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

ELLIOT A. SATTLER,
Plaintiff/Appellee,

v.

PAMELA A. MATHIS,
Defendant/Appellant.

Supreme Court Appeal No. 05-0002-GA
Superior Court Civil Case Action No. 02-0412-FCD

FOR PUBLICATION

OPINION

Cite as: ***Sattler v. Mathis, 2006 MP 6***

Argued and submitted on December 10, 2005
Saipan, Northern Mariana Islands

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BEFORE: MIGUEL S. DEMAPAN, Chief Justice; ALEXANDRO C. CASTRO, Associate Justice; and JOHN A. MANGLONA, Associate Justice

CASTRO, Associate Justice:

¶1 This appeal challenges the trial court's division of a marital property interest in the NMI Retirement Fund benefits. The trial court held that a present division of a mixed property interest in the retirement benefits could be based on the hypothetical value of that interest which would result if the employee retired on the trial date. We find that the trial court failed to apply the requisite statutory formula in dividing the retirement benefits. We REVERSE in part and REMAND the case for further proceedings consistent with this decision.

I.

¶2 Elliott A. Sattler ("Elliot") and Pamela A. Mathis ("Pamela") were married in Nevada on August 1, 1990. Shortly thereafter, Elliot accepted a job at the Attorney General's office in Saipan, and the couple moved here in November 1990. Pamela soon found a job on the island, also working for the CNMI government. Since both Elliot and Pamela were government employees, they both contributed to the mandatory NMI Retirement Fund. Elliot filed for divorce on September 24, 2002. The trial court granted the divorce on November 5, 2003, but the issue of property division and spousal support was bifurcated and addressed on December 14, 2004. It is from this later division of property that the current appeal results.

¶3 Since the parties had previously agreed upon a Property Settlement Agreement dividing everything but their respective pensions, the only property issue before the trial court was determining and dividing the marital property interest in each party's NMI

Retirement Fund. The trial court determined that the relevant statute was 8 CMC § 1828 (b):

> A deferred employment benefit attributable to employment of a spouse occurring during marriage and partly before and partly after the determination date is mixed property. The marital property component of that mixed property is the part resulting from multiplying the entire benefit by a fraction of which the numerator is the period of employment giving rise to the benefit that occurred after the determination date and during marriage and the denominator is the total period of employment. Unless provided otherwise in a decree, marital property agreement or written consent, valuation of a deferred employment benefit that is mixed property shall be made as of the death of a spouse or a dissolution.

Based on this statute, the trial court found it equitable to award each party 50% of the other party's retirement benefit which occurred during marriage. Since Elliot had reached retirement age, the NMI Retirement Fund Office was able to calculate the benefit he would receive if he retired on the trial date. Based on that amount, Pamela's benefit was also able to be calculated as 50% of Elliot's retirement benefit if Elliot were to retire on the trial date. Pamela, by contrast, was not of retirement age and, having no vested interest in the retirement benefit, no hypothetical current value calculation was possible. The court noted, however, that when she reached retirement age a similar calculation would be appropriate.[1]

¶4 Pamela appealed the trial court's judgment, arguing that the court abused its discretion in refusing to follow 8 CMC § 1828 (b). She claims that the statute mandates

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[1] In the lower court's own words:

> The Court finds that it is equitable to award Pamela a fifty percent (50%) interest in Elliot's Retirement fund as calculated by the Northern Mariana Island Retirement Fund Office for a period of 11 years, 6 months and 4 days [the length of his employment while married] … Because Pamela is not of retirement age as of this year, figures for her retirement are not able to be calculated. However, upon reaching retirement age, Pamela will be able to have a similar retirement computation for the relevant dates from marriage to the date of separation and Elliot will be entitled to a fifty percent (50%) interest in her retirement.

Sattler v. Mathis, Civ. No. 02-0412 (N.M.I. Super. Ct. Dec. 14, 2004) (Order of Spousal Support and Distribution of Deferred Employment Benefit at 5).

the use of a "coverture fraction," as defined therein, and that the court failed to apply that fraction in a manner consistent with the statute. Pamela claims that the court erred in freezing the value of her interest in Elliot's retirement benefit to that amount occurring during marriage, thereby denying her any future appreciation. Specifically, she notes that the NMI Retirement Fund determines retirement benefits based on an employee's three highest earning years. Since the trial court set the value of her interest at one half the hypothetical current value, Pamela would be deprived of the increase in benefits Elliot would enjoy due to his recent raise (and any possible future raises). Further, she argues, this inequity is compounded because the trial court does not similarly limit Elliot's interest in her retirement. By allowing Elliot's interest to be computed at some future date, Elliot will benefit from the post-divorce labor causing Pamela's interest to vest. Elliot will also benefit from any post-divorce raises Pamela might receive up until his interest is calculated. Finally, Pamela claims that since the trial court misinterpreted the relevant statute, the issue on appeal is one of mixed statutory interpretation and fact, and is thus reviewable *de novo*.[2]

¶5 Elliot argues that the issue is not one of mixed law and fact reviewable *de novo*. Instead, he argues that the current appeal challenges the trial court's division of marital assets, and is only reviewable for abuse of discretion. *See Reyes v. Reyes*, 2004 MP 13, ¶ 3 ("The division of marital property is subject to the broad discretion of the trial court, whose determinations will be upheld on appeal unless there is a clear showing of an abuse of discretion") (citation omitted). Elliot then goes on to argue that the trial court did not abuse its discretion because the retirement benefit was pure marital property and

[2] Pamela cites *Hofschneider v. Hofschneider*, 4 N.M.I. 277, 278, apparently for the proposition that when the operative issue is property classification, a de novo review is appropriate.

not subject to the statutory, or "coverture," fraction. Elliot claims that 8 CMC § 1828 subsection (a), not subsection (b), was the appropriate statute. 8 CMC § 1828 (a) reads, "A deferred employment benefit attributable to employment of a spouse occurring after the determination date is marital property." Elliot argues that since the trial court has broad discretion in dividing marital property, and it is only "mixed" property that requires the use of a coverture fraction, Pamela's argument is misplaced and irrelevant.

II.

¶6 This Court has jurisdiction to hear appeals of final judgments entered by the Commonwealth Superior Court pursuant to Article IV, Section 3 of the Commonwealth Constitution and Title 1, Section 3102(a) of the Commonwealth Code.

III.

1. Standard of Review

A. No universal standard for mixed questions of law and fact.

¶7 Our case law does not provide clear guidance on the review standard to be applied to the issue at hand, division of the marital interest in a retirement account, but our most recent decision on point, *Reyes v. Reyes*, 2004 MP 13, offers some insight. In *Reyes* we stated:

> Whether the trial court correctly classified and distributed the parties' real property is a mixed question of law and fact. While mixed questions of law and fact are usually reviewed *de novo*, … the trial court's findings of fact are reviewed under the clearly erroneous standard, … and we will not reverse those findings unless we are left with a firm and definite conviction that clear error has been made.

Id. ¶ 3 (citations omitted).

¶8 Looking beyond our own decisions, to those we have relied on in the past, is more helpful. Our precedent stems primarily from an Idaho case, *Krebs v. Krebs*, 759 P.2d 77

(1988) (discussed below), and from a Ninth Circuit decision, *US v. McConney*, 728 F.2d 1195 (1984). The *McConney* court provides a good starting point because that case reviewed the then-current case law and determined that no universal review standard for mixed law and fact questions would be appropriate. Rather:

> If the concerns of judicial administration—efficiency, accuracy, and precedential weight—make it more appropriate for a district judge to determine whether the established facts fall within the relevant legal definition, we should subject his determination to deferential, clearly erroneous review. If, on the other hand, the concerns of judicial administration favor the appellate court, we should subject the district judge's finding to *de novo* review. Thus, in each case, the pivotal question is do the concerns of judicial administration favor the district court or do they favor the appellate court.

Id. at 1202.

¶9 The US Supreme Court has also noted that "deferential review of mixed questions of law and fact is warranted when it appears that the district court is 'better positioned' than the appellate court to decide the issue in question or that probing scrutiny will not contribute to the clarity of legal doctrine." *Salve Regina College v. Russell*, 499 U.S. 225, 233, 111 S.Ct. 1217, 1222, 113 L.Ed.2d 190 (1991).[3]

B. Division of retirement benefits requires a bifurcated review

¶10 This court has in the past cited *Krebs v. Krebs* for the proposition that property characterization (marital, separate, or mixed) is a question of law that is reviewable *de novo*. *See Hofschneider v. Hofschneider*, 4 N.M.I. 277, 278 ft. 2. Revisiting that case proves instructive here. The *Krebs* court suggests a bifurcated approach. Such an approach would review property characterization *de novo*, since it is primarily a legal

[3] This line of reasoning lead Justice Scalia to write, "We have in the past reviewed some mixed questions of law and fact on a de novo basis, and others on a deferential basis, depending upon essentially practical considerations. … [T]here is no rigid rule with respect to mixed questions. Dissenting on other grounds in *Ornelas v. United States*, 517 U.S. 690, 700-01, 116 S.Ct. 1657, 1663-64, 134 L.Ed.2d 911 (1996).

determination. Property division, by contrast, would require an abuse of discretion review.

¶11 This two-part test is appropriate for the typical asset. First, determine *de novo* if the asset belongs to one spouse individually or to them jointly. Second, determine whether the trial court abused its discretion when it assigned or divided that asset based on equitable considerations. This approach, however, does not address the concerns with a mixed asset. When dealing with a mixed asset the court must first determine whether the separate and marital components of the mixed asset are severable. The relevant statute, 8 CMC § 1829, reads:

> (a) Except as provided otherwise in 8 CMC §§ 1827 and 1828, mixing marital property with property having any other classification reclassifies the other property to marital property unless the component of the mixed property which is not marital property can be traced.
>
> (b) Application by one spouse of substantial labor, effort, inventiveness, physical or intellectual skill, creativity, or managerial activity on individual property of the other spouse creates marital property attributable to that application if:
>
> (1) Reasonable compensation is not received for the application; and
>
> (2) Substantial appreciation of the individual property of the other spouse results from the application.

¶12 The two part test in *Krebs* does not offer clear guidance on which review standard is appropriate when reviewing a trial court's decision to apportion a mixed asset into separate and marital parts. This intermediary step, marital property apportionment, comes after the asset is characterized, but before it is divided. Apportionment would seem to be a more factual inquiry than asset characterization, because the trial court must trace marital and separate components. However, since the trial court, by law, only has authority to divide marital assets, and may only assign separate property to effectuate an equitable distribution of marital assets, a deferential review of mixed property

apportionment might yield too much authority to a trial court's equitable considerations. Thus, property apportionment, allocating marital and separate interests in mixed property, seems to lie in the middle ground between *de novo* and discretionary review standards.

¶13 The California Supreme Court, in *In re Marriage of Lehman*, 955 P.2d 451 (1998), grappled with a similar question as here; how to divide retirement benefits whose value had been enhanced after the parties separated. The court noted that issues of property characterization were primarily legal considerations within a factual context. Thus, as this court has also held, property characterization issues were reviewed *de novo*. When dealing with mixed property, however, the appellate court should give more deference to the trial court. In the specific context of retirement benefits:

> The [lower] court must apportion an employee spouse's retirement benefits between the community property interest of the employee spouse and the nonemployee spouse and any separate property interest of the employee spouse alone. It has discretion in the choice of methods. … Whatever the method that it may use, however, the [lower] court must arrive at a result that is 'reasonable and fairly representative of the contributions of the community and separate estates.'

Id., at 461 (internal citations omitted).

According to the California Supreme Court, apportioning mixed property into marital and separate property shares should be treated like issues of property division, and reviewed for abuse of discretion. The court goes on to note that although these two aspects of the process, characterization and apportionment, are distinct, they often implicate one another.

¶14 The *Lehman* court's reasoning modifies the bifurcated approach found in *Krebs* by pairing the issue of property apportionment along with the issue of property division for review purposes. Both should be reviewed for abuse of discretion. First, the court must determine *de novo* whether the trial court erred in its characterization of an asset

(marital, separate, or mixed). Second, the trial court is given more latitude to weigh the equities when apportioning a mixed asset into marital and separate shares, as it is when dividing a marital asset between the parties, and reviewed only for abuse of discretion.

¶15 Adopting the reasoning of this three-part approach found in *Lehman* presents a problem, however. The *Lehman* court justifies its conclusion that deference should be given to the lower court's apportionment decision based in part on the lower court's having "discretion in the choice of methods" when apportioning mixed property into separate and marital shares. *Id*. The relevant CNMI statute, however, takes that discretion away. 8 CMC § 1828 (b) states:

> The marital property component of that mixed property is the part resulting from multiplying the entire benefit by a fraction of which the numerator is the period of employment giving rise to the benefit that occurred after the determination date and during marriage and the denominator is the total period of the employment.

This formula leaves little, if any, discretion to a trial judge in apportioning mixed property retirement benefits between marital and separate shares. Indeed, so long as the dates called for in the formula can be ascertained, the marital property share would seem to be a pure matter of law. This in turn would indicate a less deferential review standard.

¶16 Nevertheless, the three-part review standard outlined in *Lehman* would satisfy the above policy concerns. First, we must determine on a *de novo* basis whether the retirement benefit was correctly categorized as separate, marital, or mixed. Then, if the retirement benefit is found to be mixed property, we must review the trial court's apportionment of it into marital and separate shares, as well as the trial courts division of the marital share, on a deferential abuse of discretion basis. The trial court is in the best position to determine the numbers necessary for the statutory fraction. Although it will

have some discretion in determining these numbers, since the statute is very clear on this point, any major deviation could easily be termed an abuse of discretion. This would preserve the consistent enforcement of this statute without need for reviewing mixed property apportionment *de novo*.

2. The Retirement Benefit Was Mixed Property.

¶17 Based on our decision above, articulating a three-part review standard for assessing a trial court's division of retirement benefits upon divorce, we must now apply that standard to the case at bar. The first question that the trial court must ask is whether the retirement benefit is separate, marital, or mixed property. We review this determination *de novo*.

¶18 The trial court found that the NMI Retirement Fund was mixed property. Although the trial court did not explain the basis for that finding, it does state that 8 CMC § 1828 (b) governed. This statute reads in part, "[a] deferred employment benefit attributable to employment of a spouse occurring during marriage and partly before and partly after the determination date is mixed property." Elliot argues that the trial court should have found the property to be marital property pursuant to 8 CMC § 1828 (a) which reads, "A deferred employment benefit attributable to employment of a spouse occurring after the determination date is marital property."

¶19 Pamela counters that the trial court was correct in its determination that the retirement benefit was mixed property. She relies on 8 CMC § 1829 (a), which states, "[e]xcept as provided otherwise in 8 CMC §§ 1827 and 1828, mixing marital property with property having any other classification reclassifies the other property to marital property unless the component of the mixed property which is not marital property can be traced." Pamela argues that the very nature of the NMI Retirement Fund makes it mixed

property in this case. Specifically, Pamela notes that the NMI Retirement Fund is a type of defined benefit plan. As such, all payments into the fund and disbursements to be received upon retirement are pre-defined by a specific formula. According to this formula, time of employment and salary received are the two main components when computing the retirement benefit. Thus, when the employee spouse contributes to the retirement benefit both during and after marriage, the individual contributions are not severable from the marital contributions. Since post separation appreciation of the benefit – based on years employed – is dependent upon pre-separation marital contributions (time employed is cumulative, and raises generally depend on prior service), marital and separate interests are not able to be traced. Further, Pamela argues that 8 CMC § 1828 (b) provides the only equitable means of dividing a benefit based on employee efforts both during and after separation. That statute divides the entire retirement benefit based on the ratio of length of marriage to total time employed. Thus, the statutory fraction provides a mathematical formula akin to tracing, which separates out individual efforts while leaving both parties to share proportionally in the growth of benefits resulting from increasing years of employment.

¶20 We note Pamela's argument to be a compelling one. However, we find that the retirement benefit was correctly deemed mixed property without need to address 8 CMC § 1829 (a). Comparing 8 CMC § 1828 subsection (a) with subsection (b) it is obvious that the "determination date" is the operative factor determining which category the deferred employment plan will fall into: mixed or marital. The definition of "determination date" can be found at 8 CMC § 1813(e):

> "Determination date" means the last to occur of the following:
>
> (i) Marriage;

(ii) 12:01 a.m. on the date of establishment of a marital domicile in this Commonwealth; or
(iii) 12:01 a.m. on February 22, 1991.

¶21 The record indicates that the parties were married on August 1, 1990 and moved to Saipan in November of 1990.[4] Thus, the "determination date" must be February 22, 1991, since this is the last date to occur. The record also indicates that for the purposes of the NMI Retirement Fund, Elliot was employed in the CNMI government from August 24, 1990.[5] Thus the trial court did not err when it decided that the retirement benefit was mixed property under 8 CMC § 1828 (b) since Elliot's benefit was attributable to him during marriage and partly before and partly after the determination date of February 22, 1991.

3. The Trial Court Abused Its Discretion in Not Applying the Statutory Fraction.

¶22 Since the retirement benefit was correctly held to be mixed property, we now review the lower court's apportionment and division of the fund for abuse of discretion. 8 CMC § 1828 (b) provides for a specific fraction to be utilized when apportioning a retirement benefit between marital and separate shares:

> The marital property component of that mixed property is the part resulting from multiplying the entire benefit by a fraction of which the numerator is the period of employment giving rise to the benefit that occurred after the determination date and during marriage and the denominator is the total period of the employment. Unless provided otherwise in a decree, marital property agreement, or written consent, valuation of a deferred employment benefit that is mixed property shall be made as of the death of a spouse or a dissolution.

[4] *Sattler v. Mathis-Sattler*, Civ. No. 03-0278 (N.M.I. Super. Ct. Nov. 5, 2003) (Order Granting Plaintiff's Absolute Divorce at 1)
[5] *Sattler v. Mathis*, Civ. No. 02-0412 (N.M.I. Super. Ct. Dec. 14, 2004) (Order of Spousal Support and Distribution of Deferred Employment Benefit at 5) (Referencing Plaintiff's exhibit 7, a letter from the NMI Retirement Fund Office)

¶23 From the outset, two things become readily apparent. First, the court must determine the fraction by which the retirement benefit will be multiplied. Second, some type of present "valuation" must be made. The first determination, setting the statutory fraction, seems straightforward. It is a simple mathematical formula. The court must find, from the evidence before it, four dates: 1) the determination date; 2) the date employment began; 3) the date of marriage; and 4) the date of separation. The time period comprising the numerator does not begin running until numbers 1, 2, and 3 (the determination date, the date employment began, and the date of marriage) have each occurred. Thus, the numerator is found by the equation: (last to occur of the determination date, employment date, or marriage date) minus (the date of separation). The denominator is the total number of years employed.[6]

¶24 The second determination, "valuation…shall be made as of…dissolution," is much less clear. At least two possible readings exist. One is simply a clarification that, upon dissolution of marriage, the trial court must determine the relevant dates so that the statutory fraction can be set. This would mean the trial court must fix the numerator of the fraction and the start date of employment, so that upon termination of employment the denominator will be set and the statutory fraction would be readily ascertainable. Alternatively, it could be read to require the court to value the retirement benefit as of the

[6] In mathematical form, the marital interest is found by multiplying the entire benefit by the fraction:

$$\frac{\textit{(last to occur of: determination date, employment, marriage date) - (date of separation)}}{\textit{total number of years employed}}$$

date of dissolution. These two approaches yield vastly different results and have great consequences for both parties.[7]

¶25 The first approach, and the one that most commentators and courts seem to favor, charges the trial court with determining the fraction of marital property but not the present value of the benefit. This approach is often preferred because it is a better method of dividing both risk of loss and appreciation of benefit between parties. It also avoids the numerous difficulties in valuing retirement benefits. If, for instance, a court sets only the numerator of the statutory fraction, leaving the denominator to grow with additional years of work, then the non-employee spouse's fractional interest will be capped, but the dollar value of that interest is still able to appreciate along with the employee spouse's. If, by contrast, the dollar value of the non-employee spouse's interest was set, it would mean that the interest was frozen and the non-employee would not be able to benefit from the time value of her money.

¶26 This contrast is more readily apparent when real numbers are used. For example, say Elliot and Pamela were married for 5 years, and then got divorced. If the Elliot had begun contributing to a retirement fund at the beginning of marriage, and continued to do so for 5 years after divorce, then the marital interest would be 5/10 (five years of contribution during marriage divided by 10 years total contribution by Elliot). If the Elliot contributed 1,000 per year at an annual interest rate of 10%, the total amount after 5 years would be $6715.61. After 10 years it would be $17,531.17. If the Pamela's *fractional interest* in the total retirement benefit was set at 5 years, then she would get $4382.79 at the 10 year disbursement. (50% of the marital share resulting from

[7] For enlightening explanations of many of the legal and economic principles discussed in this section and how different jurisdictions have treated them, see Elizabeth Barker Brandt, *Valuation, Allocation, and Distribution of Retirement Plans at Divorce: Where Are We?*, 35 Fam.L.Q. 469 (2001).

multiplying the total benefit of $17,531.17 by the fraction 5/10.) If, by contrast, the *dollar value* of her interest was set at divorce, she would only get $3357.81, or half the 5 year value. If Pamela's value was determined at the time of divorce, she would not benefit from the compounding interest over the next 5 years. Elliot, however, would benefit from the compounding interest on his and on Pamela's share over the next 5 years. This problem could be alleviated if the non-employee spouse is given her share of the retirement benefit upon divorce, instead of waiting for the plan's predefined disbursement. There are two problems with this present disbursement approach here, however. The first is practical; the parties agreed to settle all other property issues and left only the issue of splitting the retirement benefit to the court. Thus there is no other property that the court may divide to buy out Pamela's share.

¶27 The second problem is one of policy and involves when to disburse the retirement benefits. There are two options; (1) the employee spouse can buy out the non-employee spouse's share at the time of divorce, or (2) each spouse be paid their respective shares when the benefit is set to be paid out from the plan manager. Option 1 is often beneficial when the present value of the benefit is reasonably ascertainable and there exists adequate marital property (or the employee-spouse has adequate separate property) to buy out the non-employee's share. Option 2 is more appropriate when there is inadequate additional property to compensate the non-employee spouse, when the current value of the benefit is hard to calculate, or when the future of the retirement plan is uncertain. Determining whether to make a present or future disbursement should be

made on a case-by-case basis as the trial court will need to examine the equitable considerations of the litigants.[8]

¶28 In the current case, if Pamela is paid out upon divorce, then the trial court must grapple with how to determine the retirement benefit's present dollar value. The NMI Retirement Fund calculates retirement benefits based on a member's 3 highest earning years. Most people, including Elliot, tend to receive increases in pay with additional years of service. By fixing the dollar value of Pamela's interest at the time of divorce, the court must either (1) attempt to calculate the present value based on what the actual payout to Elliot will be upon retirement, or (2) disregard the post-separation benefit enhancements when determining the present value. Option 1 presents the obvious problem of being highly speculative. In order to determine the present value of future benefits, the court would have to first consider when Elliot is likely to retire, since this sets the denominator of the statutory fraction. Then the court would have to value the entire benefit to Elliot at the time of his retirement based on such factors as likelihood and extent of raises, market trends, and continued viability of the fund itself.

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[8] Professor Elizabeth Barker Brandt has outlined some issues a trial court should consider when deciding between present and deferred distribution. She explains:

> With respect to the equities between parties, a court should consider whether adequate resources are available at the time of divorce to make a lump-sum distribution of the unemployed spouse's interest in pension or whether adequate marital property exists to make an off-setting distribution of marital property. A court should also consider the importance to the parties (particularly the unemployed spouse) of obtaining the cash-flow benefit of a present distribution of pension interest. Finally, a court should consider the impact on an employed spouse's ability to be economically solvent in the wake of the divorce if a present distribution of the pension is made.
>
> With respect to the reliability of the valuation of the pension, a court should consider the problems with developing a reliable present value, such as probability that the plan will vest and mature and the ability to determine an appropriate discount rate for valuing the plan.

Valuation, Allocation, and Distribution of Retirement Plans at Divorce: Where Are We?, 35 Fam.L.Q. 469, 493-494 (2001).

¶29 Option 2 would allow the court to forgo the difficulty of affixing a present value to future benefits by disregarding post-separation benefit enhancements. But this would exclude Pamela from a benefit she is entitled to; to profit from Elliot's labor during marriage. Thus, we refuse to adopt this second option. Without the years of employment during marriage Elliot would be far less likely to receive raises in later years which increase his benefits at retirement. These raises in later years are attributable in part to the years worked during marriage, and thus in part a marital asset. *See In re Marriage of Benson*, 545 N.W.2d 525, 257 (Iowa 1996) ("The 'defined' benefit received by the employee spouse is made possible … in part by the use of the nonemployee spouse's separate property interest in the fund. The entire amount of earnings attributable to the nonemployee spouse's separate property interest remains within the fund, committed to create the 'defined' benefit"); *See also In re Marriage of Hunt*, 909 P.2d 525, 533-534 (Colo. 1995). (approving the marital foundation theory:

> The employee spouse's ability to enhance the future benefit after the marriage frequently builds on foundation work and efforts undertaken during the marriage … Thus, we find that although sometimes related to effort, post-dissolution enhancement must be treated identically to passive increases such as cost-of-living increases or increases ascribable to pension plan changes in order to equitably apportion the risks of delay inherent in the deferred distribution and reserve jurisdiction methods for distribution of benefits.

(internal citations omitted)).

¶30 Pamela argues that the trial court abused its discretion because it "placed a net present value on [her] award, [but] made no present distribution." Pamela essentially argues that if the trial court determines the non-employee spouse's dollar value interest at the time of divorce it *must* order an immediate disbursement. For the reasons above, we agree. To hold otherwise would be to punish Pamela, by not allowing her to benefit from

the time value of her interest in the retirement benefit, and to reward Elliot, by granting him all further appreciation of the marital interest in the retirement benefit.

¶31 Pamela also argues that the trial court abused its discretion by not correctly applying the statutory fraction. Here, too, we agree. 8 CMC § 1828 (b) reads in part, "[t]he marital property component of that mixed property is the part resulting from multiplying the entire benefit by a fraction of which the numerator is the period of employment giving rise to the benefit that occurred after the determination date and during marriage and the denominator is the total period of employment." The trial court decided to take a shortcut however. Instead of utilizing the statutory fraction, the court noted that it "interprets this statute to say that any interest either party has in the deferred benefit of the other party is to be calculated from the date of marriage to separation." *Sattler v. Mathis,* Civ. No. 02-0412 (N.M.I. Super. Ct. Dec. 14, 2004) (Order of Spousal Support and Distribution of Deferred Employment Benefit at 5). This led the court to award each party a 50% interest in the other spouse's retirement benefit for the period of marriage. Not only did the trial court fail to recognize that the "determination date" was later than the date of employment, thereby falsely inflating what should have been the numerator of the statutory fraction, the court also failed to apply the fraction at all.

¶32 The statute reads, "[t]he marital property component … is the part resulting from multiplying the entire benefit by a fraction …" Nowhere did the court make any findings as to what the proper numbers were to complete the fraction, nor did the court even attempt to calculate the "entire benefit" called for by the statute. Rather the trial court simply relied on the NMI Retirement Fund's calculation of what Elliot's benefit would be if he retired on the date of separation. Although this approach might be beneficial for judicial economy, it is not in keeping with 8 CMC § 1828 (b). If the court wishes to

make a present distribution, it must go through the process outlined above of valuing the "entire benefit" as of the estimated actual retirement date, and multiply that value by the statutory fraction.

V.

¶33 The retirement benefit was correctly deemed mixed property, so the trial court *must* utilize the 8 CMC § 1828 (b) statutory fraction in allocating the benefit between marital and separate property shares. The marital share is that amount resulting when the entire benefit is multiplied by a fraction; the numerator of which is that length of time between the last to occur of the determination date, the employment date, or the marriage date and the date of separation; and the denominator of which is the total length of employment.

¶34 In the present case, the marital share of the each spouse's retirement benefit should be split equally because no other assets are before the court. However, if other assets where available for division, nothing precludes the trial court from distributing the marital share in a retirement benefit unequally to offset the unequal distribution of other marital assets. Division of marital assets is left to the equitable consideration of the trial court and will be reviewed on a deferential basis.

¶35 Since we find that the trial court correctly categorized the NMI Retirement Fund benefit as mixed property, but abused its discretion in failing to apply the statutory fraction when dividing it, we REVERSE in part and REMAND for further proceedings consistent with this decision.

DATED this 21st day of MARCH, 2006.

/s/
MIGUEL S. DEMAPAN
Chief Justice

/s/
ALEXANDRO C. CASTRO
Associate Justice

/s/
JOHN A. MANGLONA
Associate Justice

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

IN THE MATTER OF DECISIONS TO BE PUBLISHED IN NORTHERN MARIANA ISLANDS REPORTER, VOLUME SEVEN.	**ERRATA ORDER** **2011-~~ADM~~-0003-~~MSC~~**

PER CURIAM:

I. DECISIONS REVISED BY THIS ORDER

The decisions listed below, all styled as opinions, require substantive revision. They are hereby revised by changes as set forth in section two of this order. The published decisions containing all revisions shall constitute the final versions of the decisions.

1. *Commonwealth v. Taitano*, 2005 MP 20
2. *Kevin Int'l Corp. v. Superior Court*, 2006 MP 3
3. *Liu v. CNMI,* 2006 MP 5
4. *Sattler v. Mathis,* 2006 MP 6
5. *Commonwealth v. Pua,* 2006 MP 19
6. *Bank of Saipan v. Martens,* 2007 MP 5
7. *Commonwealth v. Milliondaga,* 2007 MP 6
8. *Tan v. Younis,* 2007 MP 11
9. *Estate of Muna v. Commonwealth,* 2007 MP 16

10. *Commonwealth v. Blas,* 2007 MP 17

II. REVISIONS

1. *Commonwealth v. Taitano*, 2005 MP 20 ¶ 28 shall read as follows:

¶28 ...the trial court must consider the factors set forth in *United States v. Cook*, 608 F.2d 1175, 1185 n. 9 (9th Cir. 1979) (en banc). (*continuation omitted.*)

2. *Kevin Int'l Corp. v. Superior Court*, 2006 MP 3 Supreme Court Original Action Number shall read as follows:

Supreme Court Original Action No. 06-0009-GA.

Attorneys of Record shall read as follows:

For Plaintiff-Petitioner: Viola Alepuyo, Saipan.

For Defendant-Real Party in Interest: Steven Carrara, Saipan.

3. Liu v. CNMI, 2006 MP 5 ¶ 27 shall read as follows:

¶27 ...The Petitioner cites *Unites States v. Fanfan*, 2004 WL 1723114, 2004 U.S. Dist. LEXIS 18593 (D.Me. June 28, 2004)...Petitioner likens the grant of certiorari in *Fanfan*, which sought to review the effects of the *Blakely v. Washington*, 542 U.S. 296 (2004)...the *Blakely* decision... (*continuation omitted.*)

4. *Sattler v. Mathis*, 2006 MP 6 ¶ 8 shall read as follows:

¶8 Looking beyond our own decisions, to those we have relief on in the past, is more helpful. Our precedent stems primarily from an Idaho case, *Krebs v. Krebs*, 759 P.2d 77 (1988) (discussed below), and from a Ninth Circuit decision, *U.S. v. McConney*, 728 F.2d 1195 (9th Cir. 1984). (*continuation omitted.*)

5. *Commonwealth v. Pua,* 2006 MP 19 ¶ 10 shall read as follows:

¶10 Aside from the fact that the Attorney General did not "certif[y] to the Superior Court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of

a fact material in the proceeding" – which will not necessarily defeat jurisdiction, *see U.S. v. Becker*, 929 F.2d 442, 445 (9th Cir. 1991) (finding that failure to certify pursuant to analogous federal statute is correctable at the court's discretion) – this statute is clearly inapplicable to the present case. (*continuation omitted.*)

6. *Commonwealth v. Pua*, 2006 MP 19 ¶ 16 shall read as follows:

¶16 Furthermore, we are not the first court to find mandamus jurisdiction may be accorded even when appellate jurisdiction is lacking. In *U.S. v. Barker*, 1 F.3d 957, 959 (9th Cir. 1989), the Ninth Circuit held that where the Government had plead in the alternative for 1) jurisdiction pursuant to 18 U.S.C. § 3731 (the federal analog to our 6 CMC § 8101), or 2) mandamus relief, even though no jurisdiction could be had under 18 U.S.C. § 3731, mandamus relief was still available due to the gravity of issue. *See also U.S. v. Collamore*, 868 F.2d 24, 30 (1st Cir. 1989) (holding similarly that mandamus was proper when 18 U.S.C. § 3731 jurisdiction was questionable.) (*continuation omitted.*)

7. *Bank of Saipan v. Martens*, 2007 MP 5 ¶ 14 shall read as follows:

¶14 . . . The question in each case is whether under all the circumstances the remedy was pursued with reasonable dispatch. *See McDaniel v. U.S. Dist. Court*, 127 F.3d 886, 890 n.1 (9th Cir. 1997) (Rymer, Circuit Judge, concurring, *citing United States v. Olds*, 426 F.2d 562 (3rd Cir. 1970)). (*continuation omitted.*)

8. *Commonwealth v. Milliondaga*, 2007 MP 6 ¶ 6 shall read as follows:

¶6 . . . Two provisions are not the same offense if each contains an element not included in the other. *Hudson v. United States*, 522 U.S. 93, 107 (1997) (Stevens, J. concurring). (*continuation omitted.*)

9. *Tan v. Younis*, 2007 MP 11 ¶ 36 shall read as follows:

¶36 So strong is the Constitutional protection of free expression that it even contemplates and protects a degree of abuse. "[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'" *Brown v. Hartlage*, 456 U.S. 45, 60, 102 S. Ct. 1523, 71 L. Ed. 2d 732 (1982) (citations omitted). Indeed, "[s]ome degree of abuse is inseparable from the proper use of every thing; and in no instance is this more true than in that of the press." *New York Times*, 376 U.S. at 271 (quoting James Madison, 4 *Elliot's Debates on the Federal Constitution* 571 (1856)).

10. *Estate of Muna v. Commonwealth*, 2007 MP 16 ¶ 13 shall read as follows:

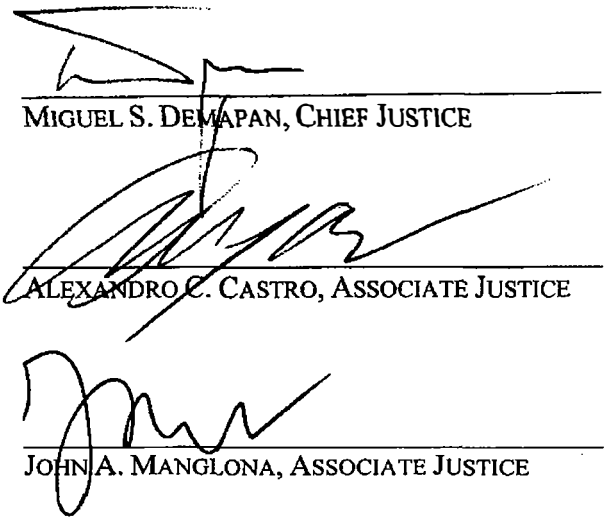
¶13 The Fifth Amendment of the United States Constitution and the Constitution of the Commonwealth of the Northern Mariana Islands Constitution require that when private property is taken for public use by eminent domain, "just compensation" must be provided to the owner. *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 9 (1984).

11. *Commonwealth v. Blas*, 2007 MP 17 ¶ 3 shall read as follows:

¶3 The Commonwealth charged Blas with vehicular homicide, reckless driving, and driving under the influence of alcohol. On October 18, 2004, the jury heard the vehicular homicide charge, while the trial court heard the reckless driving and driving under the influence charges. On November 2, 2004, the jury returned a verdict acquitting Blas on the vehicular homicide charge, but the trial court found him guilty of reckless driving and driving under the influence of alcohol. Blas timely appealed.

SO ORDERED.

Entered this 30th day March of 2011.



MIGUEL S. DEMAPAN, CHIEF JUSTICE

ALEXANDRO C. CASTRO, ASSOCIATE JUSTICE

JOHN A. MANGLONA, ASSOCIATE JUSTICE