

# THE SURVIVAL OF CUSTOMARY LAW IN THE NORTHERN MARIANA ISLANDS

By  
Elizabeth Barrett Ristroph\*

## **Abstract:**

The Commonwealth of the Northern Mariana Islands (“CNMI”), a U.S. territory located in the Pacific Ocean just north of Guam, is one of few American jurisdictions in which the traditional cultural practices celebrated by a minority of the population have the force of law. Problematically, many of these laws are uncodified and no longer practiced by the majority of people in the jurisdiction. The CNMI judiciary often stumbles through cases of first impression with no guidance from the CNMI legislature, resulting in conflicting case law. This article surveys the customary law in place in the CNMI, and considers the obstacles of applying this law in a society whose culture and customs are rapidly evolving.

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\* Assistant Attorney, North Slope Borough Law Department, Barrow, Alaska. The author served as a law clerk for the Superior Court from 2005 to 2007 and was involved in many of the probate cases discussed in the article. Cases cited are on file with the author. Only the CNMI Supreme Court cases after 1990 are available on Westlaw, although Westlaw’s reporter citations are inaccurate.

## The Survival of Customary Law in the Northern Mariana Islands

There are few American jurisdictions in which the traditional cultural practices celebrated by a minority of the population have the force of law, even when these practices are at times uncodified, imprecise, and disputed. In 1975, after three centuries of foreign rule, the people of the Northern Mariana Islands established such a jurisdiction—the Commonwealth of the Northern Mariana Islands (“CNMI”). This article surveys the customary law in place in the CNMI and considers the obstacles of applying this law in a society whose culture and customs are rapidly evolving.

### I. HISTORICAL BACKGROUND

The Northern Mariana Islands was initially inhabited by the Chamorro people, who arrived some 3500 to 4000 years ago.<sup>1</sup> Spanish colonization, beginning in 1668 with the establishment of a Jesuit mission, led to a dramatic decline in the Chamorro population.<sup>2</sup> After a series of revolts, the Spanish government relocated the entire native population from the islands of Saipan and Rota in the Northern Marianas to the neighboring island of Guam.<sup>3</sup> Not until the late 19th century were the Chamorros allowed to return.<sup>4</sup>

Many aspects of traditional Chamorro culture collapsed as the surviving Chamorros adapted to Spanish rule.<sup>5</sup> Some aspects of the ancient culture were brought to light in the mid-20th century with the work of archeologist Alexander Spoehr. Spoehr’s work, *Saipan: The*

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<sup>1</sup> SCOTT RUSSELL, TIEMPON I MANMOFO’NA: ANCIENT CHAMORRO CULTURE AND HISTORY OF THE NORTHERN MARIANA ISLANDS 78 (1998).

<sup>2</sup> *Id.* at 13.

<sup>3</sup> Britannica Encyclopedia Online, *Northern Mariana Islands History*, <http://www.britannica.com/eb/article-273249/Northern-Mariana-Islands> (last visited Jan. 30, 2008).

<sup>4</sup> Dan MacMeekin, *The Northern Mariana Islands: A Political-Legal Chronology 1521 – 1930*, <http://macmeekin.com/Library/NMChron/1521.htm> (last visited Sept. 10, 2007).

<sup>5</sup> RUSSELL, *supra* note 1, at 13.

*Ethnology of a War-Devastated Island* (1954), is the only text consistently relied on by modern courts to gain insight into traditional Chamorro culture and law.<sup>6</sup>

In the 19th century, the Refaluwasch, or the Carolinian people, immigrated to the Northern Marianas from the neighboring East and West Carolinian islands<sup>7</sup> and established permanent settlements.<sup>8</sup> Although they did adopt Christianity, the Carolinian people retained a culture that was distinct from both Chamorro and Spanish culture.<sup>9</sup> Today, there are more vestiges of traditional Carolinian culture than of Chamorro culture, such as the wreath (known as *mar-mar*) still worn by many Carolinians.<sup>10</sup>

Spain was forced to sell Guam to the United States at the end of the Spanish-American War in 1898.<sup>11</sup> Shortly after, the United States sold the Northern Mariana Islands to Germany in 1899.<sup>12</sup> After World War I, the Northern Mariana Islands were mandated to Japan by the League of Nations.<sup>13</sup> In 1947, after World War II, the United Nations established the Trust Territory of the Pacific Islands, naming the United States as Trustee over the Northern Marianas and other Micronesian islands.<sup>14</sup>

In 1975, the Northern Mariana Islands entered into a covenant with the United States whereby the islands would become a semi-autonomous Commonwealth under the sovereignty of

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<sup>6</sup> See, e.g., *Arriola v. Arriola*, No. 97-049, 6 N.M.I. 1, 1999 MP 13 (N.M.I. Sup. Ct. Apr. 28, 1999); *In re Estate of Aguida Amires*, No. 95-012, 5 N.M.I. 70, 1997 MP 8, 1997 WL 33480210 (N.M.I. Sup. Ct. May 12, 1997).

<sup>7</sup> These include what is now the Federated States of Micronesia. See Alexander Spoehr, *Saipan: The Ethnology of a War-Devastated Island*, in *FIELDANIA: ANTHROPOLOGY* 41, 326 (Chicago Natural History Museum, 1954) (“[T]he main body of the Saipan group [of Carolinians] migrated from atolls lying just to the west and north of Truk.”).

<sup>8</sup> Northern Mariana Islands Council for the Humanities, “About the CNMI,” [http://www.nmihumanities.org/about\\_cnmi.asp](http://www.nmihumanities.org/about_cnmi.asp) (last visited Sept. 10, 2007).

<sup>9</sup> Based on the author’s observations while living on Saipan from 2005 to 2007.

<sup>10</sup> *Id.*

<sup>11</sup> Treaty of Paris, U.S.-Spain, Dec. 10, 1898, 30 Stat. 1754.

<sup>12</sup> RUSSELL, *supra* note 1, at 25.

<sup>13</sup> DOI Office of Insular Affairs, Commonwealth of the Northern Mariana Islands, [www.doi.gov/oia/Islandpages/cnmipage.htm](http://www.doi.gov/oia/Islandpages/cnmipage.htm) (last visited Sept. 10, 2007).

<sup>14</sup> Trusteeship Agreement for the Former Japanese Mandated Islands art. 3, July 18, 1947, 61 Stat. 3301.

the United States.<sup>15</sup> This Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States (“Covenant”) spells out the division of power between the United States and the local government.

The CNMI is generally subject to federal law and the U.S. Constitution, with the exception of the Fourteenth and Sixth Amendments. In order to provide representation from each of the populated islands, the Covenant disregards the Fourteenth Amendment equal protection guarantee of “one person, one vote.”<sup>16</sup> Equal protection is also limited by prohibitions on the alienation of land from people who are of not of Northern Marianas descent.<sup>17</sup> The application of the Sixth Amendment is limited by the Attorney General’s ability to prosecute some offenses in the absence of a jury trial.<sup>18</sup> The local government also currently maintains independent control over immigration, customs, and taxation. This, however, may change with the passage of bills pending in the U.S. Congress that provide for a federal takeover of immigration.<sup>19</sup>

The CNMI has a limited statutory code, which was not enacted until 1984.<sup>20</sup> The statutory code contains some specific provisions for applying traditional customary law, primarily with respect to inheritance matters and the distribution of land.<sup>21</sup> While most of the statutory code is now comprised of public and local laws enacted by the CNMI Legislature,

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<sup>15</sup> Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, 48 U.S.C. § 1801, 94 Pub. L. No. 241, 90 Stat. 263 [hereinafter Covenant]. On November 3, 1986, following the approval of the Covenant by Congress, a formal presidential proclamation terminated the Trusteeship with the Northern Mariana Islands, thereby conferring United States citizenship on CNMI residents pursuant to §301 of the Covenant. Proclamation No. 5564, 51 Fed. Reg. 40399. The United Nations officially terminated the Trusteeship in December 1990. S.C. Res. 683, U.N. SCOR, 45th Sess., 2972d mtg. at 29 (1990).

<sup>16</sup> Covenant, *supra* note 15, at § 203(c); *see Reynolds v. Sims*, 377 U.S. 533, 575 (1964) (holding equal protection requires that both houses of a state legislature be apportioned by population).

<sup>17</sup> Covenant, *supra* note 15, at § 805(a).

<sup>18</sup> *Id.* at § 501.

<sup>19</sup> In December 2007, the U.S. House of Representatives passed H.R. 3079, which provides for the U.S. federal government to take over CNMI immigration. H.R. 3079 awaits Senate action as part of S. 2483, an omnibus bill made up of some 50 House-approved bills. Agnes E. Donato, *Federalization bill now heads to full US Senate*, SAIPAN TRIBUNE, Feb. 01, 2008, <http://www.saipantribune.com/newsstory.aspx?cat=1&newsID=76623>.

<sup>20</sup> *See* Northern Mariana Islands Public Law 3-90, effective January 1, 1984.

<sup>21</sup> *See generally* 8 N.M.I. Code.

many provisions derive from pre-CNMI law.<sup>22</sup> Further, Trust Territory law may still apply in certain situations, such as in the probate of the estate of a decedent who died during the Trust Territory time.<sup>23</sup> To the extent that these laws are silent, courts apply uncodified customary law (based on evidence offered by litigants) or U.S. common law (depending on the area of law).<sup>24</sup> Given its youth, the jurisdiction has little of its own common law to apply.

Cases pertaining to Commonwealth law are brought in the CNMI Superior Court, a court of general jurisdiction with five divisions.<sup>25</sup> Appeals are directed toward the three-justice panel that constitutes the CNMI Supreme Court.<sup>26</sup> Appeals from this court to the U.S. Supreme Court are extremely rare.<sup>27</sup>

## II. APPLICATION OF CUSTOMARY LAW

### A. Land categorization under the CNMI Code

The categorization of land is important in determining which probate laws apply. Most of this law is codified in the CNMI Code.

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<sup>22</sup> See Covenant, *supra* note 15, at § 505; see also U.S. Department of the Interior Secretarial Order 2989 at IV Section 1 (Northern Mariana Islands laws in effect prior to the Covenant and not inconsistent with the Covenant or other applicable U.S. laws shall remain in force).

<sup>23</sup> See 8 N.M.I. Code § 2102; *In re Estate of Manuel Aldan*, No. 95-028, 5 N.M.I. 50, 1997 MP 3, 1997 WL 33480205 (N.M.I. Sup. Ct. Feb. 13, 1997).

<sup>24</sup> See 7 N.M.I. Code § 3401 (2004) (“For civil matters, the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the contrary.”).

<sup>25</sup> See 1 N.M.I. Code § 3203.

<sup>26</sup> Pursuant to the Covenant at § 403, the Supreme Court was established on May 1, 1989. See 1 N.M.I. Code § 3101. Prior to the creation of the Supreme Court, the Covenant at § 402 vested in the U.S. District Court with original federal jurisdiction as well as appellate jurisdiction over CNMI law matters.

<sup>27</sup> The Covenant at § 403 provided that for 15 years following the creation of the Supreme Court, appeals from that court would go to the United States Court of Appeals for the Ninth Circuit, rather than to the U.S. Supreme Court. As of May 1, 2004, CNMI Supreme Court appeals can be (but seldom are) taken directly to U.S. Supreme Court.

1. Carolinian customary law

Under Carolinian customary law, property is held either in one's individual capacity or as family land.<sup>28</sup> The CNMI Code recognizes family land as land acquired “from one or more Carolinian ancestors, and held by the person as customary trustee for the use of the family members.”<sup>29</sup> Family land is held by a customary trustee for the equal enjoyment of all descendants of the original land owner.<sup>30</sup> *Estate of Ernesto Rangamar* explains the concept of family land:

Most Carolinians in the Northern Marianas descend from Carolinians “who migrated ... from ... the Caroline chain.” With them they brought and were able to maintain for a while “much of their old social organization, customs and language.” Among these customs was “their traditional land tenure pattern.”

...

Traditional Carolinian land tenure is matrilineal, and land descends by the minimeal [sic] lineage, i.e., mother to daughter. The land under this tenure system is collectively owned and controlled by females.

...

Matrilineal land was held, pursuant to Carolinian land custom, collectively by the females and recorded in the name of the oldest female member of the maternal line, with the oldest holding title and acting more or less as a “trustee” for the rest of the lineage members.<sup>31</sup>

*Rangamar* goes on to say that the system was somewhat distorted by the various systems for registration of family land under the successive German, Japanese, and Trust Territory administrations:

The German administration began a system of land registration, under which both maternal lineage lands held collectively by females and lands received by Carolinian males under a newly initiated homestead program were registered.<sup>32</sup> Carolinian males received title to homestead land, which was recorded in their individual name.

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<sup>28</sup> *Estate of Ernesto Rangamar*, No. 92-029, 4 N.M.I. 72, 76-77, 1993 WL 614806 (N.M.I. Sup. Ct. Dec. 15, 1993).

<sup>29</sup> 8 N.M.I. Code § 2107(l) (stating that the acquisition can be “by law or decision of the family or by inheritance”).

<sup>30</sup> 8 N.M.I. Code §§ 2904(b), 2910.

<sup>31</sup> *Estate of Ernesto Rangamar*, 4 N.M.I. at 76-77 (citations, footnotes and emphasis omitted).

<sup>32</sup> The registration system did not usually record the names of the other female owners of the land. It was from this registration system that the term “customary trustee” evolved. *Id.* at 77 n.14.

...

The Carolinian males that received property under the homestead program held the land individually. While some of these males gave their land to both female and male heirs, others chose to give the land only to their daughter(s) who then “subsequently founded a new matrilineal lineage.” Hence, the applicability of Carolinian land custom to such lands became dependent upon the subsequent treatment of the land by the female recipient(s) of the land.

...

The Japanese administration continued the German administration's system of registering both land held individually and matrilineal land. Under the American administration, however, Carolinian lands began to be registered in either the name of an individual Carolinian or in the name of the heirs of a decedent with a trustee designated, without regard to gender.<sup>33</sup>

For land held by an individual Carolinian, “[u]nless the family consents or agrees otherwise,” the land becomes family land upon the individual’s death and passes to the oldest surviving daughter as a customary trustee.<sup>34</sup>

Any alienation of Carolinian family land, erection of a permanent structure on the land, or occupation of a permanent structure requires the consent of the family, which is determined by majority vote of the customary trustee and his siblings.<sup>35</sup> A court will presume land held by a Carolinian to be family land unless the original owner showed clear intent to hold it otherwise.<sup>36</sup>

## 2. Chamorro customary law

Like Carolinian custom, Chamorro custom distinguishes between individually owned land and “ancestors’ land,”<sup>37</sup> known as *iyon manaina*. The CNMI Code defines ancestors’ land as “land acquired...from one or more of [the owner’s] Chamorro ancestors of Northern Marianas

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<sup>33</sup> *Id.* at 76-77 (citations, footnotes and emphasis omitted).

<sup>34</sup> 8 N.M.I. Code § 2905.

<sup>35</sup> See 8 N.M.I. Code §§ 2904(c), 2907, 2909. This relationship applies “[u]nless the family consents or agrees otherwise.” *Id.* at § 2909. For deceased siblings with descendants, the descendants may vote by representation. *Id.*

<sup>36</sup> See *In re Estate of Francisca Lairopi*, No. 97-1234, 2002 MP 10, at ¶ 12, 6 N.M.I. 417, 2002 WL 32983565 (N.M.I. Sup. Ct. May 16, 2002).

<sup>37</sup> 8 N.M.I. Code §§ 2902-2903; *Estate of Mariana Deleon Guerrero*, No. 87-295, 1 N.M.I. 301, 306, 1990 WL 291871 (N.M.I. Sup. Ct. July 20, 1990) (applying pre-code intestacy law under Chamorro custom).

descent.”<sup>38</sup> As discussed below, the only significance of this distinction is that the spouse of the decedent receives a life estate in the decedent’s ancestors’ land rather than the one-half share received for other property.<sup>39</sup>

### 3. Article XII

Article XII of the Constitution is one peculiar aspect of CNMI land law that has nothing to do with customary law, but does relate to culture. Article XII limits permanent and long-term (more than 55 years<sup>40</sup>) land acquisition to people who are at least one-quarter Northern Marianas descent and corporations that are 100 percent Northern Marianas owned.<sup>41</sup> The expressed policy goals for this restriction are to (1) protect Northern Marianas persons from exploitation, (2) promote economic advancement and self-sufficiency, and (3) recognize the importance of ownership of land for the culture and traditions of the people of the CNMI.<sup>42</sup> As Professor Marybeth Herald points out, the law and the Ninth Circuit Court decision upholding the law<sup>43</sup> assume the following: (1) there is no threat of exploitation or cultural dislocation when Northern Marianas persons sell their land to ambitious or unscrupulous persons who happen to be of the

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<sup>38</sup> 8 N.M.I. Code § 2107(a).

<sup>39</sup> 8 N.M.I. Code §§ 2902-2903.

<sup>40</sup> The Second Constitutional Convention Amendment 35 (1985) extended the original provision (ratified 1977, effective 1978) from 40 years to 55 years.

<sup>41</sup> See N.M.I. Const. art. XII, § 3: “The term permanent and long-term interests in real property . . . includes freehold interests and leasehold interests of more than fifty-five years including renewal rights, except an interest acquired above the first floor of a condominium building.” A person is of Northern Marianas descent if “a citizen or national of the United States and . . . at least one-quarter Northern Marianas Chamorro or Northern Marianas Carolinian blood or a combination thereof” or if adopted before the age of eighteen by a person of Northern Marianas descent. *Id.* at § 4. For determining descent, the constitution considers a person “to be a full-blooded Northern Marianas Chamorro or Northern Marianas Carolinian if . . . born or domiciled in the Northern Mariana Islands by 1950 and . . . a citizen of the Trust Territory of the Pacific Islands before [November 3, 1986].” *Id.* A corporation is eligible to own land only if “it is incorporated in the Commonwealth, has its principal place of business in the Commonwealth, has directors one-hundred percent of whom are persons of Northern Marianas descent and has voting shares . . . one-hundred percent of which are actually owned by persons of Northern Marianas descent.” *Id.* at § 5. Article XII’s alienation restrictions “are not subject to equal protection analysis” under the U.S. Constitution. *Wabol v. Villacrusis*, 958 F.2d 1450, 1463 (9th Cir. 1992).

<sup>42</sup> Covenant, *supra* note 15, at § 805; *Wabol*, 958 F.2d at 1461.

<sup>43</sup> See *Wabol*, 958 F.2d 1450.

correct Northern Marianas ancestry; (2) all outsider land purchasers constitute a threat; (3) and the 55-year alienations do not constitute a threat.<sup>44</sup> The policy also appears to assume that more subtle forces (i.e., the adoption of modern American comforts and values) will not distort the culture and traditions.<sup>45</sup>

Although Article XII does not concern customary law, it does come into play in cases in which the application of statutory or customary law (such as passing land to one's children) would violate Article XII.<sup>46</sup> More often, however, Article XII works with customary law, as it reduces the opportunities for Northern Marianas persons to sell their family land. From the perspective of the courts, Article XII adds another factor to consider when discerning whether statutory, common, or customary law should be applied.<sup>47</sup>

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<sup>44</sup> Marybeth Herald, *Does the Constitution Follow the Flag into the United States Territories or Can it Be Separately Purchased and Sold?*, 22 HASTINGS CONST. L.Q. 707, 744-745 (1995).

<sup>45</sup> There are no restrictions on adopting casino gambling or allowing foreign owned and staffed hotels, topless bars, and garment factories (all of which rely on the CNMI's massive pool of cheap immigrant labor)—actions that intrude on the culture and change it. See Marybeth Herald, *The Northern Mariana Islands: A Change in Course Under Its Covenant with the United States*, 71 OR. L. REV. 127, 186-87 (1992).

<sup>46</sup> *E.g.*, *Estate of Edives Imamura*, No. 89-1009, 5 N.M.I. 60, 1997 MP 7, 1997 WL 33480209 (N.M.I. Sup. Ct. May 1, 1997) (holding the Superior Court did not err in concluding that non-Northern Marianas grandchildren did not acquire any interest in their grandmother's estate through inheritance). As the number of inter-marriages increase between Northern Marianas persons (as defined in the CNMI Constitution) and non-Northern Marianas, the Article XII restriction will result in more conflicts with customary law on inheritance.

<sup>47</sup> In *Estate of Tudela*, the CNMI Superior Court held that (1) section 2411 of the CNMI code (providing for a "person not of Northern Marianas descent" can receive by devise or descent "the maximum allowable legal interest in ... real property" with any remaining interest passing to the next closest heirs or devisees eligible to own land in the CNMI) was an improper legislative attempt to transform an unconstitutional acquisition of a long-term interest in land by a non-NMI descent person; (2) the application of section 2601 (giving a surviving spouse has rights to exempt property of the decedent's estate) to non-NMI surviving spouses unconstitutional, as it would improperly allow the transfer of a family home to a person of non-NMI descent, in violation of Article XII (where there are children of the decedent); and (3) section 2902 is unconstitutional in its application to a non-NMI spouse, as it allows the spouse of a decedent to obtain a life estate in ancestral land with the children taking a vested remainder in fee simple, contrary to Article XII. No. 86-884, slip op. 12-13, 1992 WL 397525 (N.M.I. Super. Ct. May 22, 1992). The court thus declined to apply the statutory law. The CNMI Supreme Court overruled this decision on other grounds and did not consider the constitutional issue. See 4 N.M.I. 1, 1993 WL 307683 (N.M.I. Sup. Ct. June 16, 1993).

## B. Discerning the law of intestate succession

At the turn of the 21st century, very few of the probate cases handled by the Superior Court concern testate successions. It is not uncommon for an intestate succession to take place decades after the decedent's death.<sup>48</sup> Sometimes the only impetus for probating an estate is the government's exercise of eminent domain and the resulting need to determine which heirs should be awarded the proceeds of the forced sale.<sup>49</sup> In these delayed probate cases, the estate's only asset is land or proceeds from the sale of land.

The CNMI Code is the starting point for determining the law on intestate succession, although case law contains numerous examples of departures based on family agreements and uncodified customs presented to courts by expert witnesses.<sup>50</sup> Under the CNMI Code, intestate succession varies depending on whether the decedent was Chamorro, Carolinian, or neither.<sup>51</sup>

### 1. Chamorro customary law

Under Chamorro custom, a life estate in ancestors' land passes to the surviving spouse with priority of succession for the remainder to descendants and then to siblings and their descendants.<sup>52</sup> If the decedent does not have a surviving spouse (which is usually the case in old estate cases), then priority of succession for ancestors' land is to descendants and then to siblings

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<sup>48</sup> See, e.g., *Estate of Lorenzo Rofag*, No. 89-019, 2 N.M.I. 18, 1991 WL 70067 (N.M.I. Sup. Ct. Feb. 22, 1991) (finding the decedent died in 1944; probate initiated in 1989); *In re Estate of Joaquin Dela Cruz*, No. 90-023, 2 N.M.I. 1, 1991 WL 70072 (Sup. Ct. N.M.I. Feb. 7, 1991) (finding the decedent died in 1948; probate initiated in 1987).

<sup>49</sup> See, e.g., *Estate of Angel Malite*, No. 97-369 (finding decedent died in early 20<sup>th</sup> century, probate filed for third time in 1997); *In re Estate of Vicenta Kaipat*, No. 04-0090 (finding decedent died in early 20<sup>th</sup> century, probate filed in 2004). The Superior Court does not have a record of either death.

<sup>50</sup> See *infra* Section III(C).

<sup>51</sup> A separate statutory regime which has nothing to do with custom exists for decedents not of Northern Marianas Chamorro or Carolinian descent. See 8 N.M.I. Code § 2912. What happens when families are of mixed descent is unclear. Usually heir-claimants assert that they have practiced a particular culture's customs and would like to proceed under that culture's customary law. E.g., *Sullivan v. Tarope*, No. 98-1293, 2006 WL 1109449 (N.M.I. Sup. Ct. Apr. 18, 2006).

<sup>52</sup> See 8 N.M.I. Code § 2902(a), (c). Succession to heirs is "per stirpes." *Id.* at § 2915.

and their descendants.<sup>53</sup> For all other property under Chamorro custom (i.e., personal property and individually acquired real estate), one half passes to the surviving spouse and one half passes to the descendants.<sup>54</sup> If the decedent does not have a surviving spouse, then all such property passes in priority of succession to descendants, to parents, and then to siblings and their descendants.<sup>55</sup>

An important Chamorro tradition that is not codified is the succession of the family home.<sup>56</sup> Traditionally, the surviving spouse gets a life estate in the house, with the remainder going to the child who has cared for and lived the longest with the parents.<sup>57</sup>

## 2. Carolinian customary law

Under Carolinian custom, intestate succession depends upon whether property is family land, other real property, or personal property, but the statutory intestate succession scheme is subject to change upon family agreement.<sup>58</sup> For family land in which the decedent was the customary trustee, another family member will become the customary trustee and the land will retain its nature as family land “[u]nless the family consents or agrees otherwise.”<sup>59</sup> As the above

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<sup>53</sup> 8 N.M.I. Code § 2902(b), (d).

<sup>54</sup> 8 N.M.I. Code § 2903.

<sup>55</sup> *Id.*

<sup>56</sup> A surviving spouse has rights to exempt property of the decedent's estate consisting of “the primary family home and lot, household furniture, one automobile, furnishings, appliances, and personal effects.” 8 N.M.I. Code § 2601.

<sup>57</sup> See SPOEHR, *supra* note 7, at 143; *see also Diaz v. Taylor*, No. 97-0879 (N.M.I. Super. Ct. Dec. 23, 1997), slip op. at 5 (“The daughter or son who stays with the parents and cares for them receives the family home as a reward in most instances.”). The home may also be transferred before death by a revocable oral conveyance. Discussed *infra* Section II(E). *See Diaz*, slip op. at 5; *Estate of Antonia Iglecias*, No. 05-0142 (N.M.I. Super. Ct. Dec. 12, 2005).

<sup>58</sup> These rules are flexible. All sections in the Commonwealth Code concerning Carolinian probate custom contain the phrase: “[u]nless the family consents or agrees otherwise.” 8 N.M.I. Code §§ 2904-11.

<sup>59</sup> 8 N.M.I. Code § 2904 (a). Priority of succession to customary trustee is to the oldest surviving sister, to the oldest surviving brother, to the oldest surviving daughter of decedent and his siblings, to the oldest surviving son of decedent and his siblings, to the decedent's oldest surviving granddaughter, and finally to the decedent's oldest surviving grandson. *Id.* If none of these are available, the family (or the court) chooses a customary trustee. *Id.* at § 2904(a)(6).

quoted portion of the statutory code suggests, family agreement can and often does override the code.

Integral in family agreements on intestate succession is the role of the customary trustee and possibly that of a figure described in some cases as the *telap* (chief). In *Estate of Isaac Kaipat*, an expert witness on Carolinian culture testified that, while the oldest female acts as a trustee for the family property, it is the oldest son of the oldest female who acts as the *telap* and spokesperson for the family.<sup>60</sup> Carolinian culture requires the *telap* to work with the trustee and other heirs in making decisions.<sup>61</sup> In *Estate of Remedio Malite*, however, a different expert witness referred to the female trustee of family land as the *telap*.<sup>62</sup>

The power of the statutory code is also limited by the idea that it can be disproved by custom. In *Willbanks v. Stein*, after deciding that Chamorro custom applied, the Superior Court described a particular statute providing for inheritance of an illegitimate child<sup>63</sup> as the “best evidence of applicable Chamorro custom.”<sup>64</sup> The CNMI Supreme Court reversed, holding that this section of the CNMI Code sets forth a standard of proof rather than evidence of custom.<sup>65</sup> The Supreme Court stated, “[w]hile the probate code may reflect certain aspects of custom, it does not, standing alone, establish custom as a matter of law.”<sup>66</sup> The Supreme Court instructed the trial court to take further evidence, if warranted, on the issue of custom.<sup>67</sup>

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<sup>60</sup> No. 05-0247, slip op. at 4 (N.M.I. Super. Ct. Apr. 25, 2006) (Order Following Evidentiary Hearing and Denying Heirship Claim on Behalf of the Estate of Dolores K. Pelisamen). It is possible for a person to assume the role as *telap* even if he is not the oldest male, provided that this is the decision of the family. *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> No. 06-0163, slip op. at 11 (N.M.I. Super. Ct. May 25, 2006) (Order Confirming the Mwei Mwei Adoption of Jesus Somol and Recognizing the Estate of Jesus Somol as an Heir to the Estate of Remedio Malite).

<sup>63</sup> 8 N.M.I. Code § 2918(b)(2).

<sup>64</sup> No. 91-0337, slip op. at 3 (N.M.I. Super. Ct. July 19, 1993).

<sup>65</sup> *Willbanks v. Stein*, No. 91-0337, 4 N.M.I. 205, 206, 1994 WL 1886694 (N.M.I. Sup. Ct. Dec. 6, 1994).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

Thus, the CNMI Code often serves as the baseline for determining intestate succession, rather than a set of bright-line rules. Where the rules are altered, courts must go through the difficult process of determining who is the customary trustee (under Carolinian custom), who said what (often many years ago), which expert has the best knowledge of customary law, and whether the family has actually followed customary law.

### C. Conflicting laws and customs regarding marital property

The Commonwealth Marital Property Act of 1990,<sup>68</sup> based on the Uniform Marital Property Act,<sup>69</sup> established a community property regime in terms of “marital property” and “individual property.”<sup>70</sup> Under the Act, the surviving spouse retains a one-half undivided interest in marital property, subject to the Article XII alienation restrictions.<sup>71</sup> While this rule seems fairly clear, 21st century courts often deal with cases in which a decedent died prior to the application of the 1990 law.<sup>72</sup> A brief review of the case law for these estates demonstrates the confusion created by conflicting customs and the application of traditional and modern common law.

In *Matagolai v. Pangelinan*, the U.S. District Court for the Northern Mariana Islands sitting as an appeals court rejected the application of community property principles in the CNMI in the absence of legislation explicitly providing for them.<sup>73</sup> Noting that community property is a

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<sup>68</sup> 8 N.M.I. Code §§ 1811-1834.

<sup>69</sup> See *Reyes v. Reyes*, No. 97-0167, 2004 MP 1, ¶ 27, 2004 WL 3704880 (N.M.I. Sup. Ct. Jan. 15, 2004.); 8 N.M.I. Code § 1811 cmt.

<sup>70</sup> *Estate of Manuel Aldan*, No. 95-028, 5 N.M.I. 50, 52, 1997 MP 3, ¶ 16, 1997 WL 33480205 (N.M.I. Sup. Ct. Feb. 13, 1997).

<sup>71</sup> 8 N.M.I. Code § 1820(c). In general, marital property is property acquired by either spouse during the marriage except for property received by gift, devise, or descent to one spouse alone or for property traceable to one spouse's individual property. See *id.* at § 1820.

<sup>72</sup> P.L. 7-22, effective February 22, 1991, is not retroactive.

<sup>73</sup> 3 CR 591, 597 (D. N. Mar. I. App. Div. 1988).

product of civil law rather than common law, the court applied the Anglo-American common law vesting all ownership in the husband.<sup>74</sup>

In *Estate of Mariana Deleon Guerrero*,<sup>75</sup> the CNMI Supreme Court upheld the Superior Court's ruling<sup>76</sup> that property purchased during the marriage and listed only the husband's name, belonged to the husband alone. Relying on Spoehr's treatise,<sup>77</sup> the court found that Chamorro custom provided for ownership of all of the wife's property to vest in her husband upon the wife's death.<sup>78</sup>

In *Ada v. Sablan*, the CNMI Supreme Court (also relying on Spoehr's treatise<sup>79</sup>) considered a different Chamorro custom known as *patte pareho* to find that both spouses had an equal ownership interest in property acquired during marriage.<sup>80</sup> The Supreme Court also relied on the CNMI Constitution's equal protection clause.<sup>81</sup> This finding overruled the Superior Court's common law based finding that all property acquired during marriage belonged to the husband separately.<sup>82</sup>

In *Estate of Manuel Aldan*, a case brought after the Marital Property Act but concerning a death during the Trust Territory era, the Superior Court decided that "*Deleon Guerrero* must be read in the light of the prohibition against sex discrimination embodied in Article I, § 6 of the Commonwealth Constitution."<sup>83</sup> The Superior Court reasoned that since in *Deleon Guerrero* all property vested in the husband when the wife died, it is only fair that all property vested in the

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<sup>74</sup> *Id.*

<sup>75</sup> No. 87-295, 1 N.M.I. 302, 1990 WL 291871 (N.M.I. Sup. Ct. July 20, 1990).

<sup>76</sup> *Estate of Mariana Deleon Guerrero*, No. 87-295 (N.M.I. Super. Ct. Oct. 26, 1989).

<sup>77</sup> See Spoehr, *supra* note 7, at 140.

<sup>78</sup> *Estate of Mariana Deleon Guerrero*, 1 N.M.I. at 306.

<sup>79</sup> See Spoehr, *supra* note 7, at 135-136.

<sup>80</sup> No. 89-419, 1 N.M.I. 415, 423-24, 1990 WL 291959 (N.M.I. Sup. Ct. Nov. 16, 1990).

<sup>81</sup> *Id.* at 424 (citing N.M.I. Const. art. I, § 6).

<sup>82</sup> *Id.*

<sup>83</sup> No. 90-0490, slip op. at 3 (N.M.I. Super. Ct. Aug. 8, 1995).

wife when the husband died.<sup>84</sup> The court concluded that not to do so would result in sex discrimination against the wife, in violation of the CNMI Constitution.<sup>85</sup>

The CNMI Supreme Court reversed, finding that when the husband died, his property did not vest in his wife; it vested in his children (including illegitimate children not born to his wife).<sup>86</sup> The court drew from *Palacios v. Coleman*,<sup>87</sup> which held that when the property descends to the children, there is a corresponding custom which requires the children to support their widowed mother during her lifetime.<sup>88</sup> The court found that the wife benefitted from the Chamorro custom in which her children provided for her needs for the remainder of her life.<sup>89</sup>

These cases suggest two competing versions of Chamorro customary law—one version allows a husband to take all of the wife’s land, while *patte pareho*<sup>90</sup> provides for community property. Added to the confusion is the relevance of the CNMI’s equal protection clause, which was relevant to the *Ada* Supreme Court and the *Aldan* Superior Court, but not to the *Aldan* Supreme Court and the *Ada* Superior Court. Thus, although the Marital Property Act appears to establish a community property regime, there are no clear rules to apply to many estates which remain to be probated.

As of this writing, the Superior Court is currently considering another variant on Chamorro customary law with respect to rights accruing from marriage: *gumagachong*, the Chamorro customary equivalent of common law marriage. The court must decide whether

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Estate of Manuel Aldan*, No. 90-0490, 5 N.M.I. 50, 1997 MP 3, 1997 WL 33480205 (N.M.I. Sup. Ct. Feb. 13, 1997).

<sup>87</sup> 1 CR 34, 36 (D.N.M.I. 1980)

<sup>88</sup> *Estate of Manuel Aldan*, 1997 MP 3, at ¶ 11.

<sup>89</sup> *Id.* at ¶ 16.

<sup>90</sup> To date, only one other CNMI court has referred to *patte pareho*. See *Reyes v. Reyes*, No. 97-0167, 2004 MP 1, ¶ 27, 2004 WL 3704880 (N.M.I. Sup. Ct. Jan. 15, 2004) (suggesting that the Marital Property Act of 1990 codified the doctrine of *patte pareho*).

custom requires that the family members of a deceased *gumagachong* partner provide some share of the estate to the surviving partner.<sup>91</sup> As the Marital Property Act neither recognizes nor prohibits *gumagachong*,<sup>92</sup> the outcome of this case may result in another example of “judicial codification” of customary law that will impact future rights.

#### **D. The uncertain effect of customary adoption on inheritance**

Intestate succession treats illegitimate children and “adopted” children as legitimate, natural children.<sup>93</sup> The question of what constitutes “adoption” frequently arises in cases attempting to determine adoption for purposes of inheritance. Both the Carolinians and the Chamorros practice a form of customary adoption that may or may not grant full inheritance rights.

##### **1. Carolinian customary law**

The Carolinian practice of *mwei-mwei* is typically viewed as a valid adoption for inheritance purposes,<sup>94</sup> although a Carolinian family can agree to treat an adopted child as not belonging to the family for purposes of family land rights and intestate succession.<sup>95</sup>

*Mwei-mwei* occurs when a single adult or a married couple chooses to raise a child as if it were the natural child of the adopting party with the consent of the natural parent or parents.<sup>96</sup>

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<sup>91</sup> See *Estate of Charles Reyes*, No. 06-0554 (N.M.I. Super. Ct. \_\_\_\_).

<sup>92</sup> The CNMI legislature has nevertheless recognized that there is a “customary marriage” in the CNMI for certain purposes. See 6 N.M.I. Code § 103(t) (defining spouse to include “the husband of wife of a customary marriage” for purposes of criminal law, thereby allowing customary marriage to serve as a defense to a charge of rape (see 6 N.M.I. Code § 1302)).

<sup>93</sup> 8 N.M.I. Code § 2918.

<sup>94</sup> See *Estate of Lorenzo Rofag*, No. 89-019, 2 N.M.I. 18, 31-32, 1991 WL 70067 (N.M.I. Sup. Ct. Feb. 22, 1991) (affirming heredity through *mwei-mwei*); but see *Estate of Remedio Malite*, No. 06-0163 (N.M.I. Super. Ct. May 25, 2006) (Order Confirming the Mwei Mwei Adoption of Jesus Somol and Recognizing the Estate of Jesus Somol as an Heir to the Estate of Remedio Malite) (referring to the practice of *fa'am*, in which the customarily adopted child is treated more like a foster child, and the adoption ends when the child turns 18).

<sup>95</sup> 8 N.M.I. Code § 2908.

The child is usually taken in as a baby and is usually a relative of the adopting party.<sup>97</sup> *Mwei-mwei* is not terminated unless the *mwei-mwei* parent(s) die when the child is still young.<sup>98</sup>

## 2. Chamorro customary law

The Chamorro custom of *poksai* is more ambiguous. In *Estate of Andres Macaranas*, the Superior Court held that there was insufficient expert testimony to prove that the Chamorro custom of *poksai* was intended to serve as a customary adoption as envisioned by the Probate Code.<sup>99</sup> The CNMI Supreme Court reversed, rejecting the concept of having to provide expert testimony to determine the cultural connotations of *poksai*.<sup>100</sup>

The CNMI Supreme Court did not discuss situations in which families take in a child for a temporary period, after which the child returns to its original family. However, the term *poksai* also applies to this situation.<sup>101</sup>

The *Macaranas* Supreme Court ruling was distinguished by *Estate of Antonia Iglecias*, in which the claimant Velma Iglecias produced substantial evidence regarding her status as a *pineaksi* (adopted child) of her grandparents.<sup>102</sup> This included decisions the grandparents had made regarding Velma's education, residence, and discipline, as well as Velma's receipt of her grandparents' social security benefits.<sup>103</sup> The court rejected Velma's reliance on the *Macaranas* Supreme Court ruling to claim inheritance rights. The court found that Velma's claim was barred by her failure to produce evidence that Chamorro custom grants *pineaksi* the full

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<sup>96</sup> *Estate of Aguida Amires*, No. 95-012, 5 N.M.I. 70, 73, 1997 MP 8, 1997 WL 33480210 (N.M.I. Sup. Ct. May 12, 1997).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> No. 01-0136, slip op. at 7 (N.M.I. Super. Ct. Apr. 3, 2002).

<sup>100</sup> See *Estate of Macaranas*, 2003 MP 11, ¶¶ 13, 16, 17, 6 N.M.I. 571, 2003 WL 24267661 (N.M.I. Sup. Ct. June 23, 2003) (summarizing supreme court law concerning *poksai*).

<sup>101</sup> Interview with Judge Juan T. Lizama, Superior Court of Saipan, CNMI (Dec. 3, 2005).

<sup>102</sup> No. 05-0142 (N.M.I. Super. Ct. Dec. 12, 2005).

<sup>103</sup> *Id.*, slip op. at 2-4.

inheritance rights of a customarily adopted or a natural child.<sup>104</sup> Although this finding seems to mirror the *Macaranas* Superior Court's overturned finding, it was not appealed. The right of *pineaksi* to inherit from their adopting parents will remain unclear until the CNMI legislature codifies this right.

3. Double inheritance?

In *Estate of Isaac Kaipat*, the CNMI Superior Court stated, “[o]ne’s status as an adopted child should not automatically entitle him or her to inherit from the estates of both the natural and adoptive parents. Evidence of an intent of the parents to bestow inheritance rights, and/or customary law, are needed to determine the distribution of property.”<sup>105</sup> A subsequent ruling in the same case found that a child who had already inherited from his adopted parent was not entitled to inherit from his natural parent when the natural and adopted parents were brother and sister, because inheriting from both would amount to a double share in the family’s assets.<sup>106</sup> As discussed *infra*, this decision did not result from the application of customary law, which proved inconclusive on this issue. Courts will likely confront this issue again, as there are many situations in which children are customarily adopted by close relatives (e.g., grandparents).

**E. Relaxations on the evidentiary and procedural rules**

1. The *partida* and oral conveyances

By accounting for custom, the CNMI Code and jurisprudence soften the U.S. federal evidentiary rules upon which the Commonwealth Rules of Evidence are based. One of the most

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<sup>104</sup> *Id.*, slip op. at 8.

<sup>105</sup> No. 05-0247, slip op. at 10 (N.M.I. Super. Ct. Mar. 8, 2006) (Order Governing the Heirship Claims of the Heirs of Dolores K. Pelisamen and Jay Sorensen).

<sup>106</sup> No. 05-0247, slip op. at 5-6 (N.M.I. Super. Ct. Apr. 25, 2006) (Order Following Evidentiary Hearing and Denying Heirship Claim on Behalf of the Estate of Dolores K. Pelisamen).

frequent derivations from the American rules of evidence, the *partida*, is based on customary Chamorro law. A “*partida*” is a Chamorro custom that occurs when a father calls his family together and outlines the division of property among his children.<sup>107</sup> Courts consider *partida* on a case-by-case basis, because the means by which a *partida* is accomplished are flexible and the intent of the decedent must be effectuated where discerned.<sup>108</sup> Since the 1983 enactment of the Statute of Frauds, the *partida* is the only form of oral conveyance permitted in the CNMI.<sup>109</sup> Traditional oral wills may still be applicable for cases in which the decedent died prior to the enactment of the Statute of Frauds.<sup>110</sup>

A *testamento* is a written memorialization of a *partida* that “preserves in writing the intent and directions of the male head of the family in regards to distribution of the family’s property.”<sup>111</sup> Depending upon the circumstances of the case, it may be the sole evidence of a conveyance.<sup>112</sup> The *testamento* need not meet the common law or CNMI Code evidentiary requirements for a will.<sup>113</sup>

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<sup>107</sup> *Estate of Antonio Barcinas*, No. 89-850, 4 N.M.I. 149, 152 n.4, 1994 WL 413255 (N.M.I. Sup. Ct. July 26, 1994). No cases have recognized situations in which a mother performed a *partida*, although this situation is currently before the Superior Court in *Estate of Trinidad Duenas*, No. 05-0266 (N.M.I. Super. Ct. \_\_\_\_\_).

<sup>108</sup> *Estate of Pedro Deleon Castro*, No. 92-147, 4 N.M.I. 102, 110, 1994 WL 111299 (N.M.I. Sup. Ct. March 8, 1994) (internal citations omitted); *see also Estate of Jose Cabrera*, No. 88-582, 2 N.M.I. 195, 207-208, 1991 WL 258342 (N.M.I. Sup. Ct. July 31, 1991) (court found *partida* where father did not call family meeting but gave properties successively upon his children’s marriages).

<sup>109</sup> The NMI Statute of Frauds explicitly provides for the *partida*. *See* 2 N.M.I. Code § 4916 (“[t]his article shall not apply to a *partida* performed pursuant to custom of the Northern Mariana Islands”).

<sup>110</sup> *See Guerrero v. Guerrero*, No. 89-569, 2 N.M.I. 61, 70-71, 1991 WL 70062 (N.M.I. Sup. Ct. Mar. 18, 1991) (allowing testimony regarding an oral *inter vivos* conveyance of property occurring prior to 1983); *Estate of Antonio Barcinas*, No. 89-850, 2 N.M.I. 437, 444, 1992 WL 62776 (N.M.I. Sup. Ct. Jan. 30, 1992) (“Historically, under local customary law no writing was necessary to devise property.”).

<sup>111</sup> *Estate of Torres*, 1 CR 237, 244 (Dist. Ct. App. Div. 1981).

<sup>112</sup> *See, e.g., id.* at 239, 244-46 (absent other evidence of *partida* court views *testamento* as customary will). *Testamento* may also serve as a written confirmation of an oral *partida*. *Cf. Estate of Juan Camacho*, No. 87-638, 4 N.M.I. 22, 23, 1994 WL 614815 (N.M.I. Sup. Ct. July 30, 1993) (conveyance by Chamorro custom confirmed by document entitled *Ultimo na Testamento*).

<sup>113</sup> *See Estate of Pedro Deleon Castro*, No. 92-147, 4 N.M.I. 102, 1994 WL 111299 (N.M.I. Sup. Ct. March 8, 1994). The Superior Court admitted an unauthenticated and unwitnessed document executed by the decedent, which outlined a distribution of his land among his relatives, and which (according to testimony) decedent showed and read to his wife and two of his sons. The CNMI Supreme Court found that the Superior Court did not err in

## 2. Hearsay exceptions

Like its federal counterpart, the CNMI Rules of Evidence contain exceptions to the prohibition on hearsay evidence based on history and reputation. However, unlike many U.S. cases, this sort of hearsay evidence is often the cornerstone of disputes concerning probate, land, and customary adoptions. Given the delayed processing of estate successions, hearsay evidence may be the only evidence available in the case.<sup>114</sup>

Commonwealth Rule of Evidence 803(20) permits the admission of hearsay statements relating to “[r]eputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.”<sup>115</sup> This has been interpreted to allow the admission of hearsay evidence as to who owned a disputed parcel of land.<sup>116</sup>

Rule 803(19) is another frequently relied on exception to the rule that precludes admission of hearsay evidence, and permits admission of hearsay testimony regarding “[r]eputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.”<sup>117</sup> Rule 804(b)(4) is a similar exception permitting hearsay evidence concerning personal or family history when the declarant is unavailable.<sup>118</sup>

Rule 803(13) allows for admission of hearsay “concerning personal or family history contained

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determining that the document was a testament even though two of the distributees were not present when it was read.

<sup>114</sup> See *Estate of Felipe Seman*, No. 91-918, 4 N.M.I. 129, 133, 1994 WL 413208 (N.M.I. Sup. Ct. June 24 1994).

<sup>115</sup> COM. R. EVID. 803(20). The U.S. counterpart is identical. See FED. R. EVID. 803(20).

<sup>116</sup> See *Guerrero v. Guerrero*, No. 89-569, 2 N.M.I. 61, 70-71, 1991 WL 70062 (N.M.I. Sup. Ct. Mar. 18, 1991).

<sup>117</sup> COM. R. EVID. 803(19); see *Arriola v. Arriola*, No. 97-049, 6 N.M.I. 1, 1999 MP 13, 1999 WL 33992427 (N.M.I. Sup. Ct. Apr. 28, 1999). The U.S. counterpart is identical. See FED. R. EVID. 803(19).

<sup>118</sup> COM. R. EVID. 804(b). The U.S. counterpart is identical. See FED. R. EVID. 804(b); see also *Estate of Antonio Barcinas*, No. 89-850, 2 N.M.I. 437 n.4, WL 62776 (N.M.I. Sup. Ct. Jan. 30, 1992).

in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.”<sup>119</sup>

In *Estate of Remedio Malite*, the Superior Court actually declined to rely on *written* evidence regarding an alleged customary adoption, finding that documents containing admissible hearsay were not probative in this matter.<sup>120</sup> The court stated, “[f]irst of all, the essence of *mwei-mwei* is an oral agreement, without the written formalities familiar to statutory adoptions. Second, the documents presented to the Court are fraught with many of the same conflicts as those raised by the testimonies of the witnesses.”<sup>121</sup>

### 3. Affidavits

Two CNMI Supreme Court cases suggest that affidavits with references to Carolinian or Chamorro customary law (i.e., the *partida*) may not be held to the strict evidentiary requirements of other affidavits.

In *Sullivan v. Tarope*, the plaintiff argued that the defendant’s conveyances of all of his property to his three daughters, without valuable consideration, and without relinquishing possession and control over the properties, after the entry of a California judgment, were fraudulent.<sup>122</sup> The defendant argued that he gave his land by *partida*. To support his claims that a

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<sup>119</sup> COM. R. EVID. 803(3). The U.S. counterpart is identical. *See* FED. R. EVID. 803(3). The court in *Guerrero v. Guerrero*, No. 89-569, 2 N.M.I. 61, 69, 1991 WL 70062 (N.M.I. Sup. Ct. Mar. 18, 1991) explained the different applications of these rules: “Both Com. R. Evid. 803(13) and (19) allow hearsay testimony to be introduced if personal or family history is involved. Com. R. Evid. 803(20) allows hearsay testimony if boundaries of or customs affecting lands is involved. Com. R. Evid. 803(13) additionally requires the existence of certain specified family records. Com. R. Evid. 803(19) requires the additional factor of a reputation 1) among family members, 2) among associates, or 3) in the community. Com. R. Evid. 803(20) requires also that the testimony be reputation in the community.”

<sup>120</sup> No. 06-0163, slip op. at 2 (N.M.I. Super. Ct. May 25, 2006) (Order Confirming the Mwei Mwei Adoption of Jesus Somol and Recognizing the Estate of Jesus Somol as an Heir to the Estate of Remedio Malite).

<sup>121</sup> *Id.*

<sup>122</sup> No. 98-1293, 2006 MP 11, ¶ 19, 2006 WL 1109449 (N.M.I. Sup. Ct. Apr. 18, 2006).

*partida* occurred, the defendant provided the Superior Court with affidavits regarding the alleged *partida*.

One daughter's affidavit stated in pertinent part that,

... My father gave me Tract Number 22886. ... My father before [sic] giving me the deed of gift performed a *partida*. ... The land given to me will be under my care under Carolinian custom. ... As the oldest daughter of Jose T. Tarope, I will be culturally responsible for my younger sisters upon the death of my father.<sup>123</sup>

The defendant's affidavit stated,

... I am of both Chamorro and Carolinian descent. ... I practice both Carolinian and Chamorro customs. ... In 1995, I suffered a heart attack. ... Due to my ailing health in 1995, I performed the Chamorro custom of *partida*. ... I memorialized the oral *partida* by deeds of gift which are now in question. ... I gave the land to my daughters in conformity with the Carolinian custom of matrilineal inheritance. ... The land was given to my children based on Chamorro custom.<sup>124</sup>

The Superior Court struck these affidavits as being too conclusive and containing no factual support for the claim that the transfers were made by a *partida*, such as the time, place, or members present when the '*partida*' was made."<sup>125</sup>

The CNMI Supreme Court reversed, finding that when viewed in a light most favorable to the defendant, the affidavits suggested that there was a *partida*.<sup>126</sup> The CNMI Supreme Court drew on *Cabrera v. Heirs of De Castro*,<sup>127</sup> in which the trial court similarly found that an affidavit submitted into evidence did not rise to the level of setting forth sufficient indicia of a *partida*.<sup>128</sup> The *Cabrera* Supreme Court reversed, finding that although the affidavit did not state

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<sup>123</sup> *Id.* at ¶ 45 n.4.

<sup>124</sup> *Id.* at ¶ 45 n.5.

<sup>125</sup> *Sullivan v. Tarope*, No. 98-1293, slip. op. at 7 (N.M.I. Super. Ct. Mar. 19, 2003) (Order Granting Plaintiff's Motion for Summary Judgment); *see* COM. R. CIV. P 56(e) ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.")

<sup>126</sup> *Sullivan v. Tarope*, No. 98-1293, ¶ 48, 2006 WL 1109449 (N.M.I. Sup. Ct. Apr. 18, 2006).

<sup>127</sup> No. 88-359, 1 N.M.I. 172, 1990 WL 291857 (N.M.I. Sup. Ct. June 7, 1990).

<sup>128</sup> *Cabrera v. Heirs of De Castro*, No. 88-359 (N.M.I. Super. Ct. Nov. 9, 1989) (Order Granting Summary Judgment).

the time, place, or members present when the *partida* was made, the declarations made in the affidavit should be viewed in the light most favorable to the opposing party, i.e., that there was a *partida*.<sup>129</sup>

#### 4. Property title documents

CNMI courts need not find that property title documents are conclusive, and may rely on testimony to controvert title. This is because of a presumption that any land in which title is vested in the female head of a Carolinian family is Carolinian family land belonging to the entire family rather than the title holder.<sup>130</sup>

In *Estate of Rita Kaipat*, the Superior Court relied on a title document rather than Carolinian custom in determining that an heir of the decedent was the individual owner of the property.<sup>131</sup> On appeal, the CNMI Supreme Court held that failure to look behind the documents to determine how one heir acquired the land was an error.<sup>132</sup> The Superior Court was thus required to determine whether the individual heir held title for herself or on behalf of the clan.<sup>133</sup>

A similar case, *Estate of Francisca Lairopi*, concerned a dispute (in the year 2002) regarding title to property of an ancestor who had died before World War II.<sup>134</sup> Members of the extended family who were not direct heirs of the ancestor claimed that the land was Carolinian family land belonging to all of them, rather than to the heirs of the ancestor's daughter as the title to the property indicated. The CNMI Supreme Court agreed with the Superior Court's finding

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<sup>129</sup> 1 N.M.I. at 177. (“While we agree that the affidavit of a party opposing a motion for summary judgment cannot state conclusive statements . . . the affidavit of Mrs. Elena Q. Sablan and the pleadings themselves do point to the possible existence of a “partida.”).

<sup>130</sup> See *Estate of Francisca Lairopi*, No. 97-1234, 6 N.M.I. 417, 2002 MP 10, 2002 WL 32983565 (N.M.I. Sup. Ct. May 16, 2002).

<sup>131</sup> No. 90-840, slip op. at 4 (N.M.I. Super. Ct. Sep. 24, 1991).

<sup>132</sup> *Estate of Rita Kaipat*, No. 90-840, 3 N.M.I. 494, 498, 1993 WL 307672 (N.M.I. Sup. Ct. Feb. 18, 1993).

<sup>133</sup> *Id.*

<sup>134</sup> No. 97-1234, 6 N.M.I. 417, 2002 MP 10, 2002 WL 32983565 (N.M.I. Sup. Ct. May 16, 2002).

that the title determinations were “customary titles” rather than actual titles, such that the Superior Court “properly looked behind” the titles.<sup>135</sup>

By contrast, in *Estates of Antonio Teregeyo*, the Superior Court rejected the argument that a title in a single person’s name was a “customary title” for the benefit of the Carolinian family, because the title was in the name of a male instead of a family.<sup>136</sup> The court found this inconsistent with the Carolinian matrilineal tradition, and determined that the land in question belonging exclusively to the owner rather than to the family as Carolinian family land.<sup>137</sup> The CNMI Supreme Court upheld this finding.<sup>138</sup>

Likewise, in *Estate of Ernesto Rangamar*, the CNMI Supreme Court found that the land at issue was not family land because it was deeded as a homestead.<sup>139</sup> Thus, all of the heirs, including the males, were entitled to an equal undivided interest.<sup>140</sup>

#### 5. Res judicata

Customary law has been used to soften the effect of *res judicata* and the doctrine of applying the law of the case. For example, in *Estate of Rita Kaipat*, litigants presented evidence of a 1991 evidentiary hearing in which a testifying witness failed to mention one Carmen Guelles as a child of the decedent when naming the decedent’s children.<sup>141</sup> The same witness testified at a 2006 hearing that Carmen Guelles was an adopted child of the decedent.<sup>142</sup>

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<sup>135</sup> *Id.* at ¶ 19.

<sup>136</sup> Nos. 91-0298, 91-0299, slip op. at 10-11 (N.M.I. Super. Ct. Mar 14, 1995).

<sup>137</sup> *Id.*

<sup>138</sup> *Estate of Antonio Teregeyo*, No. 91-0298, 5 N.M.I. 90, 1997 MP 14, 1997 WL 33480216 (N.M.I. Sup. Ct. July 25, 1997).

<sup>139</sup> No. 92-029, 4 N.M.I. 72, 1993 WL 614806 (N.M.I. Sup. Ct. Dec. 15, 1993).

<sup>140</sup> *Id.* at 77. The court also noted that the leasing of part of the land for fifty-five years effectively removed a substantial portion of the property from the family for use by the lineal heirs.

<sup>141</sup> No. 90-0840, slip op. at 6 (N.M.I. Super. Ct. Jan. 23, 2006) (Order *Re* Accounting, Claims of Surveyors Juan I. Castro and Alfred K. Pangelinan, and Carmen Guelles’ Heirship Claim).

<sup>142</sup> *Id.*

Relying on a statutory expression that one of the purposes of the CMNI probate law is to preserve the historic traditions and culture of the citizens of Northern Marianas descent, the Superior Court took “judicial notice of Carolinian cultural morays.”<sup>143</sup> The court found that part of the Carolinian culture “is the designation of the eldest female member of the lineage as the family’s spokesperson.”<sup>144</sup> Since the witness in question was not the eldest daughter of Carmen Guelles, the court found that it was “understandable that another family member would be reluctant to speak for [the eldest daughter] in such a situation. [The eldest daughter] and her siblings should not be punished for [the witness’s] failure to speak up on their behalf.”<sup>145</sup> The court thus relied on the witness’s statement at the 2006 hearing that Carmen Guelles was an adopted child of the decedent, and based on this and other evidence, ruled that Carmen Guelles was an heir to the decedent’s estate.<sup>146</sup>

The above cases suggest that, although the CNMI evidence and civil procedure rules are almost carbon copies of the federal rules, they are applied so as to favor uncodified customary law.

#### **F. Limitations on the jury trial—custom and culture in criminal law?**

Customary law (or at least recognition of cultural morays) can also affect criminal law, in particular, the right to a trial by jury.

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<sup>143</sup> *Id.*, slip op. at 7 (citing 8 N.M.I. Code § 2104(b)(4)).

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

Before 1965, there was no right to trial by jury in the Trust Territory.<sup>147</sup> The right to a jury trial in 21st century CNMI is limited to cases in which a defendant is threatened with a fine of \$2000 or a five-year jail sentence.<sup>148</sup> The Ninth Circuit in *Commonwealth v. Magofna* provides the expressed reasoning for this limitation: “the fear that the small, closely-knit population in the Northern Mariana Islands might lead to acquittals of guilty persons in criminal cases.”<sup>149</sup> The *Magofna* court also commented on this closely-knit population: “[i]n such a small community where so many languages are spoken, ensuring juror comprehension in all stages of the proceedings may be a significant problem.”<sup>150</sup>

In *CNMI v. Atalig*, the Ninth Circuit explained why this jury trial limitation does not violate the Sixth or Fourteenth Amendments: it is consistent with culture and custom.<sup>151</sup> The court referred to the so-called Insular Cases, which suggested that traditional Anglo-American procedures such as jury trial might be inappropriate in territories having cultures, traditions and institutions different from our own.<sup>152</sup> The court suggested that Congress should have the flexibility “to avoid imposition of the jury system on peoples unaccustomed to common law

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<sup>147</sup> In August of 1965, the First Congress of Micronesia enacted PL 1-7 establishing the right to a jury trial, conditioned on local adoption by district legislatures. In 1966, the NMI District Legislature adopted the jury trial provisions of the Trust Territory Code. See 7 N.M.I. Code § 3101 *cmt.* Section 501(1) of the Trust Territory Code contained the same language as 7 N.M.I. Code § 3101.

<sup>148</sup> See 7 N.M.I. Code § 3101(a) and former 5 TTC § 501(1); see also Covenant § 501(a) “(N)either trial by jury nor indictment by grand jury shall be required in any civil action or criminal prosecution based on local law, except where required by local law.” The CNMI Constitution, which took effect on the same day as the Covenant, states: “The legislature may provide for trial by jury in criminal or civil cases.” N.M.I. Const. art. I, § 8.

<sup>149</sup> 919 F.2d 103, 106 (9th Cir. 1990) (citing Report No. 4 of the Committee on Personal Rights and Natural Resources (Oct. 29, 1976), *reprinted* in Vol. II, Journal of the Northern Mariana Islands Constitutional Convention 506 (1976)). This matter originally came before the Trust Territory trial court and was appealed to the appellate division of the U.S. District Court for the CNMI. The defendant then appealed to the Ninth Circuit Court of Appeals.<sup>150</sup> *Id.*

<sup>151</sup> 723 F.2d 682, 690 (9th Cir. 1984). This matter originally came before the CNMI trial court and was appealed to the appellate division of the U.S. District Court for the CNMI. The defendant then appealed to the Ninth Circuit Court of Appeals.

<sup>152</sup> *Id.*, citing *Balzac v. Porto Rico*, 258 U.S. 298, 310 (1922); *Dorr v. United States*, 195 U.S. 138, 148 (1904).

traditions”<sup>153</sup> and to accommodate “the particular social and cultural conditions of areas such as the NMI.”<sup>154</sup>

Thus, the limitation on the right to a jury trial—like the restriction of land alienation under Article XII of the CNMI constitution—can be justified in the face of U.S. Constitutional challenges by reference to the importance of respect for culture and tradition.

### III. FILLING IN THE GAPS

As the above-cited cases suggest, there are numerous gaps in the statutory code (as well as in the concepts of customary law) that have been left for the courts to fill in. Aside from relying on expert witnesses in customary law, CNMI courts have extrapolated law from the Restatements or U.S. jurisprudence. At the turn of the 21st century, the Restatements have been a source of guidance on the issues of third-party beneficiary contracts,<sup>155</sup> estoppels based on the acceptance of benefits,<sup>156</sup> the applicability of arbitration,<sup>157</sup> apparent agency,<sup>158</sup> fraudulent misrepresentation,<sup>159</sup> as well as other issues.

#### A. The application of the Restatements

Title 7 Section 3401 of the CNMI Code provides,

In all proceedings, the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the event not so expressed as generally understood and applied in the United States, shall be the

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<sup>153</sup> *Id.*, citing *Dorr v. United States*, 195 U.S. 138, 148 (1904); *Torres v. Puerto Rico*, 442 U.S. 465, 469, (1979).

<sup>154</sup> *Id.*

<sup>155</sup> *Aplus Co., Ltd. v. Niizeki Intern. Saipan Co. Ltd.*, No. 99-0532, 2006 WL 1789125 (N.M.I. Sup. Ct. June 22, 2006).

<sup>156</sup> *Sullivan v. Tarope*, Nos. 98-1293, 2006 WL 1109449 (N.M.I. Sup. Ct. Apr. 18, 2006).

<sup>157</sup> *PAC United Corp., Ltd. (CNMI) v. Guam Concrete Builders*, No. 00-035, 6 N.M.I. 446, 2002 MP 15, 2002 WL 32983887 (N.M.I. Sup. Ct. Aug. 16, 2002).

<sup>158</sup> *Does I v. Gap, Inc.*, No. 01-0031, 2002 WL 1000068 (D. N. Mar. I. May 10, 2002).

<sup>159</sup> *Pangelinan v. Itaman*, No. 93-012, 1994 WL 111281 (N.M.I. Sup. Ct. Mar. 21, 1994).

rules of decision in the courts of Commonwealth, *in the absence of written law or customary law to the contrary.*

One CNMI court discussing this statute stated that it “provides for the almost wholesale application of the rules of law, in the absence of written or customary law,” and characterized the statute as a “shorthand attempt to fill a gap due to the absence of statutory laws in many areas.”<sup>160</sup>

## **B. Majority views in American case law**

Although the Restatements are the courts’ first source of common law, courts may look elsewhere when the Restatements do not provide a clear solution,<sup>161</sup> or where they appear outdated or inconsistent with CNMI law. For example, in *Villanueva v. City Trust Bank*, the court declined to apply the Restatement view on the right of possession under mortgage law, finding that a lien theory was more fitting than a title theory.<sup>162</sup> In *Manglona v. Commonwealth*, the CNMI Supreme Court chose to apply the majority view (as opposed to the Restatement) treating a lease as a contract with respect to a landlord’s duty to mitigate damages.<sup>163</sup>

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<sup>160</sup> *Borja v. Goodman*, No. 88-394, 1 N.M.I. 225, 238 n.4, 1990 WL 291854 (N.M.I. Sup. Ct. June 26, 1990). Nevertheless, customary law, where it can be discerned, should take priority over common law. *Estate of Lorenzo Rofag*, No. 89-019, 2 N.M.I. 18, 32 n.7, 1991 WL 70067 (Sup. Ct. N.M.I. Feb. 22, 1991) (“7 CMC § 3401 generally upholds customary law by giving it priority over common law.”).

<sup>161</sup> *Del Rosario v. Camacho* 5 N.M.I. 183, 2001 MP 3, ¶89 n.9, 2001 WL 34883245 (N.M.I. Sup. Ct. Mar. 12, 2001) (“It is well established that the Commonwealth may look to the law of other United States jurisdictions where the Commonwealth’s written law, local customary law, and the Restatements do not provide guidance.”); *Weathersbee v. Weathersbee*, No. 95-0793, 1998 MP 14, ¶ 6, 5 N.M.I. 183, 1998 WL 34073644 (N.M.I. Sup. Ct. Nov. 17, 1998) (applying the majority view prohibiting retroactive modification of a spousal support decree).

<sup>162</sup> No. 2000-13, 6 N.M.I. 346, 2002 MP 01, 2006 WL 335860 (N.M.I. Sup. Ct. Feb. 6, 2006); *see also Ada v. Sablan*, No. 89-419, 1 N.M.I. 415, 425-29, 1990 WL 291959 (N.M.I. Sup. Ct. Nov. 16, 1990) (holding that a marital property regime exists in CNMI because as to property of a marriage, the common law, which is largely inapplicable in the several states, has principles contrary to the commonwealth constitution).

<sup>163</sup> No. 04-012, 2005 MP 15, ¶ 34, 2005 WL 3771373 (N.M.I. Sup. Ct. 2005 MP 15 Oct. 4, 2005) (“In many jurisdictions, leases have come to be viewed as more properly analyzed under contract law rather than property law.”) (citing *Teodori v. Werner*, 415 A.2d 31, 33-34 (Pa. 1980); *Wesson v. Leone Enter., Inc.*, 774 N.E.2d 611, 619-20 (Ma. 2002)).

### C. When application of common law takes priority over customary law

In *Estate of Antonio Barcinas*, the CNMI Supreme Court considered the estate of an individual who had died during the time of the Trust Territory with eight children.<sup>164</sup> The dispute concerned whether land given during the lifetime of the decedent to three of the children precluded them from the distribution of estate land. Because the decedent died before 1984, the court determined that the Probate Code did not apply to the probate of his estate.<sup>165</sup> However, the applicable Trust Territory Code did not provide for intestate succession. The court failed to cite another portion of the Trust Territory Code, which mandated that the customs of the Trust Territory inhabitants were to have full force and effect of law if there is no conflict with other laws.<sup>166</sup> In considering whether to apply Chamorro custom, the court noted that Chamorro custom contained nothing akin to the common law concept of advancements.<sup>167</sup> Instead of relying on Chamorro custom to invalidate the concept of advancements, the court relied on the common law concept of advancements.<sup>168</sup> Accordingly, it reduced the shares of the children who had received land during the decedent's lifetime.<sup>169</sup> This case suggests that in the absence of relevant statutes, a court can apply an aspect of common law that has no place in customary law.

Recent courts have declined to apply customary law when perceiving that the litigants were not actually following their customs. In *Estate of Wabol*, the court declined to view the oldest daughter as the trustee of family land under Carolinian law, as she had deviated from

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<sup>164</sup> No. 89-850, 4 N.M.I. 149, 1994 WL 413255 (N.M.I. Super. Ct. July 26, 1994).

<sup>165</sup> *Id.* at 152; see 8 N.M.I. Code § 2102.

<sup>166</sup> 1 TTC § 102.

<sup>167</sup> *Estate of Antonio Barcinas*, 4 N.M.I. at 153.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

custom when she initiated the division of the family land at issue.<sup>170</sup> The court found that it was therefore not appropriate to apply Carolinian law, and used equitable principles to divide the property.<sup>171</sup>

In *Diaz v. Taylor*<sup>172</sup> and *Estate of Isaac Kaipat*,<sup>173</sup> the Superior Court placed the burden on the party relying on a custom as basis for her claim to convince the fact-finder that she (or the family) has actually practiced the custom at issue.<sup>174</sup> The court noted that without such evidence, the court would be applying the law of a particular custom where that custom might not exist.<sup>175</sup> In *Diaz v. Taylor*, the court was asked to restore the petitioner to the residence she claimed to be her family home. The residence had been transferred from the petitioner to a third party via a non-Chamorro method of conveyance.<sup>176</sup> Because the parties had already departed from Chamorro custom, the court found that the petitioner could not rely on the custom that would have given her the right to remain in the residence until she died.<sup>177</sup> In *Estate of Isaac Kaipat*, the court found that litigants (as well as the CNMI Supreme Court addressing an earlier issue in the case) had not followed the Carolinian culture as described by their own expert witnesses.<sup>178</sup> Thus, the court decided to divide the disputed land equitably rather than by custom.

When courts do decide to rely on customary law, evidence of the law may be difficult to procure. In *Estate of Isaac Kaipat*, the Superior Court qualified expert witnesses based solely on

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<sup>170</sup> No. 04-0173, slip op. at 3 (N.M.I. Super. Ct. Oct. 27, 2006) (Order Following the October 24, 2006 Evidentiary Hearing).

<sup>171</sup> *Id.*, slip op. at 4.

<sup>172</sup> No. 97-0879 (N.M.I. Super. Ct. Dec. 23, 1997).

<sup>173</sup> No. 05-0247 (N.M.I. Super. Ct. Apr. 25, 2006) (Order Following Evidentiary Hearing and Denying Heirship Claim on Behalf of the Estate of Dolores K. Pelisamen).

<sup>174</sup> *Diaz*, slip op. at 6-7; *Kaipat*, slip op. at 7.

<sup>175</sup> *Diaz*, slip op. at 7; *Kaipat*, slip op. at 7.

<sup>176</sup> Slip op. at 5.

<sup>177</sup> *Id.*, slip op. at 7.

<sup>178</sup> Slip op. at 7.

their purported knowledge of tradition relating to community involvement.<sup>179</sup> Witnesses offered conflicting testimony on the requisites to collect “double” inheritance from both the adopting and natural parents. The court concluded that witnesses appeared to be uncertain of what actually constituted the Carolinian culture, and that Northern Mariana Carolinians as a whole seemed to know little of the Carolinian culture as it existed in its original form in the Caroline Islands.<sup>180</sup> The court held that “the culture of the Northern Marianas Carolinians has already changed greatly from its original form. . . . It is questionable whether the traditional law of the Caroline Islands can be applied. . . . Following ‘customary’ law may require a shift in the determination of just what constitutes this law.”<sup>181</sup> This decision demonstrates the unreliability of customary law and the need for legislative clarification.

#### **D. To what extent should customary law still be applied?**

Professor Stanley K. Laughlin Jr. argues that an overzealous application of the laws of the U.S. Constitution infringes upon local culture and is akin to genocide.<sup>182</sup> In 1992, the U.S. Court of Appeals for the Ninth Circuit in the case of *Wabol v. Villacrusis*<sup>183</sup> agreed with Professor Laughlin’s argument that “usually the indigenous culture is very much intertwined

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<sup>179</sup> See *id.*, slip op. at 2 n.1. The Superior Court took guidance from cases involving expert witnesses in the native Alaskan community, in which courts qualified social workers with community experience. *In re Termination of the Parental Rights of T.O.*, 759 P.2d 1308 (Alaska 1988); *L.G. v. Alaska, Department of Health and Social Services*, 14 P.3d 946 (Ala. 2000).

<sup>180</sup> *Estate of Isaac Kaipat*, No. 05-0247, slip op. at 7 n.4 (N.M.I. Super. Ct. Apr. 25, 2006) (Order Following Evidentiary Hearing and Denying Heirship Claim on Behalf of the Estate of Dolores K. Pelisamen).

<sup>181</sup> *Id.*

<sup>182</sup> Stanley K. Laughlin, Jr., *The Application of the Constitution in United States Territories: American Samoa, A Case Study*, 2 U. HAW. L. REV. 337, 377 (1981).

<sup>183</sup> 958 F.2d 1450 (9th Cir. 1992). This matter originally came before the CNMI trial court and was appealed to the appellate division of the U.S. District Court for the CNMI. The plaintiff then appealed to the Ninth Circuit Court of Appeals.

with indigenous control of the land.”<sup>184</sup> Accordingly, the court rejected a claim that the U.S. Constitution prevented the government of the Northern Mariana Islands from restricting land ownership to people of indigenous ancestry.<sup>185</sup>

This argument is less compelling when the relative number of people actually practicing the culture has been dwindling dramatically for some time, when customary law becomes a trump card<sup>186</sup> in a dispute about rights to proceeds from land belonging to a distant ancestor, or when a culture is so far removed from its ancestral origins that no one really knows the customary law.

In attempting to discern the customary law, courts are left to sort out the truth from dubious expert testimonies and an extremely limited source of written anthropological evidence. Even reliance on the latter is questionable. As much as Alexander Spoehr’s treatise is considered the authority on Northern Marianas culture, it has been disregarded in litigation. For example, in *Estate of Aguida Amires*, the CNMI Supreme Court noted, Spoehr is not accurate when he writes that “only babies may be adopted.”<sup>187</sup> The court relied on testimony from *Estate of Rofag* to find

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<sup>184</sup> Stanley K. Laughlin, Jr., *Cultural Preservation in Pacific Islands: Still a Good Idea-and Constitutional*, 27 U. HAW. L. REV. 331, 332 (2005)

<sup>185</sup> *Wabol*, 958 F.2d at 1462 (citing Laughlin, Jr., *supra* note 182, at 386-88).

<sup>186</sup> The Superior Court was suspicious of this sort of manipulation in the case *Estate of Vicente Camacho*, No. 05-0251 (N.M.I. Super. Ct. Feb. 7, 2007) (Order Denying Reimbursement of Funeral Expenses), which concerned the claim of a son of the decedent who had rendered himself liable for funeral expenses. Claimant had taken the family’s *chenchules*—the bundle of donations made to various family members under the Chamorro custom for defraying funeral expenses—which exceeded the value of the funeral expenses. *Id.*, slip op. at 1. Claimant nevertheless sought reimbursement of his expenditures from the estate on grounds that he was saving the *chenchules* to return to the various donors at their funerals. *Id.*, slip op. at 2. He argued that this was the proper use for *chenchules* under Chamorro custom. At an evidentiary hearing, no one presented expert testimony on the Chamorro custom of *chenchule*. *Id.* The judge relied on his own knowledge of the custom of the acceptance of *chenchules* by the deceased’s relatives to defray funeral expenses, not to serve as collateral for use at other funerals. *Id.* The court granted claimant leave to produce expert testimony to the contrary; he did not do so. *Id.*

<sup>187</sup> No. 95-012, 5 N.M.I. 70, 73, 1997 MP 8, ¶ 20 1997 WL 33480210 (N.M.I. Sup. Ct. May 12, 1997).

that “[n]ormally, the child to be adopted is a baby, but there is evidence that a child who is nine, ten, or eleven years old could be customarily adopted, depending upon the circumstances.”<sup>188</sup>

Sorting out the traditional customs of the Northern Marianas is not likely to get an easier as the culture continues to change. As Professor Herald points out, economic development and changes toward higher standards of living inevitably result in cultural change.<sup>189</sup> The 2000 census showed that the CNMI is home to 44,400 immigrants out of a total population of 69,221.<sup>190</sup> According to a second quarter, 1999 census count, the largest ethnic group on Saipan was Filipino.<sup>191</sup> Since children born to these immigrants are automatically U.S. citizens, they may stay in the CNMI and leave a permanent impact on the culture.<sup>192</sup>

A 1995 census found only 12,783 Chamorro speakers in the CNMI, out of a combined Chamorro and Carolinian population of 20,161.<sup>193</sup> Many children aged 13 and below do not speak Chamorro at all.<sup>194</sup> The question then arises, what is the prevailing custom from which customary law should be drawn?

The CNMI Supreme Court in *Estate of Rangamar* attempted to provide an answer:

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<sup>188</sup> *Id.*, citing *In re Estate of Lorenzo Rofag*, No. 89-019, 2 N.M.I. 18, 23 n.3, 1991 WL 70067 (N.M.I. Sup. Ct. Feb. 22, 1991); see also *Estate of Remedio Malite*, No. 06-0163 (N.M.I. Super. Ct. May 25, 2006), (Order Confirming the Mwei Mwei Adoption of Jesus Somol and Recognizing the Estate of Jesus Somol as an Heir to the Estate of Remedio Malite) (relying on expert witness’s opinion on mwei mwei of older children and disregarding Spoehr’s suggestion that children were “*mwei mweied*” as babies and that their surnames were changed to reflect the adoption)); *Arriola v. Arriola*, Nos. 97-049, 6 N.M.I. 1, 1 n.1, 1999 MP 13 (N.M.I. Sup. Ct. Apr. 28, 1999) (questioning claim regarding custom of a “kiridu” (favorite child) as described by Spoehr).

<sup>189</sup> Marybeth Herald, *supra* note 44, at 747; see also *Temengil v. Trust Territory of the Pacific Islands*, 881 F.2d 647 (9th Cir. 1989), *cert. denied*, 496 U.S. 925 (1990) (“The United States’ administration of the Trust Territory produced a rapid change in the economy of the islands, substituting a money economy for the subsistence economy familiar to the people. . . . Thus the local inhabitants to a large extent lived off the rents obtained from the family land.”).

<sup>190</sup> Commonwealth of the Northern Mariana Islands Economic Report, October 2003, at 5, <http://166.122.164.43/jcc/reports/cnmi03.pdf> (last visited September 15, 2007).

<sup>191</sup> Central Statistics Division, Department of Commerce, The CNMI Current Labor Force Survey: Second Quarter, 1999 Summary, <http://www.pacificweb.org/DOCS/cnmi/pdf/992ndlbf.pdf> (last visited September 5, 2007).

<sup>192</sup> See Herald, *supra* note 44, at 747.

<sup>193</sup> Beverley A. Lomosad, *Say what? Speak Chamorro*, Saipan Tribune, Feb. 26, 1999, <http://www.saipantribune.com/newsstory.aspx?newsID=1217&cat=3>.

<sup>194</sup> *Id.*

We agree that custom over time may gradually change by a uniform and common change in practice. However, such changes are neither legally binding [n]or accepted customs until they have at least existed long enough to have become generally known and have been peaceably and fairly uniformly acquiesced in by those whose rights would naturally be affected. Mere agreement to new ways of doing things by those to be benefitted without the consent of those to be adversely affected, will not of itself work a sudden change of customary law.<sup>195</sup>

This opinion appears to empower the Court to be the cultural keeper of society, capable of deciding when and if a custom has been around long enough to be enforced upon “those whose rights would naturally be affected.” Given the increasing intermarriage between people of Northern Mariana Islands descent and non-natives,<sup>196</sup> as well as the large number of non-natives involved in land transactions or criminal jury trials, those whose rights may be affected now include a diverse array of society.

As stated in *Estate of Isaac Kaipat*, following customary law may require a shift in the determination of just what constitutes this law.<sup>197</sup> Through its initial efforts to codify law into the 1984 CNMI Code, the Legislature seems to have recognized that certain traditions (such as oral conveyances other than the *partida*) are unworkable in the modern Northern Marianas. Other traditions can and should be applied. Rather than allowing the judiciary to decide which customs to apply and how to apply them, the CNMI Legislature should revise the statutory code to better address customary law. In the meantime, litigants are subject to an unpredictable application of statutes, customary law according to the most convincing expert witness, common law according to the Restatement, or whatever else the court can extract from U.S. jurisprudence.

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<sup>195</sup> No. 92-029, 4 N.M.I. 72, 77, 1993 WL 614806 (N.M.I. Sup. Ct. Dec. 15, 1993) (citations and internal quotes omitted).

<sup>196</sup> See *Estate of Charles Reyes*, No. 06-0554 (Petition to Allow Claim by an Omitted Spouse and/or Judgment against the Estate Arising from Common Law Relationship) (on file with the author, case currently pending before the Superior Court). Petitioner, a native of the Philippines in a relationship with a Northern Marianas Chamorro, sought to apply the Chamorro custom of *gumagachong* (similar to common law marriage) to obtain a share of her deceased partner’s estate.

<sup>197</sup> No. 05-0247, slip op. at 7 n.4 (N.M.I. Super. Ct. Apr. 25, 2006) (Order Following Evidentiary Hearing and Denying Heirship Claim on Behalf of the Estate of Dolores K. Pelisamen).