Marsil v. Telungalk ra Iterkerkill, 15 ROP 33 (2008)

MARTHA O. MARSIL,
Appellant,

v.

TELUNGALK RA ITERKERKILL,
Appellee.

CIVIL APPEAL NO. 06-044
Civil Action No. 06-306

Supreme Court, Appellate Division
Republic of Palau

Decided: January 28. 2008[1]

Counsel for Appellant: Roman Bedor

Counsel for Appellee: David Kirschenheiter

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice.

Appeal from the Land Court, the Honorable SALVADOR INGEREKLII, Associate Judge, presiding.

MATERNE, Justice:

Appellant Martha O. Marsil, on behalf of the children of Ketebengang, challenges the Land Court's determination awarding to Appellee Telungalk ra Iterkerkill ownership of the land known as *Osubed,* located in Choll County, ⊥34 Ngaraard State. Although neither of Appellant's arguments on appeal has merit, after conducting a *de novo* review of the applicable law, we reverse and remand with instructions.

BACKGROUND

The land in dispute is known as *Osubed* and is listed as Tochi Daicho Lot No. 232, or Worksheet Lot No. 2005E004-074, located in Choll County, Ngaraard State. Three claimants appeared before the Land Court: Martha O. Marsil, Warang O. Yelod, (a.k.a. Warang O. Saiske) and Kikue Saiske. The claimants agreed that the land was originally property of Otuu, and the Tochi Daicho lists Otuu's son Marsil as the individual owner of the land. Neither party challenges the Land Court's finding that the land passed to Marsil upon Otuu's death in 1929. Marsil is the grandfather of claimant Martha O. Marsil, and Marsil's adoptive sister Warang is

[1] Upon reviewing the briefs and the record, the panel finds this case appropriate for submission without oral argument pursuant to ROP R. App. P. 34(a).

the mother of claimants Dilmai and Kikue Saiske. The Land Court found that the land passed to Ketebengang, the son of Marsil and the father of claimant Martha O. Marsil, upon Marsil's death in 1953. This finding is not clearly erroneous and is supported by the record through the testimony of Besebes Osarch, who testified that at Marsil's eldecheduch the land was given to his children, namely, Ketebengang. When Ketebengang died in 1983, there was no eldecheduch and the claimants disagree as to how the land should be distributed following Ketebengang's death.

The Land Court held that when a landowner who is not a bona fide purchaser for value dies intestate, 25 PNC § 301 (b) grants to the family responsible for the deceased prior to his death the right to dispose of the land. The Land Court found that claimants Warang and Martha O. Marsil are members of Telungalek ra Iterkerkill and held that Ketebengang's father Marsil was responsible for Ketebengang under 25 PNC § 301(b). The Court held that because no discussion regarding the land took place following Ketebengang's death and because Ketebengang remained with his father's family unit, land is the responsibility of that family unit, or Telungalek ra Iterkerkill, to distribute however they see fit.

STANDARD OF REVIEW

This Court reviews the Land Court's conclusions of law *de novo. Ngirmerid v. Estate of Rechucher,* 13 ROP 42, 46 (2006). The lower court's findings of fact are reviewed under the clearly erroneous standard. *Id*. Thus, the factual determinations of the lower court will be set aside only if they lack evidentiary support in the record such that no reasonable trier of fact could have reached the same conclusion. *Id*.

DISCUSSION

Appellant asserts two points of appeal. First, she claims that the party awarded the land by the Land Court below was not a party before the Land Court and therefore should not have been awarded the land. *See Rusiang Lineage v. Techemang,* 12 ROP 7, 9 (2004) (Land Court must choose among those claimants who appear before it). In this case, Dilmai Saiske filed an Application for Land Registration on behalf of her mother Warang Osarch Saiske, listing the party in interest as "Ongalk ra Otuu/Trustee by Warang O. Saiske." The Land Court awarded the land to Telungalk ra Iterkerkill, stating that Warang O. Saiske was "claiming this land . . . to be the property of Telungalk ra Iterkerkill, to be used by everyone." Although this is arguably inconsistent with the Application for Land Ownership, Dilmai ⊥35 explicitly testified that her mother's claim was made on behalf of Iterkerkill lineage and not simply the children (Ongalk) of Otuu. *See Idid Clan v. KSPLA,* 9 ROP 12, 14 (2001).

Appellant also claims that the Land Court did not state the relevant legal authority on which it relied in awarding the land to Iterkerkill Lineage. The Land Court cited 25 PNC § 301(b)[2] as the relevant legal authority in awarding the land, holding that § 301 (b) applies

[2] In determining who shall inherit a decedent's property, courts apply the statute in effect at the time of the decedent's death. *Ngiraswei v. Malsol*, 12 ROP 61 (2005). 25 PNC § 301(b) was formerly codified at 39 PNC § 102(d). At the time of Ketebengang's death in 1983, the applicable statute was PDC § 801, but reference throughout this opinion will be to § 301 (b) as

because Ketebengang died without a will and was not a bona fide purchaser for value. Although the Land Court did cite legal authority, upon a *de novo* review of the legal conclusions of the court below, we believe the Land Court erroneously applied § 301(b) to this case.

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.

Elsewhere, this Court has debated the meaning and applicability of § 301 (b) to situations such as this. *See Bandarii v. Ngerusebek Lineage,* 11 ROP 83 (2004); *Ysaol v. Eriu Family,* 9 ROP 146 (2002). The nub of the issue is whether § 301(b) or Palauan customary law applies when a decedent who did not acquire land as a bona fide purchaser for value dies with issue but without a will. *See Bandari*, 11 ROP at 88A (Ngiraklsong, C.J., concurring). In addition to the discussion in *Bandarii* and *Ysaol,* the Court adds the following analysis.

As a preliminary matter, because Ketebengang died intestate, 39 PNC § 403(b) (formerly PDC § 801(b)) does not apply. Furthermore, because Ketebengang acquired his land from his father Marsil, and not as a bona fide purchaser for value, 25 PNC § 301 (a) does not apply.[3] Finally, there are two situations in which § 301(b) applies. First, "[i]f the owner of fee simple lands dies without issue and no will has been made . . .". Here, the Land Court applied § 301 (b) despite the fact that Ketebengang, the owner of fee simple lands, died with issue. His child, Martha O. Marsil, was a claimant below, and on her Application for Land Registration, Ketebengang was listed as having eight children. ⊥36 Thus, the first part of § 301 (b) does not apply. Section 301(b) also applies, however, 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.". Although Ketebengang did acquire his lands "by means other than as a bona fide purchaser for value . . .", his lands were not "such lands" as contemplated by this second part of § 301(b), because Ketebengang did not die without issue and without a will.

All will agree that § 301 (b) is not a model of clarity. Although the "or" that was the focal point of this Court's discussion in *Bandarii* suggests that § 301(b) applies in two distinct situations, because the second part of the statute applies only to "such lands" as referred to in the first part of the statute, three separate requirements must always be met before § 301 (b) can apply. Namely, the decedent must die without issue, without a will, and must have acquired his

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no substantive change was made.

[3] That section provides: "In the absence of instruments and statements provided for in [39 PNCA § 403(b)], lands held in fee simple, which were *acquired by the owner as a bona fide purchaser for value,* shall . . . be inherited by the owner's oldest legitimate living male child . . . ." (emphasis added).

lands other than as a bona fide purchaser for value. In effect, the "or" becomes an "and." *See Bandarii,* 11 ROP at 88 (Ngiraklsong, C.J., concurring).

Absent an applicable descent and distribution statute, customary law applies. *See Bandarii,* 11 ROP at 88C (Ngiraklsong, C.J., concurring) (citing Palau Const. art. V, § 2; 1 PNC § 302; 1 PNC § 414). Normally, custom is established by clear and convincing evidence through expert testimony at a hearing. *See Children of Matchiau v. Klai Lineage,* 12 ROP 124, 125 (2005); *Nakamura v. Sablan,* 12 ROP 81, 82 (2005). Here, there was no such expert testimony nor was there any discussion regarding Palauan customary decent and distribution. The Land Court did, however, determine that if there is no applicable decent and distribution statute, if no eldecheduch was held regarding a decedent's property, and if no other evidence exists, property goes to the decedent's children as they are the customary heirs. *See Children of Dirrabang v. Children of Ngirailid,* 10 ROP 150, 152 (2003). Upon *de novo* review, we uphold this conclusion of law made by the Land Court. Therefore, the customary heirs to the land are Ketebengang's children, and the land shall be awarded to them.

CONCLUSION

As the Land Court erroneously applied § 301 (b) to this case, we reverse and remand the matter with instructions to the Land Court to issue a determination of ownership awarding the land known as *Osubed* to the children of Ketebengang, with Martha O. Marsil acting as trustee.