

ROBERT TUTII,
Appellant,

v.

IBLAI NGIRAULAU,
Appellee.

CIVIL APPEAL NO. 11-019
Civil Action No. 05-156

Supreme Court, Appellate Division
Republic of Palau

Decided: September 12 , 2012

[1] **Appeal and Error:** Standard of Review; **Custom:** Burden of Proof

The existence of a claimed customary law is a question of fact that must be established by clear and convincing evidence and is reviewed for clear error.

[2] **Appeal and Error:** Standard of Review

We affirm the Trial Division's factual determinations as long as they are supported by such relevant evidence that a reasonable trier of fact could have reached the same conclusion.

[3] **Appeal and Error:** Preserving Issues

An argument not properly raised before the Trial Division is waived.

[4] **Equity:** Estoppel

The proponent of an estoppel theory bears the burden of production.

Counsel for Appellant: Salvador Remoket
Counsel for Appellee: Yukiwo P. Dengokl

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and ROSE MARY SKEBONG, Associate Justice Pro Tem.

Appeal from the Trial Division, the Honorable LOURDES F. MATERNE, Associate Justice, presiding.

PER CURIAM:

Appellant Robert Tutii challenges the Trial Division's award of land in Choll Hamlet, Ngaraard State, known as Cadastral Lot No. 001 E 08, to Appellee Iblai Ngiraulau. Because the trial court's conclusions were not clearly erroneous, we affirm.

BACKGROUND

Tutii Delmau (Delmau) died intestate on November 13, 2001. His wife, Mererechong Delmau (Mererechong), predeceased him. The Delmaus adopted Tutii and several others who were related by blood to Mererechong. Appellee Ngiraulau is Delmau's daughter from an earlier marriage. She was adopted out to her paternal grandparents, Delmau's parents.

After Mererechong's death, an cheldechoduch was held. Tutii received American currency, Palauan money, and a share of property known as *Bitruul*. After Tutii's adoptive mother's death, he continued to care for his father until his death.

Tutii filed a petition to settle Delmau's estate on July 20, 2005. Later that year, the Trial Division entered an order and judgment giving him all assets listed in the initial petition. However, on May 12, 2009, Tutii filed a motion to reopen the estate in order to address additional cash and Cadastral Lot No. 001 E 08. Ngiraulau filed an objection, contending that she had a valid claim to the parcel. A trial took place on December 31, 2009.

The court heard evidence from two experts and Ngiraulau on Palauan custom. Riosang Salvador testified for Ngiraulau. Salvador testified that, under the concept of *mora kotel*, a child who is adopted out to the paternal grandparents may "return[] back to her original house" when her adoptive parents die. She then may have the right to inherit from her biological parents. Additionally, Salvador noted that a child adopted to her biological paternal grandparents has authority *vis-à-vis* her biological parents as an adoptive sibling of sorts.

Wataru Elbelau testified for Tutii. He agreed that a biological child who is adopted by the paternal grandparents is like a sibling to the biological father. He and Salvador also agreed that someone like Ngiraulau, with status both as a biological child and an adoptive sibling, was stronger in status than an adopted child like Tutii. This is particularly so, Salvador testified, when the adopted child has already been taken care of in a *cheldechuduch*. Adopted children, in such cases, are *ngermedeb*, which means they return to their original house and may not inherit further properties.

On May 11, 2011, the Trial Division issued a decision. The court first concluded that the intestacy statute, 25 PNC § 301, did not apply because Delmau died with issue. It credited the testimony of Salvador and determined that, by virtue of her status as the biological child of the decedent and adopted child of decedent's parents, Ngiraulau had the stronger claim.

Tutii appeals. He contends that (1) the trial court erred in its determinations regarding custom and (2) Ngiraulau is estopped from inheriting from her biological parents because she inherited from her adoptive parents.

STANDARD OF REVIEW

[1, 2] "The existence of a claimed customary law is a question of fact that must be established by clear and convincing evidence and is reviewed for clear error." *Koror State Pub. Lands Auth. v. Ngirmang*, 14 ROP 29, 34 (2006). We affirm the Trial Division's factual determinations "as long as they are supported by such relevant evidence that a reasonable trier of fact could have reached the same conclusion." *Delbirt v. Ruluked*, 13 ROP 10, 12 (2005) (citation omitted). We review legal conclusions *de novo*. *Ngoriakl v. Gulibert*, 16 ROP 105, 107 (2008).

ANALYSIS

Tutii's first argument on appeal is that the Trial Court erred because Salvador's testimony regarding *mora kotel* only supported Ngiraulau's ability to "return" to her biological *mother's* house. This, Tutii contends, does not give her the right to inherit from her biological *father*. While this is an accurate description of *mora kotel*, it

mischaracterizes the expert testimony. Salvador stated that Ngiraulau had the right to inherit by virtue of her adoptive relationship to her paternal grandmother's house. Salvador said that this gave rise to inheritance rights from both Ngiraulau's adoptive parents (her biological paternal grandparents) and her adoptive sibling (her biological father).

Additionally, Tutii does not address the additional basis given for the trial court's conclusion. The Trial Division determined that Ngiraulau had a stronger claim to inherit from Delmau because she was adopted by Delmau's parents and Tutii was ngermedeb because he was taken care of after Mererechong's death. Evidence to support this conclusion was provided not only by Salvador, but also by Elbelau, Tutii's own expert witness. Thus, there is "relevant evidence" to support the Trial Division's conclusion, and we must affirm. *Delbirt*, 13 ROP at 12.

[3] Tutii's second argument is that Ngiraulau may not inherit from Delmau because she inherited from her adoptive parents as their adopted child. This argument was not properly raised before the Trial Division and is therefore waived. *See Rechucher v. ROP*, 12 ROP 51, 54 (2005). The only mention of Ngiraulau's inheritance from her adoptive parents came in closing argument, during which Tutii's counsel said that Ngiraulau could not "have her cake and eat it too." However, counsel did not advance a theory of equitable estoppel, which is Tutii's argument on appeal. Further, Tutii points to no evidence whatsoever regarding the basis for Ngiraulau's inheritance from her adopted parents. [4] This is fatal to his argument because the proponent of an estoppel theory bears the burden of production. *See*

Restatement (Second) of Judgments § 27 cmt. f (1982) (discussing the burden of proof to show preclusion).

CONCLUSION

For the foregoing reasons, we **AFFIRM.**