Tkel v. Ngiruos, 12 ROP 10 (2004)

RIKEL TKEL, ICHIRO DINGILIUS, and FRANCIS MATSUTARO,
Appellants,

v.

ERMANG NGIRUOS,
Cross-Appellant/Appellee,

v.

ANTONIA WENTY,
Appellee.

CIVIL APPEAL NO. 03-14
Civil Action No. 299-96

Supreme Court, Appellate Division
Republic of Palau

Argued: July 16, 2004
Decided: October 14, 2004

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Counsel for Tkel and Wenty: J. Roman Bedor

Counsel for Dingilus and Matsutaro: Moses Uludong

Counsel for Cross-Appellant/Appellee: Honora E.R. Rudimch

BEFORE: LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice; ROSE MARY SKEBONG, Associate Justice Pro Tem.

Appeal from the Trial Division, the Honorable KATHLEEN M. SALII, Associate Justice, presiding.

PER CURIAM:

BACKGROUND

This appeal concerns land in Peleliu State referred to as Droech, Tochi Daicho Lot No. 1143. The lot is broken up into three parcels, identified as Cadastral Lot No. 010 R 03, Cadastral Lot No. 010 R 04 and Cadastral Lot No. 011 R 09. The Tochi Daicho lists Erbai as the owner of the lands, which no one disputes. All parties also agree that the land was transferred to Erbai's sister, Ngesengeseu Meseral, upon Erbai's death. Meseral died in 1995.

The original complaint in this case was filed to determine Meseral's heirs. Appellant Rikel Tkel and Cross-Appellant Ermang Ngiruos agreed to a stipulated judgment concerning eleven plots of land. Tkel is the daughter of Meseral's brother, Ngeluk; Ngiruos is the adoptive daughter of the sister of Meseral's mother. Soon after the stipulated judgment, the court granted leave for Appellants Ichiro Dingilius and Francis Matsutaro to intervene. Dingilius and Matsutaro are the children of a male member of Imenglii Lineage, Meseral's maternal lineage. Later, Appellee Antonia Wenty, who built her house on a portion of one of the lands, was also permitted to intervene. Trial was held to determine which lands are part of the estate and which claimants were entitled to the plots that were not included in the stipulated judgment.

Evidence at trial showed that, in 1987, Meseral executed an affidavit requesting that a Certificate of Title be issued listing both she and Ngiruos as owners of Cadastral Lots R 03, R 04 and R 09. Two years later, Certificates of Title were issued for Lots R 04 and R 09. However, the copy of the Certificate issued for R 04 that is in the record is marked "Canceled 10/3/91," and, on that same date, certificates listing both Meseral and Ngiruos as owners were issued for Lots R 03 and R 04.

The Trial Division found the 1987 affidavit to be a valid request from Meseral to the Land Court to issue Certificates of Title to Lots R 03, R 04 and R 09, and found that "credible testimony established that one way for a landowner to convey property is through an affidavit requesting such conveyance."
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The Trial Division also agreed with Wenty's contention that a written agreement signed in 1981 that granted Wenty a use right and promised her the portion of the land on which her house was built was an inter vivos transfer of the rights to the land, not a will. Thus, the Trial Division found Meseral's estate to consist of her share of the disputed land, which was jointly owned by Ngiruos, except for the portion of the land transferred to Wenty in the 1981 agreement.[1]

The Trial Division then turned to the question of the heirs to Meseral's share of the jointly-owned land. Rejecting the competing claims of Tkel and Dingilius, the Trial Division found that Ngiruos, as the strongest member of Imenglii Lineage and the proper person under custom to dispose of Meseral's property, should determine the distribution of Meseral's estate pursuant to 25 PNC § 301(b).

Tkel appealed, challenging the issuance of the 1991 Certificates of Title and claiming that she was entitled to Meseral's share of the disputed land because she and Wenty cared for Meseral before her death. Dingilius and Matsutaro also challenge the Certificates and argue that, pursuant to § 301(b), members of Imenglii Lineage are responsible for making a collective decision as to how to dispose of Meseral's estate. Ngiruos appealed the award of land to Wenty.

STANDARD OF REVIEW

[1]The document describes the land as "Area 6010" and "this lot that [Wenty's] house is on and the yard surrounding it."

Findings of fact are reviewed for clear error, *see Tesei v. Belechal*, 7 ROP Intrm. 89 (1998); conclusions of law are reviewed de novo. *See Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2000).

ANALYSIS

I. Property in Meseral's Estate

The size of Meseral's estate depends on the answers to two questions: whether the 1981 agreement signed by Meseral was a valid inter vivos transfer to Wenty as opposed to a will; and whether the 1987 affidavit and subsequent Certificates of Title made Ngiruos co-owner of the relevant properties.

A. Transfer to Wenty

With respect to the portion of Droech awarded to Wenty, Ngiruos claims the Trial Division erred in determining that the 1981 agreement (hereinafter "the agreement") between Meseral and Wenty was a valid inter vivos transfer. Instead, Ngiruos argues, that agreement was intended as a will, but because it was not a valid will, the disputed land was not transferred pursuant to the agreement. Therefore, Ngiruos claims, the parcel of land should be included with the rest of Meseral's estate.[2]

Ngiruos correctly contends that if Meseral intended the agreement as a will but ⊥13 failed to meet the requirements of 25 PNC § 105, the agreement has no legal effect. *See generally* 79 Am. Jur. 2d *Wills* § 9 (2002) ("Whether or not an instrument is testamentary in character depends upon the intention of the maker."). But the mere fact that the agreement states that the land will pass to Wenty upon Meseral's death does not mean that the agreement was intended as a will. "A deed or contract to sell estate is not testamentary in character where it passes a present interest, merely postponing enjoyment." *Callaghan v. Reed*, 605 P.2d 1382, 1384 (Or. App. 1980) (citing, *inter alia*, Anno. 31, A.L.R.2d 532, 538 (1953)). This rule is properly applied "to a contract, lese, or other instrument." *In re Estate of Verbeek*, 467 P.2d 178, 183 (Wash. App. 1970). The question, then, is whether Meseral intended the agreement to be a will or, as the Trial Division found, an inter vivos transfer as part of a contract in which Meseral received past or future services.

In this case, the language and circumstances of the agreement support the Trial Division's conclusion. The agreement provided that Wenty would receive the land upon Meseral's death "because Antonia Wenty . . . was watching over my brother Erebai, and now is supporting me

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[2]It is worth noting that Wenty's claim could have been precluded because the 1989 and 1991 Certificates of title were issued on the basis of hearings held and determinations made after the 1981 agreement. *See Rengulbai v. Solang*, 4 ROP Intrm. 68, 72 (1993) (holding that a party that failed to file a claim with the Land Commission or appeal its determination of ownership was barred from claiming ownership based on an agreement allegedly made prior to the determinations). Because *res judicata* must be raised as an affirmative defense, however, Ngiruos cannot now make that argument. *See* ROP R. Civ. P. 8(a).

until I die."[3] In essence, Meseral was promising the land to Wenty in exchange for the services she had provided to Erbai and the future services she had promised to Meseral. At that point, both sides were bound. Wenty had to continue caring for Meseral, which she did. More significantly, under such an arrangement, Meseral could not change her mind and take the land back. As a result, the agreement should not be classified as a will. *See Wills*, *supra*, § 35 ("A will . . . is simply a statement of a purpose or wish of the maker as it exists at the time. As often as his purpose or wish changes, he may change the expression of it."). Therefore, the Trial Division did not err in finding that the agreement was an inter vivos transfer.

B. 1987 Affidavit

> The relevant sections of the 1987 affidavit read:
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> 5. That I do hereby give my full and free consent to Ermang Ngiruos to be named as one of the legal owners of the above described lands with me; and
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> 6. That I hereby request that a certificate of title be issued setting forth the name of Ermang Ngiruos as one of the legal owners of the above-described lands with me.

Tkel first argues that the affidavit does not qualify as a "deed of conveyance," as required by the Statute of Frauds, 39 PNC § 501(a), for the transfer of an interest in real property.[4] But the Statute of Frauds is an ⊥14 affirmative defense that must be raised in the trial court. *See In re Rengiil*, 8 ROP Intrm. 118, 119 (2000). Because Tkel failed to plead a Statute of Frauds defense below, she cannot do so on appeal. ROP R. Civ. P. 8(c).

Putting aside the Statute of Frauds, Tkel argues that, at best, the affidavit is merely an expression of Meseral's intent to transfer an interest to Ngiruos. Instead of issuing new Certificates of Title, Tkel claims, the LCHO should have held new hearings. As the Trial Division found, however, no hearing is required when an undisputed owner of property wishes to transfer his or her interest in the property. Such a hearing would serve no purpose. An owner is free to transfer an interest whenever he or she desires; a party opposed to the transfer would

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[3] Neither side submitted a translation of the agreement, which was written in Palauan. The quoted language is from a translation prepared for the Court by the Court's qualified translators.

[4] 39 PNC § 501(a) reads:

> Except for a lease for a term not exceeding one year, no estate or interest in real property, and no trust or power over or concerning real property, or in any manner relating thereto, can be created, granted, assigned, transferred, or declared, otherwise than:
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> (1) By operation of law; or
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> (2) By a deed of conveyance or other instrument in writing signed by the person creating, granting, assigning, transferring, surrendering, or declaring the same, or by his lawful agent under written authority, and executed with such formalities as are required by law.

essentially be challenging the ownership rights of the transferor, which it is free to do at any time in an independent action.

Tkel next argues that the affidavit did not in fact, make Ngiruos a co-owner of the lands. According to Tkel, the LCHO panel in 1989 ignored the affidavit in awarding the first Certificates of Title to Meseral. There was no reason, Tkel argues, for the second LCHO panel to reissue Certificates two years later. The affidavit, however, explicitly requests the issuance of a new Certificate of Title listing Ngiruos as a co-owner, thus providing the LCHO with a reason to issue one. Meseral might have received the 1989 Certificates, and, noticing that they listed only Meseral as the owner, requested that the 1991 Certificates to be issued. Such an explanation is consistent with the clear wishes Meseral expressed in the affidavit. If Meseral was unhappy with the changes in the 1991 Certificates, she had several years before her death to challenge it, but did not. Therefore, we affirm the Trial Division's conclusion that Ngiruos was the co-owner of R 03 and R 04 prior to Meseral's death.[5]

II. Disposal of Meseral's assets

Having resolved what properties were part of Meseral's estate, the trial court turned to the question of who should determine how those properties should be disposed. The trial court found that this question was governed by 25 PNC § 301(b), that the responsible lineage under that statute was Imenglii Lineage, and that as the child of a female ochell member of that Lineage, Ngiruos was the person authorized under the statute to determine the disposition of decedent's estate. In reaching this conclusion, the trial court also found that Ngiruos was the proper person under custom who has the authority to dispose of Meseral's property. Tkel, along with Dingilius and Matsutaro, argues that, pursuant both to the relevant statute and custom, the trial court erred in awarding Meseral's share of the property to Ngiruos. Although we disagree in part with the trial's court's analysis, we affirm its ultimate conclusion.

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25 PNC § 301(b) provides as follows:

> If the owner of fee simple land dies without issue and no will has been made in accordance with this section [or with 39 PNCA § 403] or the laws of the Republic 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. ...[6]

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[5] Because we also affirm the Trial Division's conclusion that most of Meseral's share of the lands at issue passed to Ngiruos, it does not ultimately matter whether Ngiruos acquired her share as a result of the 1987 affidavit.

[6] We apply the statute as it existed at the time of Meseral's death. *See Ngirakebou v. Mechucheu*, 8 ROP Intrm. 34, 35 n.3 (1999). At the time of Meseral's death, this provision of § 301 was codified as 39 PNC § 102(d), but the language was identical.

Tkel argues first that she and Wenty, as the persons who cared for Meseral prior to her death, have the authority under this provision to dispose of Meseral's property. This argument, however, ignores our decision in *Delbirt v. Ruluked*, 10 ROP 41 (2003), where we made clear that "the statute is . . . not satisfied by a showing that an individual or individuals cared for the deceased prior to his death. Rather, the court may determine ownership pursuant to [301(b)] where . . . a *lineage* related to the deceased through birth or adoption has assumed active responsibility for the deceased prior to his death." Slip op. at 4 (emphasis added).[7]

Dingilius and Matsutaro argue, by contrast, that while the trial court was correct that Imenglii Lineage was the appropriate lineage under the statute, it erred in conferring the decision-making power of the Lineage on Ngiruos alone and in failing to ascertain the desires of the Lineage as a whole. We agree in part with this suggestion. The statute refers to the "desires of the . . . lineage," not to the strongest member of that lineage. While it may be that in a particular case, a single individual has the authority to act on behalf on a lineage,[8] it is ultimately the lineage's ⊥16 desires, and not those of any particular individual, that trigger the application of the statute.

The question, then, is what the trial court should have done in these circumstances. On this point, we do not agree with appellants' suggestion that the trial court should now be asked to determine the desires of Imenglii Lineage. Rather, the answer is again provided by our decision in *Delbirt*: "Where a court finds no expression of the desires of a statutorily defined lineage, we conclude that it must turn to customary law to determine the proper heir of the deceased." *Delbirt*, 10 ROP at 43. But that is a question that the trial court has already answered, concluding that "the undisputed facts incline in favor of [Ngiruos'] claim to be the proper person under custom with the authority to determine [Meseral's] property, and is entitled to [her] property." Although appellants attack this conclusion as well, it is clear from the record that the trial court's finding in this regard was supported by the only disinterested expert witness on custom, and cannot be deemed to be clearly erroneous. Accordingly, although we disagree with

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[7] We also reject Tkel's alternative argument that the trial court should have followed Meseral's purported oral will that Tkel should be put in charge of her properties. We have recently made clear that oral wills that do not comply with statutory requirements "do not effect a legally valid devise of ... property." *Diaz v. Children of Merep* , 11 ROP 28, 30 (2003). To the extent Tkel now means to suggest that this holding contravenes the constitutional direction that "[s]tatutes and traditional law shall be equally authoritative," *see* Palau Const. Art. V, § 2 (an argument that we suspect was not raised below), we need not say more than that Tkel failed to introduce any customary evidence on this score below. Trust Territory-era pronouncements as to Palauan custom, while entitled to consideration, do not necessarily substitute for the clear and convincing evidence of custom that our cases require.

[8] We need not decide that issue today, however, because it is clear that neither the lineage as a whole, nor Ngiruos acting on its behalf, has ever expressed its desires in any legally cognizable way. While we have never strictly enforced § 301(b)'s requirement that a lineage's desires "shall be registered with the Clerk of Courts," and while we have said that a lineage is not required to make any disposition "immediately" after a decedent's death, *Tarkong v. Mesebeluu*, 7 ROP Intrm. 85, 88 (1998), we have also made clear that the inaction of a lineage up to and through the onset of litigation years after a decedent has passed away will constitute a waiver of the lineage's authority to act under the statute. *Id*. (holding that the failure of decedent's paternal lineage to take any action prior to an LCHO hearing two years after the decedent's death barred any claim it might have had). Here, where Meseral died in January 1995, and there has been no suggestion that the Lineage had acted up to the time of trial in November 2002, § 301(b) simply does not apply.

the trial court's application of § 301(b), we believe that its ruling on behalf of Ngiruos was supported by its findings pursuant to Palauan custom, and uphold it on that basis.

CONCLUSION

For the foregoing reasons, the judgment of the Trial Division is affirmed.