KARIHNA WELTER, Plaintiff-Appellant

v.

DAHNIS OBET, et al., Defendants-Appellees

Civil Appeal No. 153

Appellate Division of the High Court

Ponape District

August 18, 1978

Dispute over title to land in Uh Municipality, Ponape District, was appealed. The Appellate Division of the High Court, Nakamura, Associate Justice, held that in view of lack of Statute of Frauds the clear and convincing evidence test, not the preponderance of the evidence test, must be used in sustaining a gift of land inter vivos or causa mortis.

1. **Gifts—Land—Evidence**

   In view of lack of Statute of Frauds in the Trust Territory, to sustain a gift of land inter vivos or causa mortis there must be clear and convincing evidence, and use of a preponderance of the evidence test was error.

2. **Gifts—Land—Elements of Gift**

   To effect an inter vivos gift of property there must be a present intent to transfer the property with a delivery of the property, that is, the gift must be completely executed with no reservations, limitations or conditions.

3. **Wills—Invalid Wills—Ratification**

   Where purported will was declared invalid by court, the decedent was intestate and ratification of the division made by the alleged will, by the highest traditional chief of Uh Municipality of Ponape District, who was the magistrate, was of no effect.

Counsel for Appellant: ALAN B. BURDICK, ESQ., Micronesian Legal Services Corp.

Counsel for Appellees: DAVID W. LOWE, ESQ., *Office of the Public Defender*

Before BURNETT, *Chief Justice*, HEFNER, *Associate Justice*, and NAKAMURA, *Associate Justice*

NAKAMURA, *Associate Justice*

This is an appeal from a judgment entered in Civil Action No. 16-73, Trial Division of the High Court, Ponape District, in favor of defendants-appellees.

The land in dispute is located in Dhepek Section, Uh Municipality, Ponape District. The land was originally owned by a man named Obet, also known as Pohnpei Uh, who held it under German Land Certificate No. 164, dated June 11, 1912. Obet, who died in 1959, had one true son, Alehko, and two adopted sons, Atler, who died by suicide in 1971, and Dahnis Obet, grandson of the plaintiff-appellant, Karihna Welter.

Appellant was raised by Alehko, who was married to appellant's mother, Sahrihna. The Trial Court made no factual finding as to whether appellant was the true biological daughter of Alehko, nor did it make conclusions as to appellant's legal eligibility to inherit from Obet, as either the biological child of Alehko or as a child born during marriage of Sahrihna and Alehko.

The Trial Court found that Obet had, in 1955 or 1956, made a division of this property on the ground. This division was found by the Trial Court to have constituted a valid inter vivos grant of the property to the two adopted sons, Atler and Dahnis. The Trial Court also found that after the division was made, Obet prepared a document purporting to will the same property to the two adopted sons. The will, however, was found by the Trial Court to be invalid since it did not meet the requirements of the Wills Law (Ponape District Order No. 9-57), in effect at the time of Obet's death in 1959.

In 1962, three years after Obet's death, the two adopted sons, Atler and Dahnis, sought to have the division ratified by the highest traditional chief of Uh Municipality, who, at the same time, held the office of the Magistrate. A document was prepared which purported to ratify the grant. The Trial Court found this action to be an official valid act. This document was not filed with the Ponape District Clerk of Courts until July 27, 1973.

In the companion case of *Makaya v. Atler*, Civil Action No. 484, Ponape District, the Trial Court held that Atler, who committed suicide in 1971, had made a will devising whatever right Atler had in the property to his true father, Alten Ehram, one of the defendant-appellees in the case at bar. Ehram sold his rights in the half of the property claimed by him to Appellee Johnny Makaya for $600.00. Appellee Makaya filed suit against the eldest son of Atler, to quiet title to this half. That action was the companion suit, *Makaya v. Atler*, supra.

In 1973, Dahnis Obet, one of the defendant-appellees, purported to sell the other half of the property to Priska Weli, one of the defendant-appellees, also for a price of $600.00 for the three hectares of land.

The Weli document was recorded with the Clerk of Courts, Ponape District, on July 25, 1973. The 1962 purported ratification document was filed with the clerk on July 27, 1973, and the purported will of 1956 was filed on August 21, 1973. Appellant filed her complaint to quiet title on November 14, 1973, and the trial proceedings commenced on August 7, 1975, and completed on August 11, 1975.

Appellant raises two issues in this appeal. First, whether the Trial Court erred by using the "preponderance of evidence" test; and, second, whether there was a legally adequate basis for holding that appellant's claim was barred by laches.

The Trial Court found by "a preponderance of the evidence" that Obet had made an inter vivos gift of the land to his two adopted sons, namely, Atler and Dahnis, in 1962.

"It has been generally held, in most jurisdictions, that in order to sustain a gift inter vivos or a gift causa mortis, the evidence must be clear and convincing. It has accord-

ingly been stated that a mere preponderance of the evidence is not sufficient to establish the fact of a gift." 38 Am.Jur.2d, *Gifts*, Sec. 103.

[1] In view of the lack of Statute of Frauds in the Trust Territory, we hold that in order to sustain a gift inter vivos or a gift causa mortis, there must be clear and convincing evidence. Since the Trial Court used the "preponderance of evidence" test, we hold that it committed an error by using such standard.

A review of the transcript and the purported will of Obet reveals that even if the preponderance of the evidence standard is used, the judgment must be reversed.

[2] To effect an inter vivos grant of property, there must be a present intent to transfer the property with a delivery of the property.

In other words there must be complete execution of the gift with no reservations, limitations, or conditions. 38 Am.Jur.2d, *Gifts*, sections 17 and 18.

The testimony of the witnesses does not support any finding that Obet had a present intent to deliver the property. The purported will further supports the inescapable conclusion that Obet had no intent to give the property to his two adopted sons before his death. Additionally, there is no evidence of any delivery of the property, either by the sons taking possession of the property or by delivery of a deed, before Obet's death.

[3] Since Obet's purported will was declared invalid by the Court, he was intestate. Therefore, any action by the Nanmwarki in 1962 was of no effect. *Kilara v. Alexander*, 1 T.T.R. 3 (Tr. Div. 1951); *Manasa v. John*, 2 T.T.R. 63 (Tr. Div. 1959); *Toris v. Farek*, 3 T.R.R. 163 (Tr. Div. 1966); *Oneitam v. Suain*, 4 T.T.R. 62 (Tr. Div. 1968).

As for the laches issue, it is simply noted that if it is determined that the appellant acquired an interest in the land on Obet's death, appellees could acquire her title by adverse possession but not by laches. Since Obet died less than 20 years ago, the required period of time has not run. 6 TTC 302.

IT IS ORDERED that this matter is reversed and remanded to the Trial Division of the High Court for a determination of who succeeded by intestacy to the rights of Obet in the land in dispute.