IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

MAGDALENA SILIL,
Appellant,
v.
MEKREOS SILIL,
Appellee.

Cite as: 2021 Palau 37
Civil Appeal No. 21-008
Appeal from Civil Action No. 18-028

Decided: December 02, 2021

Counsel for Appellant ..... Vameline Singeo
Counsel for Appellee ..... Rachel Dimitruk

BEFORE: OLDIAIS NGIRAIKELAU, Chief Justice
JOHN K. RECHUCHER, Associate Justice
GREGORY DOLIN, Associate Justice

Appeal from the Trial Division, the Honorable Kathleen M. Salii, Presiding Justice, presiding.

OPINION

PER CURIAM:

[¶ 1] Magdalena Silil appeals from the Trial Division's decision and judgment which finally settled the estate of her deceased father, Silil Meltel. Appellant challenges the portion of the judgment that awarded a certain parcel of land to Appellee Mekreos Silil. Because the appeal fails to raise any issue that was properly preserved for appeal, we **DISMISS**.

BACKGROUND

[¶ 2] Magdalena is the biological daughter of the decedent and Mekreos is decedent's adopted son. They dispute ownership of property known as *Didersuuch*[1] located in Ngiwal State.

[¶ 3] Since about 1960, the decedent held a homestead permit for *Didersuuch*. After fulfilling all of the homesteading requirements, on July 1, 2008, the decedent received from the Palau Public Lands Authority ("PPLA") a Certificate of Compliance and a quitclaim deed to the property. It was not until a decade later that he received a Certificate of Title from the Land Court.[2]

[¶ 4] Nine days after receiving the quitclaim deed from PPLA, on July 10, 2008, the decedent executed a deed transferring the property to Mekreos. At trial, Magdalena argued that her father did not understand what he signed because, by that point, he had significant health and mental problems. Magdalena alleged that when Silil realized the import of the July 10 deed, he executed, on September 13, 2008, a document titled "Temellel a deed of transfer," which in essence was a revocation of the earlier deed. Both the original deed to Mekreos and the alleged revocation of that deed were recorded.

[¶ 5] This was the state of affairs at the time of the decedent's death. According to Magdalena, because the deed to Mekreos was invalid, the disposition of the property should proceed according to customary law, which she claims dictates that as sole surviving biological child she should be awarded the decedent's land.

[¶ 6] The Trial Division rejected Magdalena's argument, concluding that no credible evidence of Silil's mental incapacity was presented and that it is highly questionable whether the September 13 revocation of the deed was even

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[1] Different documents use different spellings, and for the sake of consistency we adopt the spelling used in the Trial Division's opinion. The property is formally designated as Cadastral Lot No. 051 D 01 and was previously listed on Worksheet Lot No. 15D02-001. LC 372-19 (Land Ct., June 20, 2019).

[2] Because Silil Meltel died in 2012, the Certificate of Title was issued to "Estate of Silil Meltel."

authentic.[3] Decision at 11. Accordingly, the trial court concluded that the deed of transfer to Mekreos was valid and that *Didersuuch*, having been transferred *inter vivos*, was not part of Silil's estate. This appeal followed.

ANALYSIS

[¶ 7] On appeal, Magdalena presses an entirely new theory of the case. Instead of arguing that the trial court erred in its determination of Silil's mental capacity or in its application of law to facts as presented to it, Magdalena now argues that, in 2008, Silil had nothing to transfer because "[p]rior to 2017, [*Didersuuch*] was government land." Appellant's Op. Br. at 6. According to Magdalena, because the decedent did not own the land until 2017,[4] he could not have transferred it to Mekreos. *Id.* at 8 (quoting *Estate of Rudimch v. Kayangel State Gov't*, 9 ROP 275, 278 (Tr. Div. 2001)). This, in Magdalena's view, made the deed to Mekreos not a deed at all, but a "unilateral contract" that could be revoked at will.

I.

[¶ 8] "No axiom of law is better settled than that a party who raises an issue for the first time on appeal will be deemed to have forfeited that issue." *Ngerdelolk Hamlet v. Peleliu State Pub. Lands Auth.*, 2021 Palau 15 ¶ 7 (quoting *Sugiyama v. Han*, 2020 Palau 16 ¶ 38). We have reviewed the record below, including Magdalena's initial petition to settle the estate, her written final argument, and the Trial Division's thorough opinion, and nowhere do we find even a hint of the argument that is now being presented to us. We are "a court of review, not of first view." *Angel v. King*, 2020 Palau 29 ¶ 2 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). It is therefore "incumbent upon litigants to properly present all arguments to the court properly vested with the responsibility to make decisions in the first instance. The familiar consequence for failure to do so is forfeiture of the argument." *Robert v.*

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[3] The Trial Division highlighted conflicting testimony regarding the authenticity of Silil's signature and the notary public's lack of recollection of having witnessed the signing of the document.

[4] We are unclear why Magdalena chose 2017 as a critical date. The only thing that happened in 2017 was a hearing before the Land Court for the purpose of issuing a Certificate of Title pursuant to a deed from PPLA. The Certificate did not issue until 2019. However, in light of our disposition of the appeal, we need not dwell on Magdalena's choice of dates.

Robert, 2021 Palau 34 ¶ 26 (Bennardo, J., concurring in part and concurring in judgment). Accordingly, we find the argument pressed by Magdalena to be forfeited. As there are no issues before us that have been preserved, we are constrained to dismiss the appeal.[5]

II.

[¶ 9] Though it does not affect our disposition of the case, we pause to note egregious deficiencies in Appellant's brief. As Appellant is represented by an attorney, these deficiencies tread close to, if not over the line of, violating the ABA Model Rules of Professional Conduct, which are binding on attorneys in Palau. *See* ROP Disc. R. 2(h).

[¶ 10] Appellant's brief fails to disclose at least two cases that constitute adverse binding authority. In *Tmetuchl v. Siksei*, we held "that under the homesteading law, once the conditions of occupancy were met, the [government's] duty to issue the deed was non-discretionary and enforceable by mandamus." 7 ROP Intrm. 102, 103 (1998) (cleaned up). We expressly rejected the same argument that Magdalena is presently making: that until the issuance of the Certificate of Title, "title to the property nonetheless remained in the Palau government and not in the homesteaders." *Id.* at 104 n.4. Indeed, the homesteader in *Tmetuchl* was in a weaker position than Silil, because unlike Silil—who received both a Certificate of Compliance and a deed from PPLA—the homesteader there died after fulfilling the requirements of homesteading but before receiving any documents confirming that fact or transferring the land to him. *Id.* at 105. Nevertheless, we concluded that one automatically becomes owner of the property upon compliance with all the homestead requirements. *Id.* Despite being directly on point, and directly adverse to the position Appellant is advancing, *Tmetuchl* is nowhere mentioned in Appellant's brief.

[¶ 11] Neither is *Airai State Pub. Lands Auth. v. Baules II*, which held that even where a grantor did not own the property at the time of delivering a deed to a grantee, "[u]nder the doctrine of after-acquired title, [such] a deed may

[5] Had we been inclined to reach the merits of the appeal, we would have affirmed the decision below, because this case is identical to *Tmetuchl v. Siksei*, 7 ROP Intrm. 102 (1998), *see post*, ¶ 10, and we have been given no reason to overrule that longstanding precedent.

have the effect of passing to the grantee a title subsequently acquired by the grantor." 2020 Palau 6 ¶ 19 (quoting 31 C.J.S. Estoppel and Waiver § 22). In other words, even had Appellant preserved the issue now pressed for appeal, and even were *Tmetuchl* not standing as a formidable barrier to her claim that "[p]rior to 2017, [*Didersuuch*] was government land," she would still be faced with *Baules II*, which is also directly adverse to her position.

[¶ 12] While the Model Rules of Professional Conduct permit attorneys to make "a good faith argument for an extension, modification or reversal of existing law," Model Rule 3.1, they also require an attorney "to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client," *id.* 3.3(a)(2). If Appellant's attorney failed to acknowledge either *Tmetuchl* or *Baules II* despite knowing of these cases, such a failure would likely violate Model Rule 3.3(a)(2). And if the attorney was unaware of these authorities, then such poor presentation would likely violate Model Rule 1.1 which demands that attorney possess "legal knowledge, skill, thoroughness and preparation reasonably necessary" to provide "competent representation to a client." Neither option reflects particularly well on Appellant's attorney.

[¶ 13] Beyond failing to cite controlling legal authority, Appellant's brief fails to mention or cite to relevant adverse facts. Indeed, nowhere in the brief does Appellant mention that Silil received a deed from PPLA in 2008. Instead, the brief claims that the first transaction affecting the ownership of *Didersuuch* was the 2017 hearing before the Land Court. This assertion either knowingly misrepresents and obfuscates the state of the record, which would violate Rule 3.3, or is made without exercising due diligence and reviewing the record prior to filing the brief, which would violate Model Rule 1.1.[6] Again, neither alternative sits particularly well with this Court.

[6] Appellant's Attorney's lack of diligence is also evident from her failure to even properly identify the parcel of land at issue in this litigation. *See* Appellant Op. Br. at 6, 9 (thrice identifying the parcel as "*Tayio*" rather *Didersuuch*.). While we recognize that "as any human, lawyers [can] make mistakes," *Ngirakesiil v. ROP (Ngirakesiil II)*, 2021 Palau 24 ¶ 29 (quoting *In re Baird II*, 2021 Palau 17 ¶ 23), in light of the brief's other deficiencies we are concerned that this is not a one-off mistake, but a pattern of lax preparation and less- than- competent representation of a client.

CONCLUSION

[¶ 14] Because the arguments advanced by Appellant have been forfeited through a failure to present them to the Trial Division, the appeal is **DISMISSED**. *See Dakubong v. Aimeliik State Gov't*, 2021 Palau 19 ¶ 14. In hopes that the exposition of the briefing failures exhibited by Appellant's counsel will serve as a warning to her and other members of the Bar, as well as to forestall similar inadequate performance in the future, the Clerk of Courts is **RESPECTFULLY DIRECTED** to serve this opinion on the Palau Bar Association and all attorneys admitted to practice in Palau.[7]

NGIRAIKELAU, Chief Justice, concurring:

[¶ 15] I concur with all of the majority's stated reasons for dismissing the appeal. I write separately to say that, instead of an outright dismissal, I would have opted for an order to show cause for two reasons. First, I would have given counsel for Appellant an opportunity to explain why the Court should not dismiss the appeal as being frivolous. Second, if counsel failed to provide a sufficient reason, I would have imposed an appropriate sanction not only for filing a frivolous appeal, but also for failing to disclose controlling adverse precedent under the duty of candor.

[¶ 16] It appears to me that counsel for Appellant either utterly failed to conduct minimal research and therefore did not discover controlling legal authority in this jurisdiction overwhelmingly contrary to Appellant's position or she was aware of such adverse authority but, for whatever reason, decided not to bring such authority to the Court's attention. In either situation, sanctions would have been warranted.

[¶ 17] I am talking about this Court's opinion in *Tmetuchl v. Siksei*, 7 ROP Intrm. 102, 103 (1998), cited by the majority, which makes it crystal clear that Silil Metel owned the land *Didersuuch* at the time he conveyed it to his son, Mekreos Silil. As the majority correctly points out, Silil was in a much stronger position than the homesteader in *Tmetuchl* because he (Silil) received both a Certificate of Compliance and a deed from PPLA, whereas Siksei, the

[7] All other pending motions are **DENIED** as moot.

homesteader in *Tmetuchl*, did not. Thus, the argument raised on appeal that Silil had nothing to convey because *Didersuuch* was not his is wholly without merit.

[¶ 18] ROP Rule of Appellate Procedure 38 provides that "[i]f the Appellate Division determines that an appeal is frivolous, it may award just damages, including attorney's fees, to the appellee." This Court has held on several occasions that "an appeal is frivolous if the result is obvious, or the arguments are wholly without merit." *Baules v. Kuartel*, 19 ROP 44, 47 (2012) (finding the result of the appeal obvious); *Petrus v. Suzuky*, 19 ROP 136, 138 (2012). As amply demonstrated by the majority opinion, the result of this appeal is obvious: Silil owned the land at the time he transferred it to his son.

[¶ 19] Not only was there controlling authority contrary to Appellant's position but, as explained by the majority, the other argument Appellant raised was forfeited because it was not preserved in the court below. Thus, sanctions would have been appropriate under Rule 38 as well as for raising issues that were not preserved below. *See General Brewing Co. v. Law Firms of Gordon, Thomas*, 694 F.2d 190, 193 (9th Cir. 1982) (imposing sanctions for arguments on issues that were not properly preserved).

[¶ 20] Additionally, sanctions would have been appropriate for counsel's failure to disclose adverse controlling precedent under Rule 3.3(a)(2) of the Model Rules of Professional Conduct. Rule 3.3(a)(2) says that a lawyer shall not knowingly "fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by the opposing counsel."

[¶ 21] Here, this Court's opinion in *Tmetuchl*, which has been the controlling precedent in this jurisdiction for more than two decades, was not disclosed to the Court. If counsel was aware or became aware of this precedent and knowingly failed to disclose it, then she in all likelihood engaged in professional misconduct in violation of Rule 3.3(a)(2) of the ABA Model Rules for which sanctions may be appropriate. *See McEnery v. Merit Sys. Protection Bd.*, 963 F.2d 1512, 1516-17 (Fed.Cir.1992) (awarding sanctions on appeal for failing to reference or discuss controlling precedent); *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 212 (9th Cir.1987) (awarding sanctions in part because the argument on appeal ignored controlling Supreme

Court authority); *Jorgenson v. Country of Volusia*, 846 F.2d 1350, 1351-52 (11th Cir. 1988) (affirming sanctions against a lawyer for failing to cite adverse precedent in the context of an *ex parte* proceeding).

[¶ 22] If, however, counsel was not aware of the adverse authority, then it is reasonable to infer that counsel did not even conduct minimal research for relevant authority in this jurisdiction because, if she had, she most certainly would have come across the adverse authority. Sanctions would have been appropriate for this failure as well. *See Natasha, Inc. v. Evita Marine Charters, Inc*., 762 F.2d 468, 472 (1st Cir.1985) (imposing sanctions because a "minimal amount of research, even a cursory reading of the relevant [] case law," should have revealed that the appellant's legal position was without merit).

[¶ 23] I have taken the time to highlight the deficiencies in Appellant's brief not to embarrass counsel, but to underscore the majority's warning to counsel and other Bar members that similar inadequate performance which routinely accompanies frivolous appeals will invite sanctions. This year is coming to a close and there are at least three instances of such poor appellate practice so far.[8] This is one too many in a small community and does not reflect well on the quality of legal service provided by the local Bar and will, if it persists, erode the public's confidence and trust in the legal profession.

[¶ 24] Imposition of sanctions is a serious matter and should not be imposed unless clearly warranted. I am also well aware of the chilling effect that the imposition of sanctions will have "upon the attorney-client relationship and upon the bar's willingness to propound novel legal theories which might potentially advance the law." *McEnery*, 963 F.2d at 1516. However, counsel who file appeals that are woefully deficient and have no hope of succeeding should be aware that they are treading the path of sanctions.

[¶ 25] With these observations, I concur and join the majority's opinion.

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[8] See *Dakubong v. Aimeliik State Gov't*, 2021 Palau 19 (appeal dismissed–issues not preserved; inadequate briefing); *Ngarmdau State Pub. Lands Auth. v. Toribiong*, 2021 Palau 20 (appeal dismissed–improperly brought appeal); *Chokai v. Sengebard*, 2021 Palau 35 (appeal dismissed–inadequate briefing).