Harry R. Fritz et al.
v.
Yuriko Fritz Materne

Civil Appeal No. 14-007
Appeal from Civil Action No. 12-208

Supreme Court, Appellate Division
Republic of Palau

Decided: November 18, 2015

Counsel for Appellants ..... Siegfried B. Nakamura
Counsel for Appellee ..... J. Uduch Sengebau Senior

BEFORE: KATHERINE A. MARAMAN, Associate Justice
ROSE MARY SKEBONG, Associate Justice Pro Tem
HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem

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

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

With limited exceptions, new arguments may not be raised on appeal. A claim asserting an interest in property does not fall within any of the exceptions.

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

The standard of appellate review concerns only whether the Appellate Division must give any deference to those conclusions of the trial court that are properly before it for review; de novo review is not a free license for parties to re-litigate a case arguing new legal claims or entirely different legal theories than those presented below.

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

Considering and resolving issues in the first instance on appeal is contrary to the design and purpose of the appellate process.

[4] **Descent and Distribution**: Applicable Law

The un-subdivided portion of 25 PNC § 301 does not apply in the case of an intestate decedent.

[5] **Descent and Distribution**: Applicable Law

25 PNC § 301(a) addresses only lands acquired through a bona fide purchase for value.

[6] **Descent and Distribution**: Applicable Law

21 PNC § 409 does not require that a decedent's adopted children and natural children be treated as equals for purposes of inheritance unless no recognized custom as to rights of inheritance of adopted children applies.

[7] **Custom**: Previous Standard

For cases filed prior to January 3, 2013, the existence and content of a particular custom is a question of fact.

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

For cases filed prior to January 3, 2013, the existence and content of a particular custom is a question of fact. Where there are two permissible views of the evidence, the trial court's choice between them cannot be clearly erroneous.

OPINION

Per Curiam:

Harry R. Fritz and Misae Fritz (collectively, "Appellants") appeal the Trial Division's March 13, 2014 Decision awarding the estate of their adopted mother, Ltelatk Fritz ("Ltelatk"), in its entirety to her biological daughter, Yuriko Fritz Materne. Appellants contend that the Trial Division failed to consider the wishes of Ltelatk's deceased husband, Rubasch Fritz ("Rubasch"), erred in its application of statutory law adoption and estate law, and erred in its finding and application of relevant custom. Finding no reversible error, we will affirm.

BACKGROUND

The facts pertinent to this case begin in November 1986, when decedent Ltelatk's husband, Rubasch, passed away. An eldecheduch was held to settle a portion of his estate pursuant to custom. Because they dealt with separate properties, Ltelatk subsequently probated a 1981 will and a 1985 "codicil"[1] executed by Rubasch, in Civil Action No. 273-88. On August 5, 1988, Ltelatk, as Administratrix of Rubasch's Estate, executed a Deed of Conveyance and Trust, by which she transferred and conveyed to

[1] None of the parties have disputed that the June 1985 "Personal Testament" of Rubasch Fritz constitutes a codicil to his 1981 will. Because it is neither disputed nor material to the claims raised and preserved by Appellants, we do not review this conclusion. Nevertheless, there appear to be issues as to the legitimacy of the distribution of assets under the 1988 Deed of Conveyance and Trust because of the content of the 1985 "codicil." These issues notwithstanding, more than 27 years elapsed between the distribution of these assets and the filing of this case, so any contest to that distribution, even had it been properly raised, would be time barred.

herself the family dwelling house situated on land known as *Kederkemais*, a portion of Tochi Daicho Lot No. 1005, located in Meketii, Koror State. Ltelatk further conveyed to herself "all the remainder of" Rubasch's Estate, including:

1. All of Rubasch's bank accounts and Palauan money;
2. Land known as *Ngerbilobaoch*, a portion of Tochi Daicho Lot No. 689, located in Idid Hamlet, Koror State;
3. Land known as *Bleyached*, Tochi Daicho Lot No. 685, located in Idid Hamlet, Koror State; and
4. Land known as *Dungang*, Tochi Daicho Lot Nos. 465 and 425,[2] located in Ngerkesoaol Hamlet, Koror State.

Ltelatk further conveyed and transferred to herself certain parcels of land "to be held by me[, Ltelatk,] in trust under which I shall hold, administer and distribute the same in my sole discretion as I see fit and proper for the benefit of my children, natural or adopted, as determined under Palauan custom and in a manner described in the attached Last Will and Testament and Codicil [of Rubasch]." These parcels included:

1. Land known as *Kelau*, Tochi Daicho Lot No. 421, located below an area known as *Nanden* in Ngerkesoaol Hamlet, Koror State;
2. Land known as *Kederkemais*, Tochi Daicho Lot No. 1005; and
3. Another parcel known as *Kederkemais*, Tochi Daicho Lot No. 1003,[3] located in Koror State, excluding "the concrete house and site thereof which has been conveyed to me as having been owned jointly by myself, . . . and my late husband Rubasch Fritz, which I have conveyed hereinabove to myself."

On August 23, 1988, the Trial Division in Civil Action No. 273-88 issued its "Instrument of Conveyance to Implement the Last Will and Codicil of the Late Rubasch Fritz and the Codicil thereto," finding that Ltelatk's Deed of Conveyance and Trust "fully carries out the terms and provisions of the Last Will and Testament of the late Rubasch Fritz." The ownership of these properties was also apparently adjudicated by the Land Court at some time in the mid to late 2000s, as certificates of title were issued to Ltelatk, in fee simple and without qualification, for several of the aforementioned properties in 2007 and 2008 (*Dungang*, *Kelau,* and both parcels

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[2] The Inventory of Assets and Liabilities of the Estate, filed in the Trial Division, lists *Dungang* as T.D. 428; the Deed of Conveyance and Trust however, lists it as we have included here. Because resolution of this discrepancy was not required at trial or on appeal, we need not address which listing is correct.

[3] As mentioned above, *supra* n. 2, a discrepancy exists regarding this T.D. listing that is not relevant to resolution of this case.

known as *Kederkemais*). The above listed properties are the subject of the current action.

In the proceedings below, Appellants did not claim these properties as duly probated under Rubasch's Will and Codicil or claim that, pursuant to this action, they were the beneficiaries of a trust or held a vested remainder interest in a life estate. Instead, having both acknowledged the probate of Rubasch's Will and Codicil and introduced such documents into evidence, Appellants conceded that "[t]he distribution of assets of Rubasch Fritz was effectuated [on or about 1987] and in short, the properties of the late Rubasch Fritz, including [*Kederkemais*] were distributed to Ltelatk Fritz." Appellants claimed "the assets of Mrs. Ltelatk Fritz" solely under the theory that "they are the children of Ltelatk Fritz and they must have equal shares to the properties of their mom."

The Trial Division, finding that Ltelatk died without a will and that the statutory requirements of 21 PNC § 301 were not met, held that the property must be awarded according to custom. The Trial Division heard from several customary experts and found, by clear and convincing evidence, that custom called for Ltelatk's estate to be inherited, in its entirety, by Ltelatk's biological children. As she had only one biological child, Appellee Yuriko Fritz Materne, the Trial Division awarded the entirety of the estate to Appellee.

Appellants timely appeal.

STANDARD OF REVIEW

We review de novo the Trial Division's conclusions of law. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001). Factual findings are reviewed for clear error. *Dilubech Clan v. Ngeremlengui State Pub. Lands Auth.*, 9 ROP 162, 164 (2002). "Under the clear error standard, the lower court will be reversed 'only if the findings so lack evidentiary support in the record that no reasonable trier of fact could have reached the same conclusion.'" *Id.* (citation omitted).

ANALYSIS

I. Appellants' Alleged Remainder Interest in the Subject Properties

Appellants argue that the trial court should have found that Rubasch's will and codicil provided them with a vested remainder interest in Ltelatk's assets and that this interest entitled them to a share in these properties upon Ltelatk's death. Appellants did not, however, assert this argument in the proceedings below, so the trial court was not called upon to consider, and did not consider, this legal theory. In their only substantive written submission to the trial court, their Pre-Trial Statement, Appellants summarized their position as follows: "In essence, Claimants submit that they are the children of Ltelatk Fritz and they must have equal shares to the properties of their

mom." Appellants' Pre-Trial Statement at 1. This statement did mention Rubasch's will, but only in the context of attempting to refute arguments asserted by Appellee in reliance on this document. *See id.* at 2.

Rather than claiming a remainder interest based on Rubasch's will, Appellants conceded that "prior to her passing, Ltelatk Fritz probated the Will of Rubasch Fritz." *Id.* Appellants further summarized the results of the probate action and its relevance to this dispute as follows: "The distribution of the assets of Rubasch Fritz was effectuated and in short, the properties of the late Rubasch Fritz, including Kederkemais were distributed to Ltelatk Fritz. Accordingly, the only issue in this matter is determining the heirs of the late Ltelatk Fritz and distributing the properties to them." *Id.* Appellants' pre-trial statement thus made no mention of any purported remainder interest in the subject properties based on Rubasch's will—indeed, it seems to accept that the properties are properly part of Ltelatk's estate because Ltelatk owned them outright—yet suggests that Rubasch's will(s), which quite clearly *do* treat his biological and adopted children as equals for purposes of inheritance, should somehow control the distribution of Ltelatk's assets.

Consequently, the trial court did not consider or decide whether Appellants had any vested interest in the subject property based on Rubasch's will. Rather, the trial court started from the conclusion that Ltelatk took possession of the lands in question, without limitation, when Rubasch's will was probated. This had been conceded by Appellants and was consistent with the titles to the relevant properties, which consistently refer to Ltelatk's ownership interest as a personal ownership in fee simple, as opposed to the type of life estate Appellants now argue Rubasch's will left to Ltelatk or as opposed to any form of trusteeship. From here, the trial court addressed the relative strengths of the claims of Ltelatk's heirs, biological and adopted, as urged by Appellants. On appeal, Appellants have not cited, and this Court's review has not found, anything in the record from the proceedings below that might suggest that Appellants' alleged remainder interest was ever presented to the trial court. In fact, Appellants effectively concede that they did not assert this claim in the underlying proceedings.

[1] As a general rule, new arguments may not be raised on appeal. *See, e.g.*, *Aimeliik State Pub. Lands Auth. v. Rengchol*, 17 ROP 276, 281-82 (2010) ("Arguments should not be raised for the first time on appeal. . . . Without a primary decision on the issue by the lower court, we have nothing to review." (citing *Nebre v. Uludong*, 15 ROP 15, 25 (2008) ("[T]he Appellate Division will not generally consider an issue unless the issue was first addressed by the trial court. . . . Thus, Nebre's claim . . . must be dismissed as a matter of law." (citation omitted))); *Ucherremasech v. Hiroichi*, 17 ROP 182, 192 (2010) ("A litigant who does not raise an argument before the trial court waives that issue and may not pursue it for the first time on appeal. . . . The reason for this principle is clear: the trial court must first have an opportunity to opine on, or at least consider, an issue before an appellate court has anything to review." (citing, *inter alia*, *Kotaro v.*

Ngirchechol, 11 ROP 235, 237 (2004) ("No axiom of law is better settled than that a party who raises an issue for the first time on appeal will be deemed to have forfeited that issue . . . .")). Although there are certain limited exceptions to this rule, for instance where refusing to address a claim risks "the denial of fundamental rights, especially in criminal cases where the life or liberty of an accused is at stake," *Ucherremasech*, 17 ROP at 192 n.11 (internal quotation marks omitted), Appellants' interest in the properties at issue in this case does not fall within any of these exceptions, *see, e.g.*, *Kotaro*, 11 ROP at 237-38 ("While we do not question the importance to [the appellant] of his interest in the land at issue, the forfeiture rule applies equally to land cases and indeed serves broader public interests . . . ."). Nor have Appellants attempted to identify or argue that any recognized exception to the waiver and forfeiture rules applies.

[2] Nonetheless, Appellants maintain that this Court should still consider their purported remainder interest because the trial court's legal conclusions are subject to de novo review. The applicable standard of review, however, concerns only whether the Appellate Division must give any deference to those conclusions of the trial court that are properly before it for review. De novo review is not a free license for parties to re-litigate a case on its merits arguing new legal claims or entirely different legal theories that were not presented in the underlying proceedings. Indeed, we have applied the waiver rule even where the lower court's legal conclusions were subject to de novo review. *See, e.g.*, *Ucherremasech*, 17 ROP at 189, 192. Whether or not de novo review applies, Appellants' assertion of their purported remainder interest suffers from the very defect that is the basis for the waiver rule: due to Appellants' failure to present this claim to the trial court, there is no primary decision regarding this claim for us to review.

[3] Appellants have had at least two opportunities to claim their alleged remainder interest: first when Rubasch's will was probated in 1988, and second during the trial of this case.[4] In each instance, they declined to do so, instead waiting until this appeal to raise this novel and complex argument, which would require, at the very least, an interpretation of Rubasch's will as well as an evaluation of the potentially preclusive effect of the probate action. Considering and resolving these issues in the first instance on appeal would be contrary to the design and purpose of the appellate process. *See, e.g.*, *Rengchol*, 17 ROP at 282 ("AIMSPLA apparently wants us to make the initial decision on these issues, but such a request runs counter to our function as an appellate court."). Accordingly, Appellants' failure to raise this issue before the trial court forfeited or waived the argument and precludes any further consideration of the matter.

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[4] A third appears to have been presented when the Land Court apparently adjudicated all claims to the lots and issued certificates of title, in fee simple and without qualification, to Ltelatk Frtiz.

II. The Application of Statutory and Customary Law

Appellants also contend that the Trial Division erred in concluding that certain statutory descent rules were inapplicable. Appellants further contend that the Trial Division erred when, having so concluded, it found that custom called for the award of the entire estate to Appellee. We do not find error in either Trial Division conclusion.

[4][5] Appellants' argument that Title 25 requires they share in the estate is easily disposed. First, the opening of 25 PNC § 301 allows that lands may be transferred or devised as desired by the owner, but this provision is inapplicable as all parties agree that the decedent died intestate. Second, section 301(a) addresses only lands that were acquired through a bona fide purchase for value, and the undisputed facts show that the decedent did not purchase these lands. Finally, section 301(b), regardless of how it is read, is inapplicable because it is clear the decedent died with children *and* was not a bona fide purchaser for value. *See Kee v. Ngiraingas*, 20 ROP 277, 284 (2013) (explaining this Court's interpretation of section 301(b) as having converted its first clause from the disjunctive to the conjunctive). Indeed, this Court has already ruled on this exact same scenario: "[i]f neither § 301(a) nor (b) applies—for example, if a decedent died with issue and was not a bona fide purchase for value—then a court should award property based on custom." *Id.* (citing *Koror State Pub. Lands. Auth. v. Ngirmang*, 14 ROP 29, 33 (2006)).

[6] Appellants also argue that Title 21 requires they be treated as equals to Appellee for purposes of custom. This simply misreads or conveniently ignores much of the plain language of the quoted statute, 21 PNC § 409, including that "[a] child adopted under this title shall have the same rights of inheritance as a person adopted in accordance with recognized custom . . . ." All the first clause of section 409 means is that an adopted child, whether adopted under the statute or custom, is treated generally as an adopted child regardless of the legal structure under which the adoption occurs. As for the second relevant clause of section 409, which states that, "[w]here there is no recognized custom as to rights of inheritance of adopted children, a child adopted under this chapter shall inherit from his adopting parents the same as if he were the natural child of the adopting parents . . . ," Appellants simply misconstrue the Trial Division's findings. Despite their argument that the Trial Division erred in "determin[ing] that there was no recognized custom as to the rights of inheritance of adopted children," Reply at 13, the Trial Division in fact found that there *was* such custom, finding both that the adopted child's rights ended when the adoptive father died and that when the adopted mother then died the *biological daughter*—not the adopted children—customarily receives the mother's belongings and properties. Tr. Decision at 7, 10. Indeed, the Trial Division decision explicitly, and correctly, points out that the existence of this recognized custom regarding the rights of adoptive children is why the second part of section 409 does not apply. *Id.* at 10–11.

The Trial Division's determination of custom itself presents a less clear cut question, but also reveals no reversible error. At the threshold, the Trial Division was correct in not applying the holding of *Beouch v. Sasao*, 20 ROP 401 (2013). *Beouch* stated, quite clearly, that "courts should apply the previous traditional law standard to all *cases filed* before [January 3, 2013.]" *Id.* at 51 n. 10 (emphasis added). This case was filed on December 13, 2012. Nothing in *Beouch* suggests that the date of Appellants' claim, which Appellant argues should control the standard used to determine customary law, actually controls, and we will not expand or alter the *Beouch* decision here.

[7] Given that the existence of custom under the previous standard is a question of fact to be settled by the expert testimony presented to the Trial Division, Appellants face a high burden in establishing that the Trial Division clearly erred in finding that custom required the estate be awarded, in its entirety, to Appellee. In challenging this finding, Appellants repeatedly assert the evidence was insufficient to support this "harsh result." But when a court must determine the applicable law and then applies such law to the facts of a case, the severity of the result is rarely a relevant factor. Indeed, the law is rife with harsh results that reasonable persons, and perhaps reasonable judges, might disagree with were they setting public policy. *See, e.g.*, *Estate of Masang v. Marsil*, 13 ROP 1, 2 (2005) (recognizing that dismissal of an appeal due to counsel's failure to timely file is a "harsh remedy"); *Ngemaes v. ROP*, 4 ROP Intrm. 250, 255 (noting that the implementation of harsh mandatory minimum sentences for certain crimes is within the judgment of the OEK, and was not for the Court to ignore); *Palau Chamber of Commerce v. Uherbelau*, 12 ROP 183, 185 n.1 (Tr. Div. 2005) (noting that the remedy for a harsh law is not judicial disregard or interpretation of that law, but amendment or repeal); *Iyar v. Masami*, 9 ROP 255, 260 (Tr. Div. 2001) (applying the "harsh" common law rule that one who intermeddles with the property of another assumes the risk of doing so). Outside of certain subjective areas of law such as criminal sentencing and the propriety of equitable relief, the law generally provides rules, dictates, and mandates to courts—not guidelines or suggestions that a court may disregard if it deems them unpalatable.

What a court should and does consider is the testimony of customary experts as to what the custom is, and the record makes clear that the Trial Division analyzed the expert testimony in some detail. The Decision identifies areas in which the customary experts agreed, areas in which they disagreed, and identifies aspects of custom that the Trial Division found by clear and convincing evidence. Appellants have not identified any testimony or evidence in the record to suggest that the Trial Division failed to account for relevant, credible evidence, or any evidence that suggests that a reasonable trier of fact could not have reached the conclusion the Trial Division did. That an adopted child might, potentially, be granted an extra teaspoon of sugar, Tr. 85, is not in *any* way conclusive as to the distribution of properties in customary intestate succession. On that point, Rechiuang Otobed was not, as Appellants assert, consistent. Both Appellants and Appellee cite to sections of his testimony that support their customary arguments. *Compare, e.g.*, Tr. 134:21 – 135:7 (testifying that properties of a

deceased husband, transferred to the wife after his death, would be inherited by the wife's daughter alone because they had become the wife's property), *with* Tr. 135:10–23 (testifying that those properties would actually be inherited by the children collectively). Presented with wavering and inconsistent testimony, often drawn out only after leading questions by counsel, the Trial Division was well within its authority and duty to assign what weight and credibility it felt was appropriate to each piece of evidence presented.

[8] The Trial Division acknowledged areas of disagreement between the two customary experts and based its decision on the custom that it found was proven by clear and convincing evidence—much of which the experts agreed on. That they disagreed on some points, and that the Appellants are disappointed the Trial Division did not find for them on these contested issues of custom, is not surprising. But as we have said many times before, "[w]here there are two permissible views of the evidence, the court's choice between them cannot be clearly erroneous." *Koror State Pub. Lands Auth. v. Giraked*, 20 ROP 248, 250 (2013) (quoting *Rengchol v. Uchelkeiukl Clan*, 19 ROP 17, 21 (2011) (citing *Ngirmang v. Oderiong*, 14 ROP 152, 153 (2007))). This is the case in all fact-finding matters, including the existence of a particular custom, and thus we do not find that the Trial Division clearly erred in finding that custom called for Appellee to inherit her mother's properties alone.

CONCLUSION

Because we find no reversible error of fact or law in the properly preserved issues presented by Appellants on appeal, the decision of the Trial Division is **AFFIRMED**.