IN THE SUPREME COURT
OF THE
REPUBLIC OF THE MARSHALL ISLANDS

TABWI NASHION and ANNE SHELDON, Plaintiffs-Appellees, vs. ENJA ENOS and ALDEN JACKLICK, ISLANDS, Defendants-Appellants.	S.Ct. Civil Appeal No.: 2006-011 H.Ct. Civil Action No.: 2003-197 OPINION

BEFORE: CADRA, Chief Justice; WALLACE* and KURREN,** Acting Associate Justices:

WALLACE, Acting Associate Justice:

This is an appeal from a High Court judgment declaring that Anne Sheldon holds the Alap rights and title, and Tabwi Nashion holds the senior dri jerbal rights and title, to Lokitak weto, Jabor, Jaluit Atoll, in the Republic of the Marshall Islands. In reaching its judgment, the High Court adopted the opinion of the Traditional Rights Court (TRC), which found that a written will or kalimur by iroijlaplap Kabua Kabua was valid under Marshallese custom and clearly dictates that Sheldon has Alap rights and Nashion has senior dri jerbal rights. We conclude that the findings of the TRC are not "clearly erroneous" and we therefore affirm the High Court's judgment.

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* Honorable J. Clifford Wallace, Senior Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation of the Cabinet.

** Honorable Barry M. Kurren, Magistrate Judge, United States District Court for the District of Hawaii, sitting by designation of the Cabinet.

BACKGROUND AND PROCEDURAL HISTORY

The original action commenced in 2003. On April 17, 2006, the plaintiffs-appellees (collectively, Nashion) filed a Motion for Substitution of Parties, substituting Anne Sheldon for Yoshimi Nashion, and Tabwi Nashion for Bwillear Nashion. This motion was made pursuant to Rule 25(a) of the Marshall Islands Rules of Civil Procedure because the original plaintiffs had passed away: Yoshimi Nashion died on April 16, 2005, and Bwillear Nashion on October 15, 2005. Their death certificates were attached to the motion. The TRC granted the motion that day, and the order was served on defendants-appellants (collectively, Enos) on April 18, 2006.

On April 21, 2006, the TRC held a status conference between Nashion and Enos. Enos requested that the trial be moved to another location to accommodate the defense witnesses; that request was granted. On June 6, 2006, Enos made an oral motion requesting time to respond to the April 17, 2006 motion to substitute plaintiffs. Nashion objected, and the TRC denied Enos's motion. The trial took place between June 7 and July 13, 2006 at the courthouse in Jabor, and Nashion and Enos presented witnesses.

On August 22, 2006, the TRC ruled for Nashion, reasoning that Kabua Kabua's 1988 kalimur clearly determined that Alling T. Elmo (who we presume had been succeeded in interest by Yoshimi Nashion and now Anne Sheldon) was to be Alap and Yoshimi Nashion (who we presume had been succeeded in interest by Bwillear Nashion and now Tabwi Nashion) was to be dri jerbal.

The TRC found that the kalimur was properly signed. It also decided that the fact that the kalimur referred to "Imonkitak weto," which does not exist, instead of "Lokitak weto," the weto in question, was simply a clerical mistake and was immaterial based on the other evidence

that Lokitak weto was intended. That evidence includes the language of the kalimur, a 1991 letter dealing with the weto, and testimony that it was Kabua Kabua's intent to leave title to Alling T. Elmo and Yoshimi Nashion. The TRC also found that Enos was aware of Kabua Kabua's disposition and did not object to it.

Finally, the TRC found that, although a contrary disposition of title was indicated by leroij Neimata Kabua in 2000, Neimata Kabua did not have the power to revoke the disposition created by her predecessor Kabua Kabua and, as she refused to take part in this case, it is probable that she no longer believes Enos is entitled to the land rights.

The matter then went before the High Court pursuant to Rule 9 of the TRC's Rules of Procedure. The High Court held a hearing on October 11, 2006. On November 7, 2006, the High Court affirmed and adopted the TRC's decision, stating that there was "nothing . . . to indicate the TRC's opinion was erroneous or contrary to law."

Enos appealed from the High Court's judgment to the Supreme Court. The parties waived oral argument. After careful consideration of the opinions under review, the briefs and the limited record that is before us, we AFFIRM the judgment of the High Court.

STANDARD OF REVIEW

We review errors of law *de novo*. *Pierce v. Underwood*, 487 U.S. 552, 584 (1988); *Pwalendin v. Ehmel*, 8 TTR 548, 552 (High Ct. App. Div. 1986). Errors of fact are reviewed for clear error. 27 MIRC Ch. 2 § 66(2); *see also Elmo v. Kabua*, 2 MILR 150 (1999). However, the High Court and this Court must give "proper deference" to the decision of the TRC in cases, such as this one, that involve customary law. *See Tibon v. Jihu*, 3 MILR 1, 6 (2005). "Accordingly, a finding of fact as to the custom is to be reversed or modified only if clearly

erroneous. A finding of fact is 'clearly erroneous' when a review of the entire record produces a definite and firm conviction that the court below made a mistake." *Id.* (internal quotations and citations omitted); *see also Zaion v. Peter*, 1 MILR (Rev.) 228, 233 (1991).

DISCUSSION

Enos makes three arguments in support of reversal: (1) the substitution of parties was procedurally defective; (2) the TRC failed to answer completely the questions submitted by the parties; and (3) the will or kalimur was invalid.

I

Enos first argues that the TRC's order substituting plaintiffs was erroneous because the TRC failed to follow Rule 25(a) of the Marshall Islands Rules of Civil Procedure. That Rule provides,

> If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representative of the deceased party and, together with the notice of hearing, shall be served on the parties in the manner provided in Rule 5 . . . . Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

MIRCP 25(a).

It does appear to us that the substitution order fails to comply with this rule. First, the TRC should not have decided the Rule 25 motion in the first place, as the motion was not a question of customary law or traditional practice and therefore was outside its jurisdiction. *See* Const. Art. VI, Section 4(3); *see also Elmo v. Kabua*, 2 MILR 150 (1999).

Second, there was no evidence attached to the motion showing that Anne Sheldon was the natural daughter of Yoshimi Nashion and that Tabwi Nashion is the oldest son of Bwillear

Nashion. There were no birth certificates or affidavits presented with the motion that would connect them as the rightful successors to the late plaintiffs.

Enos also argues that the motion was not served within 90 days of the original plaintiffs' deaths. While true, this argument does not help Enos. "Although Rule 25(a)(1) could be clearer, a careful reading of the rule coupled with an understanding of its function leads to the conclusion that the rule requires two affirmative steps in order to trigger the running of the 90 day period. First, a party must formally suggest the death of the party upon the record. Second, the suggesting party must serve other parties and nonparty successors or representatives of the deceased with a suggestion of death in the same manner as required for service of the motion to substitute." *Barlow v. Ground*, 39 F.3d 231, 233 (9th Cir. 1994) (internal citations omitted). There is no showing Enos or anyone else made a formal suggestion of death in the record furnished to us.

Nashion concedes that they did not comply with Rule 25(a) when they moved to substitute the original parties, but argues that the TRC cannot be faulted for denying Enos's motion for leave to file a response to the motion for substitution because Enos did not timely object to the substitution. Nashion alleges that the order granting the motion for substitution was served on Enos 37 days before Enos made a response or motion; that three days after the order was filed, a status conference was held and Enos did not move to respond to the motion for substitution or request reconsideration of the order; and that Enos learned on March 16, 2006 that the deceased plaintiffs did not have any natural children, but did not attempt to oppose the motion for substitution until trial.

Although Rule 25 may not have been complied with, we are forced to agree with Nashion. "It is well settled in this jurisdiction, as elsewhere, that issues or questions not raised

or asserted in the court below are waived on appeal." *Tibon v. Jihu*, 3 MILR 1, 6 (2005) (citing *Jeja v. Lajikam*, 1 MILR (Rev.) 200, 205 (1990)). Enos has the burden of showing a proper objection but has not provided any record of what took place during the hearings in this case. There is no showing whether and when Enos objected to the substitution. Without such a record, we must consider the objection to the substitution motion to be waived. We caution future litigants that, in order for this Court to consider claims properly, the parties must provide a record sufficient for the Court to determine that an objection was properly raised. Accordingly, we decline to review the issue.

II

The second argument advanced by Enos is that the TRC "failed to completely answer any questions submitted by the parties in respect to the weto disputed." However, as with the first issue, Enos has failed to provide us with an adequate record on which to evaluate this claim. Enos never specifies in the briefs exactly what questions were posed to the TRC, and provides no record of the alleged questions.

Moreover, it appears to us that the TRC did answer the central questions placed before it: the TRC explained who held the Alap and senior dri jerbal titles, and whether the kalimur was valid. On the record before us, we hold that the TRC's treatment of the issues was satisfactory and reject Enos's argument to the contrary.

III

Finally, Enos argues that the kalimur was invalid or should not have worked to pass land title to Nashion. It is critical to a proper analysis of this issue to understand that the kalimur is not a will, but is a determination of land rights under custom; the word kalimur can have many meanings not exactly encompassed in the English concept of a "will." *See Lalik v. Elsen*, 1 TTR

134, 138. It can be, and it seems to have been here, a determination by the iroijlaplap of the present rights in land rather than an actual transfer of property to occur at death. *See id.* Because the kalimur is not the same as a will, there may be procedural irregularities that would invalidate a will under common law and the probate code but would not necessarily invalidate a kalimur.

Indeed, the Marshall Islands Probate Code itself provides that, "[n]othing in this Part shall prevent the making of a will in accordance with the customary or written law of the Republic, nor shall anything in this Part affect the validity of a will made in accordance with such customary or written law." 25 MIRC 1 § 104. Here, the TRC and High Court viewed the kalimur primarily in light of customary law. This kalimur was unlike a will in that it did not transfer land from the testator, iroijlaplap Kabua Kabua, but it expressed his intentions for the disposition of land when Alap Tabwi died. In this case, the kalimur is primarily "evidence," along with other sources, of Kabua Kabua's decision and intent to give Alap and senior dri jerbal title to Nashion's predecessors. In that light, we consider Enos's arguments.

Enos first argues that the kalimur is not valid because it states "Imonkitak" instead of "Lokitak." The TRC found this to be a clerical error in typing or a verbal mistake in pronouncing the name, and held that it should not matter that the document misstated the name of the weto. Moreover, while the document specifically mentions Imonkitak, it states, "I am now bequeathing the right of alap Tabwi, after his death, relating to *all of his lands he inherited by ninnin from his father on Jaluit, including Imonkitak and other parts on Jabwor, Jaluit under 'kalotlot' or house of kalotlot.*" This suggests that is does not matter that the will misnames part of the land, because it clearly identifies "other parts on Jabwor, Jaluit" as the lands to be inherited. Those other parts would include Lokitak.

In our view, the TRC did not clearly err when it determined that the misstatement did not invalidate the kalimur because it was clear on the face of the documents to which lands it referred. Not only that, but there is other evidence that Nashion and Sheldon are the proper title holders. First, in 1991 Kabua Kabua wrote a letter that stated, "There is no one else I recognize today to be the holders of these two titles on Lokitak if it is not Alab Alling T. Elmo and Dri-Jerbal Yoshimi Nashion." That letter clearly identifies Lokitak weto. Additionally, the TRC heard testimony from individuals who were present at a funeral when the iroijlaplap Kabua Kabua stated that Alling T. Elmo and Yoshimi Nashion were to be the Alap and senior dri jerbal of Lokitak weto. Based on this evidence that the TRC considered and the text of the kalimur, we hold that the TRC did not clearly err when it found that the kalimur determined "the proper and rightful persons . . . to hold the Alab and Dri-Jerbal on Lokitak weto."

Enos's second objection is that there is a discrepancy on the dates of the kalimur. The kalimur lists the date of the declaration as April 7, 1988. However, the kalimur was signed by witnesses and filed by the court on April 6, 1988, so the April 7 date could not possibly be accurate. The inconsistency likely resulted from a clerical error or confusion about the dates.

This discrepancy could arguably pose problems were the kalimur to be considered a will under the Marshall Islands Probate Code, because it suggests the kalimur was not properly witnessed. *See* Probate Code, 25 MIRC 1 § 106 ("The execution of a will under this Part . . . must be by the signature of the testator and of at least two (2) witnesses"). However, Enos does not make that argument or otherwise explain why the mistaken date somehow invalidates the kalimur. The TRC determined that the kalimur was valid under customary law, and Enos has not provided any specific reason why the date problem makes that holding clearly erroneous. There was no clear error in the TRC's finding that the kalimur was signed and witnessed.

Finally, Enos argues that Anne Sheldon and Tabwi Nashion cannot inherit the land title because they are adopted children. Anne Sheldon admits she is adopted, but Tabwi Nashion contends he is the oldest natural son of Bwillear Nashion. In any event, the fact that either of them might be adopted is not relevant. The case that Enos cites, *Amon v. Langrine*, 7 TTR 65, is readily distinguishable from the case before us. First, for the weto disputed in the cited case, there was no iroijlaplap and so consent was needed from the rest of the clan to give title to an adopted child. That is not true here, because Kabua Kabua was the iroijlaplap and created the kalimur. Second, the TRC found that the kalimur actually was approved by lineage members because family members signed the kalimur and knew about the disposition. The TRC did not therefore err in concluding the disposition was valid.

CONCLUSION

For the above-stated reasons, we AFFIRM the judgment of the High Court.

Dated this 15 day of August, 2008.

Daniel N. Cadra
Chief Justice, Supreme Court

Dated this _____ day of August, 2008.

J. Clifford Wallace, Associate Justice
Senior Judge, U.S. Court of Appeals, Ninth Circuit (sitting by designation)

Dated this 14 day of August, 2008.

Barry Kurren, Associate Justice
U.S. District Court Magistrate Judge,
District of Hawaii (sitting by designation)