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

IN THE MATTER OF THE ESTATE OF JOSEPH RUFO ROBERTO,
a.k.a. Joseph Rufu Roberto,
Deceased.

SUPREME COURT NO. CV-07-0006-GA
SUPERIOR COURT NO. 98-983D

Cite as: 2010 MP 7

Decided May 12, 2010

Douglas F. Cushnie, Saipan, Commonwealth of the Northern Mariana Islands, for Executor-Appellant
Brien Sers Nicholas, Saipan, Commonwealth of the Northern Mariana Islands, for Claimant-Appellee
BEFORE: ALEXANDRO C. CASTRO, Associate Justice; F. PHILIP CARBULLIDO, Justice Pro Tem; and ROBERT J. TORRES, Justice Pro Tem

CASTRO, J.:

¶ 1 The executor[1] of the estate of Joseph R. Roberto ("decedent") appeals the trial court's Order Granting Partial Removal of Non-Estate Assets ("removal order") on the grounds that the trial court failed to comply with the mandate and law of *In the Matter of the Estate of Roberto*, 2003 MP 16 ("*Roberto I*"). Appellee Matilde DLG Fejeran ("Fejeran") claims that this Court lacks jurisdiction to hear the appeal, and in the event that we find jurisdiction that the trial court did comply with the mandate and law of the case on remand. We find that this Court has jurisdiction to hear the appeal. We further hold that the trial court complied with the mandate and law of *Roberto I* with respect to certain assets, and that it did not do so concerning other assets. We therefore, AFFIRM in part, REVERSE in part, and REMAND this matter back to the trial court for determination consistent with this opinion.

I

¶ 2 Decedent was born in Guam on November 7, 1922, and he died in Saipan on July 14, 1998. The decedent either lived in Guam or on the U.S. mainland for most of his life. He moved to Saipan in 1990 or 1991 and shared a home with his first cousin Fejeran. Two of Fejeran's daughters, Teressa F. Saucedo and Anna F. Racomora, are also parties to this action. Decedent never married and has no children. Fejeran and the decedent had business dealings, they held several joint bank accounts, and Fejeran was the beneficiary and a co-trustee of a trust ("the Roberto Trust") that decedent created.[2] Decedent's only sibling was his brother Thomas John Roberto who died in Florida on June 26, 1999. Thomas Roberto is survived by his wife Jacqueleen F. Roberto, and his three children Joseph Lee Roberto, Michael L. Roberto, and Dolores Maria Roberto. These children are the only heirs to decedent's estate.

¶ 3 Probate proceedings began in 1998. The executor filed an initial inventory of the estate, and Fejeran, on her own behalf and as attorney in fact for her two daughters, filed a notice of claims thereto and requested service of pleadings. Subsequently, the executor twice supplemented the inventory, and Fejeran timely filed amended notices of her claims. Eventually, the trial court issued its Findings of Fact and Conclusions of Law in October 2001 ("2001 order"). Fejeran appealed this decision claiming that the trial court failed to exclude certain items of real and personal property from the estate. In response to Fejeran's appeal, this Court issued *Roberto I* that affirmed in part and reversed in part the 2001 order, and remanded the matter for further proceedings.

¶ 4 In response to *Roberto I*, the trial court issued the removal order in 2007. As stated above, the executor appeals the trial court's removal order on the grounds that the trial court failed to comply with

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[1] The estate's executor is decedent's nephew Joseph L. Roberto.

[2] The Roberto Trust contains twenty-three parcels of real property located in the Commonwealth. Decedent purchased these pieces of real estate and later placed the land into the trust to be managed for the benefit of Fejeran. Decedent, Decedent's brother Thomas Roberto, and Fejeran were co-trustees. As discussed extensively in *Roberto I*, while decedent owned the land in fee simple absolute, he was not of Northern Mariana Island descent.

the mandate and law of *Roberto I* on remand. The removal order excluded the following assets from decedent's estate: (1) the Roberto Trust, (2) Lot No. 1734-New-8, (3) Lot No. 1734-New-15 and past and future rental income derived therefrom, (4) the Pacific Financial Corporation Certificates of Deposits Nos. 2927, 3262, 3588, and 3590, and (5) Pacific Century Trust Account Numbers 140011651 and 140017153.

¶ 5 On February 2, 2007, the executor filed a motion for reconsideration with the trial court. In late February 2007, the executor also filed this appeal challenging the removal order pursuant to 8 CMC § 2206. Thirty days later the trial court vacated the scheduled hearings on the motion for reconsideration because the present appeal was pending. On March 29, 2007, the executor filed a motion to remand with this Court. Executor admits in his reply memorandum filed with the motion to remand that no procedure exists for this Court to grant the motion. Therefore, this Court declines to create a new procedural rule in order to address executor's motion to remand.[3]

II

¶ 6 The issues before us are two fold: (i) whether we have jurisdiction over this appeal under 8 CMC § 2206, and (ii) whether the trial court followed the mandate and law of *Roberto I*. Both are questions of law, and therefore, both are subject to a de novo standard of review. *Wabol v. Villacrusis*, 4 NMI 314, 315 (1995).[4]

III

A. The Commonwealth Constitution and Interlocutory Orders

¶ 7 In November 1997, House Legislative Initiative 10-3, HS1, HD1 (1997) amended Article IV of the Commonwealth Constitution. The initiative established this Court as the appellate and highest court of the Commonwealth with jurisdiction to "hear appeals from *final judgments and orders* of the Commonwealth superior court." NMI Const. art. IV § 3 (emphasis added). The initiative further stated that "all laws, regulations, and rules affecting the judiciary shall continue to exist as if established pursuant to this [amendment], and shall unless *clearly inconsistent*, be read to be consistent with [this amendment]." House Legislative Initiative 10-3, HS1, HD1 at 4 (emphasis added).

¶ 8 Recently, this Court had the opportunity to examine the interplay between the constitutional mandate of final judgments and orders under House Legislative Initiative 10-3, HS1, HD1 and appeals of non-final orders under 8 CMC § 2206. In *In re Estate of Pilar De Castro*, 2009 MP 3 ¶ 18, we cited

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[3] If executor wished for the trial court to hear his motion for reconsideration he should have filed a dismissal of this appeal pursuant to then applicable Com. R. App. Proc. 42(b).

[4] We acknowledge, as the dissent points out, that there may be other issues with the holding of *Roberto I*. Those matters are not properly before us at this time. We are only asked to determine whether the trial court complied with the mandate and law of the case when it issued its removal order.

Malite v. Tudela, 2007 MP 3 ¶ 21, for the proposition that 8 CMC § 2206 appeals are interlocutory. In *Malite*, the petitioners originally sought a writ of mandamus from this Court ordering attorney fees to be returned in a probate matter. *Id*. ¶ 1. The Court denied probate for the issuance of a writ, but we converted the petition into an 8 CMC § 2206 interlocutory appeal and found jurisdiction. *Id.* In doing so, the Court explicitly stated that:

> We have jurisdiction to hear this interlocutory appeal by virtue of 8 CMC section 2206, which grants the Heirs a right of appeal from an order either "directing or allowing the payment of a debt, claim, legacy, or attorney's fee . . . [or] refusing to make [such an] order . . . ." *Id*. ¶ 21 (quoting 8 CMC § 2206).

The *Malite* Court made clear that an "immediate appeal" is permitted when "section 2206's necessary prerequisites" are met. *Id*. *Malite*, however, did not explicitly address the issue of the potential inconsistency between 8 CMC § 2206 and the Commonwealth Constitution after the passage of House Legislative Initiative 10-3, HS1, HD1. We now take the opportunity to provide the rationale behind the continued applicability of 8 CMC § 2206 following the passage of the 1997 amendments to the Commonwealth Constitution.

¶ 9 In 1990, before the 1997 amendments to the Commonwealth Constitution, but after passage of 8 CMC § 2206 in 1984, the Court determined it was only able to hear appeals from final orders. *Commonwealth v. Hasinto*, 1 NMI 377, 385 (1990). This was the case even though there was no explicit requirement of finality under the Commonwealth Constitution or statutory law at that time. *Id*. at 380. Despite the finality requirement, the Court held that interlocutory appeals could be permitted where expressly allowed by statute. *Id.* at 385. Furthermore, the Court also noted that an additional exception to the finality rule occurred under the "collateral orders doctrine."[5] Under *Hasinto*, because the Court permitted interlocutory appeals authorized by statute, the appeals permitted by 8 CMC § 2206 would have been permissible before the passage of House Legislative Initiative 10-3, HS1, HD1.

¶ 10 When the 1997 amendments to the Commonwealth Constitution were passed, the intent was "[t]o amend Article IV of the Constitution of the Commonwealth of the Northern Marianna Islands so that the Judicial Branch, consisting of a Supreme Court and a Superior Court, would have a firm and secure constitutional foundation, co-equal with the Executive and Legislative Branches." House Legislative Initiative 10-3, HS1, HD1. In *Borja v. Tenorio*, we held that House Legislative Initiative 10-3, HS1, HD1 "did not change or give additional authority to the Court . . . . It merely turned a statutory court into a constitutional judiciary." 1998 MP 2 ¶ 12. Stated differently, this Court concluded that the amendments

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[5] Although not directly at issue in this case, the collateral order doctrine remains in effect today. Its continued existence is useful in our assessment of the applicability of the exceptions allowed by 8 CMC § 2206. *See Commonwealth v. Camacho*, 2002 MP 14 ¶ 1, n.1 (holding that interlocutory appeals are warranted when "the order constitutes a complete, formal, and in trial court, final rejection of the claim the order addresses").

did not fundamentally change the nature of the Commonwealth Supreme Court. Furthermore, in *Camacho*, this Court acknowledged that exceptions to the finality requirement first recognized before the 1997 amendments still existed after its passage. *Camacho*, 2002 MP 14 ¶ 1 n.1. Therefore, we hold that this Court still has jurisdiction to hear interlocutory appeals authorized by 8 CMC § 2206 in light of the Constitution's finality requirement because the statute is not clearly inconsistent with the Constitution.

B. Rule 54(b) Certification and the Separate Document Rule

¶ 11 We also find that the absence of a Rule 54(b) certification does not prevent this Court from exercising jurisdiction. Commonwealth Rule of Civil Procedure 54(b) is a mechanism by which non-final orders are deemed final by the trial court. Generally, non-final orders appealed to this Court must comply with this certification requirement. Orders under 8 CMC § 2206, however, do not require this certification because the probate statute is determinative of jurisdiction.[6] In other words, there is no need for Rule 54(b) certification in cases where a statute gives a party a right to appeal an interlocutory order. Therefore, 8 CMC § 2206 and not Commonwealth Rule of Civil Procedure 54(b) confers jurisdiction.

¶ 12 The separate document rule requires that a separate entry of judgment form be filed with the Superior Court Clerk before a matter can be appealed to this Court. *In re Estate of Pilar De Castro*, 2009 MP 3 ¶ 13. This Court finds that it has jurisdiction notwithstanding the requirement "that the separate document rule applies to 8 CMC § 2206." *Id*. ¶ 20. A separate entry of judgment document was not filed with the Superior Court Clerk for the removal order. The separate document rule will not, however, prevent us from exercising jurisdiction over this appeal because the parties waived its applicability. "[T]he separate document rule may be waived if a litigant requests that an appellate court set aside an appealable order," and "the non-appealing party does not contest the appeal on the basis of the separate document rule." *Id*. ¶ 21. In the present case, both of these waiver requirements are met. First, the executor requests that this Court set aside the trial court's removal order; second, Fejeran has not challenged our jurisdiction on the basis of the separate document rule. Therefore, the separate document rule is not a bar to jurisdiction in this case if an independent ground for jurisdiction exists.

C. Statutory Jurisdiction and the Law of the Case[7]

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[6] *In re Estate of Pilar De Castro*, 2009 MP 3 (finding jurisdiction to review an appeal under 8 CMC § 2206 without a finding of certification pursuant to NMI. R. Civ. P. 54(b)). *See also Matsunaga v. Matsunaga*, 2001 MP 11 ¶ 13 (the court may hear appeals from non-final orders when expressly allowed by statute).

[7] The dissent argues that *Roberto I* improperly exercised jurisdiction when it heard Fejeran's appeal from the trial court's 2001 order. We explicitly withhold judgment on the question of whether an appeal lies from a trial court's findings of fact and conclusions of law under 8 CMC § 2206. We do recognize, however, that California's *Estate of Thompson*, 61 Cal. App. 2d 188, 188 (1943), refused to hear such an appeal under repealed Probate Code § 1240. We are unwilling to reexamine *Roberto I's* jurisdictional foundation, potentially completely vacate the opinion, and reset the litigation circa 2001. After the denial of a Petition for Rehearing, *In the Matter of the Estate of Joseph Rufo Roberto*, 2004 MP 7, a dismissal from the Ninth Circuit, Appellee's Excerpts of Record ("ER") at 8, and the denial of a Petition for Cert from the United States Supreme Court, Appellee's ER at 11, such a course of

¶ 13 This Court has jurisdiction to hear the executor's appeal of the trial court's removal order. The executor brings this action under 8 CMC § 2206, which provides:

> An appeal may be taken from an order . . . determining heirship or the persons to whom distribution should be made or trust property should pass; distributing property; refusing to make any order mentioned in this section . . . . 8 CMC § 2206.

We have had few opportunities to discuss the jurisdictional contours of 8 CMC § 2206. The statute, however, virtually mirrors repealed California Probate Code § 1240. There are numerous California cases that interpret repealed Probate Code § 1240, including the language relevant to this appeal. Therefore, we will examine California jurisprudence for guidance in this matter.

¶ 14 In *Estate of Friedman*, 100 Cal. App. 3d 810, 813 n.2 (1979) (citing *Estate of Warner*, 162 Cal. App. 2d 799, 803 (1958)), a California court found that "[t]he right to appeal under section 1240 is determined by the effect of an order, not by its form."[8] The appeal concerned who would take estate assets in the event that the in terrorem clause of the will was violated. The court held that it had jurisdiction pursuant to repealed Probate Code § 1240. The court found that it could examine the in terrorem clause because the effect of the appeal concerned the distribution of estate assets even though the statute did not explicitly allow for appeals concerning in terrorem clauses. Thus, the appellate court had jurisdiction under the statute because the ultimate issue was the determination of which parties would take under the will.

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action at this time would work a manifest injustice upon the prevailing party who may have relied on *Roberto I's* finality regarding specific assets. In *Moriarty v. Svec*, 233 F.3d 955, 961 n.1 (7th Cir. 2000), the appellant argued for the second time before the court that the National Labor Relations Board was the sole body with jurisdiction to hear his "Claim I." The court, in rejecting this argument stated "[appellant] does not bring any new theories, but continues to argue the same ones that we considered in the first case. We rejected [appellant's] argument in our initial decision . . . and [appellant's] attempt to resurrect it without good reason is barred by the law of the case." *Id.* In *Estate of Aguirre v. Koruga*, 154 Fed. Appx. 652 (9th Cir. 2005), the estate challenged a jury's verdict that power of attorney could be awarded based on extrinsic evidence. The case had previously been appealed to the court, and an earlier panel held that a power of attorney could come into existence based on such evidence. In responding to the dissent, the majority explicitly found that "[r]egardless of whether we would have reached the same decision as the original panel, we cannot say that its decision was clearly erroneous. The prior panel was not so clearly mistaken in its interpretation of the Washington law as to defeat the law of the case." *Id.* at 653. Thus, it will take more than the same rehashed arguments by the executor, and claims by the dissent that it would have decided matters differently, for this Court to reopen *Roberto I* and potentially vacate the entire decision.

[8] *Estate of Estrem*, 107 P.2d 36, 38 (1940) (effect of order denying a motion to set aside will was to allow will into probate); *Estate of Hart*, 119 Cal. App. 2d 310, 313 (1953) ("order awarding the costs of the executors against Hart, Jr., was in effect an order refusing to direct the executors"); *Estate of Effron*, 117 Cal. App. 3d 915, 921 n.3 (1981) ("the legal effect here of the order refusing to start the process through which the Bank could have been discharged is the equivalent of the appealable order refusing to revoke letters testamentary"); *Estate of Richter*, 12 Cal. App. 4th 1361, 1366 (1993) (order that determined whether a proposed action violated a will's no contest clause was an appealable order because it determined heirship).

¶ 15 Similarly, *Maxine B. Dow v. Superior Court of City and County of San Francisco*, 140 Cal. App. 2d 399, 407 (1956), held that an order that directed the payment of money and distributed property and rights in property was appealable under repealed Probate Code § 1240. In contrast, in *Estate of Cole*, 106 Cal. App. 2d 823, 824 (1951), a distinction was made between an order "directing payment or allowing payment of a claim and an order of the court merely approving or allowing the claim." The court found that an appeal was not allowed for an order permitting a claim because assets were not being distributed as a result of the order. *Id*. Thus, these cases stand for the proposition that jurisdiction pursuant to repealed Probate Code § 1240 exists even though the language of the appeal does not precisely fit within the language of the statute when the legal effect of the order falls within the meaning of the statute.

¶ 16 Here, the trial court's removal order uses language that does not precisely fit within the types of appeals provided by 8 CMC § 2206 because the statute does not specifically allow for appeals from orders removing non-estate assets. Like in *Estate of Friedman* and the other cases cited above, however, the legal effect of the removal order determines which parties will receive which assets. The removal order, unlike *Estate of Cole*, is not a preliminary step in the probate process. Instead, the removal order is concerned with distributing property to parties in this probate case. Therefore, we hold that the legal effect of the removal order falls within the types of orders that are appealable under 8 CMC § 2206.

¶ 17 Before turning to the merits, we address the dissent's argument that the law of the case doctrine does not apply to the instant appeal and that we should revisit our opinion in *Roberto I* in resolving the issues involved in this appeal. The dissent states that "our failure to reconsider the *Roberto I* decision would not only wreak manifest injustice on the heirs of Roberto's Estate, but would also result in harm to the Commonwealth as a whole." Dissent ¶ 43. We disagree.

¶ 18 The law of the case doctrine developed to "maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." *Cushnie v. Arriola*, 2000 MP 7 ¶ 14 (quoting 18 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure: Jurisdiction § 4478 (1981) ("Wright & Miller")). The doctrine favors *finality* of court decisions, which:

> Is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if, as between parties and their privies, conclusiveness did not attend the judgment of such tribunals in respect of all matters properly put in issue, and actually determinate by them.

Aldan-Pierce v. Mafnas, 1999 MP 11 ¶ 16 (*citing Ute Indian Tribe of Uintah & Ouray Res v. Utah*, 114 F.3d 1513, 1524 (10th Cir. 1997) (*quoting Southern Pac. Ry. Co. v. United States*, 168 U.S. 1, 49 (1897))); *See Wabol*, 4 NMI at 318. While the doctrine is not a limit on a court's power, it is our practice to "generally refuse to reopen what has been decided," *Cushnie*, 2000 MP 7 ¶ 14, and rests on "the desire

to protect both court and parties against the burdens of repeated reargument by indefatigable diehards. . . ." *Camacho v. J.C. Tenorio Enterprises*, 2 NMI 407, 413-14 (1992) (quoting Wright & Miller). This policy "is true even where the court on remand disagrees with or finds error in the remanding court's decisions. *Wabol*, 4 NMI at 318 (citing *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). Like almost any legal principle, exceptions exist to its application, but none of those exceptions are present in this case. Specifically, there are no unusual circumstances present to warrant our review of *Roberto I*, and second there are no clear errors in *Roberto I* that would work a manifest injustice. *Cushie*, 2000 MP 7 ¶ 16; *Arizona v. California*, 460 U.S. 605, 619 n.8 (1982) (finding that the general rule is that a court may depart from a prior holding if it was clearly erroneous and would work a manifest injustice). As will be discussed later in the opinion, there is nothing in *Robert I* that is sufficient for this Court to abandon the law of the case and reopen a seven year old opinion.

IV

A. Roberto I's Law and Mandate

¶ 19 The executor claims that the removal order did not comply with the mandate and law of *Roberto I*. The assets from *Roberto I* consist of: (1) the Roberto Trust, (2) Lot No. 1734-New-8, (3) Pacific Financial Corporation Certificates of Deposits Nos. 2927, 3262, 3588, and 3590, (4) Pacific Century Trust Account No. 140011651, (5) Pacific Century Trust Account No. 140017153, and (6) Lot No. 1734-New-15 and the initial lease payment and subsequent lease income. While the executor did not appeal the removal order's distribution of the certificates of deposit, a brief discussion of those assets is necessary to determine whether the removal order properly distributed the initial lease payment.

1. The Roberto Trust

¶ 20 The Court in *Roberto I* ordered the trial court to award the Roberto Trust, and the parcels of land that constituted the trust res, to Fejeran as her sole property. *Roberto*, 2003 MP 16 ¶ 31. The Court ordered the trial court to exclude the trust res from the estate because none of decedent's heirs were of Northern Mariana descent, and therefore, the estate was prevented "from taking any interest in the land in the Roberto Trust." *Id.* ¶ 24. Additionally, we found that Fejeran was the beneficiary of the trust so she was the rightful taker of the trust property. *Id.* ¶ 21. The removal order awarded the properties held in the Roberto Trust to Fejeran in fee simple absolute. The order did not diverge from the remand instructions in any manner; therefore, we find that the trial court's removal order complied with the mandate and law of the case from *Roberto I* with respect to the Roberto Trust.

¶ 21 Upon first blush, *Roberto I* seemingly relies on two different strands of legal reasoning in awarding Fejeran all of the real property. On the one hand *Roberto I* apparently awards Fejeran the property on the ground that the decedent's possession of the property was void *ab initio* and on the other hand that Fejeran exercised her right of recovery within the statute of limitations timeframe pursuant to 2

CMC § 4991. *Roberto I* was our first case to discuss the applicability of the statute of limitations from 2 CMC § 4991 to Article XII claims.[9] *Roberto I* squared these two competing rationales by accepting that a sale of land to a non-NMD is void *ab initio*, but that the grantor may only recover the land within six years, and after that the government is the only entity capable of confiscating the property. *Id*. ¶ 25. We found the statute of limitations constitutional pursuant to Article XII, Section 6's enforcement powers. *Id*. ¶ 26. Thus, *Roberto I* has never stood for the proposition that land sales to non-NMDs are merely voidable instead of void *ab initio*, and the two principles coexisted in the context of our previous opinion. We are unwilling to rule that the statute of limitations is unconstitutional at this time, and without either approving or disapproving of *Robert I's* reasoning, we acknowledge that it will take a future appeal to challenge the constitutionality of 2 CMC § 4991 before we will pass judgment anew on the statute. We will not *sua sponte* decide that 2 CMC § 4491 is unconstitutional, and that *Roberto I* incorrectly found otherwise in the context of this appeal. This aspect of *Roberto I's* holding constitutes neither unusual circumstances nor a clear error that if left uncorrected would work a manifest injustice sufficient to allow us to reopen to law of the case and pass constitutional judgment at this time. Such a reversal of a recently established precedent demands briefing by the parties, oral argument, and an amicus brief filed by the Attorney General's office. Therefore, for the purposes of this appeal, we accept *Roberto I's* pronouncements concerning the statute of limitations as binding.

2. Lot No. 1734-New-8

¶ 22 *Roberto I* determined that Lot No. 1734-New-8 must be excluded from the estate and re-conveyed to the Roberto Trust. *Id.* ¶ 33. The Court found that the lot was initially part of the Roberto Trust, and that it was conveyed from the trust to the decedent by a quitclaim deed on August 19, 1997. *Id.* ¶ 32. The decedent, however, was not of Northern Mariana Island decedent, and thus, the form of title that he held violated Article XII. *Id.* ¶ 33. As a result, "[t]he conveyance of Lot 1734-New-8 from the Roberto Trust to Decedent violated Article XII and is void." *Id.* We found that the transaction "clearly violates Article XII and Ms. Fejeran, an interested party as both co-trustee and beneficiary of the Roberto Trust, challenged this transaction in a timely manner. . . ." *Id.* The Court remanded the matter and ordered that the lot be reconveyed back to the Roberto Trust, and therefore, to Fejeran. The trial court, following *Roberto I's* remand instructions, ordered the property returned to the Roberto Trust, and thus, to Fejeran in fee simple absolute. There is nothing in its disposition of the property that is in contravention with

[9] The case does not explicitly rely on the statute of limitations in ordering certain assets be awarded to Fejeran, and therefore it may be possible to interpret the statute of limitations language as dicta. We will not speculate on this matter now because it is inconsequential to determining whether the trial court followed the law and mandate of *Roberto I*. That opinion engaged in legal analysis, and then for every appealed asset, gave clear and unambiguous instructions for how it was to be distributed; since we are only asked whether the trial court followed those specific instructions, we will limit our discussion of *Roberto I's* legal analysis to only those areas where it is necessary to determine this appeal.

Roberto I. The lot was ordered back into the Roberto Trust, and thus, owned by Fejeran; therefore, the trial court followed the mandate and law of the case in *Roberto I* with respect to Lot No. 1734-New-8.

3. Pacific Financial Corporation Certificates of Deposits Nos. 2927, 3262, 3588, and 3590

¶ 23 We acknowledge that the executor did not challenge the removal order's disposition of the certificates of deposit. *Roberto I*, however, stated that the initial lease payment from Lot 1734-New-15 would be distributed in the same manner as the certificates of deposit and trust accounts because the initial lease payment was comingled with those funds. *Id.* ¶ 36. *Roberto I* ordered the trial court to distribute the certificates of deposit, or the proceeds therefrom, to Fejeran as her sole property. *Id.* ¶ 47. Accordingly, the trial court's removal order directed that the proceeds from the certificates of deposit be turned over to Fejeran. We keep this distribution in mind when we analyze the initial lease payment below.

4. Pacific Century Trust Account No. 140011651

¶ 24 The Court in *Roberto I* ordered that the proceeds from Pacific Century Trust Account number 140011651 be turned over to Fejeran. The Court found that despite Fejeran's name being removed from the account prior to decedent's death, it was decedent's intent "to maintain a joint tenancy with right of survivorship." *Id.* ¶ 42. *Roberto I* stated that the trial court "committed clear error" in not finding that the account was held in joint tenancy with the right of survivorship. *Id.* ¶ 42. As a result, "[o]n remand, the trial court shall order that the account, or account proceeds, be returned to Ms. Fejeran, with interest as appropriate." *Id.* ¶ 42. In response to *Roberto I*, the removal order stated that account 140011651 was the sole property of Fejeran, and ordered that the proceeds be turned over to her possession. Therefore, the removal order complied with the mandate and law of *Roberto I*.

¶ 25 We acknowledge that *Roberto I* broke with the common law when it awarded Pacific Century Trust Account No. 140011651 to Fejeran. *Roberto I*, based on extrinsic evidence, found that it was the decedent's intent for the accounts to remain joint accounts with the right of survivorship, and that the only reason Fejeran's name was removed was because the decedent did not want her soon-to-be ex-husband claiming any of those proceeds in the then upcoming divorce proceedings. *Id.* ¶ 38. *Roberto I* found that the account was established as a joint account with the right of survivorship, *id.* ¶ 37, that decedent wrote a letter indicating that Fejeran was still to have rights to authorize the account and sign on the account, and that a bank employee testified that the decedent wanted the account to remain a joint account and that he would add Fejeran's name once her divorce was finished. *Id.* ¶ 40. *Roberto I* concluded that even though her name was not on the account when he died that the evidence was overwhelming that he intended to maintain a joint account with the right of survivorship with Fejeran. *Id.* ¶ 42.

¶ 26 We acknowledge that this holding modified the common law rule concerning joint bank accounts with the rights of survivorship by creating an exception that states that the right of survivorship can

continue to exist based on extrinsic evidence sufficiently indicating the decedent's intent. Regardless of whether this rule constituted clear error for the purposes of overturning the law of the case, it does not work a manifest injustice. *Arizona*, 460 U.S. at 619 n. 8. *Roberto I* found that it was the decedent's intent for Fejeran to have the funds after his death, and we do not believe that this finding amounts to manifest injustice because it was supported by several pieces of extrinsic evidence. At this point in the litigation, we feel that manifest injustice would result from reopening *Roberto I* and redistributing the account proceeds. Therefore, the removal order properly awarded account 140011651 to Fejeran.

5. Pacific Century Trust Account No. 140017153

¶ 27 *Roberto I* ordered the trial court to make additional findings of fact to determine whether Pacific Century Trust Account No. 140017153 was held in joint tenancy with the right of survivorship or whether it was held in decedent's name alone. The Court stated that if it was a joint account then it should be disposed of in the same manner as account 140011651. If the trial court determined that account 140017153 was not held jointly between the decedent and Fejeran, then the account would be part of decedent's estate. The trial court determined that account 140017153 was the sole property of Fejeran. Its disposition of account 140017153 in the removal order mirrored its disposition of account 140011651. In making this ruling, however, the trial court did not make any findings of fact. Its order simply stated that account 140017153 was the sole property of Fejeran. Removal Order at 4. The trial court must determine the status of account 140017153 in light of *Roberto I's* analysis concerning how a joint bank account with the right of survivorship may continue to exist based on extrinsic evidence clearly indicating the decedent's intent. Therefore, we hold that the trial court did not comply with the mandate and law of *Roberto I*. We remand the determination of this account's status back to the trial court. We instruct the trial court to make findings of fact concerning whether Pacific Century Trust Account No. 140017153 was a joint account with right of survivorship, or whether it was decedent's personal property.

6. Lot No. 1734-New-15

¶ 28 The Court in *Roberto I* determined that Lot 1734-New-15 was originally part of the Roberto Trust as part of a larger parcel of land known as Lot 1734-New-R2. *Id.* ¶ 35. We did not, however, determine whether the lot was reconveyed to the decedent prior to it being leased to Calvary Christian Academy, or whether it was leased while it was still part of the Trust. Instead, we concluded that in either event, the lot would become Fejeran's property because it was either part of the Trust, or if it was reconveyed to the decedent it would be treated like Lot 1734-New-8, and Fejeran properly exercised her right of recovery as a co-trustee of the Roberto Trust. *Id*. Our mandate was clear that Fejeran would take possession of the property, *id.*, and the removal ordered followed our mandate by stating that "Lot No. 1734-New-15 is hereby excluded from this Estate and is awarded to Claimant Fejeran as her sole property in fee simple absolute . . . ." Removal Order at 2-3. We also ordered that the $99,000 initial lease payment be analyzed

similarly to Pacific Century and Pacific Financial accounts because the funds were commingled. All of the above accounts are to be awarded to Fejeran except account 140017153 because, as discussed above, the trial court must make additional findings of fact before it can determine who owns those proceeds. The removal order was silent regarding the initial lease payment, though it discussed the amounts that comprised the other accounts. The trial court must explicitly distribute the initial lease payment. We find that the law and mandate of *Roberto I* was not followed in disposing of the initial lease payment; therefore, we order the trial court to distribute the $99,000 initial lease payment in the same manner as the other accounts.

¶ 29 The removal order also specified that the lease income from Lot 1734-New-15 be turned over to Fejeran. The income that the executor possessed at the time of the removal order was $219,030 for September 2000 through October 2004. *Id*. at 3. From October 2004 through January 2007 the rental income was in held in trust by Calvary's attorney and totaled $123,011.58. *Id*. The trial court ordered that all of this money be turned over to Fejeran, and that all future rental payments were to be made to Fejeran. *Roberto I* did not discuss the rental income from Lot 1734-New-15, and we also failed to determine or order the trial court to determine, who owned the lot when the lease was entered into. Fejeran is entitled to the lease income regardless of whether the Roberto Trust or the decedent owned the lot when it was leased because if it was owned by the Trust when it was leased then the income is for the Trust's benefit, and if it was owned by the decedent then the reconveyance to him was void and Fejeran timely exercised her right of recovery. Under either factual scenario, the removal order properly distributed the lease income to Fejeran.

V

¶ 30 While we are mindful that our opinions may affect outside events as the dissent forewarns, our primary consideration, however, is to only address issues properly placed before us. Sometimes our decisions result in large social impacts, but the Commonwealth's jurisprudence cannot be driven by speculation and irrational fears that the judiciary's words will tear asunder the social and economic fabric of our community. The Court's duty is to apply the relevant facts to the applicable law and reach the conclusion that the law requires. We must always guard against deciding a case based on our personal predilections and opinions concerning the correct outcome. The law, not its interprets, provides the correct conclusion. In order to create the better jurisprudence and foster confidence in our judiciary, we must only address the dispute before us. While it may be difficult at times, we must not attempt to right all of the wrongs that the dispute created; such an approach to judging will cause far more harm in the long run than any temporary gain that the parties may enjoy from having the Court adjudicate issues not properly before it under guises such as "justice" and "exceptional circumstances." This type of an approach will effectively turn courts into casinos where parties spin the wheel by appealing and re-

appealing the same issues in the hopes that a new panel of justices will agree with their arguments; this will destroy the bedrock principle of finality. Once decided, a past opinion should not be overturned simply because a new panel of justices disagrees with its reasoning or outcome. The citizens of the Commonwealth benefit from a stable and dependable judiciary where finality and the rule of law are properly respected.

¶ 31 Therefore, we find that the removal order complied with the mandate and law of *Roberto I* with respect to (1) the Roberto Trust, (2) Lot No. 1734-New-8, (3) Lot No. 1734-New-15 and the subsequent lease income, and (4)Pacific Century Trust Account No. 140011651. The removal order did not comply with the mandate and law of the case in regards to (1) Pacific Century Trust Account No. 140017153, and (2) the initial lease payment for Lot No. 1734-New-15. Accordingly, we AFFIRM in part, REVERSE in part, and REMAND this matter back to the trial court for determination consistent with this opinion.

SO ORDERED this 12th day of May, 2010.

/s/____________________________
ALEXANDRO C. CASTRO
Associate Justice

/s/____________________________
F. PHILIP CARBULLIDO
Justice Pro Tem

TORRES, Just Pro Tem, concurring in part and dissenting in part:

¶ 32 I concur with the majority's assertion of jurisdiction over this appeal, but write separately to dissent from the analysis presented in Parts IV and V. This appeal squarely demands that we determine how the trial court should have disposed of the lease income from Lot 1734-New-15. The Majority acknowledges that *Roberto I* did not discuss the rental income or determine who owned the lot when the lease was entered into. *Supra,* ¶ 29. Consequently, there is no law of the case dictating how the lease income should be distributed. Nonetheless, the Majority would hold that Fejeran is entitled to the lease income. Our failure to present a coherent legal analysis to support such a holding is a dereliction of our duty as an appellate court to state the applicable law and apply it to the relevant facts.

¶ 33 Instead, to properly resolve this question requires us to both determine what *Roberto I* stood for, and to fill in a critical gap in *Roberto I.* We are obliged to choose between the two theories of ownership that "coexisted" in *Roberto I*, ¶ 21: namely, the theory that the non-NMD's long-term interest in land is void ab initio, and the theory that the non-NMD's interest is merely voidable. This determination in turn

requires us to interpret and articulate how the statute of limitations set forth in 2 CMC §4991 applies to the facts of this case.

¶ 34 Furthermore, the law of the case doctrine does not require us to reify other holdings of the *Roberto I* opinion that were clearly erroneous. For the most part, the trial court did not err in this case, but we did. In an appeal that asks us to determine whether the trial court complied with the mandate and law of *Roberto I,* we cannot ignore *Roberto I*'s statement of the law. This statement of the law was at best ambiguous and uncertain, giving the trial court little guidance on what law to apply in complying with our mandate, and at worst, clearly erroneous. Because the law of the case is inapplicable to questions that have not been fully litigated and squarely determined, and because unusual circumstances such as error justify suspending the doctrine, I believe we should take this opportunity to reconsider *Roberto I* now, before there has been a final adjudication of the rights of the parties.

I

The Law of the Case

¶ 35 The law of the case does not apply to a court's analysis of a question of law where the court has not made a final determination of the issue, either because the matter was expressly reserved by the court or because the previous opinion was ambiguous and uncertain. *See* 1B James Wm. Moore, Moore's Federal Practice ¶ 0.404[1], at II-5 (2d Ed. 1996) (law of the case doctrine applies to issues "fully briefed and squarely decided" in the first appeal; *see also In Re Monaghan's Estate*, 227 P.2d 227 (Ariz. 1951) (stating the longstanding rule of law of the case applies except when a matter is expressly reserved or when the previous decision is ambiguous and uncertain) and *Arizona v. California*, 460 U.S. 605, 615-28 (1982) (suggesting general principles of finality and repose apply only to matters that have been fully and fairly litigated). "*Roberto I* did not discuss the rental income from Lot 1734-New-15, and we also failed to determine or order the trial court to determine, who owned the lot when the lease was entered into." *Supra* ¶ 29. Consequently, no law of the case applies to our determination of how the lease income from Lot 1734-New-15 should be distributed.

¶ 36 Furthermore, the law of the case is not a jurisdictional bar to our reconsideration today of other holdings of *Roberto I.* This doctrine developed "to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." *Cushnie v. Arriola*, 2000 MP 7 ¶ 6 (quoting 18 C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure: Jurisdiction § 4478 (1981) (hereinafter Wright and Miller) (quotations omitted)). However, the law of the case "merely expresses the practice of the courts generally to refuse to reopen what has been decided, not a limit to their power." *Id.* at ¶ 6, *citing Messenger v. Anderson*, 225 U.S. 436, 444 (1912) and *Leslie Salt Co. v. U.S.*, 55 F.3d 1388, 1393 (9th Cir. 1995) (emphasis added). *See also Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988).

¶ 37 A longstanding exception to the law-of-the-case doctrine (or an instance when courts will exercise their discretion not to apply it) is where an appellate court concludes, on the second appeal, that its original decision was "clearly erroneous." *See, e.g., Galveston, Harrisburg & San Antonio Ry. Co. v. Faber*, 8 S.W. 64, 65 (Tex. 1888), cited approvingly in *Texas Parks & Wildlife Dept. v. Dearing*, 240 S.W.3d 330, 348 (Tex. Ct. App. 2007); *Johnson v. Cadillac Motor Car Co*. 261 Fed. 878 (2nd Cir. 1919) (not hesitating to overrule its earlier decision upon the identical case when upon careful reflection it determined that the principle of law which it had laid down was incorrect); *Diplomat Elec., Inc. v. Westinghouse Elec. Supply Co.* (430 F.2d 38, 48) (5th Cir. 1970) (stating that the decisions of law made by this court on the former appeal, the case having been remanded for a trial on the merits, under the doctrine of 'law of the case' were controlling on the trial court and are controlling on this court on this appeal, except as to a legal decision, which the appellate court on reexamination determines to be clearly erroneous); *Chicago & N.W. Transp. Co. v. United States*, 574 F.2d 926, 930 (7th Cir. 1978) (stating that a conviction on the part of the second reviewing court that the decision of the first was clearly erroneous is an unusual circumstance or compelling reason justifying suspension of the doctrine). *But see Wrist-Rocket Mfg. Co., Inc. v. Saunders Archery Co.*, 578 F.2d 727, 730-31 (8th Cir. 1978) (stating that the Eighth Circuit's policy is to not disturb matters decided on a previous appeal unless clearly erroneous and manifestly unjust); *accord Petition of U.S. Steel Corporation*, 479 F.2d 489, 494 (6th Cir.), cert. denied, 414 U.S. 859 (1973).

¶ 38 A Supreme Court in particular may refuse to be bound by considerations of consistency when the opinion on the former appeal was clearly erroneous. Thus, Chief Justice Hickman, writing for the Supreme Court of Texas, has stated:

> It would be unthinkable for this Court, after having granted the writ, reconsidered the case, and arrived at the conclusion that the opinion on the former appeal was clearly erroneous, to hold that it is bound by considerations of consistency to perpetuate that error. Our duty to administer justice under the law, as we conceive it, outweighs our duty to be consistent.

Connecticut General Life Ins. Co. v. Bryson, 219 S.W.2d 799 (Tex. 1949).

¶ 39 This Court has already adopted the majority view outlined above by holding for our jurisdiction that the law of the case does not bar a court from reconsidering a previously determined issue where unusual circumstances such as error are present. *Cushnie v. Arriola*, 2000 MP 7 ¶ 5, 6. In *Cushnie*, we found that the "apprehensive and uncertain nature" of a trial court's decision to grant summary judgment was clear from the record, and attributable to inadequate briefing by the parties. *Id.* ¶¶ 7-8. These facts were held to be sufficiently "unusual circumstances such as error" that precluded application of the doctrine. *Id.* ¶¶ 8-9. *Cushnie* did not even require a showing that failure to reconsider the decision would result in a manifest injustice before suspending the law of the case doctrine.

¶ 40 I am not unsympathetic to my colleagues' general reluctance to revisit the reasoning of the Court's previous opinion. Two important principles are in conflict when a court decides whether to apply the law of the case doctrine to bar its reconsideration of an earlier decision. The first principle is one of justice: that a judgment clearly erroneous should not stand. The second principle is one of public policy: that at some time there must be an end to litigation and a final decision that parties can rely on. The question we grapple with is not whether the principle of finality is important—it is. Instead, we must determine whether compelling circumstances override the concerns of finality and repose, counseling us to exercise our power today to reconsider a clearly erroneous decision so as to avoid manifest injustice.

¶ 41 Here, unusual circumstances are present—more unusual than the merely inadequate briefing in *Cushnie*—to justify finding the law of the case doctrine inapplicable. *Roberto I* clearly erred when it prematurely asserted jurisdiction over and determined matters that had not yet been considered by the trial court. *Roberto I* clearly erred in failing to properly apply the law to first determine whether Roberto was an individual of Northern Marianas descent. And *Roberto I* clearly erred in usurping the trial court's province as fact-finder and failing to apply common law precedent to determine whether the bank account was a joint tenancy without providing a reasoned legal justification for this departure. I am convinced that in this case, the conflict is easily resolved.. I would hold that it is proper herein to correct *Roberto I* so as to avoid manifest injustice, resolve ambiguities, and provide a clear statement of the law to guide the bench, the bar, investors, and the people of the Northern Marianas.

II

A. No law of the case governs the disposition of the income from the lease of Lot 1734-New-15

¶ 42 In *this* appeal, the Executor asserts that the trial court's order failed to address the question of current rents from the lease of the Calvary Christian Academy in light of the law of the case set forth in *Roberto I.* Appellant's Br. at 9. As the Majority acknowledges, *Roberto I* did not discuss the rental income from Lot 1734-New-15, and failed to determine or order the trial court to determine who owned the lot when the lease was entered into. *Supra,* ¶ 29. However, the Majority holds that Fejeran is entitled to the lease income regardless of whether the Roberto Trust or the decedent owned the lot when it was leased. *Id.* In fact, under either factual scenario, the outcome is *not* necessarily the same.

¶ 43 Determining proper disposition of the lease income requires us to explicitly determine whether Roberto had acquired an interest in land that was void from the moment it was conveyed to him, or whether he is entitled to some of the income earned because he acquired a valid possessory interest that

was only voided from the point in time when Ms. Fejeran asserted her claim. Answering this question also requires us to clarify the law with respect to the effect of the statute of limitations.[10]

¶ 44 In its original Findings of Fact and Conclusions of Law, the trial court had determined that on August 19, 1997, Roberto leased Lot 1734 NEW-15 to Calvary Christian Academy for a period of 55 years. *Finds. Fact & Concl. L.* at 4, #13. Prior to leasing the lot to the Academy, Roberto had held the lot in fee simple. *Id.* at 8, #6. However, the Court did not venture into determining the precise interest that the Estate had relative to the Calvary Christian Academy and Roberto's predecessor/grantor in owning the land. *Id.* at 8, n.30. Furthermore, the lease income had not yet been addressed by the trial court when it issued the Findings of Fact and Conclusions of Law that were the basis for the *Roberto I* appeal.[11]

¶ 45 In *Roberto I,* we looked to the record to determine that Lot 1734 New-15 was originally included in the Roberto Trust as part of a larger parcel, Lot 1734-New-R2, finding support in the trial testimony and our own examination of the relevant land surveys. *Roberto I* at ¶ 34-35. However, we did not adopt the trial court's factual determination that Roberto purported to have fee simple title to the Lot (implicit in which would be a determination that the Lot had been conveyed from the Trust to Roberto). Instead, we stated that, if Lot 1734 New-15 had remained in the Trust, it should be treated like the other Trust lands. On the other hand, if the Lot was subsequently reconveyed, "it must be treated like Lot 1734-New-8." *Roberto I* at ¶ 35. We did not remand for factual determination, perhaps because we presumed that, "[e]ither way, Lot 1734-New-15 must be excluded from the Estate and awarded to Ms. Fejeran." *Id.* On remand, the trial court ordered all the income to Ms. Fejeran, but made no further factual determination as to whether Lot 1734-New-15 had ever been reconveyed from the Trust. Order at 2-3.

¶46 The *Roberto I* opinion was our first to consider the application of the statute of limitations, 2 CMC §4991, on Article XII claims. *See supra*, ¶ 21; 2004 MP 7 (Den. Reh'g, May 12, 2004). Although neither *Roberto I* nor today's majority opinion seeks to do so, I believe it is important to lay out the

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[10] The Majority suggests in a footnote that this court did not explicitly rely on the statute of limitations in ordering certain assets be awarded to Fejeran in *Roberto I*, therefore, it may be possible to interpret the statute of limitations discussion as dicta. *See* n.9, above. It is well within this court's prerogative to characterize as dicta the three pages of *Roberto I* that discussed the statute of limitations, including a subheading stating "A non-NMD with Right of Possession May Pass Good Title, Subject to Recovery by the Grantor." *Roberto I* at ¶¶ 25-31. However, we are still taxed to determine today the question of how to dispose of the income from the lease of Lot 1734-New-15.

[11] This court addressed the initial payment of $99,000 for the lease, but not as a matter of allocating income from real property. Instead, it held that these funds had been commingled with other jointly held funds and therefore "no longer had a separate life;" consequently, the funds would be addressed when the court determined what to be done with the accounts into which they were deposited. *Roberto I* ¶ 36. Because there is no ambiguity in the opinion about the fact that funds would be treated as "no longer separate," I will treat this finding as the law of the case and not revisit here how the $99,000 should have been allocated. Instead, I adopt the majority's approach and will address the $99,000 below, in addressing the disposition of the disputed bank accounts.

Article XII framework within which this court must operate in determining how to construe the statute of limitations. Article XII provides that the acquisition of permanent and long-term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent. Art. XII, § 1. The term acquisition used in Section 1 includes acquisition by sale, lease, gift, inheritance or other means. Art. XII, § 2. The term permanent and long-term interests in real property used in Section 1 includes freehold interests. Art. XII, § 3 (ratified 1977, effective 1978; amended by Second Const. Conv. Amend. 35 (1985)). Any land transaction in violation of this provision shall be void. Art. XII, § 3 (ratified 1977, effective 1978; amended by Second Const. Conv. Amend. 35 (1985)). Any transaction made in violation of Section 1 shall be *void ab initio*. Art. XII, § 6 (effective 1978; amended by Second Const. Conv. Amend. 36, 1985).

¶ 47 We have already stated that the intention of drafters of Article XII, § 6 "could not be clearer." *Diamond Hotel Co., Ltd. v. Matsunaga*, 4 NMI 213 (1995), aff'd, 99 F.3d 296 (9th Cir. 1996). Any transaction which violates Article XII, § 1 is "completely without force and effect." *Id.* Under this Constitutional framework, it is readily evident that no legislative enactment short of a Constitutional amendment can change the law that a conveyance to a non-NMD in violation of Section 1 is *void ab initio.* Therefore, until there is a Constitutional amendment, we must construe the statute of limitations in a manner that does not give "force and effect" to a transaction that was a violation of Article XII § 1.

¶ 48 The majority now concedes that "upon first blush," *Roberto I* relied on two different strands of legal reasoning in awarding Fejeran all of the real property, but asserts that these "two principles coexisted in the context of the previous opinion." *See supra* ¶ 21. However, I would characterize these strands a little differently than they are characterized above. Under one approach, the Court seemed to apply the Article XII requirement that conveyance of a fee simple land to a non-NMD is *void ab initio,* allowing lands to revert to the Trust. *See Roberto I* at ¶ 33 (stating that Roberto, a non-NMD, held title in violation of Article XII when the trust conveyed Lot 1734-New-8 to him via quitclaim deed, and consequently the conveyance "is void").[12] This approach is consistent with *Manglona v. Kaipat*, in which

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[12] We stated:

> [T]he conveyance of Lot 1734-New-8 from the Roberto Trust to Decedent violated Article XII and is void. Lot 1734-New-8 was transferred out of the Roberto Trust and back into Decedent's name in 1997. Through this transaction, the Decedent acquired an interest in land in the Commonwealth. *See* N.M.I. Const. art. XII, § 2. We have established that Decedent is not a NMD and so may not acquire a fee simple interest in real property in the Commonwealth. *See supra* ¶¶ 18–20. Therefore, this transaction clearly violates Article XII and Ms. Fejeran, an interested party as both co-trustee and beneficiary of the Roberto Trust, challenged this transaction in a timely manner when she filed a notice of claims in the instant case.

Roberto I, ¶ 33.

we held that an interest in land taken in violation of Article XII reverted to the grantor, for such a transfer is *void ab initio*. *See Manglona v. Kaipat*, 3 NMI 322 (1992). It is also consistent with this Court's statement that such a transaction is "completely without force and effect." *Diamond Hotel Co., Ltd. v. Matsunaga*, 4 NMI 213 (1995), aff'd, 99 F.3d 296 (9th Cir. 1996).

¶ 49 Under the other approach, we purported to "decide how to dispose of land purchased in violation of Article XII by a non-NMD where the grantor is barred by the statute of limitations from asserting a claim on that land." *Roberto I*, ¶ 27. Applying the statute of limitations, we stated that a non-NMD has a right of possession in land superior to all but the original grantor exercising its right of recovery within the statute of limitations, and the non-NMD can transfer good fee simple title to one legally capable of acquiring it. *Roberto I,* ¶¶ 27, 30. This approach affords the non-NMD a *legally operable* interest in land that has been conveyed to him in violation of Article XII. Such a legally operable interest cannot be described as an interest that is *void ab initio*, or "completely without force and effect."[13]

¶ 50 In purporting to apply the statute of limitations to determine that Ms. Fejeran prevailed in her land claims, the *Roberto I* opinion did not present a careful analysis of the Article XII prohibition on a non-NMD's acquisition of long-term interests in land. Instead, we broke with the precedent of *Manglona* and *Diamond*, without expressly holding that former precedent interpreting Article XII had been superseded by the statute. It is understandable that the discussion was cursory, because it would be difficult to explain how a regular legislative enactment could supersede this court's interpretation of our Constitution.

Admittedly, this language is ambiguous. In one breath, we seem to apply a *void ab initio* theory (finding the conveyance from the Trust to Roberto violated Article XII and "is void"), and then seem to apply the "merely voidable" theory, applying the statute of limitations to find that Ms. Fejeran challenged the conveyance "in a timely manner." The difficulty with assuming that the opinion adopted the "merely voidable" approach is that our opinion failed to establish Ms. Fejeran's status as the grantor asserting her right of recovery, identifying her merely as one of three co-Trustees and a beneficiary of the Trust.

[13] On appeal, this Court determined how the Trust property should be disposed. We stated that, from the time of a land purchase, a non-NMD has a right of possession superior to that of any other person or entity except the grantor and possibly the Government. *Roberto I* , ¶ 27. This right of possession becomes superior even to the rights of the grantor after the statute of limitations has run. *Id.* Then, we set about to "decide how to dispose of land purchased in violation of Article XII by a non-NMD where the grantor is barred by the statute of limitations from asserting a claim on that land." *See id.* We found that a non-NMD purchaser with a right of possession based on an apparent fee simple interest, may pass good, fee-simple title to any person or entity legally capable of owning such an interest in the Commonwealth. *Id.* ¶ 30. The transaction may take any valid form, including by sale, by gift, through a will, or by operation of the laws governing intestate succession. *Id.* However, passing title from a non-NMD to a NMD does not cut off the right of the original grantor to seek return of the land under Article XII, so long as the statutory period for bringing such an action has not run. *Id.*

It necessarily follows from these articulated principles, that, if a non-NMD can transfer good, fee simple title, then the initial conveyance of land to a non-NMD is not void, but merely voidable if the grantor asserts its right of recovery within the statute of limitations, or the government confiscates the land.

¶ 51 The Executor contends on appeal that a non-NMD, i.e., a person who cannot hold a long-term interest in realty, other than a fifty-five year lease, may transfer to an NMD fee simple absolute title, and presumably, any lesser estate, to one who can so hold. *Id.* at 8. *Compare with Roberto I* at ¶ 30. If this reasoning is truly the law of the case, then Roberto was able to transfer his possessory interest by leasing the property, and his heirs, by operation of his will, could also benefit. If, as we stated in *Roberto I*, a non-NMD may enjoy a possessory interest in land, then presumably this possessory interest may also be transferred to another via a lease, and the non-NMD who transferred the possessory interest can enjoy its fruits, i.e. holds the right to the lease income. Under this analysis, if Lot 1734 New-15 was reconveyed from the Trust to Roberto, Roberto [and subsequently, his heirs] had the right to the lease income earned at least until the time that the possessory interest was extinguished.

¶ 52 Conversely, if the law of the case from *Roberto I* is that the conveyance of the lot from the Trust to Roberto was void *ab initio*, upon assertion of the grantor's right of recovery, the grantor would have the right to the income already earned. Similarly, if factual determination by the trial court reveals that the lot remained part of the Trust and was therefore leased for the benefit of the Trust, then the Trust, and ultimately Ms. Fejeran as the Trust's sole beneficiary, would be entitled to *all* the income.

¶ 53 It could be said that the distinction between "void" and "voidable" is all in the timing. If Roberto had a voidable possessory interest in the land, then his heirs should be entitled to income earned prior to the time this interest was voided. I would remand to the trial court for factual determination of whether Lot 1734-New-15 at all times remained part of the Trust or was conveyed to Roberto. I would also provide guidance to the trial court of what law to apply if it finds that the lot had been conveyed to Roberto; in other words, I would specify whether Roberto had a transferable possessory interest in the estate until the grantor exercised its right of recovery, or whether the conveyance to Roberto was void *ab initio*. *Roberto I* and the Majority in this appeal do not provide any such guidance.

B. Cumulative errors of Roberto I suggest the decision was neither well considered nor deliberately determined

¶ 54 I would not seek to reconsider a decision that had been previously well-considered and deliberately determined, even if I disagreed with its outcome. However, in numerous ways, this Court has fallen into mistake in *Roberto I*, and now should avail itself of the opportunity to revise its decision without reluctance. As expressed for the New York Court of Appeals in 1850 by Judge Harris:

> [The court] may, and undoubtedly ought, when satisfied that either itself, or its predecessor, has fallen into a mistake, to overrule its own error. I go farther, and hold it to be the duty of every judge and every court to examine its own decisions, and the decisions of other courts, without fear, and to revise them without reluctance. But when a question has been well considered and deliberately determined, whatever might have been the views of the court before which the question is again brought, had it been res nova, it is not at liberty to disturb or unsettle such decision, unless impelled by 'the most

> cogent reasons.' 'I cannot legislate,' said Lord Kenyon, 'but by my industry I can discover what my predecessors have done, and I will tread in their footsteps.'"

Baker v. Lorillard, 4 N.Y. 257, 261 (1850). I agree, and would find that it is the duty of the Court to examine its decision, and by its industry discover precedent to help guide its revision. The points of error discussed below, in tandem, demonstrate "unusual circumstances" that should preclude application of the doctrine of law of the case. *See Cushnie v. Arriola,* 2000 MP 7 ¶¶ 8-9.

a. Premature assertion of jurisdiction

¶ 55 Our troubles began with our assertion of jurisdiction over Ms. Fejeran's appeal from the Findings of Fact and Conclusions of Law issued by the trial court. *Roberto I* did not decide an appeal from an order purporting to dispose all of the assets before the court. Instead, it was an appeal from Findings of Fact and Conclusions of Law, and we neglected to include a statement of jurisdiction to explain why such an order constituted an appealable order to begin with. This is particularly noticeable in light of the in-depth analysis presented above in articulating our basis jurisdiction to hear *this* appeal. *See above,* ¶¶ 7 to 16.

¶56 As the Majority correctly states, our statute governing appealable probate orders, 8 CMC §2206, "virtually mirrors" repealed California Probate Code §1240. *See above*, ¶ 13. Although we are not bound by California decisions interpreting code provisions upon which ours are based, we look to such decisions for guidance. *See Commonwealth v. Martinez*, 4 NMI 18, 20 (1993) (looking to federal case law for guidance in interpreting our local counterpart to a federal rule of civil procedure). The California "case law is unanimous to the effect that an appeal does not lie from the findings of fact or conclusions of law. Therefore, [a] purported appeal from the findings of fact and conclusions of law must be dismissed." *In re Estate of Nielsen*, 22 Cal.Rptr. 260 (Cal. Ct. App. 1962), quoting *Brice v. Dept. of Alcoholic Bev. Control*, 314 P.2d 807, 809 (Cal. Ct. App. 1957). *See also* California Jurisprudence 3d, Appellate Review §99, Appealability of Judgments and Orders, Particular Judgments and Orders, Probate Matters, Generally, Nonappealable Orders (interpreting CPC §1240 and citing *In re Thompson's Estate*, 61 Cal. App. 2d 188 (Cal. Ct. App. 1943) ("Findings of fact and conclusions of law are no more appealable in probate proceedings than they are in other civil proceedings.")

¶57 Because we asserted jurisdiction over Findings that had not purported to dispose of all the assets at issue, we found it incumbent to determine factual and legal issues that had not yet been determined by the trial court. Observing that the trial court had as yet issued *no* ruling as to the disposition of the trust lands, and had not ruled on the ownership of Lots 1734-New-8 or 1734-New-15, we blazed forward, deciding it was our role to determine what was to be done with the lands. *Roberto I* ¶ 2 and ¶16. The resulting opinion did not consider important questions, for which the opportunity for full and fair litigation in the trial court had been short-circuited, such as whether a minority co-Trustee (one of three)

can assert a grantor's right of recovery on behalf of the Trust, and whether an equitable doctrine should prevent a co-Trustee who has conveyed land out of the Trust by quitclaim deed from recovering that land pursuant to Article XII, absent allegations of foul play, such as fraud in the inducement.

¶ 58 The *Roberto I* Court determined issues that had not yet been decided by the trial court, holding that all the real property in the Trust should be awarded to Ms. Fejeran as the Trust's sole beneficiary. Similarly, we ordered the two parcels that had been conveyed from the trust to Roberto to be returned to the Trust, and thus to Fejeran, in fee simple absolute. The Majority now states that it shall "explicitly withhold judgment" on the question of whether jurisdiction was properly asserted. *Supra* n. 7. I raise this issue to illustrate how the unripe procedural posture of *Roberto I* may have led this court to usurp the trial court as fact-finder, making factual determinations outside the scope of the trial court's original Findings.

b. Roberto I's determination that Pacific Century Trust Account No. 140011651 was a joint tenancy was an unprincipled departure from common law

¶ 59 The Majority now acknowledges that *Roberto I* broke with the common law when it reversed the trial court, awarding Pacific Century Trust Account No. 140011651 to Fejeran. ¶ 25. The trial court on original hearing of the matter determined that the Pacific Century managed agency account was Roberto's sole property. Fact & Concl. L. at 8.[14] This legal conclusion that the managed agency account was Roberto's sole property was supported by findings of fact. Although during his lifetime Roberto had jointly held certain assets with Ms. Fejeran, the Pacific Century accounts were no longer jointly held at the time of Roberto's death. *See* Finds Fact & Concl. L. at 4, #18. Prior to June 11, 1998, Roberto had caused Ms. Fejeran's name to be deleted from the managed agency accounts. *Id.* at 6, #26. Therefore, the managed agency account, "which was funded and under the sole name of Decedent at the time of his death, was his sole property and is thus a part of his estate." *Id.* at 8, #4.

¶ 60 In making its determination, the trial court was not unmindful of the Restatement law governing donative transfers. Indeed, it determined that two other accounts (not disputed on appeal) were joint accounts. Citing to the Restatement (second) of Property, Don. Transfers, §32.4 cmt. d (1990), the court determined those accounts were an *inter vivos* donative document of transfer, and full ownership passed to Ms. Fejeran, outside of probate. *Finds Fact & Concl. L.* at 8-9.

¶ 61 Unlike most jurisdictions, there is no statutory law here in the Northern Marianas to guide us in determining when a multiple-party account is deemed to create a joint tenancy with right of survivorship.

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[14] Pacific Century Trust Account Nos. 140011651 and 140017153 are sometimes referred to together as "the managed agency account" by the trial court, because they were each formerly part of a single Pacific Century Managed Agency Account numbered as Account No. 14-0264-00-3. *See Finds. Fact & Concl. L.* at 8. This account was subsequently split into two separate trust accounts and renumbered as Pacific Century Trust Account Nos. 140011651 and 140017153.Both the Executor and Ms. Fejeran assert this fact in their briefs, and therefore I presume it for purposes of appeal, despite the absence of a factual finding on this point in the trial court's Finds Fact & Concl. L.

Fortunately, in determining the law for our jurisdiction, this court is not completely unmoored from precedent. In the absence of customary or statutory law, the court applies the common law, as expressed by the Restatements of Law, and to the extent not so expressed, as generally understood and applied in the United States. 7 CMC §3401; *see also Ito v. Macro Energy, Inc.*, 4 NMI 46, 55 (1993). Appellant cited to cases showing a bank card designation of joint tenancy is for the protection of the bank and does not determine the right of parties vis a vis each other. *Chase v. Reid*, 348 P.2d 473 (Idaho 1960). Even if a joint account was in existence at the time of decedent's death, without an express designation on the signature card of "with right of survivorship" the court might determine that a tenancy in common is created. *In re. Estate of Hill*, 931 P.2d 1320 (Mont. 1997). This Court did not cite to any precedent in crafting its rule in *Roberto I.*

¶ 62 According to the Restatement, "[n]ot all multiple-party accounts are established with donative intent to provide for a survivorship feature." Restatement (Third) of Property (Wills & Other Donative Transfers) § 7.1(f), Validity Of Will Substitutes. A donor's act to add a name to an agency account only has the effect of creating an agency, conferring a power of attorney on the added person authorizing him or her to withdraw funds during the donor's lifetime. *Hall v. Hall,* 71 S.E.2d 471, 473-74 (1952) ("The court below correctly concluded that the change of the name on the ledger sheet and passbook from 'J. E. Hall' to 'J. E. Hall, or wife, Mrs. Lukie R. Hall' had the effect only of constituting said Lukie R. Hall agent with authority to withdraw said funds during the lifetime of J. E. Hall, and that said power of attorney or agency was revoked upon the death of J. E. Hall.")

¶ 63 Indeed, if the trial court found that Ms. Fejeran was merely an agent for the agency account, the Restatement provides further guidance: "For example, an agency account, as authorized by Revised Uniform Probate Code § 6–205, is not a will substitute. The balance on hand at the death of the depositor does not pass to the agent, but instead passes as an asset of the depositor's probate estate." Restatement (Third) of Property (Wills & Other Donative Transfers) § 7.1(f), Validity Of Will Substitutes. *See also* 71 Banking Law Journal 457, discussing multiple-party accounts, and cases cited therein ("If no further evidence is introduced which would show the donative intent on the part of the depositor, the form of the account is deemed to indicate that an agency has been created. Since the agency is revoked by the depositor's death, the co-depositor may not recover the balance remaining in the account. The fact that the depositor has not provided for survivorship is usually deemed to be evidence of an intention to exclude survivorship.") (citations omitted).

¶ 64 In *Roberto I*, we reversed as "clear error" the trial court's factual finding as to Account No. 14001651. *Roberto I* at ¶ 42. In doing so, we usurped the role of the trial court as fact-finder, and demonstrated a lack of understanding of what an "agency" account is. Pursuant to Commonwealth Rule of Civil Procedure 52(a), this Court cannot set aside the factual findings of the trial court unless such

findings are clearly erroneous. *In re Estate of Yong Kyun Kim*, 2001 MP 22 ¶ 4. "A finding is clearly erroneous when, even though some evidence supports it, the entire record produces the definite and firm conviction that the court below committed a mistake. . . . The test is whether the trial court could rationally have found as it did, rather than whether the reviewing court would have ruled differently." *Id.,* quoting *Rogolofoi*, 2 NMI at 476 (citation omitted); *see also In re Estate of Rofag*, 2 NMI 18, 31 (1991). As for Account No. 140017153, we only stated that "the record reveals the existence" of the account, and we were unsure whether it was ever a joint account. Consequently, "we remand[ed] disposition of this account to the trial court for proceedings consistent with this opinion." *Id.* On remand, the trial court allocated Account No. 140017153 to Fejeran without further factual findings.

¶ 65 The Majority holds today that the trial court did not comply with the mandate and law of *Roberto I*, for the trial court must determine the status of the account "in light of *Roberto I's* analysis concerning how a joint bank account with the right of survivorship may continue to exist based on extrinsic evidence clearly indicat[ing] the decedent's intent." ¶ 27. The Majority now acknowledges that its holding modified the common law rule concerning joint bank accounts with rights of survivorship, creating an exception that requires a court to find a right of survivorship based on extrinsic evidence sufficiently indicating the decedent's intent. *See* ¶ 26. However, the *Roberto I* decision articulated no legal basis for the rule it created. In light of this jurisdiction's practice of relying on Restatement and common law principles when no statute or precedent is expressly on point, I believe it was improper for this court to depart from the common law without a reasoned basis. Further, upon articulating a new legal test that was dependent on fact-finding based on extrinsic evidence to determine whether joint tenancy with a right of survivorship existed, we should have remanded for the trial court's factual determinations. This is particularly the case where as here, other issues were being remanded, including the closely-related factual question concerning the status of the other managed agency account.

¶ 66 I would instruct the trial court to first determine whether the account ever was a multiple-party account. If so, the court should apply the common law, as set forth in the Restatements, to determine whether evidence in the record, including extrinsic evidence, indicates that Roberto had intended to create a right of survivorship in the joint account. The court should look to the totality of the circumstances, including the language of the document purporting to create the tenancy to determine if there is any mention of survivorship; the signature card; the bank's policies governing how a joint tenancy with rights of survivorship are created; the relationship of the two individuals; whether Ms. Fejeran ever herself deposited into the account; and the testimony of bank witnesses revealing other evidence of the donor's intent.

c. Erroneous Legal Analysis in Determining Roberto's status as a non-NMD

¶ 67 Ironically, it was Claimant Fejeran who in the *Roberto I* appeal contested the trial court's determination that Roberto was non-NMD. I would hazard this is because she was aware that, under the law as stated up until that point, any interest in land she possessed flowed directly from Roberto's, and if his interest was *void ab initio*, so was hers. Fejeran cited to evidence in the trial court record that Roberto's maternal grandparents were Pedro Pangelinan Ada and Maria Martinez Ada, both of whom were from Saipan and were residents of Saipan at the time of their death. *Roberto I* Appellant's Br. at 22-23. This evidence showed Roberto was of one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood.

¶ 68 In essence, Fejeran argued that the trial court had not properly applied the legal test to determine whether Roberto was of NMD descent. This test is set forth in Article XII § 4 of the Commonwealth Constitution. Since an individual of Northern Marianas Descent for Article XII purposes is defined as "a citizen or national of the United States . . . of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof," Roberto could have had NMD status, despite the trial court's determination the his mother was naturalized, if one of his grandparents was a citizen of the Trust Territories. Indeed, it would seem impossible for the trial court, or this court sitting in review, to have correctly determined Roberto's NMD status without inquiring into the status of his grandparents.

¶69 Despite the point raised in the appellant's brief concerning the citizenship of Roberto's grandparents, the *Roberto I* opinion purporting to conclusively determine Roberto's non-NMD status completely overlooked whether Roberto's maternal grandparents were citizens of the Trust territory for purposes of Article XII. *See Roberto I*, ¶¶ 18-20. This Court's failure to apply the correct legal analysis in determining Roberto's NMD status in *Roberto I* deeply concerns me. In tandem with the Court's premature assertion of jurisdiction and our departure from the common law concerning joint tenancies, the decision appears unbridled by general jurisprudential principles and suggests a commitment to achieving a certain outcome, rather than a commitment to applying the applicable law to the relevant facts.

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¶ 70 I would find that the trial court's removal order complied with the *mandate* of *Roberto I* with respect to (1) the Roberto Trust, (2) Lot No. 1734-New-8, and (3) Lot No. 1734-New-15, *including* the trial court's award of past and future rental income and the initial lease payment for Lot No. 1734-New-15. I would not determine that the trial court erred in distributing the lease proceeds without articulating without first articulating what legal principles the trial court should have applied in determining the question. The majority, instead of clarifying the law with respect to whether Roberto had a possessory

interest in the lease from which his Estate may now benefit, once more makes the conclusory assertion that any analysis would result in the same outcome, in effect issuing a naked mandate. Because the law of the case was unclear and we continue to remand issues to the trial court for determination, in my opinion clarification at this point is not only warranted, but is indeed unavoidable.

¶ 71 As for the managed agency accounts, I would find that our prior decision was clearly erroneous in that it failed to follow the common law as required by sound jurisprudential principles and as codified in 7 CMC §3401. Furthermore, *Roberto I* inexplicably displaced the trial court's role as fact-finder. Therefore, the law of the case does not apply to bar our reconsideration of how both accounts should be distributed.[15] I would remand to the trial court for fact-finding to determine, for *both* managed agency accounts, whether there is sufficient evidence in the record to show that Roberto intended to create a joint tenancy with right of survivorship.[16]

¶ 72 The problem with letting a short-sighted, results-oriented opinion like *Roberto I* stand uncorrected is that the manifest injustice will ultimately by borne not just by the parties who may have been deprived of their rightful inheritance, but also by the very citizens of the Northern Marianas whom it appears the Court sought to champion. This appeal and the prior proceedings raise important questions about our role as an appellate court relative to the trial court's role as fact-finder, our discretion as the Supreme Court of the Northern Marianas to correct errors we have made (and how that discretion should be bounded), and our commitment to articulating rules of law that are consistent, logical, and predictable. I would begin to answer these questions so that the rules we establish give rise to a legal framework that can support a stable commercial environment and a robust societal order.

/s/____________________________
ROBERT J. TORRES
Justice Pro Tem

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15 I concur with the Majority's finding that the trial court's removal order complied with the law of the case with respect to Certificates of Deposit No. 2927, 3236, 3588, and 3590, but do not understand why we chose to address this in the opinion, since it was not a point of contention in the appeal before us.

16 In light of this court's finding in 2003 MP 16 that the initial lease payment of $99,000 has been commingled in these accounts, the court's determination as to the rightful ownership of the accounts will necessarily determine the ownership of the $99,000 lease payment.