IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

CLEOPHAS N. ROBERT, *Appellant*, **v.** **KEVIN NGIRNGEMEUSCH,** *Appellee.*
CLEOPHAS N. ROBERT, *Appellant*, **v.** **CHILDREN OF NARUO,** *Appellees.*

Cite as: 2023 Palau 5
Civil Appeal No. 22-020 & 22-021
Appeal from Civil Action No. 22-001 & 22-021

Decided: February 3, 2023

Counsel for Appellant ..... Johnson Toribiong
Counsel for Appellees ..... C. Quay Polloi

BEFORE: JOHN K. RECHUCHER, Associate Justice, presiding
FRED M. ISAACS, Associate Justice
KEVIN BENNARDO, Associate Justice

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

OPINION[1]

PER CURIAM:

[¶ 1] In these consolidated appeals, Appellant Cleophas Robert ("Cleophas") challenges the Trial Division orders dismissing his claims to his deceased brothers' interests in a parcel of land known as *Tund*.

[¶ 2] Because the Trial Division properly found that customary law determines that the deceased's children inherited the interests, we **AFFIRM**.

BACKGROUND

[¶ 3] The present appeal is part of a lengthy dispute started by Ngirngemeusch Tengadik. In 1988, Tengadik filed a claim for Cadastral Lot No. 007-10, known as *Tund* and located in Ngaraard State, alleging that it had been taken without compensation by the Japanese Government before World War II. Because Tengadik died before his claim was adjudicated, Appellant Cleophas Robert stepped forward to continue the claim on behalf of the "Children of Ngirngemeusch." On June 20, 2007, the Land Court recognized fourteen (14) individuals as "Children of Ngirngemeusch" and declared them joint owners of *Tund*, awarding each a 1/14th interest in the land. Amongst these joint owners were Kenneth Ngirngemeusch ("Kenneth") and Naruo Ngirngemeusch, or Naruo Robert ("Naruo").

[¶ 4] On December 27, 2007, Naruo died intestate. He was survived by his wife, three daughters, Naemi, Ruth, and Felicia, and one son, Leland (collectively "Naruo's children"). During Naruo's *cheldecheduch*, the relatives did not discuss the 1/14th interest in *Tund*. On February 9, 2014, Kenneth died intestate. He was not married, but had two sons, including Appellant Kevin Ngirngemeusch ("Kevin") and Kenley. During Kenneth's funeral, his relatives did not hold a traditional *cheldecheduch* because Kenneth was not married, but did distribute children's money to Kevin and Kenley. At no point did they discuss the 1/14th interest in *Tund*.

[1] The parties did not request oral argument in this appeal. No party having requested oral argument, the appeal is submitted on the briefs. *See* ROP R. App. P. 34(a).

[¶ 5] On January 23, 2019, Cleophas signed an agreement with the Republic of Palau to lease part of *Tund* to the Republic. Cleophas did not share the proceeds equally with the other thirteen individuals who are listed as co-owners of *Tund*. Kenneth and Naruo had by then passed. Thus, when some of the joint owners filed suit against Cleophas, the two deceased were represented by their children as heirs to their interests. On November 27, 2019, the Trial Division granted partial summary judgment, concluding that the fourteen individuals listed on the Certificates of Title were fee simple owners. On January 27, 2021, the Trial Division reaffirmed its decision, finding that the plaintiffs were entitled to the interests in *Tund*; thus granting an interest to Kevin and Naruo's children despite the fact that they were not named on the Certificates of Title.

[¶ 6] This contradiction between the two Trial Division decisions led to the appeal in *Robert v. Robert*, 2021 Palau 34. This Court ruled that the 2007 Certificates of Title were binding on all the parties and vested fourteen equal shares in the lease proceeds. However, we vacated the part of the Trial Division's judgment that granted an interest in *Tund* to Kenneth and Naruo's children and remanded the case for the Trial Division to determine who inherited Kenneth's and Naruo's interests.

[¶ 7] On September 12, 2022, the Trial Division heard cross-motions for summary judgment on Naruo's estate, then did the same for Kenneth's estate on September 14, 2022. The Trial Division found that under customary law, Kenneth's interest in *Tund* had immediately vested in his customary heirs, Kevin and Kenley, at his death. The trial court then granted summary judgment in favor of Kevin and closed Kenneth's estate. As for Naruo's case, the Trial Division found that Cleophas' claim had been barred by judicial estoppel, *res judicata*, and the statute of limitations. Nonetheless, the Trial Division reached the merits and found that under Palauan custom, Naruo's legal heirs to the 1/14th interest were his children. The trial court then granted summary judgment in favor of Naruo's children.

[¶ 8] We are now asked to review the Trial Division's settlement of Kenneth's and Naruo's estates, and determine whether their children inherited their fathers' interests in *Tund* as a matter of customary law, or whether the

interests are to be assigned to *Telungalk ra Ngirngemeusch*, the Lineage of Ngirngemeusch under 25 PNC § 301(b) and customary law.

STANDARD OF REVIEW

[¶ 1] "Conclusions of law are reviewed *de novo*, factual findings are reviewed for clear error, and exercises of discretion are reviewed for abuse." *Elsau Clan v. Peleliu State Public Lands Authority*, 2019 Palau 7 ¶ 7. "Generally, '[a] discretionary act or ruling under review is presumptively correct, and the burden is on the party seeking reversal to demonstrate an abuse of discretion.'" *Island Paradise Resort Club v. Ngarametal Ass'n*, 2020 Palau 27 ¶ 12 (quoting *Ngoriakl v. Gulibert*, 16 ROP 105, 107 (2008)).

[¶ 2] We review a lower court's grant of summary judgment *de novo*. *Akiwo v. Republic of Palau*, 6 ROP Intrm. 105, 106 (1997). Drawing all inferences from the evidence in favor of the non-moving party, the Appellate Division evaluates whether there were no genuine issues of material fact and whether the moving party was entitled to judgment as a matter of law. *Koror State Pub. Lands Auth. v. Wong*, 21 ROP 5, 7 (2012).

DISCUSSION

[¶ 3] Cleophas argues that (1) the *cheldecheduch* for both Kenneth and Naruo were conclusive and binding settlements under customary law, (2) that Kenneth and Naruo did not purchase *Tund* for value and as such, could not have passed *Tund* to their children under 25 PNC § 301, and (3) that the statute of limitations and *res judicata* barred the claim of Naruo's children. The children respond that (1) Cleophas' claim is barred by judicial estoppel, (2) Cleophas' reliance on customary law is erroneous because the land was subject to Palauan statutory and common law, and (3) Cleophas' claim regarding Naruo's interest is specifically barred by the statute of limitations and *res judicata*.

I. Judicial Estoppel

[¶ 4] "The doctrine of judicial estoppels exists 'to protect the integrity of the judicial process, by prohibiting parties from deliberately changing positions according to the exigencies of the moment.'" *Etpison v. Obichang*,

2020 Palau 8 ¶ 34 (Dolin, J., concurring) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001)) (internal citations and quotations omitted). Under this doctrine, when "a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Id.* Judicial estoppel is an equitable doctrine, and as such, it is "invoked by a court at its discretion." *Id.* at ¶ 39; *see also Obichang v. Etpison*, 2021 Palau 26 ¶ 15.

[¶ 5] Appellees argue that Cleophas' claim is barred by judicial estoppel. First, because Cleophas filed a verified pleading on February 10, 2022, in which he stated that there was no traditional *cheldecheduch* held for Kenneth. Second, because Cleophas announced at Naruo's *cheldecheduch* that Naruo's properties would go to his surviving spouse and children.

[¶ 6] We have repeatedly held that "an issue that was not raised in the trial court is waived and may not be raised on appeal for the first time." *Techur v. Telungalek ra Techur*, 2018 Palau 12 ¶ 23 (quoting *Fanna Mun. Gov't v. Sonsorol State Gov't*, 8 ROP Intrm. 9, 9 (1999)). The issue of judicial estoppel is no different. *See Obichang v. Etpison*, 2021 Palau 26 ¶ 14. Because Appellees did not raise this issue below and the Trial Division did not address it in its Order on the cross-motions for summary judgment, we decline to consider whether Cleophas is barred from claiming a partial *cheldecheduch* was held for Kenneth.

[¶ 7] However, Appellees and the Trial Division both addressed judicial estoppel in regard to Naruo's estate. The Trial Division found that Naruo's estate was probated in 2009, and that Cleophas testified under oath that Naruo's properties would go directly to his surviving spouse and children. *See In the Matter of the Estate of Naruo Ngirngemeusch aka Naruo Robert*, Civil Action No. 09-144 (Tr. Div. 2009). Cleophas clearly assumed the position that all of Naruo's properties would go to Naruo's children in the 2009 case, and now wants to seek an advantage by pursuing an inconsistent theory. We also note that the findings in the 2009 estate case espoused Cleophas' position. Therefore, the Trial Division did not err in finding that Cleophas is judicially estopped from claiming an interest in *Tund*. We **AFFIRM** the Trial Division's

September 12, 2022 Order granting summary judgment in favor of Naruo's children.

II. Law Governing the Disposition of Decedent's Estate

[¶ 8] Before turning to Kenneth's 1/14th interest in *Tund*, we believe it worthwhile to clarify what law governs the disposition of a decedent's land owned in fee simple. When this case previously appeared before this Court, we held that when land is held in unqualified fee simple, such tenure is not governed by Palauan customary law, but is instead governed by Palauan statutory and common law. *Robert*, 2021 Palau 34 at ¶ 17. This determination is grounded on the fact that title under customary law and title in fee simple are alternative, but fundamentally different, forms of ownership interest. In fact, the Palau National Code expressly provides that "[l]and now held in fee simple . . . may be transferred, devised, sold or otherwise disposed of at such time and in such manner as the owner alone may desire, *regardless of established local customs which may control the disposition or inheritance of land through matrilineal lineages or clans*." 39 PNC § 403 (emphasis added).

[¶ 9] Nonetheless, we have repeatedly held that when determining who shall inherit a decedent's property, absent an applicable descent and distribution statute, customary law applies. *See Marsil v. Telungalk ra Iterkerkill*, 15 ROP 33, 36 (2008); *Bandarii v. Ngerusebek Lineage*, 11 ROP 83, 88 (2004) (Ngiraklsong, C.J., concurring). Specifically, we have found that where 25 PNC § 301 does not apply, we apply Palauan custom, and that the rules of common law only apply when neither statutory nor customary law applies. *See Bandarii*, 11 ROP at 88 (citing 1 PNC § 303).

[¶ 10] Under 1 PNC § 303, "[t]he rules of the common law . . . shall be the rules of decision in the courts of the Republic in applicable cases, in the absence of written law applicable . . . or local customary law . . . to the contrary." The manifest purpose of this statute is "to avoid gaps in the law during the development of Palau's legal system." *Renguul v. Arai State Pub. Lands Auth.*, 8 ROP Intrm. 282, 284 (2001). Therefore, there is no need to apply United States common law where Palauan custom already resolves the issue.

[¶ 11] Additionally, "[t]he common law comprises the body of those principles and rules of actions . . . which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming and enforcing such usages and customs." *Yano v. Kadoi*, 3 ROP Intrm. 174, 189 (1992). Our allusion to the common law in *Robert* merely referenced case precedent from this Court and the Trial Division, which has consistently applied customary law in the absence of an applicable statute.

[¶ 12] We return to Kenneth's interest with these explanations in mind. 25 PNC § 301(a) governs the inheritance of land held in fee simple where the decedent left no will and acquired the land as a bona fide purchaser. Because Kenneth did not purchase the land as a bona fide purchaser, this section does not apply. Section 301(b) states:

> If the owner of fee simple land dies without issue and no will has been made . . . or if such lands were acquired by means other than as a bona fide purchaser for value, then the land in question shall be disposed of in accordance with the desires of the immediate maternal or paternal lineage to whom the deceased was related by birth or adoption and which was actively and primarily responsible for the deceased prior to his death.

[¶ 13] We have previously established that the second half of section § 301(b) must be read in conjunction with its first half. As such, § 301(b) only applies if the owner of "such lands"—lands owned in fee simple by an individual who dies without issue and without a will—"were acquired by means other than as a bona fide purchaser for value." *Marsil v. Telungalk ra Iterkerkill*, 15 ROP 33, 36 (2008); *see also In re Estate of Tellames*, 22 ROP 218, 221-22 (Tr. Div. 2015). Thus, although Kenneth was not a bona fide purchaser for value and he did not have a will, he still died with issue: Kevin and Kenley. Therefore, the latter half of § 301(b) does not control.

[¶ 14] Absent an applicable descent and distribution statute, customary law governs. *See Marsil*, 15 ROP at 36. Although senior family members can

transfer individually owned land at a *cheldecheduch*, what is not discussed at the *cheldecheduch* is not settled. *See Rechesengel v. Lund*, 2019 Palau 32 ¶ 25. Furthermore, under customary law, a decedent's children are his presumed heirs. *See Ruluked v. Skilang*, 6 ROP Intrm. 170, 171-72 (1997); *Matchiau v. Telungalk ra Klai*, 7 ROP Intrm. 177, 179 (1999); *Rechesengel*, 2019 Palau 32 at ¶ 24 ("The prevailing customary law is that when no statute is applicable to determine the distribution of a decedent's property and no [*ch*]*eldecheduch* was held regarding such distribution, property should be given to the decedent's children, as they are the customary heirs."). Finally, individually owned lands vest immediately in a decedent's heirs at the time of death. *Tengadik v. King*, 17 ROP 35, 39 (2009)

[¶ 15] The record shows that while his relatives did not hold a customary *cheldecheduch* for Kenneth, as he was unmarried at the time of his death, they fulfilled customary obligations to take care of his children by giving Kevin and Kenley *ududir ar ngalk* (children's money) and one piece of Palauan money. We give little credit to Cleophas' argument that fulfilling such obligations constituted a partial *cheldecheduch*. Regardless of whether or not there was a *cheldecheduch*, Kenneth's relatives did not discuss the 1/14th interest during the funeral. As such, the interest was not settled. The Trial Division properly found that customary law governed, and that the interest vested immediately in Kenneth's customary heirs, his children Kevin and Kenley. Therefore, we **AFFIRM** the Trial Division's September 14, 2022, Order granting summary judgment in favor of Kevin.

CONCLUSION

[¶ 16] We **AFFIRM** the Trial Division's judgment in both cases.

SO ORDERED, this 3rd day of February, 2023.

JOHN K. RECHUCHER
Associate Justice

FRED M. ISAACS
Associate Justice

KEVIN BENNARDO
Associate Justice