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Jose R. Lifoifoi, Chair
Committee on Land and Personal Rights
Third Northern Marianas Constitutional Convention
Saipan, MP 96950

Re: **Ninth Circuit Reversal of CNMI Supreme Court in *Ferreira v. Borja***

Dear Chairman:

I am submitting this letter as supplemental testimony on Article XII. During the hearing on June 16, 1995, concern was expressed over the argument that the Ninth Circuit "rewrote" Article XII by reversing the CNMI Supreme Court in *Ferreira v. Borja*. I can understand the concern that our Supreme Court may have, in effect, been stripped of its power to interpret our Constitution by the Ninth Circuit; however, the facts reveal that this is not what happened. The controversy in *Ferreira* did not involve Article XII, but an ancient English doctrine of trust law. I hope that this letter can be made available to those members of the committee who wish to examine this situation in greater detail.

I.
The Basic Facts in *Ferreira*

The facts of *Ferreira* are unusually important. It began with a 1980 Partnership Agreement between Jim Grizzard, Bobbie Grizzard, Frank Ferreira and Diana Ferreira. The partnership was formed to sell, lease and develop part of Lot 008 B 10. The Grizzards were to

put most of the capital into the partnership, Frank Ferreira was to pay for professional services needed by the partnership (surveying, accounting, legal fees, etc.), and Diana was to purchase the property and execute a 40 year lease to the partnership. Diana bought the parcel and two others as well. The Grizzards sold all their interest in the land to Nansay Micronesia, Inc. Diana leased the three lots to Nansay Micronesia and agreed to sell her fee title to Ana Little. In order to clear her title, she filed a quiet title suit against the former owners, the Mafnas sisters. They claimed that their sale to Diana was void because it violated Article XII.

In the trial court, Judge Villagomez agreed with the defendants and held that the transaction violated Article XII. 3 C.R. 534 (January 19, 1988). He reasoned that the members of the partnership acted as though they thought *they*, and not just Diana, owned the land. Diana exercised minimum control over the land. He concluded that having "control" over the land is a form of "acquisition" of a permanent interest in land under Article XII. As this is forbidden for the three partners who are not of NMI descent, the purchase was void. What Judge Villagomez did was articulate a "control test" for transactions under Article XII.

The case was appealed to the newly-created CNMI Supreme Court.

II.
How An Article XII Analysis Is Conducted

The basic rule for Article XII is found in Section 1:

> Section 1: Alienation of Land.
> The acquisition of permanent and long-term interests in real property within the Commonwealth shall be restricted to persons of Northern Marianas descent.

Logically, the steps a court must follow in analyzing the facts of a case are:

- See if there is a person who is not of NMI descent involved in a land transaction. (step 1)
- Determine, under principles of property law, what property interest the non-NMI descent person has. (step 2)
- Measure that property interest against the yard stick of Article XII: is it a "permanent" or a "long-term" interest in real property as defined in § 3? (step 3)

Section 3 reads:

> Section 3: Permanent and Long-Term Interests in Real Property.
> The term permanent and long-term interests in real property used in Section 1 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 . . . .

In *Ferreira*, it was obvious that there were three persons who are not of NMI descent involved in the transactions. The Court did not have to do any Article XII analysis to determine if Jim Grizzard, Bobbi Grizzard and Frank Ferreira were of NMI descent. It was undisputed that they were all not of NMI descent. So, this first step was a non-issue.

The big issue for the Court was what property interest did the three receive (step 2). The answer to this question would not come from an analysis or an interpretation of Article XII. It would not come from the CNMI Constitution at all. To determine what property rights a person has requires that one look to property law. The area of property law is vast. The issue is what property law to rely on. The early cases relied on principles of contracts law and agency law. But, the Supreme Court rejected that law and, instead, looked to the law of trusts.

Once the Court applied trust law and came up with the nature of the property interest, the only question left was whether that interest was more than a non-NMI descent person could

possess (step 3). To answer this question, the Court looked to Article XII, § 3 for an answer. Here is where Article XII was analyzed and interpreted by the Supreme Court. But, the Court's answer to this question was not later challenged. On appeal, only the Court's application of trust law (step #2) was questioned and rejected. Its analysis of Article XII (step #3) was not questioned.

III.
The Supreme Court's First *Ferreira* Decision

The CNMI Supreme Court began its analysis by listing the three issues inherent in any Article XII case. These are the same issues, though worded differently, as the ones I pointed out above. 2 NMI 514, 523. The Court had no trouble finding that there were non-NMI descent persons involved. The question was what property interest they had. The Court pointed out that the trial court relied on the law of agency, which the Supreme Court rejected as the proper law to answer this issue:

> The trial court erroneously applied agency principles in reaching its judgment. It is the law of trust that govern since only through trust principles may one acting as an agent acquire a fee interest.

Id. at 525.

The Court held that Diana was a trustee for the Grizzards under a resulting trust theory. The Court clearly specified its legal source for this conclusion. The source is not the CNMI Constitution, but the RESTATEMENT (SECOND) OF TRUSTS:

> In RESTATEMENT (SECOND) OF TRUSTS § 440 (1959), it is stated that, "Where a transfer of property is made to one person and the purchase price is paid by another, a resulting trust arises in favor of the person by whom the purchase

price is paid, except as stated in §§ 441, 442 and 444."

Id. at 526.

The Court reasoned that since the three parcels of land were transferred to Diana as a result of the purchase price being paid by the Grizzards, the resulting trust doctrine applied. Diana holds only bare legal title as a trustee for the Grizzards who hold equitable title. Id. From this point on, the Court spent its time discussing whether any of the exceptions to the general rule apply. Since they found that none apply, it was time to turn to the final issue of the three issues. Can the Grizzards hold an equitable fee simple interest in the property or is that a long-term or permanent interest that would violate Article XII? This is the step where the CNMI Constitution was applied. This reasoning had already been carried out in the earlier decision of the Supreme Court, Aldan-Pierce v. Mafnas. It was determined that the term "permanent and long-term interests" includes freehold interests, and "[a]n equitable interest of indeterminate duration is encompassed within a freehold interest." Id. at 17. Thus, the equitable interest acquired by a non-NMI descent person from a resulting trust is a freehold interest which violates Article XII.

III.
The Dissent In *Ferreira* Focused On The Resulting Trust Doctrine, Not Article XII.

It is important to note that the *Ferreira* court was divided (2-1) and that there was a dissenting opinion by Special Judge King. He did not question the finding that the Grizzards are not of NMI descent. He did not disagree with the Court's determination that an equitable fee simple interest would constitute a "permanent and long-term interest" under Article XII law. He

only challenged their application of trust law. He spent eight pages explaining why the resulting trust doctrine is not properly applied to these facts. Id. at 534-542. Therefore, from the date of the opinion's issuance until now, the controversy surrounding the *Ferreira* case focused on trust law and not on Article XII.

> I have serious misgivings about the Court's use of the resulting trust doctrine in this context . . . .

Id. at 534.

> The keystone of the Court's analysis in this opinion, and in the recent case of Aldan-Pierce v. Mafnas (citation omitted), is the resulting trust doctrine. For the following reasons, I do not believe this doctrine is being properly applied by the Court.

Id.

> The resulting trust doctrine is merely an analytic tool designed for the limited purpose of assisting courts to sort out the equities and relative rights between one who has furnished funds and one who holds the legal title as a result. [citation omitted]
>
> The court's attempt here to use the doctrine for the wholly unfamiliar purposes of determining whether article XII of the Constitution of the NMI has been violated and for enforcing the constitutional prohibitions against the parties who have provided funds for the purchase of land necessarily rips the resulting trust doctrine from its moorings.

Id. at 535.

It should be readily apparent that the debate in *Ferreira* was not over how to interpret and apply Article XII (step #3); instead, the controversy has centered on the issue of what property interest the non-NMI descent persons held as a result of the transaction (step #2).

III.
Where Does The Resulting Trust Doctrine Come From?

The resulting trust doctrine does not come from Article XII or from the CNMI Constitution. It is not even a matter of statute in the Commonwealth. It comes from common law. We apply common law in the Commonwealth when there is no statutory law on the subject.

> § 3401. Applicability of Common Law.
> In all proceedings, the rules of common law, as expressed in the restatements of the law approved by the American Law Institute . . . 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 . . . .

The Commonwealth has no written law on trusts, so our only source is the common law as stated in a series of legal volumes which collect the common law called the "Restatement of the Law." The resulting trust doctrine is found at § 440 of the Restatement. It is so antiquated that the compiler of the third edition of the Restatement on Trusts has decided to drop the resulting trust doctrine from the next edition.

Judge King, in his criticism of the majority's use of this antiquated trust doctrine, said:

> [T]he Court has looked far back to an obscure doctrine of the law of trusts which emerged from the mists of medieval England.

Id. at 541.

The issues raised by the *Ferreira* and *Aldan-Pierce* decisions centered on the proper application of a medieval doctrine of trust law, and not upon the meaning or application of Article XII of the CNMI Constitution.

IV.
The Ninth Circuit's Decision in *Ferreira*

A. Where Does The Ninth Circuit Get The Authority to Review the CNMI Supreme Court?

When the Supreme Court of the Commonwealth was established, it was recognized by the Sixth Northern Marianas Commonwealth Legislature that the decisions of the new court would be subject to review on appeal by the Ninth Circuit of the United States Court of Appeals:

> It is the intent of the legislature to recognize that until the expiration of fifteen years after the enactment of Public Law 1-5 final decisions of the Commonwealth Supreme Court will be appealable to the United States Court of Appeals for the Ninth Circuit, as is provided by Section 403(a) of the Covenant, and that upon expiration of that period all final decisions of the Supreme Court will be appealable thereafter only to the United States Supreme Court.

P.L. No. 6-25, § 2.

Covenant § 403(a), after giving the CNMI a choice of whether to establish their own appellate court or refer appeals to the federal district court, provides that if an appellate court were established then for a 15 year period its decisions would be reviewable by the Ninth Circuit. This was intended to permit appeals to be taken in San Francisco, as a matter of convenience, rather than having to go to the Supreme Court of the United States in Washington, D.C.[1]

Section 403(a) "assures that the relations between federal courts and the courts of the Northern Mariana Islands will be essentially the same as the relationship between the federal courts and the courts of the states." Id. It is not unique to have a federal court reviewing a decision of the Supreme Court of any state, except that normally such review would be by the

[1]Section by Section Analysis of the Covenant to Establish A Commonwealth of the Northern Mariana Islands (Marianas Political Status Commission, February 15, 1975), p. 37.

U.S. Supreme Court. Here, for purposes of convenience, the review will be carried out for 15 years by the Ninth Circuit. After that, review of decisions of the CNMI Supreme Court will be taken directly to the U.S. Supreme Court.

B. The Ninth Circuit Gave Deference to the CNMI Supreme Court In Its Decision.

The Ninth Circuit recognized that the CNMI Supreme Court is the "ultimate expositor" of local law. *Ferreira*, 1 F.3d 960, 962 (1993). But, it also noted that it has the power to review a decision of the CNMI Supreme Court if that decision is "untenable or amounts to a subterfuge to avoid federal review of a constitutional violation." Id. The Ninth Circuit did not question the determination that the Grizzards are non-NMI descent persons (step #1). It did not question the determination that an equitable fee simple interest is a "permanent and long-term" interest in land under Article XII (step #3). It did hold that the Supreme Court's application of the ancient trust doctrine of "resulting trusts" (step #2) was untenable. Thus, the Ninth Circuit did not review the CNMI Supreme Court's interpretation of Article XII at all.

The Ninth Circuit ruled that it would be wrong for a court to use its equitable powers to create a resulting trust in favor of someone and then use the existence of the resulting trust as the basis for finding a violation of Article XII. The opinion states that courts have refused to apply the resulting trust analysis when the reason for purchasing land under the name of another person is to accomplish an illegal purpose, such as to permit a non-NMI descent person to own land. The Court ruled: "We agree with Judge King that the CNMI Supreme Court's application of the resulting trust theory was untenable." The Ninth Circuit sent the case back to the CNMI Supreme Court to re-decide. They did not tell the Court how the matter should be re-decided,

but the clear indication was that the resulting trust doctrine could not be used in the new decision.

V.
The CNMI Supreme Court Re-decides *Ferreira*

Once the Ninth Circuit returned the *Ferreira* case to it, the CNMI Supreme Court had an opportunity to reexamine its earlier decision. The Court re-heard legal arguments on the case, and without hesitation the Court agreed that the resulting trust doctrine had earlier been misapplied in its first decision:

> We agree with the Ninth Circuit in that, because the purported transaction to be accomplished had an illegal purpose, no resulting trust would have arisen in favor of third parties not of Northern Marianas descent.

The Court remanded the case to the trial court with instructions to enter a decision quieting title in the property in favor of Diana Ferreira.

Article XII was not interpreted by either the Ninth Circuit, nor by the CNMI Supreme Court in its re-decision of the case. Both were concerned only about the proper application of the common law of trusts. By properly applying trust law, the non-NMI descent persons did not acquire an equitable interest in fee simple. "All fee title and interest in the land at issue, legal and equitable" is held by Diana Ferreira. Id. at 4 (concurring opinion of Chief Justice Dela Cruz). Therefore, there is no need to engage in any Article XII analysis since it is a person of NMI descent who owns the land.

CONCLUSION

First of all, it should be apparent that it is not unusual for federal courts to review the decisions of the state supreme courts. The decisions of all state supreme courts are subject to federal review and such review is commonplace. For example, in *Powell v. Ducharme*, 998 F.2d 710, 713 (9th Cir. 1993), the Ninth Circuit stated: "Washington Supreme Court interpretations of Washington law are binding on this court unless we determine such interpretations to be untenable, or a veiled attempt to avoid review of federal questions." The U.S. Supreme Court also noted this principle in reviewing a decision of the Supreme Court of North Carolina:

> It is settled that a state court may not avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forward nonfederal grounds of decision which are without any fair or substantial support.

Wolfe v. State of North Carolina, 364 U.S. 177, 185 (1960).

The decisions of the CNMI Supreme Court are subject to no greater review by the Ninth Circuit than a state supreme court decision is subject to review by the U.S. Supreme Court. The only difference is that the Supreme Court may decline to review a case while the Ninth Circuit may not. This situation, created by the framers of the Covenant in § 403(a), will last for a period of 15 years. Then, all CNMI Supreme Court decisions will be directly appealable to the U.S. Supreme Court.

Second, cases where the court is called upon to apply Article XII may or may not raise disputes as to the meaning of Article XII. In *Ferreira v. Borja*, the dispute did not involve the meaning of Article XII. Instead, the dispute was over the proper application of property law in order to determine exactly what interest was held by the Grizzards, persons clearly not of NMI

descent. The lower courts used an agency analysis and then a control analysis to determine the property interest, but the CNMI Supreme Court rejected both theories and applied a common law doctrine of trust law. The issue on appeal to the Ninth Circuit was whether the Court had properly applied this ancient doctrine of English common law. Even our Supreme Court was split on this question. The Ninth Circuit ruled that the doctrine was not applied correctly and sent it back for the Supreme Court to re-decide. In its new decision, the Court rejected the resulting trust doctrine, finding that it did not apply. Thus, the *Ferreira* case is basically a case of trust law and not a case deciding issues of Commonwealth constitutional law.

It should be apparent from these two principles that the Ninth Circuit did not usurp the power of the Commonwealth Supreme Court to interpret the CNMI Constitution. The Ninth Circuit did not strip the Supreme Court of its sovereignty. We gave the Ninth Circuit the power to review appellate decisions when the CNMI agreed to the Covenant. What happened, plain and simple, is that the Ninth Circuit reviewed the Commonwealth Supreme Court's application of trust law, not Article XII law. The Ninth Circuit said nothing about how Article XII should be applied. Statements that have been made to the contrary are taking advantage of the fact that this subject matter is quite complex and likely not to be understood by persons who are not attorneys. Sovereignty is an emotional issue and further clouds a person's understanding of this case.

I hope that this clarifies the record by showing that the reversal in *Ferreira* was on a matter of trust law and was not on the interpretation of Article XII.

Very truly yours,

Rexford C. Kosack