FOR PUBLICATION

Appeal No. 01-041-GA

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,

MATILDE DLG. FEJERAN,
TERESA F. SAUCEDO,
ANNA F. RACOMORA

Claimants/Appellants,

v.

JOSEPH L. ROBERTO

Executor/Appellee.

OPINION

Cite as: ***In re Estate of Roberto,*** **2003 MP 16**

Civil Case No. 98-0983

Argued and submitted on Nov. 14, 2002
Decided Nov. 14, 2003

For Matilde DLG. Fejeran,
Teresa F. Saucedo and
Anna F. Racomora
Claimants-Appellants:

Brien Sers Nicholas, Esq.
PO Box 502876
Saipan, MP 96950

For Joseph L. Roberto,
Executor-Appellee:

Douglas F. Cushnie, Esq.
PO Box 500949
Saipan, MP 96950

BEFORE: CASTRO, Associate Justice; LIZAMA and ONERHEIM, Justices *Pro Tempore*

LIZAMA, Justice *Pro Tempore*:

¶1 Appellants Matilde DLG. Fejeran, Teresa F. Saucedo and Anna F. Racomora appeal the trial court's "Findings of Fact and Conclusions of Law." Appellants had sought to have certain items of real and personal property excluded from the estate of Joseph Rufo Roberto (aka Joseph Rufu Roberto). We have jurisdiction pursuant to Article IV, Section 3 of the Constitution of the Commonwealth of the Northern Mariana Islands. We affirm in part, reverse in part and remand for further proceedings consistent with this opinion.

ISSUES PRESENTED AND STANDARD OF REVIEW

¶2 I. Did the trial court err in concluding that the decedent, Joseph Rufo Roberto, was not an individual of Northern Marianas descent? Because the relevant facts are undisputed, this is a pure question of law, which we review de novo. *Agulto v. N. Marianas Inv. Group, Ltd.*, 4 N.M.I. 7, 9 (1993).

¶3 II. Did the trial court err in not excluding from the estate, lands in the Commonwealth purchased by decedent and then placed in the Roberto Trust for the

benefit of Appellant Matilde Fejeran? Because the relevant facts are undisputed, this is a pure question of law, which we review de novo. *Id.*

¶4 III. Did the trial court err in not declaring that Lot 1734-New-8 excluded from the estate and awarded to Matilde Fejeran? Because the relevant facts are undisputed, this is a pure question of law, which we review de novo. *Id.*

¶5 IV. Did the trial court err in not declaring that Lot 1734-New-15 the property of the "Roberto Trust" executed for the benefit of Matilde Fejeran and in not declaring any revenue generated by lease of that lot should be property of the Roberto Trust? This is a mixed question of law and fact, which we review de novo. *Id.*

¶6 V. Did the trial court err in concluding that certain accounts at Pacific Century Trust were the sole property of Decedent and a part of his estate? This is a question of fact, which we will reverse only if the finding was clearly erroneous. *Camacho v. L & T Int'l Corp.*, 4 N.M.I. 323, 325 (1996).

¶7 VI. Did the trial court err in concluding that a certain Pacific Financial Corporation account was the sole property of Decedent and a part of his estate? This is a question of fact, which we will reverse only if the finding was clearly erroneous. *Id.*

¶8 VII. Did the trial court err in concluding that Decedent's shares of the common stock in Chalan Kiya Industrial Center, Inc., and Chalan Kiya Apartment Circle, Inc., are part of the Decedent's estate? This is a question of fact, which we will reverse only if the finding was clearly erroneous. *Id.*

FACTUAL AND PROCEDURAL BACKGROUND

¶9 The Decedent, Joseph Rufo Roberto, was born in Guam on November 7, 1922 and died in Saipan on July 14, 1998. He was the son of Jose Roberto and Ignacia Ada Roberto. Jose Roberto was born in Guam on November 13, 1889 and died in Guam on February 14, 1979. Ignacia Ada Roberto was born in Saipan on April 24, 1897 and died in Guam on March 20, 1980. Decedent's parents were married in Saipan on December 25, 1921, after which they returned to Guam. They lived in Guam continuously until their deaths.

¶10 The Decedent lived either in Guam or in the mainland United States for most of his life. He moved to Saipan in 1990 or 1991 and lived there until his death. He never married and had no children. His only sibling was a brother, Thomas John Roberto, who died in Florida, where he resided, on June 26, 1999. Thomas John Roberto was survived by his wife, Jacqueleen F. Roberto, and his three children, Joseph Lee Roberto (the Executor of Decedent's estate), Michael L. Roberto, and Dolores Maria Roberto. These children are the only heirs to Decedent's estate.

¶11 Neither Decedent, nor his parents, nor any of his heirs resided in Saipan at any time between 1944 and 1990.

¶12 At the time of his death, Decedent left a "Last Will and Testament" dated March 5, 1985, devising all of his property to his brother, Thomas John Roberto.

¶13 From 1992 until his death, Decedent shared a home with appellant Matilde DLG. Fejeran. Ms. Fejeran was Decedent's first cousin. Two of her daughters, Teresa F. Saucedo and Anna F. Racomora, are also appellants herein. Ms. Fejeran and Decedent had some business dealings and also held a number of joint accounts in various banks

and other financial institutions. Some of these accounts were still jointly held at the time of the Decedent's death, while Ms. Fejeran's name was removed from others with her consent. These accounts are described in more detail below.

¶14 Probate of Decedent's estate was instituted in 1998. On December 17, 1998, the Executor filed an initial inventory of the estate. On December 28, 1998, Ms. Fejeran, for her own part and as attorney in fact for her daughters, filed a notice of claims and request for service of pleadings. The inventory was twice supplemented by the Executor, after which Ms. Fejeran filed timely amended notices of her claims.

¶15 The property currently at issue is:

1. Twenty-three parcels of real property located in the Commonwealth that were purchased by Decedent and later placed in a trust (hereinafter the "Roberto Trust") to be managed for the benefit of Ms. Fejeran. The co-trustees were Ms. Fejeran, the Decedent, and the Decedent's brother Thomas Roberto. This trust was executed on July 18, 1995.

2. One parcel of real property, Lot 1734-New-8, located in the Commonwealth, which was removed from the Roberto Trust and placed in the name of Decedent on August 19, 1997.

3. One parcel of real property, Lot 1734-New-15, located in the Commonwealth. This parcel was originally included in the Roberto Trust as part of larger parcel – Lot 1734-New-R2. Lot 1734-New-15 was leased to Calvary Christian Academy and an initial lease payment of $99,000 was made to Decedent. Of this, $80,00 was invested with Pacific Century and $25,000 was used to purchase Pacific Financial certificate # 3077.

4. A managed agency account and a hypothecation account at Pacific Century Trust.

5. An account consisting of ten certificates of deposit in various denominations issued by Pacific Financial Corporation.

6. Three Hundred Thirty Four shares of common stock in Chalan Kiya Industrial Center, Inc., and 10,000 shares of common stock in Chalan Kiya Circle Apartments, Inc.

¶16 Of these properties, the court below declined to rule on the issue of ownership of the real property described in 1, 2 and 3 above, beyond to say that Decedent could not hold a fee simple interest in it because he was not of Northern Marianas descent. However, the court apparently did not order the land removed from the estate.

ANALYSIS

¶17 The current appeal presents the Court with a number of interesting questions of probate and property law. The Court will consider these questions in the order listed above.

I. Decedent is Not of Northern Mariana's Descent.

¶18 Article XII of the Commonwealth Constitution restricts land ownership within the Commonwealth to people of "Northern Marianas descent." N.M.I Const. art. XII, § 1. A person is of Northern Marianas descent ("NMD") if he or she is "a citizen or national of the United States and [he or she] is of at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof." *Id.* at § 4. To be considered full-blooded a person must have been "born or domiciled in the Northern Mariana Islands by 1950 and [must have become] a citizen of the Trust Territory of the

Pacific Islands before the termination of the Trusteeship with respect to the Commonwealth" or must be descended from such persons. *Id*.

¶19 Applying this principle, the trial court correctly concluded that Decedent was not a NMD. As noted in the factual outline, the Decedent's father was born on Guam and lived most of his life there. There is simply no possibility that he could be considered a NMD, because he was not born in the Trust Territories and never resided there. Decedent's mother is a more difficult case because she was born and spent her childhood in Saipan. However, she moved to Guam shortly after her marriage in 1921 and permanently resided there. Therefore, we must consider whether her birth and early life alone are enough to qualify her as a NMD.

¶20 The Trust Territories Code governed citizenship in the Territories. The Code allowed, "[all] persons born in the Trust Territory" to be citizens of the territory unless "at birth or otherwise [they] have acquired another nationality." 53 T.T.C. § 1(1). Thus, Decedent's mother could have been a Trust Territory citizen because of her birth in Saipan. However, she resided in Guam in 1921 until her death in 1979, likely making her a citizen of Guam. (In 1921, Guam was a possession of the United States, while the Northern Marianas were a possession of Japan). Furthermore, she became a citizen of the United States via the Guam Organic Act of 1950, as evidenced by the U.S. Passport she obtained in 1953. Excerpts of Record ("E.R.") at 177B-179. In so doing, she "acquired another nationality." Therefore, she could not be a citizen of the Trust Territory and could not pass on such citizenship to her son. The Decedent himself was born in Guam and resided either there or in the mainland U.S. until he moved to Saipan in 1990 or 1991. He could not be considered a NMD and the trial court correctly so

concluded. We must consider how this finding effects the disposition of land purchased in the Commonwealth by the Decedent.

II. The Trial Court Erred In Not Excluding the Roberto Trust From the Estate.

¶21 The Roberto Trust was executed by the Decedent in July 1995 for the benefit of Matilde Fejeran. The co-trustees were the Decedent, the Decedent's brother Thomas Roberto, and Ms. Fejeran. The corpus of the Roberto Trust was 24 parcels of land within the Commonwealth. E.R. at 448-60. The estate claimed these lands in its probate pleadings, but the trial court issued no ruling as to their disposition. We must consider what is to be done with these lands.

A. Executor Concedes That None of the Heirs or Devisees May Own the Property In Question.

¶22 In his brief, Appellee contends that the fee simple interests in Commonwealth land apparently acquired by Decedent, including those later transferred to the Roberto Trust, should "revert to the respective grantors." Appellee's Br. at 16. This argument seems the natural result of applying Appellee's contention that Decedent was not a person of Northern Mariana's descent, as that term is defined in the Commonwealth Constitution art. XII, § 4. Article XII limits the ownership of real property in the Commonwealth to NMDs and any acquisition of land that violates Article XII is "void ab initio." N.M.I. Const. art. XII, §§ 1 & 6. Appellee argues that, because Decedent is not a NMD, we must void the original land purchases and also any trust arrangement. If the Decedent has no rights in the property, he argues, then there is no property around which to form the trust and Ms. Fejeran could have no interest in those lands through the Roberto Trust or otherwise. However, by arguing that the land must return to the

grantors, the Appellee is also conceding that neither the devisee nor the heirs can take any interest in the land. Under such circumstances, we question whether the estate has any right to contest Ms. Fejeran's claim of ownership.

B. The Executor May Not Contest Ms. Fejeran's Claims To the Roberto Trust.

¶23 In a probate action, the executor is essentially suing the entire world, seeking to dispose of all property potentially in Decedent's estate and to insure that this property is correctly distributed. At a minimum, the executor must show that the Decedent really did have an interest in any property claimed and that some heir or devisee may assume that interest. Instead, the Executor here is attempting to show that Decedent did not have an interest in the real property in question and, in so doing, is conceding that no heir or devisee can take an interest in it.

¶24 Indeed, we are baffled as to why the estate's counsel would expend time and resources arguing that this land should not be included in the estate, because the estate does not benefit from its exclusion. Because the Executor's role is solely to argue for the proper inclusion and distribution of property in the estate, once it becomes clear that the estate cannot hold particular property, the estate has no voice in deciding who does hold it. We conclude that the estate's concession is binding and prevents the estate from taking any interest in the land in the Roberto Trust. On remand the trial court shall order that all the land in the Roberto Trust be excluded from the estate. However, this does not end our inquiry. We still must consider, who, if not the estate, takes title to the land. Therefore, we must decide how to treat land acquired in violation of Article XII (as the Decedent did) upon the death of the acquirer.

C. A Non-NMD Has a Bare Right of Possession In Land Purchased In Violation of Article XII and Recovery By the Grantor is Subject To the Statute of Limitations on Article XII Claims.

¶25 At the time of a land "purchase" made in violation of Article XII, a non-NMD purchaser does not acquire ownership of the land. However, the non-NMD does acquire a bare right of possession. Hence, a NMD (other than the grantor) could not simply squat on the non-NMD's illegally-acquired land without being subject to an action for ejectment. However, this right of possession is subordinate to the grantor's right of recovery and to the Government's right of confiscation, if the non-NMD is not a natural person. *See* N.M.I. Const. art. XII § 6. The Executor essentially contends that the "right of recovery" in the grantor never expires. He argues that, because land sales to a non-NMD are constitutionally void ab initio, the land must be returned upon challenge to the original grantors, no matter how much time has passed since the "sale." With regard to the Government, this is unquestionably true.[1] However, individuals are bound by the Commonwealth's statute of limitations on Article XII claims.

¶26 This statute of limitations bars claims under Article XII brought more than six years after the plaintiff last had possession of the property. 2 CMC § 4991(a). The statute is consistent with the Legislature's power to "enact enforcement laws and procedures" under Article XII § 6, and it serves the valuable purpose of assuring that all real estate transactions have some finality. After the lapse of the statutory period, the non-NMD becomes not only the only person or entity (except possibly the Government)

[1] The Government is not bound by a statute of limitations. 2 CMC § 4991(d)(2). However, the Government has as yet made no claims to the land in question here and it is by no means clear that the Government could seize lands from a private person without giving compensation. The taking of such lands without compensation from a corporation is explicitly allowed. N.M.I. Const. art. XII, § 6.

with the apparent right to possess the land, but also the sole person who could assert such a right.

¶27 We conclude 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. This right of possession becomes superior even to the rights of the grantor after the statute of limitations has run. Thus we must 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. This problem is particularly thorny where, as here, the land is subsequently transferred to another entity.

D. A Non-NMD With Right of Possession May Pass Good Title, Subject To Recovery By the Grantor.

¶28 One possible approach to the problem of non-NMD "purchasers" is simply to grant the non-NMD purchaser what amounts to a life estate in the land, (subject to recovery by the grantor within the statutory period), and cancel all subsequent transactions at the death of the non-NMD. The land would then revert to the original grantor, whether the statute of limitations had run or not. This could be extremely problematic, of course, especially where the land in question has changed hands several times since its original purchase by the non-NMD. This interpretation would allow someone who purchased an apparent fee simple interest in land to be completely divested of that interest without any recourse for recovering the lost value. It seems clear that the statute of limitations was enacted to prevent this sort of occurrence.

¶29 Of course, such a result would be entirely avoidable if the Legislature were to require that a registry of Article XII eligible individuals and corporations be kept and that each land sale transaction recorded by the Commonwealth Registrar be accompanied

with a certification that the buyer was so registered. Checking on the NMD status of previous owners could then be a relatively simple part of doing due diligence. The importance of having such a registry will only grow as the amount of readily available land shrinks and the population becomes larger and more diverse. Unfortunately, no such system exists and so we must take a different approach to protect subsequent grantees.

¶30 We conclude 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. The transaction may take any valid form, including by sale, by gift, through a will, or by operation of the laws governing intestate succession. 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.

¶31 Applying these rules to the instant matter, we conclude that ownership of the land in the Roberto Trust must be awarded to Ms. Fejeran. The Roberto Trust was formed in July 1995, more than eight years ago, so the Decedent must have acquired all lands in the Roberto Trust prior to that date. Therefore, none of the original grantors can challenge the acquisitions. Their right to do so has expired under our 6-year statute of limitations. 2 CMC § 4991(a).[2] In addition, no individual challenged the validity of the transfer of Roberto Trust land from Decedent's ownership to the trust within the statutory period. The only party who might have done so, the estate, sought only to void the initial sales and only did so for the benefit of the grantors, not for its own benefit. Ms. Fejeran

[2] The statute allows tolling only in the event of fraudulent concealment. 2 CMC § 4991(b).

appears to be the only individual with even color of title to the land in the Roberto Trust. Therefore, we remand to the trial court for proper orders awarding the Roberto Trust lands to Ms. Fejeran.[3]

III. The Trial Court Erred In Not Excluding Lot 1734-New-8 From the Estate.

¶32 Lot 1734-New-8 was originally part of the Roberto Trust. It was subsequently reconveyed to Decedent by quitclaim deed on August 19, 1997. The trial court concluded that Decedent was not a NMD and therefore could not hold a fee simple interest in this lot, but did not issue a specific ruling on whether the property was a part of the estate. As with the land still in the Roberto Trust, we conclude that the estate's concession that it has no interest in the land bars it from disputing Ms. Fejeran's claim. Had the estate instead successfully argued that Decedent was a NMD, it could have taken a valuable interest Lot 1734-New-8.[4] However, we also have found alternate grounds on which Ms. Fejeran may claim this lot for the Roberto Trust.

¶33 The 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

[3] The award of land to Ms. Fejeran is valid only as between her and the estate. This decision does not have the same legal effect as a successful quiet title action.

[4] If Decedent were a NMD, he could have held a fee simple interest in Lot 1734-New-8. His heirs could then have taken that interest if they are NMD's or a leasehold if they are not. 8 CMC § 2411. Therefore, it was in the estate's interest to argue that the Decedent was a NMD. Instead, the estate (properly) prevailed in their argument that Decedent was not a NMD.

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.[5] Therefore, the reconveyance of Lot 1734-New-8 must be voided and the lot must be excluded from the estate and returned to the Roberto Trust. We remand to the trial court for proper orders.

IV. The Trial Court Erred In Not Excluding Lot 1734-New-15 From the Estate.

¶34 The last piece of land we must consider is Lot 1734-New-15. According to Appellant, this lot was originally included in the Roberto Trust as part of a larger parcel, Lot 1734-New-R2, and this argument is supported by the trial testimony, E.R. at 667, and by our own examination of the relevant land surveys E.R. at 468A-469. This evidence notwithstanding, the trial court stated that Lot 1734-New-15 was held in fee simple by Decedent. However, this statement is expressed as a conclusion of law and not a finding of fact, so it is not clear whether the trial court actually considered that this lot might once have been part of the Roberto Trust. Furthermore, this finding is inconsistent with the trial court's conclusion that the Decedent was not a NMD and so could not hold a fee simple interest in land in the Commonwealth.

¶35 Our examination of the record reveals that Lot 1734-New-15 was originally part of the Roberto Trust corpus and any finding to the contrary is clearly erroneous. If the lot is currently part of the Roberto Trust, it must be treated like all other land in the trust and be excluded from the estate. *See supra* Section II. If the lot was part of the Roberto

[5] Ms. Fejeran filed a total of three notices of claims, each in response to an inventory submitted by the Executor. The last of these notices was filed on June 1, 1999, well within the statute of limitations for both parcels, keeping in mind that the reconveyance of Lot 1734-New-8 did not predate the execution of the Roberto Trust in July 1995.

Trust, but was subsequently reconveyed, it must be treated like Lot 1734-New-8 and be excluded from the estate. *See supra* Section III. Either way, Lot 1734-New-15 must be excluded from the estate and awarded to Ms. Fejeran.

¶36 In addition, we note that Decedent received an initial payment of $99,000 from Calvary Christian Academy for the lease of Lot 1734-New-15. Ms. Fejeran claims that this money is rightly hers, presumably as proceeds from the Roberto Trust. However, these proceeds were later combined with other investments, primarily accounts with Pacific Century and Pacific Financial, that were held jointly by Decedent and Ms. Fejeran. They no longer have a separate life and we will deal with them as we consider what is to be done with the accounts into which they were deposited.

V. The Trial Court Committed Clear Error In Finding That the Pacific Century Managed Agency Account Was the Sole Property of the Decedent and Part of the Estate.

¶37 One of the most hotly contested items of property in the trial court was a Managed Agency Account, originally numbered 14-0264-00-3, at Pacific Century Trust. (Pacific Century Trust was then known as Hawaiian Trust Company.) This account was established by Decedent on December 5, 1989. On October 29, 1992, Decedent requested that this account ownership be changed to joint with right of a survivorship with Ms. Fejeran. This was done, and the account was apparently renumbered to 140011651. Sometime prior to June 11, 1998, Ms. Fejeran agreed to have her name deleted from this account, leaving the Decedent as the sole account holder. The trial court determined that this account was, therefore, the sole property of the Decedent and a part of the estate.

¶38 The purpose of changing this account from joint to single-holder status was clear. As Ms. Fejeran admits, it was done to prevent her husband, whom she was then divorcing, from being able to reach the account during the divorce proceedings. E.R. at 546-47. Ms. Fejeran claims that this was meant to be a temporary arrangement, with the ownership of the account being restored to joint status after the divorce was concluded. E.R. at 547. Unfortunately for her, Decedent passed away before this could happen. Therefore, Ms. Fejeran seeks to reclaim her interest in the account by arguing that Decedent held the account in trust for her.

¶39 In response, the Executor claims that Appellants did not argue for the creation of a trust before the trial court and therefore should not be allowed to argue it now. Appellants seem to grant that the trust issue was not squarely raised below, but urge us to hear and decide the trust claim anyway. However, we believe we must first consider whether the steps taken by Decedent and Ms. Fejeran were sufficient to break the joint tenancy. If the account remained a joint tenancy, the name change notwithstanding, then there is no need to go into trust principles. Hence, we will begin by examining the evidence presented.

¶40 As noted above, Ms. Fejeran testified that the name change was intended to be temporary and for a specific purpose. Ms. Fejeran's testimony is self-serving and would not be convincing by itself. However, this claim is supported by the testimony of Marilyn P. Magofna, the Pacific Century Trust employee who handled the transfer of the agency account into the sole name of Decedent. Ms. Magofna testified that Decedent's stated purpose for the name change on the account was to protect the account from Ms. Fejeran's soon-to-be-ex husband. E.R. at 658. She further testified that Decedent said,

"the account will be back in joint status once the marital problems have been resolved." *Id.* In addition, we have the words of the Decedent himself. In a handwritten letter to Pacific Century Trust, dated June 11, 1998, Decedent authorizes Ms. Fejeran to obtain information about the account and to sign on his behalf, things she had always been authorized to do. E.R. at 336.

¶41 In responding to this argument, the Executor has presented no evidence suggesting that Decedent intended to permanently deprive Ms. Fejeran of her interest in this account. Instead, the Executor claims that all of the proceeds used to fund the account came from the Decedent and he notes that the account was solely held by Decedent at the time of his death and that Ms. Fejeran surrendered her interest in the account voluntarily. As to the former, we believe that the source of the funds is irrelevant in this case. It is undisputed that Decedent voluntarily added Ms. Fejeran's name to the agency account and the Executor does not claim that this was induced through fraud, undue influence, or other nefarious means. Once Ms. Fejeran became a joint holder of the agency account, she had rights in that property, regardless of its origin. The latter point, the legal effect of the change of names on the account, might be more troubling, but only if we conclude that the name change was sufficient to destroy the joint tenancy.

¶42 Unfortunately for the estate, the evidence compels us to conclude that the change of names on the account did not destroy the joint tenancy. Decedent added Ms. Fejeran's name to the account in 1992. E.R. at 383. In so doing, he was specific in his request that it become a joint account. E.R. at 651-52. Later, when he decided to remove Ms. Fejeran's name from the account, he was equally clear in stating that he intended her to

have a continued interest in the account. E.R. at 384 and 663. In other words, Decedent was attempting to remove the account from Ms. Fejeran's name for the purpose of her divorce, while at the same time maintaining it as a joint account for all other purposes. We conclude that this attempt failed and the account in question remains a joint account.[6] Therefore, Ms. Fejeran's interest in it is unbroken from the time the joint tenancy was created and it remains in force. The evidence that the Decedent intended to maintain a joint tenancy with right of survivorship is overwhelming and the trial court committed clear error in failing to so find. On remand, the trial court shall order that the account, or account proceeds, be returned to Ms. Fejeran, with interest as appropriate. In addition, the record reveals the existence of a hypothecation account, number 140017153. We are unsure whether this account was ever a joint account, and if so, what its status is now. We therefore remand disposition of this account to the trial court for proceedings consistent with this opinion.

VI. The Trial Court Committed Clear Error In Finding That the Pacific Financial Corporation Account Was the Sole Property of the Decedent and Part of the Estate.

¶43 In addition to the Pacific Century Trust account, Decedent and Ms. Fejeran held at one time joint ownership of master account number 7001749 at Pacific Financial Corporation. This account consisted of a number of certificates of deposit issued by Pacific Financial Corporation. Over of the course of the joint ownership, several of these were redeemed and others were purchased to replace them. At the time of Decedent's passing, there were ten certificates outstanding. As with the Pacific Century account,

[6] The Executor points to this attempt to hide assets from Ms. Fejeran's husband as an example of Ms. Fejeran's alleged dishonestly and bad faith. This may be so. However, we are not asked to decide whether Ms. Fejeran was right or wrong to do what she did. We are simply asked to determine what the legal consequences of that act are as between Ms. Fejeran and the estate.

Ms. Fejeran was the joint holder of this account until shortly before Decedent's death. However, on July 1, 1998, Decedent deleted her name from the account with her permission. As with the Pacific Trust account, it appears that the purpose of this transaction was to shield these assets from Ms. Fejeran's husband during their divorce proceedings and not to create sole ownership of the account in Decedent. Nonetheless, the certificates were issued to Decedent and appear on their face to be his sole property. The trial court concluded that the certificates were the sole property of the Decedent and awarded them to the estate.

¶44 As evidence of the intent to maintain joint ownership, we have the testimony of Jacinta Cruz, the investment clerk at Pacific Financial Corporation who handled the name change. She testified that Decedent had emphasized that he still wanted Ms. Fejeran to have "full access to the account." E.R. at 523. This seems entirely consistent with the Decedent's treatment of the Pacific Century account. However, Ms. Fejeran has essentially conceded that the account can no longer be considered jointly owned. Her own pleadings reflect an arrangement in which she was to be the sole owner of four of the certificates and Decedent was to be the sole owner of the other six. Specifically, it appears that four of the ten certificates, numbers 2927, 3262, 3588, and 3590, were marked with an asterisk to indicate that they were the property of Ms. Fejeran. E.R. at 42-45. If the Decedent and Ms. Fejeran agreed to split the certificates, there can be no more joint tenancy and, unless the four certificates were held in trust for Ms. Fejeran, they must pass to the estate. Therefore, we will consider whether a trust was formed with Ms. Fejeran as beneficiary.[7]

[7] The Executor argues that we should not consider the possibility of a trust because this argument was not raised below. We recognize this, but note that we may hear the argument nonetheless if it necessary to reverse plain error and to prevent injustice. *Bolalin v. Guam Publ'ns, Inc.*, 4 NMI 176, 181 (1994). Here we believe that

¶45 Under our jurisprudence, the formation of a trust occurs when a settlor (Decedent in this case) transfers an interest in property (the four certificates) to a trustee (also Decedent) for the benefit of an ascertainable beneficiary (Ms. Fejeran). *Lifoifoi v. Lifoifoi-Aldan,* 1996 MP 14 ¶28. At the time of the transfer, the settlor must manifest an intent to create the trust. *Id.* In this case, the only real question is intent.[8] Decedent's insistence that Ms. Fejeran continue to have access to the accounts is clear evidence of intent to create a trust, as is the apparent agreement between Decedent and Ms. Fejeran that four of the certificates would be her property. We find Ms. Fejeran's assertion of ownership credible in part because she could just as easily have asserted ownership of all the certificates, or of the six certificates that did not bear asterisks. (One of these six, certificate # 4004, is worth $100,000 by itself. This is more than the total value of the four certificates that Ms. Fejeran claims).

¶46 In rebutting Ms. Fejeran's claim of ownership of the four certificates, the Executor first argues that the funds used to purchase the certificates originated with the Decedent. As we stated in our discussion of the Pacific Century account, we do not believe this is relevant because there is no dispute that the certificates were held jointly at one time. In addition, the Executor points to the testimony of Ms. Alexis Fallon, a lawyer who drafted the documents necessary to create the Roberto Trust. She testified that she asked Decedent at that time whether he wished to include other accounts in the Roberto Trust and that he replied that everything else was taken care of. She further testified that he had stated he understood that anything not in the Roberto Trust would go

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the trial court did err and it would be unjust not to reverse this error.

[8] The fact that Decedent is both settlor and trustee is not a problem. RESTATEMENT (SECOND) OF TRUSTS § 17 (1959)

to his brother and his brother's children.[9] The Executor suggests that this is evidence that the Decedent intended his brother and his brother's children to inherit the Pacific Financial and Pacific Century accounts.

¶47 We must disagree. We note that the discussions between Ms. Fallon and Decedent took place in 1995, as she prepared the documents for what would become the Roberto Trust. E.R. at 468. At that time, Ms. Fejeran was already a joint-holder of the accounts at both Pacific Century Trust and Pacific Financial Corporation. Therefore, Decedent had no reason to worry that Ms. Fejeran would not receive the proceeds from those accounts, should he pass away. Had he intended them to go to his brother and his brother's children, he would have had to take affirmative steps to divest Ms. Fejeran of her interest. He only did this much later and for a demonstrably different purpose. Compelled by the evidence, we must reverse the trial court and conclude that a trust was created in which Decedent held Pacific Financial certificates numbered 2927, 3262, 3588, and 3590 for the benefit of Ms. Fejeran. Therefore, Ms. Fejeran is entitled to return of these certificates and/or any roll-over certificates or proceeds derived there from. However, we must affirm the trial court's holding as to the other six certificates. On remand, the trial court shall dispose of these certificates and/or proceeds there from in accordance with this opinion.

VII. The Trial Court Did Not Commit Error In Awarding Decedent's Shares In Chalan Kiya Industrial Center, Inc. and Chalan Kiya Circle Apartments, Inc. to the Estate.

¶48 The final items at issue are shares of stock amounting to a 1/3 interest in two corporations: Chalan Kiya Industrial Center, Inc. ("Industrial Center") and Chalan Kiya

[9] We do not include citations here because this portion of the testimony was not made part of the excerpts of record. However, it is cited in the Appellee's brief and we do not doubt the veracity of the citations.

Circle Apartments, Inc. ("Apartments"). Ms. Fejeran alleges that Decedent promised her, in December 1993, that he would give her his interest in the Industrial Center for herself and his interest in the Apartments for two of her daughters, Teresa F. Saucedo and Anna F. Racomora. The sole evidentiary basis for this claim is Ms. Fejeran's testimony. There were no transfers of stock at the time – indeed it appears that no stock certificates had been issued. Furthermore, there is no evidence that Decedent communicated this intent to anyone else or took any affirmative steps to realize it. This contrasts sharply with Decedent's efforts to create and later preserve Ms. Fejeran's interest in the real property and accounts discussed above. Finally, according to Ms. Fejeran, Decedent said: "[w]hen I die, my share is for you." E.R. at 569. It appears, therefore, that Decedent did not intend to make a present gift of his interest in these corporations, but rather a testamentary gift. This would take the form of an oral will and, as such, would not comply with Commonwealth law concerning oral wills, which requires the testimony of two disinterested witnesses, among other things. 8 CMC § 2305(a)(1). (Ms. Fejeran was the sole witness and, as potential devisee, was not disinterested.) We affirm the trial court's decision to award Decedent's interest in Chalan Kiya Industrial Center, Inc. and Chanlan Kiya Circle Apartments Inc. to the estate.

CONCLUSION

¶49 For the foregoing reasons, the trial court's decision is **AFFIRMED IN PART** and **REVERSED IN PART** and remanded for further proceedings consistent with this opinion.

SO ORDERED THIS 14TH DAY OF NOVEMBER 2003.

/s/_____
ALEXANDRO C. CASTRO, ASSOCIATE JUSTICE

/s/_____
JUAN T. LIZAMA, JUSTICE *PRO TEMPORE*

/s/_____
VIRGINIA S. ONERHEIM, JUSTICE *PRO TEMPORE*