Wasisang v. Remeskang, 5 ROP Intrm. 201 (1996)
UCHERRIANG WASISANG,
Appellant,

v.

YUSIM REMESKANG,
Appellee.

CIVIL APPEAL NO. 32-95
Civil Action No. 144-93

Supreme Court, Appellate Division
Republic of Palau

Opinion
April 3, 1996

Counsel for the Appellant: Carlos H. Salii

Counsel for the Appellee: J. Roman Bedor

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; JEFFREY L. BEATTIE, Associate Justice; PETER T. HOFFMAN, Associate Justice.

PER CURIAM:

Appellant, Ucherriang Wasisang, appeals the decision of the trial court reversing the determination of the Land Claims Hearing Office ("LCHO") that she is the individual owner of the land known as *Bai'lmark*, located in Ngardmau State. Appellee, Yusim Remeskang, and appellant both claim *Bai'lmark*, appellant on the grounds that she is the deceased landowner's niece and appellee on the grounds that he is the adopted son of the deceased landowner. The LCHO determined that appellant had the right to the property based on Palauan custom. The trial court reversed the LCHO's determination, based on § 801 of the Palau District Code, which was in effect in 1970 at the time of decedent's death. For the reasons stated below, we remand this case to the trial court for the limited purpose of allowing appellant to move for a new trial.

Discussion

Appellant argues that the trial court should be reversed because the trial court *sua sponte* applied § 801 of the Palau District Code to determine the ownership of the disputed property. Appellant analogizes the trial court's actions to improperly raising *sua sponte* an affirmative defense at trial. *See, e.g., Kumangai v. Isechal* , 1 ROP Intrm. 587, 589 (1989). In this case, ⊥202 however, Rules 8(c) and 15(b) of the ROP Rules of Civil Procedure, which prevent the trial court from *sua sponte* raising an affirmative defense at trial, are inapplicable since the matter was

on appeal from the LCHO and the scope of the pleadings is not an issue.[1]

It is well established that the trial court has broad powers with respect to determining the issues on appeal from the LCHO. *See Diberdii Lineage v. Iyar* , 5 ROP Intrm. 61 (1995); *Remengesau v. Sato* , 4 ROP Intrm. 230 (1994); *Ngiratreked v. Joseph* , 4 ROP Intrm. 80 (1993). Thus, the trial court may "adopt in whole or in part the LCHO findings, may disregard them altogether and make its own findings based on the existing record (trial *de novo* on the record), may make its own findings based on evidence and testimony presented in a new trial (trial *de novo*), or may proceed with any combination of the above." *Diberdii Lineage*, 5 ROP Intrm. at 62. Moreover, since Rules 8(c) and 15(b) are inapposite in this case, there is nothing to prevent the trial court from applying the relevant law to the facts on an appeal from the LCHO, regardless of whether it was briefed by the parties. *See generally Sibbach v. Wilson & Co.* , 61 S.Ct. 422, 427 (1941) (court can consider plain error neither raised below nor argued on appeal).

The only question remaining is whether the trial court properly applied § 801. Section 801(c), as enacted in 1970, provides that "[i]n the absence of instruments and statements provided for in section (b) above, lands held in fee simple by an individual shall, upon the death of the owner, be inherited by the owner's oldest living male child of sound mind, natural or adopted." Under § 801(c), appellee should inherit *Bai'lmark*.[2] Appellant, however, contends that custom, not § 801, governs this case. Appellant makes two distinct arguments with respect to custom. First, appellant argues that the *eldecheduch* of appellee's adopted mother terminated appellee's right to inherit from his adopted father. Second, appellant contends that the father/son relationship between appellee and his adopted father was severed after his adopted mother's death. Appellant also argues that § 801 should not in any event be applied because it has been long since modified by the legislature, which recognized its harsh results with respect to Palauan customary land ownership. In effect, ⊥203 appellant argues that § 801(c) as amended in 1975, and currently codified at 39 PNC § 102(c), should be applied retroactively.

Appellant's argument that § 801(c), as modified, should apply retroactively must fail. In *Arbedul v. Mokoll* , 4 ROP Intrm. 189, 192 (1994), the court applied § 801(c) as enacted at the time of the landowner's death. Nothing in 39 PNC § 102 or in Palau District Code § 801 as amended in 1975 indicates that the court should apply the revised law retroactively. The retroactive application of laws is disfavored: "a law will not be construed as retroactive unless the act clearly, by express language or necessary implication, indicates that the legislature intended a retroactive application." C. Dallas Sands, *2 Sutherland Statutory Construction* § 41.04 (4th Ed. 1973); *see also* 73 Am. Jur. 2d *Statutes* § 350 (1974) (whether statute operates retroactively is a question of legislative intent.). Thus, § 801(c) of the Palau District Code is the relevant statutory law in this case.

Turning to appellant's argument that custom should govern this dispute, this Court has already explicitly addressed the issue of how the termination of inheritance rights pursuant to custom influences the application of § 801(c), holding that custom "cannot affect our

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[1] In addition, it should be noted that Rules 8(c) and 15(b) are also inapplicable because § 801 of the Palau District Code is not an affirmative defense.

[2] Both parties agree that appellee was adopted by the deceased landowner.

interpretation of Section 801(c), which was plainly intended to displace custom." *Arbedul*, 4 ROP Intrm. at 193 n.3; *accord Ngiradilubech v. Nabeyama* , 5 Intrm. 117, 120-21 (1995) (successor to § 801(c), 39 PNC § 102(c), displaces custom). Appellant has not given any reason why *Arbedul* should be overturned.

Appellant also argues--for the first time on this appeal--that the father/son relationship was severed prior to appellee's adopted father's death. Ordinarily, appellant would be barred from making this argument because she failed to raise it in the trial court. *See, e.g., Sugiyama v. Ngirausui*, 4 ROP Intrm. 177, 179 (1994). The record contains no evidence regarding whether the father/son relationship may be terminated under Palauan custom, and, if so, the manner in which such termination is accomplished. Appellant did not request a trial *de novo* on this issue.

In this case, however, appellant contends that she should be able to raise this defense now, because the trial court *sua sponte* applied § 801(c), and appellant had no notice that it would be necessary to present her defense that the father/son relationship had terminated. We find that under these circumstances, appellant's remedy consists of seeking a new trial from the trial court to adduce evidence on the disputed point, not raising the issue for the first time on appeal. Because the Court is announcing this rule for the first time, however, the Court will in ⊥204 this instance refer this matter back to the trial court, where the appellant may make its motion for a new trial within ten days following the date of this decision. In all future cases, however, a claimant must seek the appropriate relief prior to appeal.

At this time we need not address whether § 801 was intended to displace any custom relating to termination of the father/son relationship. In the first instance, that question is better left to the trial court, where the parties may fully develop the issue in connection with any motion for a new trial.

Accordingly, this case is REMANDED to the trial court for the sole purpose of permitting appellant to move for a new trial on the issue of termination of the father/son relationship.

Appellee's counsel failed to appear before the Court at the appointed time for oral argument. Accordingly, this Court fines Mr. Bedor $150.00 to be paid within 30 days of the date of this decision. Mr. Bedor, however, may move for reconsideration if he contends there was good cause for his failure to appear.