Ngiralulk v. Children of Obiliou, 8 ROP Intrm. 32 (1999)

SILAS NGIRALULK,
Appellant,

v.

CHILDREN OF OBILIOU, rep. by
LORENCIO LOUCH, Appellees.

CIVIL APPEAL NO. 98-24
D.O. No. 3-125

Supreme Court, Appellate Division
Republic of Palau

Decided: September 2, 1999[1]

Counsel for Appellant: David J. Kirschenheiter

Counsel for Appellee: Yukiwo P. Dengokl

BEFORE: JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice.

PER CURIAM:

This is an appeal of a Determination of Ownership [2] issued by the Land Court regarding parcels of land known as *Ititong*, Tochi Daicho Lots 1839 and 1840, located in Ngkeklau Hamlet, Ngaraard State. The land ⊥33 at issue was registered in the Tochi Daicho under the name of Iderrech, who died intestate in 1979. Both Appellant, representing the children of Iderrech's late brother, and Appellee, the children of Iderrech's late sister, agree that the Daicho listing is correct. While the record is unclear as to what theory of ownership each party was urging, it appears that both parties are claiming the land simply as a result of being the closest relative to Iderrech.[3] However, the Land Court decided the case based on a theory that neither side urged—that because the children of a female are stronger than the children of a male, Appellees, as children of Iderrech's sister, are entitled to the land. Appellant appeals, arguing that all of Iderrech's nieces and nephews, on both sides, should share the land evenly.

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[1] Upon review of the record and submissions of the parties, the panel has determined that this case is suitable for decision without oral argument pursuant to ROP R. App. Pro. 34(a).

[2] Counsel for both parties are reminded of ROP R. App. Pro. 28(a)(9), which directs that copies of the order appealed from shall be appended to all briefs.

[3] Neither party claimed the land by operation of 25 PNCA § 301(b) (formerly 39 PNCA § 102(d)), which states that an intestate's individual property acquired other than by purchase passes "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 decesased prior to his death."

Appellees raise several threshold arguments, contending for example, that Appellant waived their current argument by not raising it before the Land Court. While it is true that Appellant did not present this argument to the Land Court, we will not find a party to have waived an argument where the argument is directed against a theory that the court applied *sua sponte* and without opportunity for argument below. We have examined Appellees other threshold arguments and find them to be without merit.

The Land Court may have decided this case by making a finding of a custom-namely, that children with maternal connections to an intestate deceased customarily have a stronger right to inherit the deceased's personal property than do children with a paternal connection. [4] However, it is not clear from the findings of fact that the Land Court intended to take judicial notice of such a custom, and if it did, what the particular custom is. While the Land Court may take judicial notice of a custom even without the parties submitting evidence of such, Land Court R. Pro. 9, it must nevertheless explain in its findings of fact why it is taking such judicial notice, Land Court R. Pro. 5, and describe the custom it is noting. *Matchiau v. Telungalek ra Klai* , 7 ROP Intrm. 177, 179 (1999).

We vacate the decision of the Land Court and remand the case for further proceedings. If the Land Court did indeed intend to take judicial notice of a custom, it may simply re-issue its findings of fact explaining the reasons for doing so and describing the custom. The parties will thereafter have 10 days from service of that decision to request an opportunity to be heard by the Land Court on the propriety of taking notice of such custom, Land Court R. Pro. 5, and the time to appeal the Land Court's ultimate determination shall begin running after the Land Court grants a hearing and ⊥34 issues a final determination of ownership. *Id.* Alternatively, the Land Court may choose to re-open the hearing to allow the parties to submit evidence of custom before issuing its decision, or take such other action that the rules may permit.

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[4] Clearly, Palauan courts have ruled before that where clan matters are involved, the *ochell* of a clan are stronger than the *ulechell* and other members. *See Tet ra Ollei Uehara v. Obeketang*, 1 ROP Intrm. 267 (Tr. Div. 1985); *Risong v. Iderrech*, 4 TTR 459 (Tr. Div. 1969). However, we have never passed on whether these same strengths customarily affected disposition of an intestate's individual property.