**FOR PUBLICATION**

**APPEALS NOS. 01-002-GA & 01-003-GA**
**(Consolidated)**

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

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**BRIAN P. REYES,**
Plaintiff-Appellee,

**v.**

**JEANETTE P. REYES,**
Defendant-Appellant.

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Civil Action No. FCD-DI-97-0167

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**OPINION**

**Cite as: *Reyes v. Reyes*, 2004 MP 1**

Argued and submitted March 21, 2002
Decided January 15, 2004

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BEFORE: Castro and Manglona, Associate Justices and Cabullido, Justice *Pro Tem.*

CASTRO, Associate Justice:

¶1 Jeannette P. Reyes ("Jeannette") and Brian P. Reyes ("Brian") appeal and cross-appeal, respectively, from the trial court's December 27, 2000, decision regarding the dissolution of the parties' marriage and the distribution of marital property. The appeals were consolidated on August 5, 2003. The notices of appeal being timely, this Court has jurisdiction in accordance with N.M.I. Const. art. IV, § 3 and 1 CMC § 3102(a). We AFFIRM in part, REVERSE in part and REMAND with instructions.

## ISSUES PRESENTED AND STANDARD OF REVIEW

¶2 The issues brought on appeal consist of the following:

I. Did the trial court err in finding November 21, 1997, to be the date of the parties' separation?

II. Did the trial court err by making a prohibition against remarriage a condition of Jeannette and the minor children's occupancy of the family home and by requiring Jeannette to pay nominal rent to Brian?

III. Did the trial court err in granting Jeannette occupancy of the Papago House for 10 years and ordering Brian to maintain the premises?

IV. Did the trial court err in not crediting Brian for child support payments made for an emancipated child?

V. Did the trial court abuse its discretion in declining to consider marital fault in the distribution of marital properties?

VI. Did the trial court abuse its discretion in declining to find marital waste?

VII. Did the trial court err in valuing BPR Professional Services at $551,349.09?

VIII. Did the trial court abuse its discretion in finding that accounts in the First Savings and Loan Bank held in Brian's name, the name of third parties, or in the name of BPR Professional Services were marital property?

IX. Did the trial court err in finding that the estate owed $42,000 to Sabina Pangelinan?

X. Did the trial court abuse its discretion by holding that the dividends from UMDA and Mobil stocks were marital property?

XI. Did the trial court abuse its discretion in treating the improvements constructed on lots 514 NEW 7 and 514 NEW 8 as marital property?

XII. Did the trial court err in finding that Jeannette's marital property rights in the Dan Dan home were barred by the statute of limitations pursuant to 8 CMC § 1822?

XIII. Did the trial court err in finding that transmutation of separate property to marital property is not an automatic result of the construction of improvements on that property with marital funds?

XIV. Did the trial court commit clear error in granting attorney's fees?

XV. Does 1 CMC § 3404 that directs the CNMI Judiciary to issue opinions within one year violate the separation of powers doctrine?

¶3 This 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. *See Robinson v. Robinson*, 1 N.M.I. 81, 86 (1990). 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. *McNett v. McNett*, 501 P.2d 1059, 1061 (Idaho 1972). Whether the trial court correctly classified and distributed the parties' real property is a mixed question of law and fact. While mixed questions of law and fact are usually reviewed *de novo*, *see Agulto v. Northern Marianas Inv. Group Ltd.*, 4 N.M.I. 7, 9 (1993), the trial court's findings of fact are reviewed under the clearly erroneous standard, *see id*. at 10; *Rosario v. Quan*, 3 N.M.I. 269, 276-77 (1992), and we will not reverse those findings unless we are left with a firm and definite conviction that clear error has been made. *Camacho v. L & T Int'l Corp.*, 4 N.M.I. 323, 325 (1996).

## FACTUAL AND PROCEDURAL BACKGROUND

¶4 Jeannette and Brian were married on June 13, 1980, and the couple had four children together: Joshua, Brian, Jr., Marjorie and Joaquina.

¶5 At some point in the marriage, Brian initiated an extramarital affair with Emily Siobal ("Ms. Siobal"), who bore him two daughters. As a result of marital indiscretions and abuse, the marriage between Jeannette and Brian suffered and eventually broke down. On November 21, 1997, Brian filed for divorce.

¶6 On February 2, 1998, the trial court issued an order allowing Jeannette to occupy the marital residence in Papago. In addition, Jeannette retained custody of the minor children and was awarded all rental income from the Twin Bear apartment complex, constructed by the parties during their marriage. The trial court also ordered Brian to pay temporary child support.

¶7 On August 4, 1998, the matter of Brian's divorce request was tried. The trial court found insufficient evidence to support a divorce pursuant to 8 CMC § 1331(h) (separation of the parties for more than two years). However, Brian stipulated that Jeannette was entitled to divorce pursuant to 8 CMC § 1331(a) (adultery) and (b) (cruel treatment and neglect) and, on August 11, 1998, the trial court granted divorce.

¶8 The division of marital property was tried at the beginning of March 1999.

¶9 In March of 2000, the parties filed their respective responses noting corrections and objections to the trial court's proposed listing of marital properties proffered the previous month.

¶10 On September 8, 2000, the trial court determined that, for purposes of the MPA,[1] the parties separated on November 21, 1997, when Brian filed for divorce.

¶11 The trial court issued its ruling on December 27, 2000, and on January 26, 2001, Jeanette filed her notice of appeal. On February 8, 2001, Brian filed his notice of cross-appeal.[2]

## ANALYSIS

### I. The Trial Court Correctly Determined the Parties' Date of Separation.

¶12 Under the MPA, the date of separation for purposes of divorce is determined when the parties are living separately and apart with no "intent to resume the marriage relationship." 8 CMC § 1813(h). To determine if there has been a complete and final end to the marriage, the court looks at the parties' conduct, including relevant evidence such as joint vacations or visits, efforts at reconciliation, and the filing of taxes. *In re Marriage of von der Nuell*, 23 Cal. App. 4th 730, 736-37 (Cal. Ct. App. 1994); s*ee also Hanan v. Hanan*, Civ. No. 93-0643 (N.M.I. Super Ct. Dec. 1, 1994) (Decree of Divorce: Equitable Distribution of Marital Estate at 7-8). 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." *In re Marriage of von der Nuell*, 23 Cal. App 4th at 736. The trial court concluded that the parties continued to function socially and financially as a married couple up until the day Brian filed for divorce. We agree.

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[1] The Marital Property Act is codified at 8 CMC §§ 1811, *et seq.*

[2] This Court consolidated the appeals on August 5, 2003, because they originated from the same civil case, relied on the same nucleus of fact and presented similar issues on appeal.

¶13 Brian and Jeannette had a difficult marriage, by any definition, but the record clearly shows that they made good faith attempts to reconcile, including resuming cohabitation for a period of weeks in March 1996, before finally filing for divorce in November 1997. The MPA calls for a determination of the date of a true breakdown of the marriage with no present intent to resume the marriage relationship, 8 CMC § 1813(h). The record shows that Brian moved out of the family home on more than one occasion, but he did not take all of his personal possessions, including clothing. He also maintained a set of keys and came and went freely. Further, Brian continued to give gifts to his wife on birthdays and holidays, dined at the house approximately three times a week, and paid taxes jointly with Jeannette until late 1997.

¶14 In light of the relevant evidence presented as to the difficult nature of the marriage, the continuing social and financial unity of the couple, and ongoing attempts toward reconciliation up until the very end of the marriage, the trial court did not commit clear error in determining November 21, 1997, to be the parties' date of separation.

**II. The Trial Court Abused Its Discretion by Imposing Certain Conditions on Jeannette's Occupancy of the Family Home.**

¶15 Abundant precedent supports the trial court's judgment giving Jeannette the right to the exclusive use and possession of the marital home until such time as the youngest of the minor children reaches majority. *Berard v. Berard*, 749 A.2d 577 (R.I. 2000); *Kanouse v. Kanouse*, 549 So. 2d 1035, 1037 (Fla. Dist. Ct. App. 1989); *Cabrera v. Cabrera*, 484 So. 2d 1338 (Fla. Dist. Ct. App. 1986); *Zeller v. Zeller*, 396 So. 2d 1177 (Fla. Dist. Ct. App. 1981). However, the trial court also ordered that Jeannette's occupancy rights would terminate if she remarries or cohabits with an unrelated adult. Jeannette argues that the trial court abused its discretion by imposing these conditions on

her occupancy of the family home, as it negatively affects the children's stable home life.

¶16 Court orders that act to restrain a party to a divorce from remarriage, other than for cessation of alimony payments, have been deemed unenforceable or void as being against public policy. *Cox v. Cox*, No. 04-97-00951-CV, 1998 Tex. App. LEXIS 6852; *Isenhower v. Isenhower*, 666 P.2d 238, 241 (Okla. Ct. App. 1983). Also, attempts to connect the forfeiture of rights to occupancy of the family home with remarriage have been held to be unenforceable. *S.W. Bell Tel. Co. v. Gravitt*, 551 S.W.2d 421, 427 (Tex. Civ. App. 1976). The court in *Ales* held that a woman given exclusive use of the family home after divorce should not be forced to move out because her paramour moved in, despite the fact that she agreed to the condition in a prior settlement agreement, because her need for spousal support remained unchanged. *In re Marriage of Ales*, 592 N.W.2d 698 (Iowa Ct. App. 1999). Brian attempts to use the *Ales* case to support the proposition that prohibitions against remarriage or cohabitation are enforceable. This argument is untenable as the prohibition against remarriage or cohabitation in this case is based on occupancy of the family home and is thereby distinguishable from the holding in *Ales*, as the *Ales* court focused on the effect of remarriage or cohabitation on the obligations to pay alimony upon changed circumstances. *Id.* at 703.

¶17 The *Ales* case is instructive in its holding that provisions allowing the custodial parent to remain in the family home are primarily made to provide stability for the children. *Id.* at 704. The overarching consideration of this Court in determining the propriety of Jeannette's continued occupancy of the family home is protecting the best interests of the children. *See Robinson*, 1 N.M.I. at 88. As written, the trial court's order

serves no rational or legitimate purpose, as it would force the children from their home if their mother remarries.

¶18 The trial court abused its discretion in conditioning its grant of occupancy of the family home to Jeannette so long as she does not remarry or cohabitate with any unrelated male. The trial court's decision conflicts with this Court's policy toward protecting children, advocating families, and championing stability in the familial household and moreover is unenforceable. While courts have found modification of a spousal support agreement based on remarriage to be proper, even if it affects occupancy or maintenance of the family home,[3] it 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. We reverse and remand with instructions to delete the provision restricting Jeannette's occupancy of the family home based on remarriage or cohabitation with an unrelated male.

¶19 The trial court further abused its discretion by ruling that Brian should receive a nominal payment or credit of $57.39 per month for the rental value of the Papago home. The court was misguided in relying on *In re Marriage of Ales* for the proposition that a custodial parent must pay rent, when that court stated that the parent/occupant only receives an ancillary benefit from residing in the family home while the primary beneficiaries of the right are the minor children. *In re Marriage of Ales*, 592 N.W.2d at 704.

¶20 Ostensibly, the trial court awarded nominal rent to Brian to offset Jeanette's continued use of the family residence. However, Brian'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

[3] *See In re Marriage of Ales*, 592 N.W.2d 698 (Iowa Ct. App. 1999).

support his children. *See Pille v. Sanders*, App. No. 99-009 (N.M.I. Sup. Ct. June 28, 2000) (Opinion at 7) (*citing Seegert v. Zietlow*, 642 N.E.2d 697, 703 (Ohio Ct. App. 1994). Since the children were rightly allowed to continue living in the family home and Jeanette, the primary care giver, was granted continued occupancy of the home to care for the children, it is problematic to then charge her rent. In this instance, the nominal rent charged by Brian to Jeannette attaches to the children's occupancy of the family home and is inconsistent with the Commonwealth's strong interest in protecting children. *See Francis v. Welly*, App. No. 98-034 (N.M.I. Sup. Ct. Dec. 28, 1999) (Opinion at 5); *See also In re N.T.M.*, App No. 98-022 (N.M.I. Sup. Ct. Dec. 14, 1999) (Opinion at 3). Under the circumstances of this case, Brian may not charge a rental fee for Jeannette's occupancy of the family home.

¶21 The trial court abused its discretion by allowing Brian to charge a nominal rental fee that attached to the minor children's occupancy of the familial home. This is especially true when that rental fee has little impact on the financial status of the owner of the house or his ability to maintain and repair the premises. Jeannette's occupancy of the family home enables her to be a reliable parental presence and provides a tangible benefit to the children. We reverse and remand for instructions to strike the provision awarding rental value of the family home to Brian.

**III. Occupancy and Maintenance of Papago House Were Properly Assigned.**

¶22 As stated *supra*, ensuring the safety and well being of the parties' children is of the utmost importance in divorce proceedings. *Robinson*, 1 N.M.I. at 88. When assigning a parent's child support obligation to minor children, the court assesses all relevant facts, including the relative financial means and earning capacity of each parent.

8 CMC § 1715(e). After carefully reviewing the individual financial affidavits presented by each parent, the trial court deemed Jeannette to be in a superior financial position based on her cash flow. The trial court assigned Jeannette 83% of the costs associated with supporting the children. When viewed with his assignment of 17% of child support obligations and his considerable cash reserves[4] and assets, including title to the Papago property, Brian's complaints regarding his obligation to maintain the children's home in Papago are not well founded.

¶23 The trial court did not abuse its discretion in finding that the best interests of the minor children required an order allowing Jeannette, as custodial parent, to continue to occupy the marital home as the primary caretaker while ordering Brian, as owner of the property, to pay for maintenance of the children's residence.

**IV. Child Support Payments Correctly Accounted.**

¶24 In its decision on December 27, 2000, the trial court ordered Brian to pay child support of $657.39[5] per month for the minor children. *Reyes v. Reyes*, Civ. No. 97-0167 (N.M.I. Super. Ct. Dec. 27, 2000) (Decision Following Trial at 33-34) ("Decision Following Trial"). After trial and prior to its decision, the trial court ordered Brian to pay $1,000 a month as reasonable child support based on the parties' financial affidavits. On September 25, 1999, Marjorie Reyes turned eighteen and became an emancipated adult. 8 CMC § 1106. Brian filed a motion to reduce his child support obligation based on the fact that Marjorie was no longer a minor. The court heard the motion and stated that there was no reason Brian would have to continue providing support for Marjorie,

[4] While determining the parties' respective child support obligations, the trial court noted that Brian's income decreased, but that cash reserves in checking and savings accounts increased.

[5] The court ordered Jeannette to shoulder child support of three thousand two hundred nine dollars and sixty-one cents ($3,209.61) per month.

but that resolution of the matter would be included in the decision and order to be issued the following month. Brian contends that the trial court's decision improperly failed to credit him for $342.61 paid monthly in temporary child support that exceeded his final child support obligation amount.

¶25 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. *Parker v. McDaniel*, 288 So. 2d 86, 87 (La. Ct. App. 1974); *Becker v. Becker*, 387 A.2d 317, 319-20 (Md. Ct. Spec. App. 1978); *Jerry v. Jerry*, 361 S.W.2d 92 (Ark. 1962); *Rhodes v. Gilpin*, 264 A.2d 497, 499 (D.C. 1970); *Lusk v. Lusk*, 537 S.W.2d 874, 878 (Mo. Ct. App. 1976); *Beaird v. Beaird*, 380 S.W.2d 730, 732 (Tex. Civ. App. 1964). 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. *Hamiter v. Torrence*, 717 N.E.2d 1249, 1253 (Ind. Ct. App. 1999). The costs associated with raising children are not static and the needs of one child can be vastly different than the next. *Becker*, 387 A.2d at 319. Further, the continual rise in the cost of living, inflation, and other factors should mitigate pro rata reductions if a single child reaches majority. *Id*. Unforeseen costs such as medical or dental expenses necessitate that child support not be based on penurious rules. *Parker*, 288 So. 2d at 87.

¶26 In its decision, the trial court declined to include any credit to Brian for temporary child support payments made after one of the parties' children reached the age of majority. The temporary child support payments were based on Brian's financial position relative to Jeannette and meant for the care of the children as a whole. The trial

court did not abuse its discretion in declining to credit Brian for temporary child support payments made after one of the children reached the age of majority during the temporary child support period.

## V. The Trial Court Properly Declined to Include Fault as a Factor in the Distribution of the Marital Estate.

¶27 In *Ada v. Sablan*, this Court defined the patte pareho[6] doctrine and overruled the antiquated common-law principle that all property acquired during marriage belonged to the husband separately. *Ada v. Sablan*, 1 N.M.I. 415, 423-24 (1990). Following the direction of the equal protection clause of the Commonwealth Constitution, Article I, Section 6,[7] 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. *Id.* at 426-29. The MPA codifies the patte pareho doctrine in Commonwealth law and is based on the UNIF. MARITAL PROP. ACT, 9A U.L.A. 97 (1987). *See* Commission Comment at 8 CMC §1811. A clear aim of the MPA is ensuring that each spouse has an undivided one-half interest in marital property. 8 CMC § 1820(c). Within the dictates of the MPA, the trial court has broad discretion in dividing marital property on divorce. *See Dobbs v. Dobbs*, 452 So. 2d 872, 873 (Ala. Civ. App. 1984); *Williams v. Williams*, 375 S.E.2d 349, 350 (S.C. Ct. App. 1988); *In re Marriage of Popp*, 767 P.2d 871, 873 (Mont. 1989). With this background, we turn to the consideration of fault in dividing property on divorce.

[6] Patte pareho is a Chamorro custom giving both spouses an equal ownership interest in property acquired during marriage.

[7] Article I, Section 6 reads; "Equal Protection. No person shall be denied the equal protection of the laws. No person shall be denied the enjoyment of civil rights or be discriminated against in the exercise thereof on account of race, color, religion, ancestry or sex."

¶28 Many jurisdictions hold that a court should not consider fault or marital misconduct in dividing property on divorce. *See Markham v. Markham*, 909 P.2d 602, 608 (Haw. Ct. App. 1996) (spousal misconduct is irrelevant in determining the division of marital property); *In re Marriage of Griffin*, 860 P.2d 78, 79 (Mont. 1993). Some jurisdictions that consider marital fault do so when it relates to present or future financial circumstances of the parties, or in cases where the fault is so egregious that the failure to penalize it would be inequitable. *In re Marriage of Sommers*, 792 P.2d 1005, 1010-11 (Kan. 1990). Also, in jurisdictions where fault is considered, it is but one of the relevant factors analyzed and it does not preclude an equal distribution. *Noah v. Noah*, 491 So. 2d 1124, 1128 (Fla. 1986). Still other jurisdictions explicitly exclude consideration of marital fault but recognize economic fault by considering the effect of marital misconduct on parties' finances, including one party's depletion or dissipation of marital assets. *Romano v. Romano*, 632 So. 2d 207 (Fla. Dist. Ct. App. 1994); *see also Blickstein v. Blickstein*, 472 N.Y.S.2d 110, 113-14 (N.Y. App. Div. 1984).

¶29 Commonwealth law recognizes infidelity as grounds for divorce,[8] but an extramarital affair does not necessarily involve gross fiscal mismanagement or squandering of marital assets that may continue to harm an innocent spouse long after a divorce decree is final. *See In re Marriage of Steadman*, 821 P.2d 59, 60 (Wash. Ct. App. 1991). 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. *Id.*

[8] 8 CMC § 1331(a).

¶30 Patte pareho dictates that marital assets be divided equally on divorce and does not contemplate assessment of fault due to marital misconduct. *See Ada v. Sablan*, 1 N.M.I. 415, 423-24 (1990). The effect of martial 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. It is thereby the holding of this Court that the trial court did not abuse its discretion in declining to include adultery as a pertinent factor in the division of marital assets.

**VI. The Trial Court Did Not Receive Proof of Marital Waste.**

¶31 Brian claims that Jeannette committed marital waste by mishandling income from various marital properties including the Oregon house, the Twin Bear Apartments and a document handling business. 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. 8 CMC § 1814(a). It follows that the victim of a breach 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. 8 CMC § 1831(a). 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).

¶32 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. Com. R. App. P. 28(a)(4);

*see also Greer v. Greer*, 624 So. 2d 1076 (Ala. Civ. App 1993). Brian cites to a record of deposits and withdrawals from the Twin Bear Apartments as evidence of marital waste but makes no specific allegations as to actual misuse or mismanagement of that income. Appellee's Excerpts of Record at 149 and 158. Instead, Brian argues that this Court should find marital waste because use of the rental income from the Twin Bear Apartments is not adequately accounted for during the course of the parties' marriage. 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.

¶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. *See McNett v. McNett*, 501 P.2d 1059, 1061 (Idaho 1972). Without specific evidence to support claims of misuse, dissipation or gross mismanagement of marital assets, this Court will not overturn the lower court. As such, we find that after reviewing the scarce evidence before it, the trial court did not abuse its discretion in declining to find marital waste.

**VII. The Trial Court Correctly Valued BPR Professional Services.**

¶34 Parties each submitted a copy of BPR Professional Services' ("BPR") December 31, 1997, Balance Sheet ("balance sheet") and a Profit and Loss Statement from June 30, 1998. Decision Following Trial at 3. The balance sheet submitted to the trial court quoted the equity of BPR to be $551,349.09. Appellee's Excerpts of Record at 139. The trial court also received testimony from Brian who certified the balance sheet as accurate. Decision Following Trial at 3. The court-appointed auditor, David Burger, testified that

performance of a separate audit was hindered due to Brian's failure to cooperate. *Id*. at 4. The trial court received no other evidence relative to the value of the business other than the balance sheet and found its valuation to be "reasonable, if not conservative."[9] *Id*.

¶35 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. *See Robinson v. Robinson*, 1 N.M.I. 81, 86-89 (1990). Attempts to attain a separate audit of BPR were frustrated by Brian's lack of cooperation, and the trial court had no information beyond the balance sheet before it as to the actual value of BPR. As such, it reached the reasonable conclusion that the value on the balance sheet was correct. Therefore, the trial court did not abuse its discretion in valuing the assets of BPR based on the balance sheet because the parties certified the balance sheet as accurate, the court appointed auditor was prevented from conducting a separate audit, and no other evidence of the value of BPR was offered.

**VIII. The Trial Court Did Not Abuse Its Discretion in Classifying Accounts Held in the First Savings and Loan Bank as Marital Property.**

¶36 The trial court was called upon to determine whether the First Savings and Loan Bank ("FSLB") accounts in Juan CH Reyes' name and in the names of third parties were marital property. 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. *Ada v. Sablan*, 1 N.M.I. 415, 428 (1990). The presumption is nearly conclusive and may only be overcome by clear and convincing

[9] "[A] 1998 Profit and Loss Statement listed BPR's average monthly income for the first six months of 1998 to be $16,232.60. If the value of BPR is indeed only $551,349.09, then these figures represent an astounding return of approximately 35% per annum on the owner's equity." Decision Following Trial at 4.

evidence with any doubts to be resolved in favor of a finding of marital property. *Beam v. Beam*, 569 P.2d 719, 725 (Wash. Ct. App. 1977); *Kennedy v. Kennedy*, 379 P.2d 966, 969 (Ariz. 1963); *Porter v. Porter*, 195 P.2d 132, 136 (Ariz. 1948). Self-serving statements are not enough to overcome the presumption towards classifying property as marital. *In re Marriage of Janovich*, 632 P.2d 889, 891 (Wash. Ct. App. 1981); *Thaxton v. Thaxton*, 405 P.2d 932, 934 (N.M. 1965); *Carlson v. McCall*, 271 P.2d 1002 (Nev. 1954); *Shanafelt v. Holloman*, 296 P.2d 752 (N.M. 1956). 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. *See In Re Marriage of Stumpf*, 932 P.2d 845, 847 (Colo. Ct. App. 1996).

¶37 As the party claiming that the funds in the FSLB accounts in question belonged to him or third parties, Brian has the burden of proving to the trial court that the funds derived from his separate assets. Decision Following Trial at 20 (*citing Santos v. Santos*, App. No. 98-029 (N.M.I. Sup. Ct. May 10, 2000)(Opinion at 6)). 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. *Porter*, 195 P.2d at 137. At trial, Brian testified that the FSLB accounts at issue consisted of his separate funds, belonged to a third party, or were included in the division of marital property as part of the funds included in the BPR balance sheet. The trial court disagreed.

¶38 The funds in question can be divided into the following categories: Juan CH Reyes Accounts; Manobu Yamazaki Account; Children's Accounts; and Ms. Siobal's Accounts.

### A. Juan CH Reyes Accounts

¶39 Brian claims that accounts CD 03-10-01-017967, SV-03-07-039115, and SC-03-07-41590 were the separate property of his father, Juan CH Reyes. Trial testimony from Juan CH Reyes and Susie Williams, a representative of FSLB, as well as withdrawal slips with Juan CH Reyes' signature were admitted into evidence in an effort to prove that the money belonged to Juan CH Reyes. Brian offered the evidence to show that Juan CH Reyes controlled the funds in accounts in his name and that the money should not be classified as marital property.

¶40 However, that testimony was discredited by evidence of a withdrawal of approximately $80,000 from a marital account (BPR account # SV-03-07-030916) that coincided with a deposit of the same amount into account SV-03-07-051490, claimed by Brian to be his separate property. Decision Following Trial at 19. In *Santos v. Santos*, the Court held that mixed 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. *Santos,* (Opinion at 6) (*citing* 8 CMC § 1829(a)). 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. *Ada v. Sablan,* 1 N.M.I. 415, 428 (1990); *Barton v. Barton*, 973 P.2d 746 (Idaho 1999) (burden on party claiming separate property to trace property to separate source).

¶41 After reviewing the factual record before it, the trial court was unconvinced by Brian's testimony and found that he failed to trace the monies in the accounts held jointly with his father to separate property. Decision Following Trial at 31. At trial, Brian claimed that account CD-03-017967, with a value of $75,000, belonged to his father,

Juan CH Reyes. However, no evidence was proffered to indicate that the opening deposit on account came from a non-marital source. In fact, in the case of the largest account, the trial court found that the opening deposit undeniably consisted of marital funds. The trial court also noted that Brian damaged his credibility as a witness by failing to reveal the Juan CH Reyes accounts in the course of discovery and attempting to hide their very existence from Jeannette after their marriage collapsed. *See Thomas v. Thomas*, 690 P.2d 105, 110 (Ariz. Ct. App. 1984). The trial court eventually classified all of the Juan CH Reyes accounts as marital, subject to equal distribution between the parties with Jeannette's share treated as a credit against any amounts owed to Brian after complete distribution of the marital assets. Decision Following Trial at 31.

¶42 After reviewing the evidence, including the inconsistent testimony from Suzie Williams and Juan CH Reyes[10] and the actions by Brian to obfuscate the accounts, this Court does not find clear error in the actions of the trial court that would warrant overturning its factual findings classifying the Juan CH Reyes accounts as marital property.

**B. Manobu Yamazaki Account**

¶43 Jeanette challenges the trial court's classification of the funds in FSLB account SV-03-07-054247 ($28,437.14) in the name of Manobu Yamazaki as separate property. Brian testified that the funds in the account in Mr. Yamazaki's name belonged to Mr. Yamazaki as the owner of apartments managed by Brian. Brian claimed that money did not belong to him and was separate from the marital estate. Appellee's Supplemental Excerpts of R. ("S.E.R.") at 71-72.

[10] Juan did not recall having any accounts with Brian. Decision Following Trial at 19.

¶44 Jeannette's argument is based on the relatively small number of account transactions in relation to the management of multiple apartments.[11] However, the limited transaction history of an account, on its own, does not demonstrate clear error by the trial court in determining that the Yamazaki account was separate property. See *generally Camacho*, 4 N.M.I. 323. The trial court held that unrebutted trial testimony and exhibits offered into evidence indicated that funds in FSLB account SV-03-07-054247 were held in trust for Mr. Yamakazi to manage apartments and that Brian transferred those funds to Bank of Hawaii account 6879258679. Decision Following Trial at 21.

¶45 The trial court found the presumption toward marital property dispelled and classified the Yamakazi account as separate property. The testimony and exhibits entered into evidence at trial clearly convinced the trial court that Brian overcame the presumption towards marital property for the Yamazaki account. The trial court's determination that the funds in the Yamazaki account were separate property is clearly based on the evidence before it and we will not disturb that finding.

### C. The Children's Accounts Were Correctly Classified But Distribution Was Incomplete.

¶46 The trial court correctly classified the funds in numerous certificates of deposit ("CDs") CD 03-10-021059 ($51,062.32), CD 03-10-023841 ($2,000), and CD 03-10-021141 ($21,385.17) in the children's names ("children's accounts") as marital funds. Since all property is presumptively marital property and the accounts are in the names of the couple's children, then it follows that the funds would belong to each party equally and should be divided or controlled as such. *See Beam v. Beam*, 569 P.2d 719 (Wash. Ct.

[11]Jeannette contested the characterization of the Yamazaki account as separate property because there were few, sporadic deposits and no withdrawals from the account. She claimed that the transaction record does not reflect the regular deposit of rental income and withdrawal of funds for routine maintenance, as expected in an account connected to the management of apartments. Jeannette's Opening Br. at 15.

App. 1977). The trial court determined that the combined value of the CDs was included on the balance sheet of BPR (as accounts transferred from FSLB to Bank of Hawaii), although it was not explicit as to how they were included, and it declined to separately account for the distribution of those funds from the division of BPR assets in an effort to avoid charging one party twice for the same funds. Decision Following Trial at 21.

¶47 While the classification of the children's accounts as marital property is correct, the trial court did not adequately account for its distribution of the funds purported to be in the children's accounts to ensure that the accounts are correctly divided. The lower court relied on testimony from Rowena Masangcay, BPR's newly hired accountant, as to the combining of balances in all BPR accounts into one figure as the method of determining the total cash on hand belonging to Brian. Decision Following Trial at 21 n. 36. There is slight evidence on the record to show that the children's accounts were included in BPR's 1997 balance sheet, and, in fact, there is additional testimony from Ms. Masangcay that the CDs were specifically excluded from the balance sheet. Trial R. at 100; Appellant's S.E.R. at 8. This Court is also concerned that attempts by Brian to conceal the financial records of BPR and/or hinder efforts by a court appointed auditor might lead to an incorrect distribution of marital funds, including the children's accounts. Decision Following Trial at 3.

¶48 On review, it is clear that the funds in the children's accounts are marital property but the record is not sufficiently clear to allow this Court to ascertain whether the children's accounts are, or are not, included on the 1997 balance sheets.[12] Therefore, we remand this issue to the trial court with instructions for a full and final determination

[12] The trial court expressed doubt as to the location of the children's accounts and stated that the "accounts appear to be included" in the BPR balance sheet. Decision Following Trial at 21.

whether the children's accounts at issue, CD 03-10-021059 ($51,062.32), CD 03-10-023841 ($2,000), and CD 03-10-021141 ($21,385.17) were included in the BPR balance sheet.

**D. Accounts in Ms. Siobal's Name are Marital Property.**

¶49 The trial court found that the funds transferred into accounts opened in Ms. Siobal's name, CD-03-10-02113 ($10,692.58) and CD-03-10-023833 ($2,052.22) were marital funds and that those funds should be subject to equal distribution. The monies in the accounts of Ms. Siobal were gifts of marital property given Ms. Siobal by Brian and fall under 8 CMC § 1822, Gifts of Marital Property to Third Persons. Section 1822(b) of Title 8 states, in pertinent part,

> (b) If a gift of marital property by a spouse does not comply with subsection (a) of this section [over $500], the other spouse may bring an action to recover the property or a compensatory judgment in place of the property, to the extent of noncompliance. The other spouse may bring the action against the donating spouse, the recipient of the gift, or both. 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. If the recovery occurs during marriage, it is marital property. If the recovery occurs after a dissolution or the death of either spouse, it is limited to one-half of the value of the gift and is individual property.

8 CMC § 1822(b). The trial court was satisfied that Jeannette became aware of these gifts only during divorce proceedings when she unearthed financial information through discovery, and that she properly claimed her half interest in them. Decision Following Trial at 31.

¶50 We agree with the trial court's finding that the funds in accounts in Ms. Siobal's name were diverted from accounts originally containing marital funds, and, as such, are

subject to equal distribution.[13]

**IX. The Trial Court Correctly Classified the Amount Due to Sabina Pangelinan.**

¶51 Brian claims that there was no agreement to purchase land from Jeannette's mother, Sabina Pangelinan ("Ms. Pangelinan"), and that Jeannette gave marital funds to Ms. Pangelinan as a series of marital property gifts of which he seeks to recover his one half share. Jeannette and Ms. Pangelinan testified that the parties reached an agreement to transfer land and that an outstanding balance was owed on the purchase price. The trial court favorably received Jeannette and Ms. Pangelinan's testimony regarding the payments made from marital funds to Ms. Pangelinan for the As Lito property and took note of the quitclaim deed that transferred title to the property from Ms. Pagelinan to Jeanette and Brian as corroboration of that testimony. After weighing the evidence before it, the trial court determined that the parties indeed negotiated to purchase property from Ms. Pangelinan in As Lito and that $42,000 was owed as the outstanding balance due from the $100,000 purchase price. Decision Following Trial at 11.

¶52 Jeannette offered into evidence a written agreement to prove the transfer of real property from Ms. Pangelinan to Brian and Jeanette that was signed by Ms. Pangelinan. The agreement is not enforceable on its own against Brian and Jeannette because it lacked their counter-signatures as required by the statute of frauds. 2 CMC §§ 4911, *et seq*. However, the undated document lists the amount to be paid, the payment schedule of the transaction, and it identifies the property. Decision Following Trial at 10. Also presented into evidence by Ms. Pangelinan was a handwritten ledger showing partial

[13] The trial court also noted that distribution of Jeannette's one half share of the funds in the accounts in Ms. Siobal's name, as well as those in Juan CH Reyes name, would operate as a $68,497.49 credit in Jeannette's favor against any amounts owed to Brian after the distribution of marital assets. Decision Following Trial at 31.

performance of the transfer of land evidenced by a series of payments made by Jeannette against the outstanding balance. Jeannette's Exhibit F. Finally, Jeannette and Ms. Pangelinan provided testimony as to the agreement to purchase land and to the course of performance to date. Decision Following Trial at 10.

¶53 The trial court favorably received Jeannette and Ms. Pangelinan's testimony regarding payments made over time and took note of the quitclaim deed that transferred title to the property from Ms. Pagelinan to Jeanette and Brian. The trial court also weighed the credibility of the witnesses' testimony regarding the nature of Ms. Pangelinan's claim to disbursement of monies from the marital estate and found in her favor. This Court will not disturb the trial court's determinations of credibility. *Santos v. Santos*, App. No. 98-029 (N.M.I. Sup. Ct. May 10, 2000) (Opinion at 6-7) (*citing Williamson v. Williamson*, 586 A.2d 967, 972 (Pa. Super. Ct. 1991)).

¶54 Brian offers little evidence, other than conflicting testimony, that the As Lito property was received to satisfy loans made to Ms. Pangelinan as well as a defense based on the statute of frauds to counter the documentary evidence and testimony of Jeannette and Ms. Pangelinan in support of the agreement to transfer the As Lito property. While the document signed by Ms. Pangelinan is not a contract enforceable against Brian or Jeannette, it provides evidence of the terms of an agreement and may be enforced as to the purchase price against Ms. Pangelinan, as the party transferring the property, by Brian or Jeannette. *See* 2 CMC § 4912. Here, Jeannette is effectively enforcing a contract for the sale of the As Lito property for $100,000 pursuant to the terms of the agreement that Ms. Pangelinan signed.

¶55 The Supreme Court of Hawaii described the purpose of the statute of frauds as

being to prevent fraudulent enforcement of contracts that were never in fact made, and not to prevent performance of oral contracts that have in fact been made. *Glockner v. Town*, 42 Haw. 485, 486 (1958) (*citing* 37 C. J. S., *Statute of Frauds* § 217 (1943)). When analyzing a statute of frauds defense, the court "should always be satisfied with 'some note or memorandum' that is adequate, when considered with the admitted facts, the surrounding circumstances, and all explanatory and corroborative and rebutting evidence, to convince the court that there is no serious possibility of consummating a fraud by enforcement." *Id*. (*citing* 2 CORBIN ON CONTRACTS § 498 (West ed. 1950). In this case the totality of the evidence, including consistent testimony from Jeannette and Ms. Pangelinan, rebuttal testimony from Brian, and documentary evidence presented to describe the property, the purchase price, and a course of payment, convinced the trial court that no fraud would be consummated by enforcing the oral contract of sale. Further, Brian and Jeannette Reyes have benefited greatly from the transaction in dispute as they have received a sizeable sum to lease the property in As Lito to the La Mode Garment Factory and it is specious for Brian to argue that he should unjustly benefit from the transfer of land, the resulting lease of that land, and then receive half of the money paid to Ms. Pangelinan to acquire the As Lito property.

¶56 It is within the discretion of the trial court to adjudge the credibility of witnesses, weigh testimony and documentary evidence presented, and find an agreement for the sale of real property. The trial court did not abuse its discretion in awarding $42,000 from the marital estate to Ms. Pangelinan as the outstanding balance due from the sale of the As Lito property.

**X. Income from UMDA and Mobil Stocks Became Marital Property**.

¶57 The record is clear that 200 shares of UMDA stock and 20 shares of Mobil stock were purchased for Brian when he was a child and therefore were his unchallenged separate property. 8 CMC § 1820(f). Jeannette does not dispute Brian's claim of separate ownership of the stock. However, in dispute is whether income derived from the sale of stock becomes marital property when those funds are commingled with a marital bank account and lose their individual character. Commonwealth law clearly states, "[i]ncome earned or accrued by a spouse or attributable to property of a spouse during marriage and after the determination date is marital property." 8 CMC § 1820(d). For the purposes of distribution of assets in divorce, income is defined under 8 CMC § 1813(j), which reads, in pertinent part;

> "Income" means wages, salaries, commissions, bonuses, gratuities, payments in kind, deferred employment benefits, proceeds, other than death benefits, of a health, accident, or disability insurance policy, or of a plan, fund, program, or other arrangement providing benefits comparable to those forms of insurance, other economic benefits having value which are attributable to the effort of a spouse, dividends, interest, income from trusts, and net rents and other net returns attributable to investment, rental, licensing, or other use of property, unless attributable to a return of capital or to appreciation.

8 CMC § 1813(j). Finally, "mixing marital property with property having any other classification reclassifies the other property to marital property unless the component of the mixed property which is not marital property can be traced." 8 CMC § 1829(a).

¶58 Brian deposited proceeds from the sale of his stock into a marital account. 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). Here, the proceeds from the sale of stock were commingled with funds in a

marital account to the extent that the character of the funds unalterably changed from separate to marital property.

¶59 The trial court did not abuse its discretion in holding that income received from the sale of separate property loses its individual character and becomes marital property when commingled with marital funds such as a joint bank account to the extent that it can no longer be separately identified.

## XI. Lot 514-8 is Separate Property, and Lot 514-7 and the Barracks are Marital Property.

¶60 Brian inherited Lot 514-8 from his father and acquired Lot 514-7 through a quitclaim deed from a third party. The trial court found Lots 514-8 and 514-7 to be Brian's separate property[14] but the improvements built on Lot 514-8 were deemed to be a marital asset subject to equal division. Decision Following Trial at 7. At issue here is whether transmutation of Lots 514-7 and 514-8 ("Lots") occurred based on the improvements to the Lots paid for with marital funds and whether the admission of a single appraisal for the Lots effectively rendered the separate component of the mixed property untraceable. *See* 8 CMC § 1829(a).

¶61 The MPA classifies both real and personal property into three categories: (1) marital; (2) separate; or (3) mixed. *See* 8 CMC §§ 1820 and 1829. All properties owned by either party during the marriage and at the time of dissolution are presumed to be marital property. 8 CMC § 1820(b). Separate property is property owned prior to the marriage, or that was acquired during the marriage by gift or inheritance. 8 CMC § 1820(f) and (g). As one would expect, mixed property results from a combination of marital and separate property. *See* 8 CMC § 1829.

[14] 8 CMC § 1820(g)(1).

¶62 Jeannette argues that the construction of improvements on the Lots, paid for with marital funds, lead to transmutation of the underlying property because the separate component may no longer be traced. 8 CMC § 1829(a).[15] She contends that the two Lots were effectively joined and lost their separate component when both were improved through the construction of barracks to house employees of the family business. Further, in obtaining an appraisal of the Lots during divorce proceedings, Brian made no effort to separate either the value of Lot 514-8 as his individual property or the value of the improvements thereon.

¶63 Jeannette further argues that Brian did not rebut the MPA's presumption towards marital property by tracing Lots 514-7 and –8 to his separate property, and the trial court clearly erred in finding otherwise. She does not dispute the award of ownership of the barracks to Brian as part of the family business, but argues that the value of Lot 514-7 and the combined improvements to the Lots should count in the equal distribution of marital assets as an asset awarded to Brian.

¶64 Resolution of this issue depends on whether transmutation of the property took place. 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." *Miller v. Miller*, 428 S.E.2d 547, 551 (W. Va. 1993); *see also Mayhew v. Mayhew*, 475 S.E.2d 382, 391 (W. Va. 1996), *overruled on other grounds*, 519 S.E.2d 188 (1999). For example, the character of separate property is lost when the property is improved with marital funds

[15] 8 CMC § 1829(a) reads, in pertinent part, "mixing marital property with property having any other classification reclassifies the other property to marital property unless the component of the mixed property which is not marital property can be traced." 8 CMC § 1829(a).

and there is no effort to segregate the land from marital assets. *See Tubbs v. Tubbs*, 755 S.W.2d 423, 425 (Mo. Ct. App. 1988). However, constructing improvements on separately owned land does not, in and of itself, lead to transmutation when individual ownership may still be traced. *Santos v. Santos*, App. No. 98-029 (N.M.I. Sup. Ct. May 10, 2000) (Opinion at 6-8).

¶65 Brian's separate ownership of Lot 514-8 may be clearly traced to his inheritance from his father, Juan CH Reyes, so transmutation has not occurred as to that lot despite the building of barracks that are located, in part, on the property. Further, that a single appraisal including Lots 514-7, 514-8 and the barracks was admitted into evidence is attributable to the barracks location on both of the lots and the entire property's use in supporting the family business rather than an attempt to value the property as a single, marital source. The independent identity of each property is readily identifiable and the appraisal for the whole is helpful in making a valuation of the property as a BPR asset.

¶66 The trial court erred in mistakenly listing Lot 514-7 as Brian's separate property received through inheritance, Decision Following Trial at 25, when the property was actually received through a quitclaim deed to Brian during the parties' marriage. 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).

¶67 Lot 514-8 was correctly listed as Brian's separate property received through inheritance from his father, Juan CH Reyes. Decision Following Trial at 25. Further, the improvements built on the Lots were correctly treated as a marital property as they were built with marital funds. Therefore, we affirm the trial court's treatment of Lot 514-8 as

separate property and the improvements as marital property, but we correct its error in classifying Lot 514-7 as separate property and remand with instructions to divide the value of the Lot 514-7, at the time of separation, equally between the parties.

## XII. The Statute of Limitations for Recovery of a Marital Gift Under 8 CMC § 1822 Does Not Bar Jeannette's One Half Interest in the Dan Dan House.

¶68 The trial court concluded that the house constructed by Brian, on the Dan Dan property owned by Charles Reyes ("Charles"), with Charles' permission, belonged to Brian and was a marital asset as the funds used to construct the house were undisputedly marital. Decision Following Trial at 12-13. The general rule is that buildings on, or affixed to, the soil become part of the underlying land and belong to its owner. *In re Marriage of Didier*, 742 N.E.2d 808, 814 (Ill. App. Ct. 2000) (*citing* 41 AM. JUR. 2D *Improvements* § 3 (1995); 21 ILL. L. & PRAC. *Improvements* § 3 (1977)). However, an exception to this rule "is found in the well-established principle that a structure erected by one man on the land of another, with his permission, does not become a part of the real estate, but continues to be personal property of the person who erected it." *In re Marriage of Didier*, 742 N.E.2d at 814 (emphasis omitted). The trial court found Brian's testimony that the Dan Dan house belonged to Charles and that Brian only paid rent for its use unpersuasive. Also unconvincing was the lack of documentary evidence to support Brian's claims that he conveyed title to the Dan Dan house to anyone. Decision Following Trial at 12.

¶69 While the trial court correctly found the Dan Dan house to be marital property, it did not divide the value of the house equally because Jeannette failed to challenge the gift of marital property within three years as required by 8 CMC § 1822(b). An action by a spouse to recover a marital gift made by the other spouse must be commenced within one

year after the spouse has notice of the gift or three years after the gift was made, whichever is earlier. 8 CMC § 1822(b). The trial court determined that Jeannette knew of the Dan Dan house since 1991 and found her subsequent inaction in challenging the gift to be inexcusable neglect that caused the three-year statute of limitation to run. Decision Following Trial at 31.

¶70 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. 8 CMC § 1814(a). The trial court found that a breach of fiduciary duty occurred in this instance, as Brian secreted marital funds to erect the Dan Dan residence. Despite the breach of fiduciary duty, the court held that the three year statue of limitations of 8 CMC § 1822(b) barred Jeannette's recovery of half of the value of the Dan Dan house. In so holding, the trial court tacitly condones surreptitious behavior by a spouse and opens the door for abuse of the patte pareho doctrine through fraudulent gift claims used to improperly exclude marital property from equal division on divorce.

¶71 Absent concrete proof of the donor's intent to give a valuable gift, such as transfer of title or testimony of a witness as to the donative intent, along with receipt and acceptance of the gift by the donee, there is no way to prove that a gift was freely given or, if so, when a gift was given. *See Olsen v. Olsen*, 562 N.W.2d 797, 800 (Minn., 1997). Without recognizable proof of intent to convey a gift, as distinguished from a simple loan or temporary agreement to use, the potential for outright fraud and other bad faith "gift" transactions is unlimited. Here, the record contains no evidence from Brian, aside from self-serving statements, that the house built on Charles' property was a gift to Charles, to

Ms. Siobal, to his daughters with Ms. Siobal, or to anyone at all. Instead, the record shows that Brian constructed, possessed, maintained and improved the residence for an extended period during the course of the marriage.

¶72 Property built with marital funds is presumed to be marital property absent a clear showing that it is separate and should be divided equally on dissolution of marriage. *Ada v. Sablan*, 1 N.M.I. 415, 428 (1990). Brian constructed the Dan Dan house with marital funds and his unconvincing testimony failed to overcome the marital property presumption. The Dan Dan house was not conclusively conveyed to any person and Brian continued to control and improve the property during the course of the marriage. For the reasons stated above, we find that the trial court abused its discretion in holding that the Dan Dan house was a gift and that Jeannette was barred from challenging such a gift by the statute of limitations. The Dan Dan house is marital property and its value should be divided equally between the parties.

¶73 The trial court expressed difficulty in valuing the Dan Dan house because of the unsupported recollections of its construction cost in 1991, a property valuation made eight years after it was built and the unknown value of subsequent improvements made to the house. Decision Following Trial at 12. In the equitable distribution of marital properties, a property is to be valued as close as practicable to the date of trial. *Ogard v. Ogard*, 808 P.2d 815, 819 (Alaska 1991); s*ee also Rodriguez v. Rodriguez*, 908 P.2d 1007, 1012 (Alaska 1995) (property valued at time of trial). Despite the stated difficulties, the trial court recognized an appraisal of the Dan Dan house to be $174,622, which consisted of a total value of $201,000 less $26,378 for the value of the land. This valuation was based on the trial testimony of the appraiser, Mark Gruber. Decision

Following Trial at 12.

¶74 This Court fails to find any evidence of Brian's intent to convey the Dan Dan house, any proof that he conveyed the property, or any delivery of the property to a third party. The record shows that construction of the Dan Dan house was paid for with marital funds and Brian maintained ownership of the house at all times. While Jeannette was aware of the house long before the parties' separation, she sensibly did not challenge the construction cost as a marital gift because the house was not given to anyone. We agree with the trial court's decision insofar as it recognizes the Dan Dan residence as a marital asset but we reverse the trial court's exclusion of the house from the division of marital assets on dissolution of marriage due to the running of the statute of limitations pursuant to 8 CMC § 1822(b) and remand the issue for an equal distribution of its value of $174,622 as determined at the time of trial.

**XIII. Transmutation of Mixed Properties**

¶75 Brian received property in Papago from his father through partida and Jeannette's mother deeded property in As Lito to her. Undoubtedly, these unimproved lots were originally separate property. During the course of the marriage, the parties constructed a family home on the Papago property and constructed the Twin Bear Apartments on the As Lito property using marital funds. The construction of improvements on separate properties using marital funds creates mixed property. Mixed property is property that contains a combination of separate property and marital property and is presumed to be wholly marital unless ownership of the separate component can be traced. 8 CMC § 1829(a). When the commingling of separate and marital property renders the identity of the individual property lost and no longer traceable, then the property is correctly

classified as marital. *Santos v. Santos*, App. No. 98-029 (N.M.I. Sup. Ct. May 10, 2000) (Opinion at 6-8). 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. *Tubbs v. Tubbs*, 755 S.W.2d 423 (Mo. Ct. App. 1988).

¶76 Applying the notion of patte pareho, codified in the MPA, 8 CMC §§ 1811, *et. seq*., the trial court found that the value of improvements to the separate lands made during the course of a marriage were marital assets subject to equal division on divorce. *See Ada v. Sablan*, 1 N.M.I. at 418-21; *see also Lindemann v. Lindemann*, 960 P.2d 966 (Wash. Ct. App. 1998); *Bliss v. Bliss*, 898 P.2d 1081 (Idaho 1995). The trial court found that transmutation of the Papago and As Lito properties did not occur because separate ownership of the lands was clearly identifiable and the separate character of the property had not been so changed by the parties as to be lost. Decision Following Trial at 7. A different result occurs when intent to gift separate land to the marriage leads to transmutation of the underlying separate property. *See Santos v. Santos*, App. No. 98-029 (N.M.I. Sup. Ct. May 10, 2000).

¶77 The trial court found clear and convincing evidence of transmutation of the Oregon property based on Jeannette's addition of Brian's name to the title of the property. 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. *Lalime v. Lalime*, 629 A.2d 59, 60 (Me. 1993). The court weighed Jeannette's defenses of duress and coercion against evidence that she received advice from counsel before adding Brian's name to the title, and then

correctly classified the Oregon property as marital property.

¶78 The trial court did not abuse its discretion in determining that the Papago and As Lito Lots were separate property as individual ownership could be clearly traced to prior to the marriage. The equal division of the value of improvements built on the Papago and As Lito Lots using marital funds was also correct. Finally, there was no direct evidence of the parties' intent to convey the separately owned Papago or As Lito properties to the marital estate, while Jeanette's addition of Brian's name to the deed to the Oregon property was clear evidence of intent that transmutation of the Oregon property occur.

**XIV. The Trial Court Did Not Commit Clear Error in Granting Attorney's Fees.**

¶79 Brian claims the trial court's award of attorney's fees to Jeannette was clear error as there is no Commonwealth statute authorizing attorney's fees in divorce proceedings or evidentiary support for the award. In general, the award of attorney's fees is governed by the common law "American Rule," which states that parties must bear their own costs of litigation. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247, 95 S. Ct. 1612, 1616, 44 L. Ed. 2d 141, 147 (1975). The American Rule is based on "the philosophy that 'one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel.'" *Young v. Redman*, 128 Cal. Rptr. 86, 91 (Ca. Ct. App. 1976) (*quoting Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, 718, 87 S. Ct. 1404, 1407, 18 L. Ed. 2d 475, 478 (1967). There are several exceptions to the American Rule, which allow for the winning party to collect attorney's fees and costs. *Young*, 128 Cal

Rptr. at 91. The exceptions allow for attorney's fees when authorized by statute, agreed to by contract, or when allowed in judicially established equitable circumstances.[16] *Id*.

¶80 Commonwealth law does not expressly authorize the award of attorney's fees in divorce proceedings. Title 7, Section 3401 of the Commonwealth Code states that "in the absence of written law or local customary law to the contrary," the rules of "the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth." 7 CMC § 3401. Pursuant to Title 7, Section 3401, the common law American Rule applies in the award of attorney's fees in divorce proceedings.

¶81 Historically, Courts awarded reasonable attorney's fees to the wife in a divorce action based on the notion that a husband must support his wife. *In re Marriage of Johnson*, 568 N.E.2d 927 (Ill. App. Ct. 1991). However, Article 1, Section 6 of the Commonwealth Constitution nullifies such treatment in its preclusion of discrimination based on sex. N.M.I. Const. art. I, § 6. An award of attorney's fees based solely on gender is untenable discrimination based on sex in direct violation of the CNMI Constitution. Evolved gender roles are better addressed by updated methods of deciding whether to award attorney's fees, including a balancing of the equities such as the parties' relative need and ability to pay. *See Jackson v. Jackson*, 995 P.2d 1109, 1113 (Okla. 1999); *Montante v. Montante*, 627 So. 2d 554 (Fla. Dist. Ct. App. 1993) (failure to award attorney's fees despite husband's superior ability to pay and wife's need an abuse

[16] The commonly recognized equitable exceptions to the American Rule include the common fund, substantial benefit, private attorney general, third-party tort, and, applicable here, bad faith. *See Fleming v. Quigley*, 2003 Guam 4, 7 n.3 (*citing Trope v. Katz*, 902 P.2d 259, 263 (1995)).

of discretion).

¶82 Commonwealth Code sections dealing with divorce are silent as to the award of attorney's fees. *See* 8 CMC §§ 1331, *et seq*. This fact alone does not end the analysis, as Brian misinterprets the cases he cites as precedent for requiring statutory authorization before a court can award attorney's fees. *Vishner* stands for the proposition that in awarding attorney's fees, a court is governed by an existing statute not that such a statute is required before a court may award fees. *Vishner v. Vishner*, 271 P.2d 68, 69-70 (Cal. Ct. App. 1954). In fact, a court may award attorney's fees even without specific statutory authorization when an equitable exception to the American Rule, such as bad faith, is evident. *See Vaughan v. Atkinson*, 369 U.S. 527, 530, 82 S. Ct. 997, 999, 8 L. Ed. 2d 88, 91 (1962); *McEnteggart v. Cataldo*, 451 F.2d 1109, 1112 (1st Cir. 1971); *Bell v. Sch. Bd. of Powhatan County*, 321 F.2d 494, 500 (4th Cir. 1963); *Rolax v. Atlantic Coast Line R. Co*., 186 F.2d 473, 481 (4th Cir. 1951); 6 MOORE ON FEDERAL PRACTICE ¶54.77 [2] (2d ed. 1974).

¶83 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. *Trope v. Katz*, 45 Cal. Rptr. 2d 241, 245, 902 P.2d 259, 263 (1995); *Dussart v. Dussart*, 546 N.W.2d 109 (S.D. 1996) (court abused its discretion in failing to award wife's fees where husband created secret bank account during marriage to pay attorney's fees). Here, the trial court found that Brian delayed the litigation by refusing to cooperate in the audit of BPR, failing to promptly respond to discovery requests, and refusing to disclose significant assets. As a result of his bad faith actions, the trial court awarded $5,000 to Jeannette to cover a portion of her attorney's fees. Decision Following Trial at 34-35. We will not reverse the trial court's

award of attorney's fees to Jeannette based on Brian's failure to cooperate with discovery and unwillingness to provide financial information, especially in light of the parties' relative unequal financial position at the time of trial.

¶84 However, the trial court also noted that Jeannette "failed to introduce any evidence of her attorney's fees." Decision Following Trial at 34. When determining the reasonableness of an attorney's fees award, the court needs sufficient details to evaluate the reasonableness of time incurred. *See Copeland v. Marshall*, 641 F.2d 880 (U.S. App. 1980); *See also Schweiger v. China Doll Rest.*, 673 P.2d 927, 932 (Ariz. 1983). Here, the trial court did not review a detailed accounting of Jeannette's attorney's fees, but such an accounting was unnecessary because the lower court did not intend its award to cover all litigation costs. Instead, the trial court awarded the sum of $5,000 to cover a portion of Jeannette's attorney's fees in response to Brian's bad faith actions that prolonged litigation.

¶85 We defer to the discretion of the trial court in awarding a reasonable amount in attorney's fees meant to cover a portion of Jeannette's litigation expenses based on the bad faith exception to the American Rule against awarding attorney's fees in divorce. Jeanette's request for attorney's fees on appeal is denied as each party may now bear his or her own costs of litigation.

## XV. A Statute That Directs the CNMI Judiciary to Issue All Opinions Within One Year Violates the Separation of Powers Doctrine.

¶86 The parties' divorce proceedings initiated in March 1999 and the trial court issued its Decision Following Trial and Judgment on December 27, 2000, more than one year later. Section 3404 of Title 1 of the Commonwealth Code ("one-year time frame"), dealing with written opinions by the CNMI Judiciary, states:

> Decisions of the Supreme Court and of the Superior Court which determine a case and decisions which determine a substantial question of procedure or substantive law **shall be set forth in written opinions**, **with the reasons for the decision stated**, **within one year of submission of the case for decision**, and shall be published in consultation with the Law Revision Commission.

1 CMC § 3404 (emphasis added). On appeal, Brian claims that in issuing an opinion more than one year after it was submitted, the trial court violated Title 1, Section 3404, and in so doing, committed clear error. We disagree.[17]

¶87 Before addressing the applicability of Title 1, Section 3404, to the CNMI Judiciary, we note that Brian raises the issue for the first time in his appeal. The CNMI Supreme Court may consider an issue raised for the first time on appeal if: (1) it is one of law not relying on any factual record; (2) a new theory or issue has arisen because of a change in law while the appeal was pending; or (3) plain error occurred and an injustice might otherwise result unless the Court considers the issue. *Cushnie v. Bank of Guam*, 4 N.M.I. 198, 199-200 (1994). The exceptions to the general rule of denying consideration of issues first brought on appeal are narrow. *Bolalin v. Guam Publications, Inc.*, 4 N.M.I. 176, 181 (1994). In this instance, we choose to address this issue raised for the first time on appeal because it is a matter of law and does not rely on the factual record. This Court takes judicial notice of the procedural record including the date parties submitted this case for decision and the date the trial court issued the decision in order to determine compliance with Title 1, Section 3404.

[17] This Court acknowledged application of 1 CMC § 3404 to the Commonwealth Courts previously, and uses this opportunity to clarify its stance regarding the non-binding nature of the statute on the CNMI Judiciary. *See Office of the Attorney General v. Superior Court (Fabricante)*, Org. No. 99-001 (N.M.I. Sup. Ct. June 28, 1999) (Opinion at 9 fn.5).

¶88 While it is the policy of this Court not to consider constitutional issues unless necessary, *see In re Estate of Tudela*, 4 N.M.I. 1 (1993), review of Title 1, Section 3404, is warranted in this instance as protection of the independence of the CNMI Judiciary, as well as the other co-equal branches of the CNMI Government, is of the utmost importance. Another judicial policy guiding this Court is that when testing the constitutionality of a statute, the language will be construed in a manner consistent with constitutional limitations whenever possible. *In re Seman*, 3 N.M.I. 57, 73 (1992). We now turn to the application of the one-year time frame to the CNMI Judiciary.

¶89 Title 1, Section 3404, was promulgated as part of the Commonwealth Judicial Reorganization Act, enacted on May 2, 1989. PL 6-25, § 3. At that time, the Commonwealth Judiciary was a statutory court and did not have co-equal footing with the Executive and Legislative Branches. In 1997, an amendment to Article IV of the CNMI Constitution recognized the CNMI Judiciary as a constitutional court and a co-equal branch of the CNMI Government. Section 1 of House Legislative Initiative 10-3 contained the following language:

> Purpose. The Legislature initiates this proposed amendment because it recognizes that the judicial branch of the Commonwealth Government should be co-equal with and independent of the executive and legislative branches. The current N.M.I. Const. Art. IV does not provide constitutional status for the present structure of the courts reorganized pursuant of Public Law 6-25. The Legislature further recognizes that the judicial branch should be established in the Constitution to assure its independence from the executive and legislative branches.

House Legislative Initiative 10-3, HS1, HD1 § 1 (1997). The very nature of the CNMI Supreme Court was transformed by House Legislative Initiative 10-3 from a "statutory court into a constitutional judiciary." *Borja v. Tenorio*, 1998 MP 2 ¶12.

¶90 The Commonwealth Constitution ("CNMI Constitution") creates three separate,

coordinate and co-equal branches of government, the Legislative, Executive and Judicial. N.M.I. Const. art. II, § 1; N.M.I. art. III, § 1; and N.M.I. Const. art. IV, § 1. No branch may assert control over the others, except as provided in the constitution, and no branch may exercise the power granted by the constitution to another. *Sablan v. Tenorio*, 4 N.M.I. 351, 363-64 (1996). The CNMI Consitution defines the Judicial Branch and states "[t]he judicial power of the Commonwealth shall be vested in a judiciary of the Northern Mariana Islands which shall include one supreme court and one superior court and such other inferior courts as may be established by law." N.M.I. Const. art. IV, § 1.

¶91 As a constitutional court, this Court has "all inherent powers, including the power to issue all writs necessary to the complete exercise of its duties and jurisdiction under this constitution and the laws of the Commonwealth." N.M.I. Const. art. IV, § 3. This includes the power of the Court, through its Chief Justice, to submit rules to regulate civil and criminal procedure, judicial ethics, admission to and governance of the bar of the Commonwealth, and other matters of judicial administration. N.M.I. Const. art. IV, § 9; s*ee also Commonwealth v. Camacho,* 2002 MP 14 ¶15 (*quoting* Rosco Pound, *The Rule-Making Authority of the Courts*, 12 A.B.A. J. 555, 600-03 (1926)). The core function of the Commonwealth Court is to decide "cases and controversies properly before them." *United States v. Raines*, 362 U.S. 17, 20, 80 S. Ct. 519, 522, 4 L. Ed. 2d 524, 529 (1960). As a coordinate and separate branch of the CNMI Government, the CNMI Judiciary must remain free from undue interference with our decision-making function in the form of a statute imposing an arbitrary time limit to decide all cases before us.

¶92 A legislative enactment that unduly encroaches upon the inherent powers of the judiciary violates the separation of powers doctrine and is unenforceable. *Kunkel v.*

*Walton*, 689 N.E.2d 1047, 1051 (1997). In *Coate v. Omholt*, the Supreme Court of Montana struck down statutes that provided 90 day time limits within which the Montana Judiciary had to issue decisions. *Coate v. Omholt*, 662 P.2d 591 (Mont. 1983). The court held that the question of when cases were to be decided and the manner in which there were to be decided was a matter solely for the judicial branch of government to determine based on the separation of powers doctrine. *Id*. at 593.

¶93 In *Nevada v. Merialdo,* the Nevada Supreme Court struck down a statute requiring district judges to submit a monthly affidavit testifying that no cases were under advisement for more than 90 days before that judge could receive his salary. *Nevada v. Merialdo,* 268 P.2d 922 (Nev. 1954). The *Merialdo* court determined that the 90 day time period imposed on a judge coerced a decision and violated the separation of powers outlined in Nevada's Constitution. *Id*. at 926. In *Indiana ex rel. Kostas v. Johnson,* the court stated:

> [T]he court and not the legislature must be the judge of the order in which it will dispose of cases and what period of time proper disposition shall require. There may be, and probably are, abuses and unjustified delays by courts in the disposition of cases, but the remedy is within the judicial branch of the government, not the legislative, or perhaps at the polls when a delinquent judge comes up for reelection.[18]

*Indiana ex rel. Kostas v. Johnson*, 69 N.E.2d 592, 596 (Ind. 1946). Further, the Supreme Courts of Arkansas, Indiana, Ohio and Wisconsin also struck down statutes that limited the time within which courts could hear or determine cases. *Sands v. Albert Pike Motor Hotel*, 434 S.W.2d 288 (Ark. 1968) (statute requiring affirmance of decision after inaction for 60 days struck down); *Shario v. Ohio*, 138 N.E. 63 (Ohio 1922) (statute

[18] In the Commonwealth, judges and justices are subject to retention elections at the end of eight years for Justices and six years for Judges. N.M.I. Const. art. IV, § 5.

limiting time within which courts could hear or determine case struck down); *In re Grady*, 348 N.W.2d 559, 570 (Wis. 1984) (statute struck down because a reasonable time period for judicial decision-making may only be established by the supreme court); *Johnson*, 69 N.E.2d 592 (Ind. 1946) (statute requiring issuance of decision within 60 days unconstitutional); c*f. In re Tina T.*, 579 N.E.2d 48, 57 (Ind. 1991) (statute that forestalls entry of final decision until input from professionals regarding mental condition upheld).

¶94 Other courts have upheld legislative enactments that affect the judicial branch's decision-making function in limited circumstances. The United States Supreme Court held that the automatic stay provision of the Prison Litigation Reform Act of 1995, 18 U.S.C. §§ 3626, *et seq.* ("PLRA")[19] did not violate the separation of powers doctrine, because it simply established new standards for enforcement of prospective relief and encouraged courts to apply the new standards promptly. *Miller v. French*, 530 U.S. 327, 350, 120 S. Ct. 2246, 2260, 147 L. Ed. 2d 326, 344-46 (2000). The Oregon Supreme Court upheld a statute that expedited decision-making in special proceedings before the appellate court. *Oregon ex rel. Emerald People's Util. Dist. v. Joseph*, 640 P.2d 1011 (Or. 1982). The statutes upheld in these cases differ greatly from 1 CMC § 3404, because the PLRA properly influences the decision-making function rather than attempting to limit it and the Oregon statute applies only to special proceedings.

¶95 The one year time frame in Title 1, Section 3404, applies to all cases before the Commonwealth Courts. Such broad application is distinguishable from the automatic

[19] Under the PLRA's automatic stay provision, a motion to modify or terminate prospective relief operates as a stay during the period beginning 30 days after the filing of the motion, extendable up to 90 days, ending only when the court rules on the motion. 18 U.S.C. § 3626(e)(2)&(3).

stay provision of the PLRA that establishes standards for the entry and termination of prospective relief in civil actions specifically challenging prison conditions. Also, the PLRA does not prescribe a rule of decision on the court, instead, it provides a new legal standard for prospective relief and encourages courts to apply that standard promptly. *Miller*, 530 U.S. at 350, 120 S. Ct. at 2260, 147 L. Ed. 2d at 346. Conversely, the one year time frame is a blanket rule of decision irrespective of unique details, delays or difficulties encountered in deciding the myriad cases and controversies before the Commonwealth Courts.

¶96 The Oregon Supreme Court upheld a statute requiring the appellate court to expedite the appeal process in special proceedings. *Joseph,* 640 P.2d at 1014. The Court's reasoning was that the legislature's command for the court of appeals to hear cases within three months from the time of taking the appeal was proper as it did not on its face "unduly burden or unduly interfere with the judiciary in the exercise of its judicial function." *Id*. at 1013 (*citing Oregon ex rel. Acocella v. Allen*, 604 P.2d 391, 395 (1979)). Undue interference was held to mean that which makes it impossible, within the statutory deadline, for counsel to complete proper briefing and for the court to arrive at a reasoned decision. *Id*. at 1014. The Oregon Supreme Court stated, "[w]e do not infer in the abstract that the three-month limitation does or does not unduly interfere with the court's conscientiously and competently performing its judicial function." *Id*. Instead, the court's decision dealt directly with a statute that imposed a three-month time limit designed to expedite special proceedings dealing with the validity of bonds sold by governmental entities. *Id*. A clear distinction may be drawn between the Oregon Supreme Court's decision upholding a statute that applies a time frame for judicial

decision making in specialized proceedings with the one-year time frame of 1 CMC § 3404 that applies to all cases before the CNMI Judicial Branch regardless of the litigants, causes of action, or issues presented.

¶97 These decisions demonstrate that narrowly tailored statutory influence on the judiciary is not improper. The CNMI Legislature, itself a co-equal branch of government, is not without influence on the workings of the CNMI Judiciary. While control over court administration and procedure remains vested in the judicial branch by the Constitution, legislation may acceptably be used to augment its function. *See Kansas v. Mitchell*, 672 P.2d 1, 8-9 (1983). Pursuant to Article IV, Section 9(A), of the CNMI Constitution, the CNMI Legislature has what is, in effect, plenary veto power over the rules proposed by the Chief Justice of the CNMI Judiciary. N.M.I. Const. art. IV, § 9(A). This incongruous dynamic may survive separation of powers inquiry because the legislature may approve or disprove of the rules proposed by the Chief Justice but it may not modify or enact rules for the judiciary. *See In re McCabe*, 544 P.2d 825 (Mont. 1975).

¶98 A statute that imposes a one year deadline on the judiciary's exclusive role in adjudicating disputes is further distinguishable from proper uses of the legislature power to interact with the judiciary, such as enacting sentencing guidelines. The United States Supreme Court held that the people's elected representatives may properly deprive the courts of a nonprocedural function, such as sentencing discretion, by fixing the punishment of crime by statute. *Chapman v. United States*, 500 U.S. 453, 467, 111 S. Ct. 1919, 1928, 114 L. Ed. 2d 524, 539 (1991). However, Title 1, Section 3404 is a legislative enactment that directly interferes with the Court's primary constitutional

authority over court procedure and core function of adjudicating disputes.

¶99 The function of the legislature is indeed to create law, but it has no constitutional authority to modify or enact statutes that overrule court rules of procedure. *Lombardo v. Seydow-Weber*, 529 N.W.2d 702, 704-05 (Minn. Ct. App. 1995) (*citing Minnesota v. Johnson*, 514 N.W.2d 551, 553-54 (Minn. 1994)). In *Lombardo*, the court concluded, "[the] [c]reation of court procedure is purely a judicial function." *Id.* at 705. As a pure judicial function, the procedural rules of a court take precedence over statutes, to the extent that there is any inconsistency. *Minnesota v. Cermak*, 350 N.W.2d 328, 331 (1984); *Minnesota v. Keith*, 325 N.W.2d 641, 642 (1982).

¶100 In anticipation of the impact of House Legislative Initiative 10-3 on laws affecting the judiciary, the drafters stated "all laws, regulations, and rules affecting the judiciary shall continue to exist and operate as if established pursuant to this [N.M.I. Const.] Art. IV, and shall, unless clearly inconsistent, be read to be consistent with [N.M.I. Const.] Art. IV, as amended." House Legislative Initiative 10-3, HS1, HD1 § 3 (1997). Following the framer's guidance, this Court concludes that Section 3404's one-year time frame is a statutory imposition of a procedural rule that is clearly inconsistent with the independence of a constitutional court and unduly interferes with the CNMI Judiciary's decision-making function in violation of the separation of powers doctrine.

¶101 The setting and enforcement of time periods for judges and justices in the CNMI to decide cases is an area of authority exclusively reposed in the judicial branch of government. However, this Court declines to promulgate a procedural rule to limit the time frame within which it may issue a decision at this time.[20] The Court's reasoning is

[20] Rule 47 of the Rules of Appellate Procedure reserve the Court's ability to regulate its practice "in any matter not inconsistent with [appellate procedure] rules." Com. R. App. P. 47.

that an arbitrary time deadline, such as twelve months, fails to respect the unique attributes[21] of each case that compel a *sui generis* schedule. While a year may well be a reasonable amount of time to dispose of any single case, the CNMI Judiciary's docket reflects many and varied cases under advisement that require suitable time periods to fully and fairly adjudicate. Also, attempts to impose a time limit to expedite decision-making on this Court are decidedly superfluous as we are duty bound to follow the Commonwealth Code of Judicial Conduct, which includes Canon 3 requiring all Judges and Justices to perform his or her duties impartially and diligently, and to "dispose promptly of the business of the court." Com. C. Judic. Cond. Canon 3(A)(5).

¶102 The foremost considerations in the decision-making process of this Court are protecting the interests of the people of the Commonwealth, correctly interpreting and applying the law, and maintaining the integrity of the judicial system. It would be a grave disservice to the people of the Commonwealth if this Court rushed to judgment to meet the one year time frame prescribed in a legislative enactment that is blind to each case's respective requirements.

¶103 This Court strives to issue a final opinion in all cases brought on appeal well within a year but it may not be required to do so by general statute. The CNMI judiciary may choose to follow statutes that unduly interfere with its constitutional mandate as a rule of comity or it may use them as guidance, but it is not bound by such legislation.[22] This Court will not attempt to rewrite a statute or do violence to its plain language to avoid a constitutional infirmity, as that is a function of the legislature and not the

[21] Such facets include, but are not limited to, a proclivity of issues, the complexity of issues, recusal of Justices, appointment of *Pro Tem* Justices, voluminous caseloads, turnover of law clerks and other support staff, natural disasters, equipment malfunction, and off island calendaring.

[22] Arguably, the omission of a remedy in the language of 1 CMC § 3404, makes the statute function as a policy statement, with harmless error the natural result of an infraction.

judiciary. *In re Seman*, 3 N.M.I. 57, 74 (1992). The one year requirement in 1 CMC § 3404 is unenforceable as it violates the separation of powers doctrine of Article IV, Section 1 of the Commonwealth Constitution because the CNMI Legislature may not unduly interfere with the CNMI Judiciary's core function of adjudicating disputes.

**CONCLUSION**

¶104 For the reasons outlined above, we AFFIRM in part, REVERSE as to the prohibition against remarriage, the payment of rent for occupancy of the family home, the incomplete distribution of funds in the children's accounts, and the incorrect characterization of the Dan Dan House as a marital gift, and REMAND for further proceedings consistent with this opinion. We further declare that 1 CMC § 3404, that directs the CNMI Judiciary to issue all opinions within one year, is unenforceable as it violates the separation of powers doctrine of Article IV, Section 1 of the Commonwealth Constitution.

SO ORDERED THIS 15TH DAY OF JANUARY 2004.

/s/_____
ALEXANDRO C. CASTRO, ASSOCIATE JUSTICE

/s/_____
JOHN A. MANGLONA, ASSOCIATE JUSTICE

CARBULLIDO, Justice *Pro Tem*, Dissenting in Part:

¶105 I concur with the majority on issues I through XIV (¶¶1 through 85) of this opinion but I respectfully dissent from this Court's analysis of issue XV, the application of the one year time frame found in Title 1, Section 3404, in this case. Brian raises the

issue of the application of the one-year time frame for the first time in his appeal. This Court need not, and in this case should not, exercise its discretion to address this issue for the first time on appeal.

¶106 Assuming *arguendo* that one of the exceptions to the rule against addressing issues for the first time on appeal may apply in this instance, we need not apply it. While it is true that if this Court chooses to address an issue for the first time on appeal then the issue must fit within one of the exceptions described in *Cushnie*, it is also true that we are not required to address such issues. *See Cushnie*, 4 N.M.I. at 200. Application of the exceptions to the rule against addressing issues for the first time on appeal is wholly discretionary. I would choose not to address the application of the one-year time frame for the first time on appeal because in general, constitutional challenges should be thoroughly briefed, analyzed and examined. Brian has not made an adequate argument why this Court should deviate from this principle.

¶107 For the reason outlined above, I would decline to address the application of the one-year time frame found in 1 CMC § 3404, brought for the first time on appeal, and respectfully dissent on issue XV of the Court's analysis.

/s/_____
F. PHILIP CARBULLIDO, JUSTICE *PRO TEM*