

*Smau v. Emilian*, 6 ROP Intrm. 31 (1996)  
**DONGESANG SMAU,**  
**Appellant,**

v.

**IBIOCHEL EMILIAN,**  
**Appellee.**

CIVIL APPEAL NO. 16-96  
Civil Action No. 229-94

Supreme Court, Appellate Division  
Republic of Palau

Opinion

Decided: December 4, 1996

Counsel for Appellant: Yukiwo P. Dengokl

Counsel for Appellee: J. Roman Bedor, T.C.

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LARRY W. MILLER, Associate Justice;  
R. BARRIE MICHELSEN, Associate Justice

MILLER, Justice:

On appeal from a Land Claims Hearing Office determination that appellant Dongesang Smau was the sole owner of the land Osbocheriu, 132 Tochi Daicho Lot 969, Cadastral Lot 001 R 05, in Peleliu State, the Trial Division held that Smau and appellee Ibiochel Emilian are "tenants in common" of the land. Although for slightly different reasons and although we delete any reference to the common law concept of tenancies in common, we affirm the judgment of the Trial Division that Smau and Emilian hold equal interests in the land.

The Peleliu Tochi Daicho lists the land as the individual property of Ngirablai, and such designation accords with the beliefs of Emilian and Smau. Ngirablai died during World War II, and no eldecheduch was held in connection with his property.

Ngirablai had three children. Saburo and Maidesil were his biological children. Ngirablai's third child, Orachel, was cheltekellel, or brought to the marriage by Ngirablai's wife. Emilian is the child of Maidesil. Smau is the child of Orachel. Saburo has no surviving children. Maidesil, Orachel and Saburo are deceased.

The LCHO held that, pursuant to Palauan custom, Ngirablai's relatives should have conveyed property to Orachel upon the death of Ngirablai, but failed to do so. The LCHO further held that, due to the disagreement between, and divorce of, Maidesil and his wife

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(Emilian's mother), Maidesil's relatives should not have conveyed property to Emilian. For these reasons, the LCHO awarded the land to Orachel's daughter, Smau.

The Trial Division heard this case without the benefit of a transcript of the LCHO proceedings. The Trial Division noted that even if the LCHO's interpretation of Palauan custom were correct, the LCHO erred in attempting to correct the mistake of Ngirablai's relatives by awarding the land to Smau. Instead, relying on Trust Territory case law, the Trial Division found that the land was inherited by Ngirablai's children ( *i.e.*, Saburo, Maidesil and Orachel), and that since Emilian was the only person claiming to have inherited Maidesil's interest in the land, and Smau was the only person claiming to have inherited Orachel's interest in the land, Emilian and Smau own the land as "tenants in common." This appeal followed.

## DISCUSSION

Smau puts forward three grounds for reversal of the Trial Division's decision. We discuss each in turn.

### 133 I.

Smau argues first that the Trial Division committed error in failing to dismiss the appeal below on the basis of Emilian's failure to provide a transcript of the LCHO proceedings. We disagree.

"The appellant bears the burden of presenting to the appellate court a record that is sufficient to show error on the part of the court below." 5 Am. Jur. 2d *Appellate Review* § 488 (1995). "[A] transcript of at least part of the proceedings in the trial court is generally necessary if the appeal involves issues of fact or evidence." *Id.* § 492 (emphasis added). We have previously assumed that it is permissible to go forward with an appeal on the LCHO's summary and adjudication alone. *E.g., Rurcherudel v. Uchel*, 3 ROP Intrm. 140 (1992) (noting that, as here, the appellant "paid to have the LCHO Summary and Adjudication translated but not the record of the LCHO hearing itself"). We now so hold.

If an appellant raises issues that concern facts and/or evidence, resolution of the appeal necessarily involves a review of the record which sets forth such facts and/or evidence. In such circumstances, a transcript will generally be necessary. A transcript is unnecessary, however, when the appellant agrees upon the facts, but disputes the lower court's interpretation of the relevant law and how such law applies to those facts.

This case falls into the latter category. Emilian did not challenge any of the pertinent facts -- that Ngirablai was the owner of the land, that he died intestate, and that no eldecheduch was held in connection with his property -- but rather the LCHO's resolution of the dispute in light of these facts. Thus, the Trial Division did not err in failing to dismiss the appeal below on the basis of Emilian's failure to provide a transcript of the LCHO proceedings.<sup>1</sup>

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<sup>1</sup> Dismissal is generally not the appropriate remedy in any event. If an appellant makes arguments that cannot properly be considered without a transcript, but has failed to provide an

134 II.

Smau next argues that the Trial Division improperly engaged in speculation and assumed facts not in evidence in arriving at its conclusion. We may assume that the broad discretion generally accorded to the Trial Division in reviewing LCHO findings, *see, e.g., Diberdii Lineage v. Iyar*, 5 ROP Intrm. 61, 62 (1995); *Ngiratereked v. Joseph*, 4 ROP Intrm. 80, 83 (1993), is somewhat limited by the absence of a transcript. Here, however, although Smau suggests that the Trial Division made its own findings, we do not discern any difference in the facts as found by the LCHO and as set forth in the decision below. Rather, consistent with our discussion above, we believe that the Trial Division accepted the LCHO's findings, but disagreed only as to the legal conclusions to be drawn from them. It is plain that the Trial Division had the authority to correct what it found to be a legally erroneous determination by the LCHO. We turn then, finally, to a discussion of whether the Trial Division's decision was correct on the merits.

### III.

In 1959, Palauan's first statute of descent and distribution was enacted as Palau District Code Section 801. Prior to 1959, property of a decedent generally was disposed of at an *eldecheduch*. We have previously upheld land determinations based on the actions taken at an *eldecheduch* prior to the enactment of § 801. *Remengesau v. Sato*, 4 ROP Intrm. 230, 234-35 (1994); *Kubarii v. Olkeriil*, 3 ROP Intrm. 39, 40-41 (1991). There are, however, no Appellate Division opinions regarding the disposition of property of a decedent who died prior to 1959 for whom no *eldecheduch* was held.

The Trial Division determined that in such circumstances, Palau courts should look to Trust Territory case law for guidance, noting that "[t]he cases which have addressed the question of who inherits property owned by a decedent who died before any statute of descent and distribution was in effect and in the absence of a decision on the property in an *eldecheduch* have held that the property goes to his heirs, who are his children." Decision and Order at 2, *citing Edeyaoch v. Timarong*, 7 T.T.R. 54, 62 (Tr. Div. 1974). Accordingly, as noted above, it concluded that the land was inherited by Ngirablai's three children upon his death, and that both Emilian and Smau, as the sole claimants' of their parents' 135 interests,<sup>2</sup> should be awarded the land.

Smau contends that the Trust Territory cases relied upon by the Trial Division misstate Palauan custom and should not be followed. We find, however, that we need not address that issue, nor attempt to formulate any general rule to govern this situation<sup>3</sup> because we agree with

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adequate transcript, the court should simply reject those arguments. *See generally Appellate Review, supra*, § 492 ("[S]ubmission of a transcript which is silent as to the material facts or evidence on a particular point will result in the affirmance of the trial court's ruling on the matter.").

<sup>2</sup> According to the LCHO determination, Saburo had no surviving children as of the time of hearing, and no other person claimed the land, or a share of it, as his heir.

<sup>3</sup> Smau's observation that, under Palauan custom, the heirs normally are determined at an

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the trial court that, in this case, the LCHO had no basis to accord disparate treatment to the two parties herein. In particular, we see no basis to conclude either that Orachel, Smau's mother, inherited the land upon Ngirablai's death to the exclusion of her two brothers, Maidesil and Saburo, or that Maidesil's interest did not pass to Emilian.

As to the first, the LCHO's statement that Ngirablai's relatives should have conveyed a property to Orachel after Ngirablai died does not imply that they had any lesser obligation to Ngirablai's two natural children, and the LCHO decision itself recites that Maidesil lived on the land until his death and that Saburo collected war claims money in connection with the land, negating any suggestion that their rights to the land were cut off.<sup>4</sup>

As to the second, we are doubtful whether, as the LCHO decision appears to suggest, there is a Palauan custom which requires that a man's relatives deny land to his child because of her mother's wrongdoing during their marriage. More important, the LCHO did not purport to find that Maidesil's relatives had, in **L36** fact, rejected Emilian; rather, as the Trial Division noted, the record is silent as to whether there was an eldecheduch after Maidesil's death.<sup>5</sup> We might fault Emilian for a lack of proof in this respect were it not for the fact there is likewise no proof establishing that Smau inherited Orachel's share or, for that matter, that Orachel inherited a share of the land in the first place.

At bottom, therefore, whether or not we accept as a general proposition that children inherit their parents' lands, the only way to justify either party's claim to the land on this record is on the basis of such an assumption -- that the land passed from Ngirablai to his children, Maidesil, Saburo and Orachel, and from Maidesil and Orachel to Emilian and Smau, respectively. We therefore uphold the Trial Division's judgment that both should be awarded ownership.

As noted at the outset, we differ from the Trial Division in one respect -- its statement that Emilian and Smau own the land as tenants in common. As we have noted before, the Anglo-Saxon concept of tenancies, which conforms with Anglo-Saxon notions of property and property ownership, fails to fit within the Palauan framework of property law. *E.g.*, *Children of Ngeskesuk v. Espangel*, 1 ROP Intrm. 682, 690-01 (1989) (rejecting characterization of ownership as joint tenancy); *Riumd v. Tanaka*, 1 ROP Intrm. 597, 605-06 (1989) (same). With that modification, we affirm the judgment of the Trial Division, and direct the Land Court to

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eldecheduch, *see* Opening Brief at 10, does not answer the question of what a court should decide where it is undisputed that no eldecheduch took place and where those relatives who would have had the authority to conduct an eldecheduch have presumably long since passed away.

<sup>4</sup> Indeed, the LCHO's discussion of Emilian's right to inherit from Maidesil, and its conclusion that she was "not to be taken into consideration by Maidesil's relatives", LCHO Adjudication at 4, is superfluous except on the assumption that Maidesil inherited a share of the land.

<sup>5</sup> The LCHO decision states that Maidesil died in the 1950's. As the Trial Division also noted, if he died after the enactment of § 801, then his interest in the land would have passed to his oldest child irrespective of his relatives' wishes.

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issue a certificate of title awarding the land to Ibiochel Emilian and Dongesang Smau as co-owners in accordance with Palauan custom.