In re Kemaitelong, 7 ROP Intrm. 94 (1998)
IN THE MATTER OF THE ESTATE OF BLACHEOS KEMAITELONG

CIVIL APPEAL NO. 25-97
Civil Action No. 316-93

Supreme Court, Appellate Division
Republic of Palau

Argued: July 24, 1998
Decided: August 17, 1998

Counsel for Appellant: Johnson Toribiong

Counsel for Appellee: Carlos H. Salii

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; JEFFREY L. BEATTIE, Associate Justice; and R. BARRIE MICHELSEN, Associate Justice.

MICHELSEN, Justice:

In this appeal, we review the Trial Division's disposition of property following the death of Blacheos Kemaitelong ("Blacheos"). The specific items involved in this appeal are a piece of Palauan money, two parcels of land in Airai and two taro paddies. We affirm the Trial Division decision.

BACKGROUND

Krispil Ikeda ("Krispil") petitioned to be appointed administrator of the Estate of Blacheos, his first cousin, who died on May 8, 1993. The petitioner stated that he had been chosen by Blacheos' lineage to file the petition. His petition noted the Estate consisted of "several real properties and bank accounts which need to be identified and evaluated." The pleading recited that an eldecheduch had been held in June 1993 which settled "the customary obligations of decedent's family to decedent's widow and her children."

A separate petition was filed by Kesewaol Kemaitelong ("Kesewaol"), sister of Blacheos, who also sought appointment as administrator. The petition's allegations were similar to Krispil's first petition; that the Estate consisted of some real property and some bank accounts. She also repeated the statement that an eldecheduch was held and settled the obligations of Blacheos' family to decedent's widow and children.[1]

By December 1993, Kesewaol's claims had expanded. In addition to a more detailed

[1] Blacheos' survivors include his widow, Sophia, and his stepchildren from Sophia's previous marriage; his first wife, Aliil, and his natural children from that marriage; his younger full sister, appellee Kesewaol Kemaitelong; and his older half-sister, Riuch Rubeang.

listing of real property and bank accounts, she mentioned a piece of Palauan money ("Choko's money")[2] that Blacheos possessed at the time of his death. She said the money "did not belong to Blacheos but has been kept by him for the children of Kemaitelong." She requested that all the land listed, and all bank accounts, be declared her property as sole surviving full sister because "there was an elbechiil and children's money given out during the eldecheduch. Under the custom, decedent's widow and her children, have no further claim to the remaining assets of decedent."

⊥95 Although Kesewaol argued that the widow and children were bound by the decisions made at the eldecheduch, she alleged that she was not. She wanted the Palauan money called Choko's money to be declared hers, even though it had been given out as "children's money" to Blacheos' adopted stepchildren at the eldecheduch. [3] She explained her silence at the eldecheduch was due to intimidation of other relatives, so she voiced no objection at the time.

ANALYSIS

Appellant raises two issues on appeal. First, may a decedent's relative undo the decisions made at the eldecheduch when she was present and did not object to the decisions announced by the other relatives? Second, in a probate proceeding when the Trial Division knows the claims of the heirs, is the court required to make a determination of ownership even if the heirs do not request it?

This Court reviews findings of fact under the clearly erroneous standard. ROP R. Civ. Pro. 52(a). A factual finding is clearly erroneous when, although there is evidence to support it, we are "left with a definite conviction that a mistake has been committed." *Elbelau v. Semdiu*, 5 ROP Intrm. 19, 22 (1994). Questions of law are reviewed *de novo*. *Ngiradilubch v. Nabeyama*, 5 ROP Intrm. 117 , 119-20 (1995). Mixed findings of law and fact are reviewed de novo. *Remoket v. Omrekongel Clan*, 5 ROP Intrm. 225, 228 (1996).

A. Choko's Money

The Trial Division ruled in favor of Kesewaol regarding the ownership of Choko's money. The court relied on the testimony of Blacheos' half-sister, Riuch Rubeang, and determined by a preponderance of the evidence that Riuch, who was not called as a witness by Kesewaol, testified "consistently with Kesewaol and inconsistently with decedent's widow, Sophia." The court concluded that Choko's money had come from Kemaitelong, was given by Choko to Blacheos for Kemaitelong's children, and not as his individual property. It issued a

---

[2] This money formerly belonged to Choko, a cousin of Blacheos and Kesewaol, who lived in Guam.

[3] It appears that Kesewaol has not noticed the irony of her argument. She asserts that the children get no share of the estate because they are bound by the results of the eldecheduch when they received the children's money in question. Now, however, in these proceedings, Kesewaol seeks to recapture the very "children's money" given out at the eldecheduch, that supposedly bars the children from further claims.

declaratory judgment in favor of Kesewaol.[4]

Appellant argues that Palauan custom makes no provision for later challenging the final decisions made at an eldecheduch. One of Kesewaol's arguments on appeal is that the Estate did not present expert testimony to support the argument that customary law precludes later challenges to decisions announced at eldecheduch. We find this argument persuasive.

⊥96 The question of "whether an alleged customary law exists is a question of fact." *Ruluked v. Skilang*, 6 ROP Intrm. 170, 171 (1997). "Palauan custom is normally established by expert testimony that traces the historical application of the custom to the facts." *Silmai v. Rechucher*, 4 ROP Intrm. 55, 59 (1993). Where the issue involves the existence of an applicable customary law, the standard of proof is clear and convincing evidence. *Ngirmang v. Orrukem*, 3 ROP Intrm. 91, 92 (1992).

This Court will adhere to the practice of requiring satisfactory proof of custom when the custom's existence, or its applicability to the facts of the case, is challenged by the opposing party. *Ngiraremiang v. Ngiramolau*, 4 ROP Intrm. 112 (1993).

Here, no evidence was presented in the Trial Division to support the assertion that under Palauan customary law decisions made at an eldecheduch cannot be challenged later, even when persons are not allowed to speak, or when property is given out because of a mistake regarding ownership. The Trial Division's analysis of this issue was consistent with past precedent.

> It was suggested at closing argument that Kesewaol having failed to object when the money was given out at the eldecheduch, she should be barred from claiming it now . . . It is certainly plausible, on appropriate expert customary evidence, to suggest that a person in those circumstances should not be heard to demand more than she had already agreed to accept. The Court is not prepared, however, in the absence of any expert evidence, to adopt such a rule with respect to Kesewaol who, although present at the eldecheduch, was not represented and received nothing there.

Trial Division at 34.

Furthermore, given the existing record, we see no basis to conclude that the Trial Division's fact-finding was clearly erroneous. The Court was acting as fact-finder when accepting Kesewaol's evidence regarding Choko's money. "Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." *Ngiramos v. Dilubech Clan*, 6 ROP Intrm. 264, 266 (1997) (citations omitted).

---

[4] What benefit accrues to Kesewaol because of this declaratory judgment is not clear at this time. *Techur v. Tutii*, 2 ROP Intrm. 122, 126 (1990) (doctrine of res judicata does not apply to party who was not involved in the prior suit). *Cf. Takawo v. Sechelong*, 1 ROP Intrm. 130 (Tr. Div. 1984) (person receiving Palauan money at eldecheduch named as defendant, when plaintiff asserted ownership of that money).

B. Airai Lands and Taro Paddies

With regard to the two lands in Airai, the Trial Division did not decide their disposition because the "[c]laims to these two lands . . . were withdrawn at trial." The Court awarded the taro paddies to Kesewaol, with the stipulation made by the parties during trial that Sophia may continue to use them.

Krispil argues that, pursuant to 39 PNC § 102(c), at the time of Blacheos' death, title to the lands in Airai and the taro paddies vested in Blacheos' natural children from his wife Aliil. Thus, Krispil claims, the properties should have been awarded to those children. Krispil argues that the Trial Division erred by not making a decision concerning these properties because "[t]itle to lands cannot lie in abeyance."

⊥97 Kesewaol contends that Blacheos' natural children are not parties to this action, but they were aware of the proceedings and were aligned with the Estate during trial; and the Trial Division and Krispil understood and accepted the withdrawal of the claims in this case. Kesewaol also asserts that this issue was never raised in the Trial Division.

Krispil's current position on the Airai properties appears contrary to that taken at trial. The parties clearly reached an agreement on the disposition of these properties when Kesewaol withdrew her claims.[5] The decision below reflected the position of the parties that the ownership

---

[5] During the direct examination of Kesewaol, Krispil's counsel made these representations to the court regarding the Airai lands:

> The Court: What happened to the ones in Airai?
>
> Mr. Salii: In Airai? In Airai the Court . . . what happened to the land in Airai?
>
> A: (Mr. Salii translating what the Witness said in response) They were going to talk about it outside the Court to discuss it and not here.
>
> ********
>
> Mr. Toribiong: The only one in Airai that I'm aware of . . . is the one which Charley Gibbons conveyed to Blacheos, the deed of which I have. I'll bring that to the Court's attention.
>
> The Court: Okay. Well, so you don't have any claim for lands in Airai?
>
> Mr. Toribiong: I'm not aware of any, except the one that Blacheos acquired from Charley Gibbons which I believe his daughter, Mechereng, is using right now.
>
> The Court: All right.

of the lands was not an issue.

Similarly, during the closing argument, the parties reached agreement on the disposition of the two taro paddies. The Trial Division opinion recited the agreement that the two paddies were not discussed at the eldecheduch, and that they should be awarded to Kesewaol with the proviso that Sophia may continue to use them.[6]

⊥98 Thus, Krispil is raising for the first time on appeal an issue that was not presented to the trial court. Indeed, the trial court was led to believe that the issues were resolved.

The rule is that arguments made for the first time on appeal are considered waived. *Ngerketiit Lineage v. Ngerukebid Clan* , 7 ROP Intrm. 38 (1998). The rule is particularly apropos when the position taken on appeal is inconsistent with the representations made at trial on which the court relied.

We express no opinion on whether others who were not parties in the case are bound by any decisions made by the litigants in this case.

The decision of the Trial Division is hereby AFFIRMED.

****

Mr. Toribiong: Mechereng is Blacheos' daughter from Aliil.

The Court: Yeah. If if ... if Kesoaol is withdrawing her claim for that I don't have to think about it.

Mr. Salii: No.

****

Mr. Salii: Yeah, now, so . . . we're withdrawing claim to item five, six [the two lands in Airai] and seven.

Transcript at 20-21.

[6] The closing argument is not in the transcript. On the tape of the closing argument, however, the trial judge asked: "Do you think the parties would be agreeable to vesting ownership in Kesewaol with an understanding that Sophia can use it as long as she likes?" Krispil's counsel replied that

> [t]he only interest that I'd like to preserve, in the interest of domestic harmony, is to allow Sophia to continue her use rights. And use rights do not last beyond a lifetime . . . from our point of view . . . the taro paddies were . . . never considered at the eldecheduch except that Sophia was using them and we didn't want to disrupt that use drastically . . . .