

PRIDA SANTOS and NELEN LIPAI, Plaintiffs

v.

ANTON LIPAI, Defendant

Civil Action No. 313

Trial Division of the High Court

Ponape District

December 30, 1968

Action to determine right to succeed as owner of land located in Madolenimw Municipality, Ponape District. The Trial Division of the High Court, H. W. Burnett, Associate Justice, held that decedent's will conveyed a portion of the land in question but did not revoke his present transfer of a remainder interest which he had made earlier.

1. Ponape Land Law-German Land Title-Wills

German land law specifically prohibited testamentary disposition of land and the disposition of such land by will could not be made prior to the effective date of Ponape District Order No.9-57, April 1, 1957. (Ponape District Order No.9-57)

2. Ponape Land Law-German Land Title-Wills

Certain transfers were permitted by the Japanese administration, when approved by or on behalf of the *nanmarki* and the Head of the Ponape Branch Office, that cut off the possibility of inheritance by the grantor's heir, although they did not affect the possession until after the death of the grantor, and have been loosely referred to at times as wills, but these were in effect present transfers of a remainder interest after a life estate reserved to the grantor and were not wills in the ordinary American sense.

3. Wills-Construction

The primary function of the court is to determine, and give effect to, the intent of the testator.

4. Wills-Construction

In determining the testator's intent the court may receive such evidence as will enable it to place itself in the position of the testator and thus find the meaning of the language employed.

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BURNETT, *Associate Justice*

FINDINGS OF FACT

1. Karel Lipai, owner of the land Pondiadi Peiei, intended to convey the land to Prida Santos by the document executed by him June 19, 1956.

2. The will executed by Karel Lipai on August 9, 1959, constituted a partial revocation of the prior disposition and set aside the northern portion of Pondiadi Peiei to be owned by Nelen.

OPINION

This action involves a dispute as to the right to succeed Karel Lipai as owner of the land Pondiadi Peiei, located in the Mesihsou Section, Madolenimw Municipality, Ponape District. Both the plaintiff Prida Santos and defendant Anton Lipai agree that Nelen, the surviving wife of Karel Lipai, is the owner of the northern part of Pondiadi Peiei. The dispute is only as to the remaining portion. The plaintiff Prida claims as an adopted daughter of Karel Lipai and claims to take pursuant to a land will executed June 19, 1956. Defendant Anton Lipai contends that this will was revoked in its entirety by a will executed August 9, 1959, and that he, therefore, succeeds to ownership as the adopted son of Karel Lipai.

Disposition of the controversy turns entirely upon the effect to be given to the two documents referred to throughout as "wills". If defendant is correct in his contention that the first will was revoked in its entirety, then he would succeed in accordance with the inheritance law in effect

at the time of the death of Karel Lipai in 1960, since I find the evidence convincing that he was in fact an adopted son. It is unnecessary to make any finding as to whether plaintiff Prida Santos was adopted or not since she must take, if at all, under the will executed in 1956.

[1] First inquiry must necessarily be as to the nature and validity of the document executed by Karel Lipai in 1956, since it is clear that German land law specifically prohibited testamentary disposition of land. This court has consistently held that disposition of land by will could not be made prior to the effective date of Ponape District Order No.9-57, April 1, 1957.

[2] The difficulty lies, however, in the confusion generated by the use of the term "will" and the tendency to think in terms of a will in the American sense. In fact, however, the majority of such documents, as stated by former Chief Justice Furber in *Eneriko v. Marina*, 1 T.T.R. 334, were not truly wills at all:-

"Certain transfers were permitted by the Japanese administration, when approved by or on behalf of the *Nanmarki* and the Head of the Ponape Branch Office, that cut off the possibility of inheritance by the grantor's heir, although they did not affect the possession until after the death of the grantor, and have been loosely referred to at times as wills. These were, however, in effect present transfers of a remainder interest after a life estate reserved to the grantor and were not wills in the ordinary American sense. No change in the Ponape Island land law permitting transfers by will in the American sense was made until Ponape District Order No.9-57, effective April 1, 1957, expressly authorized certain wills, provided they were executed in accordance with that order."

I hold that the document executed by Karel Lipai on June 19, 1956, and referred to throughout as a "will", was in fact a present transfer of a remainder interest of the sort referred to in 1 T.T.R. 334, and not a "will" prohibited by the law in effect at that time, particularly in

view of the fact that it bore the approval of both the *nanmarki* and the District Administrator.

The will executed August 9, 1959, complied in all respects with Ponape District Order No.9-57, and thus constituted a valid testamentary disposition of the northern portion of Pondiadi Peiei to Nelen as her own land. The difficulty is with that portion of the will which purports to "revoke the validity of land will No. 386-376 which I made to Prida Santos". No mention is made whatever in the document as to the balance of the land, nor does anything in the will itself make clear whether the "revocation" was intended to be partial or complete.

[3,4] It is elementary that the primary function of the court is to determine, and to give effect to, the intent of the testator. In determining that intent the court may receive such evidence as will enable the court to place itself in the position of the testator and thus find the meaning of the language employed.

Defendant makes the valid contention that Karel Lipai intended an entire revocation and to permit the balance of the land to pass in accordance with inheritance law. There was testimony, however, which I found convincing, that Karel Lipai expressed his understanding that the prior document was sufficient to leave Prida's right untouched as to such remainder. This is, of course, consistent with the view which I have taken of the document which he executed in 1956, as a present transfer to Prida, and testimony that he sought her consent to making provision for Nelen. In giving full effect to his intent, I therefore hold that, upon Karel's death, his retained life estate ended and Prida Santos became entitled to succeed him.

It was acknowledged by both sides that other persons, notably Artur Anton, natural father of the defendant and younger brother of plaintiff Prida Santos, are now living, and for many years have lived on the land. Neither ques-

tions their right to continue, in accordance with custom and with the established German land law.

It is therefore ordered, adjudged, and decreed:-

1. As between these parties and all persons claiming under them, Nelen, the surviving wife of Karel Lipai, is the owner with all rights of possession in the northern portion of the land Pondiadi Peiei, Mesihsou Section, Madolenimw Municipality, Ponape District.

2. The remaining portion of the land Pondiadi Peiei is owned by Prida Santos, subject to all the rights and obligations imposed by the transfer to her dated June 19, 1956, and by the system of private land ownership set forth in the standard form of German Land Title document.

3. No costs are assessed against either party.