no longer attends school; and she has a child of her own. *See* Pet. Response to Court's Request for Supplementation of Record (filed Oct. 10, 2000). Petitioner further claims that Respondent has found employment with the Office of the Governor, Public Information Office, at a salary of $35,000 per year. See Declaration of Brian P. Reyes (filed July 11, 2000); Respondent's Income and Expense Declaration (filed September 26, 2000) (indicating monthly wages of $2,916.00). At the same time, Petitioner contends that Reyes Planning and Consulting is experiencing severe economic difficulties, that he has been forced to terminate several workers, and that his monthly income has been reduced to $1,000. In light of the substantial change in circumstances, Petitioner seeks an order from the court reducing the $1,000 monthly payment, awarding him half of the Twin Bear and Oregon rentals, and directing Respondent to assume responsibility for one-half the minor children's tuition fees.

92. In reviewing the parties' updated financial information, the court finds that Petitioner's income has decreased considerably, although cash reserves in the form of funds on deposit in checking and savings accounts have increased. At the same time, Respondent's income has increased significantly. Respondent's increase in income, combined with Marjorie Reyes' emancipation, constitute substantial changes in circumstances that merit a reduction in child support.

93. The child support obligation should be borne by both parents in proportion to the financial capability of each parent. As reflected in the most recently filed financial affidavits,

Petitioner's monthly income has been reduced to $1,000, while Respondent's monthly income, including the rental income from Twin Bear Apartments and the Oregon Home, amounts to $6,216.00. Therefore, Petitioner will bear 17% of the monthly amount necessary to support the children, and Respondent shall be responsible for 83% of these costs. Based upon the testimony of the parties, the court finds these expenses to be $3,242.00 plus additional monthly tuition fees of $625.00, or a total of $3,867.00. Taking the total of these expenses and multiplying them by Petitioner's share of these costs (.17), the court concludes that Petitioner's total monthly child support obligation to **[p. 34]** amount to $657.39. The remaining 83% of these expenses, or $3,209.61 shall be borne by Respondent.

94. The court finds, moreover, that it is in the best interests of the children for the parties to share joint legal custody of the minor children, for Respondent to continue as the custodial parent, and for Petitioner to continue to enjoy reasonable and ample visitation. It appears that the parties have agreed upon a schedule for visitation. To the extent that problems arise in this area that the parties cannot resolve by themselves, the court will retain jurisdiction and the parties may apply to the court for relief as needed.

V. MISCELLANEOUS RELIEF

95. Respondent requests the court to award her spousal support and attorney's fees, although, since February of 1998, she has been receiving all of the income from Twin Bear Apartments and the Oregon Home to enable her to support herself and to satisfy her obligations to support the minor children. Spousal support is appropriate in order to allow one spouse the time to seek or train for employment. *See Thornburgh v. Thornburgh*, App. No. 96-050 (N.M.I. Sup.Ct. Nov. 24, 1997). At the present time, however, Respondent is already employed and has considerable assets of her own. The court concludes, therefore, that spousal support is no longer appropriate.

96. As to attorney's fees, Respondent points once again to Petitioner's marital misconduct and also urges the court to consider the relative financial position of the parties at the time of trial, along with their conduct during the litigation. Respondent points to Petitioner's failure

to cooperate in the audit of BPR, his failure to respond to discovery requests in a timely manner, and his refusal to disclose significant financial assets, all of which she claims have significantly increased the cost of this litigation. Petitioner, on the other hand, counters that attorney's fees are not permitted by statute and are not warranted under the circumstances of this case.

97. Although Respondent has failed to introduce any evidence of her attorney's fees, the court does find some award of fees to Respondent is appropriate, in light of Petitioner's failure to cooperate in discovery and his unwillingness to provide financial information. Accordingly, the court will order Petitioner to pay to Respondent the sum of $5,000 to cover a portion of her attorney's fees **[p. 35]** incurred in connection with this action. This payment may also be used as a credit against any amounts owed to Petitioner based upon the distribution of the marital assets ordered above.

98. The children of the parties have resided in the marital home since the time it was built by the parties. They have continued to live there with their mother, moreover, since Petitioner elected to leave the home and reside elsewhere. Thus, it would be unjust to require Respondent to utilize the majority of her portion of the awarded marital assets in order to purchase suitable replacement housing for the children while Petitioner would have no such burden. Given the dual objectives of minimizing trauma to and maintaining stability for the children, moreover, the court finds it to be in the best interests of the children to award exclusive use and possession of the Marital Home to Respondent as the custodial parent until the youngest of the minor children reaches majority or until Respondent remarries or co-habits with an unrelated adult. *See Berard v. Berard*, 749 A.2d 577 (R.I. 2000); *Kanouse v. Kanouse*, 549 So.2d 1035 (Fla.App.4th Dist. 1989).[47] Therefore, for as long as she elects to remain in the Marital Residence, Petitioner shall be entitled to a nominal payment or credit for the rental value of the premises. *See In re Marriage of Ales*, 592 N.W.2d 698

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[47] *See also Cabrera v. Cabrera*, 484 So.2d 1338, 1340 (Fla.App. 1986) (dislocation of wife and child from marital home should not be imposed absent compelling circumstances); *Zeller v. Zeller*. 396 So.2d 1177, 1179 (Fla. App. 1981).

(Iowa.App.1999) (provisions which allow the primary physical care parent to remain in the family home are primarily made to provide stability for the children; the economic benefit to the parent is ancillary). For the duration of the time that Respondent occupies the marital residence, Petitioner shall be responsible for costs of insurance, for major repairs, and for payment of taxes, if any.[48] Respondent shall be responsible for routine repairs to the premises and for payment of all utilities.

99. The financial information provided by the parties suggests that any rental payment based on the fair market value of the home would only increase Respondent's expenses as well as Petitioner's income, and thus require a corresponding increase in Petitioner's child support obligations. To the **[p. 36]** extent that the parties wish to engage in such an exercise,[49] then within ten (10) days of the entry of judgment, the parties shall schedule the matter for hearing, and the court will decide the issue and, if necessary make appropriate adjustments in child support.

Dated this _27_ day of December, 2000.

/s/
TIMOTHY H. BELLAS, Associate Judge

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[48] Considering the share of marital assets awarded to Petitioner exclusive of his interest in the marital residence, Petitioner will have sufficient assets and income so that maintaining the marital residence in the manner prescribed by the final order of this court should not create a hardship for him.

[49] In this regard, the court notes that Petitioner is only paying $50.00 monthly for the house which he currently occupies, even though the Dan Dan residence has appraised for more than $201,000.00