IN THE SUPREME COURT OF GUAM

IN THE MATTER OF THE CONSOLIDATED ESTATES OF CONSOLACION NEDEDOG TORRES AND LUIS ESPINOSA TORRES,
Respondents-Appellees,

v.

ESTATE OF THE LATE ANA TORRES CRUZ THROUGH ITS ADMINISTRATRIX MARIA C. GUZMAN,
Petitioner-Appellant.

Supreme Court Case No.: CVA09-001
Superior Court Case Nos.: PR0070-65 / PR0032-49

OPINION

Cite as: 2011 Guam 4

Appeal from the Superior Court of Guam
Argued and submitted on November 19, 2009
Hagåtña, Guam

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BEFORE: KATHERINE A. MARAMAN, Presiding Justice[1]; MIGUEL S. DEMAPAN, Justice *Pro Tempore*; RICHARD H. BENSON, Justice *Pro Tempore*.

MARAMAN, J.:

[1] Petitioner-Appellant, the Estate of the Late Ana Torres Cruz ("ELATC") through its Administratrix Maria C. Guzman appeals from the Superior Court's 2007 Decision and Order for declaratory relief and a 2008 Decision and Order denying relief under Guam Rules of Civil Procedure 60(b). On appeal, ELATC argues that the probate court erred in concluding that Estate 431 be distributed according to the third and fourth paragraphs of the will of Consolacion Nededog Torres because: (1) Consolacion intended to devise that part of Estate 431 that she owned in 1952 which did not include the condemned portion that was later returned by the Government; (2) the exact size of the property is unknown; and (3) the condemned property of Estate 431 should be distributed under the residuary clause of the will. For the reasons discussed below, we affirm both the 2007 and 2008 Decisions and Orders of the probate court.

I. FACTUAL AND PROCEDURAL BACKGROUND

[2] While married to Consolacion Nededog Torres, Luis Espinosa Torres bought property known as Estate No. 431 ("Estate 431"), also known as "Gongna" in 1915. The exact size of Estate 431 remains unknown as it was never surveyed, but was estimated to be about forty hectares.

[3] On April 5, 1948, Luis Espinosa Torres died. ER at 16 (Death Certificate for Luis E. Torres). On July 31, 1952, the probate court invalidated his will due to mental incompetency and lack of testamentary capacity. In September of 1953, the probate court ordered that Luis

[1] Then Chief Justice Robert J. Torres and Associate Justice F. Philip Carbullido were recused from this matter. Justice Maraman, as the senior member of the panel, was designated Presiding Justice.

Espinosa Torres' estate be distributed to his wife "en toto." Appellant's Excerpts of Record ("ER") at 122 (Dec. & Order, date ("2007 Dec. & Order"); Appellee's Excerpts of Record ("SER") at 23 (Supplemental Order for Final Distribution, Sept. 1953).

[4] On June 28, 1950, a disputed portion of Estate 431[2] was condemned by the United States government and title instantly passed to the federal government pursuant to 40 U.S.C. § 259(a) (1946).[3] 40 U.S.C. § 259(a) (1946); *see also* ER at 122-23 (2007 Dec. & Order); ER at 17-20 (1950 Declaration of Taking, June 15, 2009).

[5] On April 5, 1952, Consolacion Nededog Torres executed her Last Will and Testament. The dispute focuses on the following third, fourth and eighth paragraphs of Consolacion's will:

> THIRD: I give, devise and bequeath unto my daughter, Remedios Torres Flores, resident of Yigo, Guam, twenty (20) hectares of land to be taken from the northern portion of that certain tract of unsurveyed land belonging to me, known and designated as 'Gongna' which contains an area of approximately fifty-one (51) hectares, lying and situate [sic] in the Municipality of Dededo, Guam, together with the improvements thereon, and all my rights and interests in and to said twenty (20) hectares of land.
>
> FOURTH: I give, bequeath and devise unto my sons, namely Jesus Nededog Torres, Tomas Nededog Torres, Joaquin Nededog Torres, Luis Nededog Torres, and Jose Nededog Torres the remaining portion of 'Gongna,' which remaining portion contains an approximate area of thirty-one (31) hectares . . .
>
> . . . .

[2] It was uncertain from the record whether all or part of Estate 431 was condemned. During oral argument, Appellant conceded that the same amount that was condemned was the same amount returned and this was not contested by the Appellees. Digital Recording at 10:18:05 (Oral Argument, Nov. 19, 2009).

[3] Title 40 U.S.C. § 259(a) states, "upon the filing of said declaration of taking and of deposit in the court . . . title to the said lands in fee simple absolute . . . shall vest in the United States of America." 40 U.S.C. § 259(a) (1946). Section 259(a) was later re-codified as 40 U.S.C. § 3114(b) (2002). Title to property passes to the federal government automatically when: 1) a declaration of taking is filed and; 2) either the owner receives compensation, or the compensation is deposited with the court pursuant to the Taking Act. *United States v. C. M. Dow*, 357 U.S. 17, 21-22 (1958). Title still vests with the United States even if the original owner still litigates after the fact to adjust the amount of compensation. *United States v. C. M. Dow*, 357 U.S. 17, 21 (1958). On June 28, 1950, the Naval Governor, Carlton Skinner signed a "Declaration of Taking" and deposited $34,000.00 with the Guam District Court. ER at 17-20 (1950 Decl. of Taking, June 15, 2009).

> EIGHTH: I give, devise and bequeath unto my daughters, Ana Torres Cruz and Remedios Torres Flores, all of my residual property, real or personal, to be divided between them, share and share alike.

ER at 35-36, 40 (Will of Consolacion Torres, June 15, 2009).

[6] On December 17, 1953, Consolacion Nededog Torres transferred by Deed of Gift to Remedios Torres Flores, the twenty hectares Consolacion had previously devised to Remedios by will. The Deed gave Remedios twenty hectares in the "Northern" portion of Estate 431 "[b]ounded on the: [n]orth by Juan G. San Nicolas[,] [e]ast by Government Land[,] [s]outh by Consolacion Nededog Torres[,] [w]est by cliff." ER at 43 (Deed of Gift, Dec. 17, 1953).

[7] Although title passed to the federal government in 1950, Consolacion still engaged in litigation over the property and was one of many defendants who filed an answer insisting that they were still owners in fee simple of the property that was condemned in 1950. The litigation over the condemned property concluded on August 27, 1957, when the District Court of Guam issued its judgment and accepted the stipulated agreement between the federal government and Consolacion to pay Consolacion $6,160.00 as compensation for the condemned property. On June 28, 1963, Consolacion Nededog Torres passed away.

[8] On December 31, 2002, the originally condemned portion of Estate 431 was returned to the estate of Luis Espinosa Torres. Although the property was returned to the Estate of Luis Espinosa Torres, due to the ruling of the probate court in September 1953, all of Luis's property became part of Consolacion's estate. On August 22, 2005, the announcement to reopen the estate and to consolidate probate proceedings was published.

[9] On November 30, 2006, Willie T. Flores and Susie A. Flores, co-administrators of the consolidated estates of Consolacion Nededog Torres and Luis Espinosa Torres ("Co-

administrators"), filed a Motion for Declaratory Relief to ascertain their rights to Estate 431 and the additional federal compensation of $97,251.77 for the condemned land.

[10] In its February 22, 2007 response, the Estate of the Late Ana Torres Cruz ("ELATC") argued that the probate court could not determine distribution and qualifying heirs to Estate 431 according to the will because the property was not surveyed and the court could not decide on the issue of distribution without knowing the exact size of the land. On June 12, 2007, the Superior Court ruled in its Decision and Order that: (1) "[a]ny mistaken description of the size of Estate No. 431 does not affect the specific intention of the testator" and that solely the language of the will unambiguously reflected the intent of the testatrix; (2) Estate 431 would be distributed according to the third and fourth paragraphs of Consolacion's will and; (3) the $97,251.77 would be used to cover probate related expenses and any remaining portion would be distributed according to the residual clause in the eighth paragraph. ER at 126-31 (2007 Dec. & Order).

[11] On July 9, 2007, ELATC filed a Rule 60(b) motion for relief from the 2007 Dec. & Order, which the court denied on December 11, 2008. *In re Consol. Estates of Torres'*, PR0070-65 and PR0032-49 (Dec. & Order at 1, Dec. 11, 2008 ("2008 Dec. & Order")). The Superior Court determined that although ELATC styled its motion as a Rule 60(b) motion for relief, the 2007 Order was an interlocutory order, and consequently, ELATC should have brought a motion for reconsideration, pursuant to GRCP Rule 59(e). The Superior Court determined that granting reconsideration pursuant to GRCP Rule 59(e) was not appropriate. The Decision and Order denying relief on either ground was entered on the docket on December 15, 2008. On January

14, 2009, ELATC appealed to this court for review of the probate court's 2007 and 2008 Decisions and Orders denying relief under GRCP Rule 60(b).[4]

II. JURISDICTION

[12] The 2007 Dec. & Order is an interlocutory order falling under 7 GCA § 3108(b).[5] A judgment is final when "it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce, by execution, what has been determined." *Dep't of Revenue and Taxation v. Civil Serv. Comm'n*, 2007 Guam 17 ¶ 15 (quoting *Sullivan v. Delta Air Lines, Inc.*, 935 P.2d 781, 791 (Cal. 1997)). A decree is interlocutory, "if final adjudication is postponed awaiting further judicial determination of the rights of the parties . . . ." *Id.* at ¶ 15 (quoting *Craig of Cal. v. Green*, 202 P.2d 104, 106 (Cal. Ct. App. 1949)). The 2007 Dec. & Order did not terminate the litigation between the parties as there still remain issues for the Superior Court to resolve. *See Dep't of Revenue and Taxation v. Civil Serv. Comm'n*, 2007 Guam 17 ¶ 15. Among other remaining issues, final distribution under 15 GCA § 3103 has not been ordered. Appellees' Motion to Dismiss at 2 (Feb. 19, 2009); *see also* ER at 136 (2008 Dec. & Order) (explaining how the June 12, 2007 order is interlocutory). As a threshold issue, the 2007 Dec. & Order is interlocutory and falls under 7 GCA § 3108(b). *Dep't of Revenue and Taxation v. Civil Serv. Comm'n*, 2007 Guam 17 ¶ 15.

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[4] Although ELATC's Notice of Appeal stated an intention to appeal the 2008 Dec. & Order denying the Rule 60(b) motion, not once has ELATC mentioned this issue in its brief. ELATC has not provided a standard of review of the probate court's denial of a Rule 60(b) motion, nor has it provided any theory as to why this court should reverse the probate court's 2008 Order denying the Rule 60(b) motion. Therefore, we consider the issue abandoned. *See, i.e. Grotto v. Leonardi*, 1999 Guam 30 ¶ 13.

[5] Although ELATC asserts that 7 GCA § 26801 provides an alternate means of jurisdiction in this case, we do not address the issue since jurisdiction is available under 15 GCA § 3433 and 7 GCA § 3108(b).

[13] "Orders other than final judgments shall be available to immediate appellate review as provided by law and in other cases only at the discretion" of this court. 7 GCA § 3108(b) (2005) (emphasis added). An interlocutory appeal as a matter of right requires: (1) an order that is not a final judgment and (2) a law that provides an independent right to appeal the particular interlocutory order. *See* 7 GCA § 3108(b); *Guam Top Builders, Inc. v. Tanota Partners*, 2006 Guam 3 ¶ 7 (finding interlocutory appeal as a matter of right in case involving mechanic's lien). As discussed above, the first requirement is readily satisfied in this case. The second requirement is satisfied by 15 GCA § 3433, which provides the independent right to appeal this particular interlocutory order. *See* 15 GCA § 3433 (2005) (stating "[a]n appeal may be taken to the . . . [Supreme Court of Guam] from an order of the Superior Court of Guam . . . determining heirship or the persons to whom distribution should be made . . . .").

[14] The probate court addressed the "Co-Administrators request [for] a declaration as to the respective property rights of the heirs, and non-heir third parties, under Consolacion's Will as to Estate No. 431." ER at 125 (2007 Dec. & Order) We read the probate court's determination of the property rights of the heirs and non-heirs in distributing Estate 431 as an "order determining heirship" under 15 GCA § 3433. 15 GCA § 3433 (2005). As such, we assert jurisdiction pursuant to 7 GCA § 3108(b) and 15 GCA § 3433.

III. STANDARD OF REVIEW

[15] The standard of review of a probate court's interpretation of a testator's intent when construing a will is an issue of first impression for this court. The paramount rule when construing a will is that a will should be "construed according to the intention of the testator" and

"[w]here the testator's intention cannot have effect to its full extent, it must have effect as far as possible." 15 GCA § 603 (2005).

[16] When there is an imperfect description in a will or when an uncertainty or ambiguity arises on the face of a will, a testator's intention must be determined from the words of the will or from extrinsic evidence, taking into view the circumstances under which the will was made. 15 GCA § 611 (2005).

[17] When no extrinsic evidence is considered and the construction of the will is based solely on the language or when the competent extrinsic evidence is not conflicting, a probate court's interpretation is a question of law. *Estate of Brown,* 199 Cal. App. 2d 274, 277 (Cal. Ct. App. 1962). Under these circumstances, there is no issue of fact, and an appellate court is not bound by a probate court's construction and therefore must independently construe the will. *See In re Estate of Russell*, 444 P.2d 353, 362 (Cal. 1968). We review questions of law *de novo*. *Nissan Motor Corp. in Guam v. Sea Star Group Inc.,* 2002 Guam 5 ¶ 10.

[18] If however, extrinsic evidence is properly admitted, and such evidence is conflicting and conflicting inferences arise therefrom, "any reasonable construction will be upheld as long as it is supported by substantial evidence." *Winet v. Price*, 6 Cal. Rptr. 2d 554, 557 (Cal. Ct. App. 1992); *see also In re Estate of Hemlani*, 2008 Guam 25 ¶ 31; "[F]actual findings of the trial court are upheld 'unless there is an entire lack of substantial evidence in support thereof.'" *Camacho v. Camacho*, 1997 Guam 5 ¶ 37 (quoting *Plante v. Gray*, 157 P.2d 421, 424 (Cal Ct. App. 1945)).

IV. ANALYSIS

A. Whether Consolacion's Will is Ambiguous

[19] Generally, a will should be "construed according to the intention of the testator" and "[w]here the testator's intention cannot have effect to its full extent, it must have effect as far as possible." 15 GCA § 603 (2005). Section 611 of Guam's Probate Code provides that "[w]hen there is an imperfect description in a will" or "[w]hen an uncertainty arises upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will or from extrinsic evidence, taking into view the circumstances under which the will was made." 15 GCA § 611 (2005). Section 611 is identical to former section 105[6] of the California Probate Code.

[20] Given that review of a testator's intent is an issue of first impression it is instructive to consider how the California courts in applying the same statute have resolved this issue. The California Supreme Court in *In re Estate of Russell*, 444 P.2d 353 (Cal. 1968) set forth applicable rules governing the interpretation of wills. The court recognized the paramount rule that a will be construed according to a testator's intent and in examining the testator's intent stated:

> [E]xtrinsic evidence of the circumstances under which a will is made (except evidence expressly excluded by statute) may be considered by the court in ascertaining what the testator meant by the words used in the will. If in the light

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[6] Former section 105 provides:

> When there is an imperfect description, or no person or property exactly answers the description, mistakes and omissions must be corrected, if the error appears from the context of the will or from extrinsic evidence, excluding the oral declarations of the testator as to his intentions; and when an uncertainty arises upon the face of a will, as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made, excluding such oral declarations.

Cal. Probate Code § 105.

> of such extrinsic evidence, the provisions of the will are reasonably susceptible of two or more meanings claimed to have been intended by the testator, an uncertainty arises upon the face of a will and extrinsic evidence relevant to prove any of such meanings is admissible, subject to the restrictions imposed by statute. If, on the other hand, in the light of such extrinsic evidence, the provisions of the will are not reasonably susceptible of two or more meanings, there is no uncertainty arising upon the face of the will and any proffered evidence attempting to show an intention Different from that expressed by the words therein, giving them the only meaning to which they are reasonably susceptible, is inadmissible. In the latter case the provisions of the will are to be interpreted according to such meaning.

In re Estate of Russell, 444 P.2d 353, 361-362 (citations omitted).

[21] The court ultimately held that although section 105 delineates the manner of determining a testator's intent, "'when an uncertainty arises upon the face of a will,' it cannot always be determined whether the will is ambiguous or not until the surrounding circumstances are first considered." *Id.* In addition, the court said extrinsic evidence is admissible to resolve a latent ambiguity which is not apparent on the face of the will. *Id.* at 357. This court has previously stated that a latent ambiguity exists "[i]f the language employed in the writing is fairly susceptible of either one of two interpretations contended for" and such latent ambiguity must be resolved "without doing violence to its usual and ordinary import or some established rule of construction." *Torres v. Torres*, 2005 Guam 22 ¶ 37.

[22] In applying the general principles as stated above, we first look to the language of the will to determine if it is ambiguous and if it is, whether such ambiguity is such as to require the admissibility of extrinsic evidence. Specifically, at issue here is the interpretation of the third, fourth and eighth paragraphs of Consolacion's Will:

> THIRD: I give, devise and bequeath unto my daughter, Remedios Torres Flores, resident of Yigo, Guam, twenty (20) hectares of land to be taken from the northern portion of that certain tract of unsurveyed land belonging to me, known and designated as 'Gongna' which contains an area of approximately fifty-one (51) hectares, lying and situate [sic] in the Municipality of Dededo, Guam,

> together with the improvements thereon, and all my rights and interests in and to said twenty (20) hectares of land.
>
> FOURTH: I give, bequeath and devise unto my sons, namely Jesus Nededog Torres, Tomas Nededog Torres, Joaquin Nededog Torres, Luis Nededog Torres, and Jose Nededog Torres the remaining portion of 'Gongna,' which remaining portion contains an approximate area of thirty-one (31) hectares . . . .
>
> EIGHTH: I give, devise and bequeath unto my daughters, Ana Torres Cruz and Remedios Torres Flores, all of my residual property, real or personal, to be divided between them, share and share alike.

ER at 35-36, 40 (Will of Consolacion Torres).

[23] ELATC correctly asserts that there exists a latent ambiguity in the Will. Appellant's Br. at 11 (July 15, 2009). Although the language of the Will is clear on its face, external circumstances make the language of the Will susceptible to the following interpretations, with respect to the devise of Estate 431:

1. As contended by the co-administrators: Consolacion believed that she still held title to the condemned land or believed she would regain title to the condemned land, and intended to devise the pre-condemnation size of the land via paragraphs three and four of her will; or

2. As contended by ELATC: Consolacion knew that title passed to the United States Government and sought to only devise the remaining uncondemned portion of the land according to paragraphs three and four of her will. Thus, the land returned by the Guam Ancestral Lands Commission in 2002 was unbequested real property to be distributed under the residual clause of paragraph eight.

The latent ambiguity in Consolacion's Will becomes apparent when one considers that Estate 431 (or at least part of it) was condemned in 1950 by the United States Government *before* Consolacion executed her Will in 1952 and that the land was returned in 2002, nearly forty years after Consolacion's death. Consolacion made no express mention of the condemnation nor made her intentions clear as to what should be done with any remaining interest, contingent or

otherwise, in Estate 431. Accordingly, we conclude that there exists a latent ambiguity in Consolacion's Will because the language of the Will is fairly susceptible of two or more meanings.

B. Whether Extrinsic Evidence Under Which Will Was Made May Be Considered

[24] ELATC argues on appeal that the probate court failed to consider extrinsic evidence it submitted. Contrary to ELATC's assertion, the probate court, in fact, considered the extrinsic evidence. *See* ER at 144 (2008 Dec. & Order) (observing that ELATC's argument for rehearing did not demonstrate how the extrinsic evidence was new). The probate court had before it a voluminous record of evidence, excerpts of which are currently before this court. ER *passim* (the extrinsic evidence before the probate court); SER *passim* (the extrinsic evidence before the probate court). Both the probate court's decision and the parties' appellate briefs cite to the extrinsic evidence in the record to support their interpretations of Consolacion's intent. *See, e.g.*, Appellant's Br. (June 15, 2009); Appellees' Br. at 27, 33-36 (July 15, 2009); ER at 123-24, 126, 128-29 (2007 Dec. & Order). The probate court reviewed, among other things, the 1954 and 1957 District Court records from Civil Case No. 33-50, the Deed of Gift to Remedios Nededog Torres, and the history of the condemnation proceedings. ER at 124, 129 (2007 Dec. & Order); Transcript ("Tr.") at 12 (Hr'g on Mot. for Relief, July 8, 2009). Even during oral argument, ELATC could not direct this court to any specific extrinsic evidence that was excluded or overlooked by the probate court. Digital Recording at 10:03:53 and 10:13:20 to10:14:34 (Oral Argument, Nov. 19, 2009).

[25] Extrinsic evidence of the surrounding circumstances was properly considered in order to determine Consolacion's intent in devising Estate 431. Moreover, the parties concede there is no

conflict of the extrinsic evidence in the record. Because the extrinsic evidence is not conflicting, we are not bound by the probate court's construction and instead must independently construe the Will. *In re Estate of Russell*, 444 P.2d 353, 362 (Cal. 1968).

[26] The probate court concluded that Consolacion intended to convey Estate 431 according to the third and fourth paragraphs of her Will and implicit in such conclusion was that Consolacion believed she owned Estate 431 in its entirety at the time the Will was executed. *See* ER at 127-28 (2007 Order). The extrinsic evidence supports a finding that Consolacion believed that she still owned all of Estate 431, despite the condemnation, because the evidence revealed: (1) Consolacion contended the property was hers as community property acquired during marriage and (2) Consolacion executed her Will in 1952 even before the court in 1953 declared the estate be distributed to Consolacion. Additionally, there is evidence that she was asserting ownership of Estate 431 and litigating the federal condemnation of Estate 431 at the time of executing her will. SER at 24 (Answer in 1954 Civil Case No. 33-50); ER at 122 (2007 Dec. & Order); SER 23 (Suppl. Order for Final Distribution, Sept. 1953); SER 19 (Tr., Apr. 3, 1952; Consolacion's testimony regarding what she believed to be community property).

[27] We agree with the probate court's conclusion that any mistake regarding the size of Consolacion's property did not affect her intention to devise the property according to the third and fourth paragraphs of her will. ER at 128 (2007 Dec. & Order). First, the probate court observed that the exact area and location of borders of Estate 431 were not known at the time Consolacion made her Will. Further, the court considered the Deed of Gift given to Consolacion's daughter Remedios, in which the borders of Estate 431 were specifically delineated, in concluding that "regardless of Estate No. 431's final size," it was Consolacion's

specific intent to devise a tract of twenty hectares of the estate to her daughter Remedios Torres Flores. ER at 129 (2007 Dec. & Order). Moreover, the extrinsic evidence does not contradict the probate court's interpretation of the language of the Will that:

> The devises in the Third and Fourth Clauses are dependent upon each other and the total area of Estate No. 431. The Third and Fourth Clauses, when construed together, form one consistent whole and reflect an intention to distribute Estate No. 431, not necessarily by exact metes and bounds, but rather by portions.

ER at 128 (2007 Dec. & Order).

[28] Upon an independent examination of the Will and the extrinsic evidence offered we agree with the probate court's interpretation that Consolacion intended to devise Estate 431 pursuant to the third and fourth paragraphs of her Will.

C. Whether Post-Mortem Acquisition of Property Can be Distributed According to Will's Terms

[29] For the first time on appeal, the Co-administrators argue that we should affirm the trial court's order on the basis that under 15 GCA § 623, property acquired after the death of a testator should be devised according to the testator's will. Since the issue is one of purely law, we exercise our discretion to address the application of 15 GCA § 623 to the facts of this case. *Taniguchi-Ruth Assoc. v. MDI Guam Corp.*, 2005 Guam 7 ¶ 80 (court has discretion to consider issue raised for the first time on appeal when it is "purely one of law"). Title 15 GCA § 623 states:

> Any estate, right, or interest in lands acquired by the testator after the making of his will, passes thereby and in like manner as if title thereto had been vested in the testator at the time he made the will, unless the contrary manifestly appears by the will to have been the intention of the testator.

15 GCA § 623 (2005). The Co-administrators offer no legal theory as to why 15 GCA § 623 should apply to this case, which involves a post mortem acquisition of property, rather than

applying only to property acquired after the execution of a will but prior to the death of a testator.

[30] Whether 15 GCA § 623 applies to post mortem acquisitions is an issue of first impression for this court. As 15 GCA § 623 is not clear on how to resolve the issue, we look to the history of § 623 to aid in its interpretation. *See In re Application of Leon Guerrero*, 2005 Guam 1 ¶ 31. Title 15 GCA § 623 is derived from the California Probate Code section 121. *Compare* Probate Code of Guam § 121 (1933) *with* 15 GCA § 623 (2005), *and with* California Probate Code § 121 (1949). California Probate Code section 121 was originally Civil Code section 1312, which was adopted to ameliorate the harsh consequences of the common law rule preventing after-acquired property from passing by a will. *See In re Estate of Hopper*, 4 P. 984, 984-85 (Cal. 1884). The California Supreme Court in *In re Estate of Hopper*, explained:

> According to the rule of the common law, after-acquired real estate did not pass by a will; and this rule was enforced so strictly that a will was held to be inoperative upon real estate of which the testator was the owner at the time of the making of the will, and afterwards sold, re-purchased, and died seized,-which is the exact case at bar . . . But in this state, as in many others, that rule has been changed by statute.

4 P. 984, 984-85. In 1931, California amended its after-acquired property statute to further ameliorate the harsh application of the rule, and such was the version that Guam adopted. *See* California Probate Code § 121 (1949).

[31] We have been unable to identify a California case that has addressed the precise issue of whether its after-acquired property statute applies to property acquired by the estate after the testator's death. In evaluating jurisdictions with similar after acquired property statutes, only a few have addressed this precise issue. *See In re Estate of Braman*, 258 A.2d 492, 494-96 (Pa. 1969) (acknowledging the lack of case law on the subject and ultimately finding that "a testator

cannot dispose of property in which he lacks any interest, legal or equitable, at the time of death"); *Emery v. Wason*, 107 Mass. 507, 507-10 (Mass. 1871) (finding that the stocks acquired after death passed via will where testator subscribed for shares of new stock, paid half the price and died shortly before the other half was due, and his executors paid the second half after testator's death); *Cobb v. Stewart*, 4 Met. 255, 255 (Ky. 1863) (finding that a statute providing for a property deed given to a person who is dead to be distributed to the heirs did not apply to non-heir devisees who were designated to take real property under the will).

[32] Generally, the purpose of after-acquired property statutes was to abrogate the English common law of implied revocation through impossibility; the trend is to construe after-acquired property statutes in order to maximize the ability to fulfill the testator's intent and avoid ademption. *See, e.g.*, *In re Estate of Hopper*, 4 P. 984, 984-85 (Cal. 1884) (emphasizing the importance of the testator's intent); *Woolery v. Woolery*, 48 Ind. 523 *passim* (1874); *Emery v. Wason*, 107 Mass. 507, 508-10 (Mass. 1871) (permitted after acquired property to pass via will to best effectuate the intent of the testator); *Ridenour v. Callahan*, 19 Ohio C.D. 65 at * 6 (Ohio Cir. Dec. 1906) ("At common law, a specific bequest was supposed to refer to the property answering the description at the date of the will. . . . But under the modern statutes by which wills are construed . . . speak from the death of the testator, a bequest of a leasehold is not adeemed by the expiration and renewal of the lease; and a subsequently acquired fee in the same property, although described as held for a term of years, passes under the bequest."); *Morey v. Sohier*, 3 A. 636 (N.H.) *passim* (1885) (". . . every will is construed to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will. So in this state, many of the conditions upon which the doctrine of implied

revocation was formerly based in England no longer exist."); *Brown v. Brown*, 16 Barb. 569 *passim* (N.Y. Gen. Term 1852) (emphasizing the importance of carrying out testator's intent). Evaluating the policy objectives of after-acquired property statutes across jurisdictions supports a broad interpretation in order to best fulfill the intent of the testator and to avoid ademption. *See, e.g.*, *In re Estate of Hopper*, 4 P. 984, 984-85 (Cal. 1884); *Emery v. Wason*, 107 Mass. 507, 508-10 (Mass. 1871); *Ridenour v. Callahan*, 19 Ohio C.D. 65 *passim* (Ohio Cir. Dec. 1906); *Morey v. Sohier*, 3 A. 636 (N.H.) *passim* (1885); *Brown v. Brown*, 16 Barb. 569 *passim* (N.Y. Gen. Term 1852).

[33] The Indiana Supreme Court in *Woolery* observed that the main justification for a court to not distribute via will land that was already conveyed was because it would be legally impossible. *See Woolery v. Woolery*, 48 Ind. 523 *passim* (1874). The court in *Woolery* observed:

> The conveyance of the land devised is not, of itself, a revoking act. It revokes the devise by necessary implication, while the title of the land remains out of the testator, because it renders the will inoperative upon the subject-matter; and no revocation is allowable by way of implication, except from necessity. . . . The reconveyance of the land to the testator left the title in him at the time of his death, as it was when he made the devise, and thus restored the operative power of the will over the subject-matter. The testator performed no revoking act according to the statute, and the will at the time of his death was not revoked by necessary implication. We think, therefore, that it is still in force.

Woolery v. Woolery, 48 Ind. 523 at *3 (1874). Absent impossibility, however, there lacks a sufficient legal basis to prevent carrying out the terms of one's will. *See Woolery v. Woolery*, 48 Ind. 523 *passim* (1874). In light of its purpose to best effectuate a testator's intent and to prevent ademption, we interpret 15 GCA § 623 to allow for post mortem acquisitions to pass via will, where the intent to devise property is unified with the legal possibility to devise such property,

due to the fact that fee simple ownership of the property has been restored. *See* 15 GCA § 623; *Woolery v. Woolery*, 48 Ind. 523 *passim* (1874).

[34] As a general rule, ELATC is correct that a testator is presumed to convey no more than what a testator owns. *See* 15 GCA § 621 (2005) ("[a] devise of land conveys all the estate of the testator therein *which he could lawfully devise. . . .*" (emphasis added)); *Zahnen v. Limtiaco*, 2008 Guam 5 ¶17 (quoting *Shelton v. Vance*, 234 P.2d 1012, 1014 (Cal. Ct. App. 1951) ("a distribution . . . does not quiet title to property, the reason being that '[a] decree of distribution distributes only such title as the deceased had at the time of his death.'").

[35] Moreover, applying 21 GCA § 4202, we presume that a testator intended to convey a fee simple title unless it appears from the will that a lesser estate (such as a contingent future interest) was intended. *See* 21 GCA § 4202 (2005). In *Taitano v. Lujan*, we found that where someone owned land that was later condemned, that individual possessed ". . . an alienable contingent future interest . . . ." in the land. *Taitano v. Lujan*, 2005 Guam 26 ¶ 41.

[36] In this case, Consolacion intended to convey fee simple title to Estate 431 but actually possessed a contingent future interest in Estate 431 at the time of executing her will. *See* 21 GCA § 4202; *Taitano v. Lujan*, 2005 Guam 26 ¶ 41. Ultimately, fee simple in the once-condemned Estate 431 was restored to the Consolacion's estate. We read *Taitano v. Lujan*, 21 GCA § 4202 and 15 GCA § 623 together to find that although Consolacion in fact possessed a contingent future interest, Consolacion's intent to convey fee simple interest in Estate 431 should be effectuated once fee simple title in Estate 431 was restored to Consolacion's estate. *See* 21 GCA § 4202; 15 GCA § 623; *Taitano v. Lujan*, 2005 Guam 26 ¶ 41.

[37] In this case, the probate court did not abuse its discretion in finding that Consolacion Torres intended to devise Estate 431 according to the third and fourth paragraphs of her Will. It is undisputed that all the land that was taken by the federal government was returned to the estate. Since there is a unison of the testatrix's intent to convey her property in fee simple and the legal possibility to distribute Estate 431 according to the testatrix's intent, we find that 15 GCA § 623 provides the statutory basis to permit distribution of Estate 431 by Consolacion's Will, though fee simple interest in Estate 431 was reacquired by the estate after her death. *See* 15 GCA § 623; *Woolery v. Woolery*, 48 Ind. 523 *passim* (1874).

C. Whether the Probate Court Abused its Discretion in Reaching Merits without Extending Additional Discovery

[38] ELATC argues at length on appeal the importance of determining the exact size of Estate 431 and asks that this case be "remanded with instructions that the lower court conduct an evidentiary hearing to ascertain the exact sizes of the Torres' interests in 1949, 1952 and 2003 Estate 431 . . . ." Appellant's Br. at 26. However, during oral argument, ELATC conceded that whatever land the federal government condemned was returned to Estate 431. Digital Recording at 10:18:05 (Oral Argument, Nov. 19, 2009). Thus, speculation about whether Estate 431 changed size has ended.

[39] ELATC's argument that the probate court must know the exact size of Estate 431 is an integral part of its position that the property should pass under the residuary clause and not by paragraphs three and four of the Will. That position was rejected by the probate court, which held that the testatrix intended to distribute Estate 431 in accordance with paragraphs three and four of her Will. Further, the court held that if the description of the property in the Will is ambiguous, then pursuant to 15 GCA § 611 the court would consider extrinsic evidence to

ascertain the boundaries of the heirs' parcels, but it need not do so to determine the respective rights of the parties. ER at 129 (2007 Dec. & Order). This court agrees.

V. CONCLUSION

[40] In sum, we find that a latent ambiguity exists in the language of Consolacion's Will and because of the ambiguity it was proper for the probate court to consider extrinsic evidence surrounding the circumstances under which the Will was made in order to ascertain Consolacion's intent. In exercising our independent examination of the Will and the extrinsic evidence in the record we agree with the probate court's interpretation that Consolacion intended to devise Estate 431 pursuant to the third and fourth paragraphs of her Will. Moreover, we find that the after-acquired property statute, 15 GCA § 623, applies to post mortem acquisitions. Under *Taitano v. Lujan*, 2005 Guam 26, Consolacion possessed an alienable contingent future interest in the condemned Estate 431 and properly conveyed that interest via will.

[41] Therefore, we **AFFIRM** both the 2007 and 2008 Decisions and Orders of the probate court.

Original Signed By: **Miguel S. Demapan**
MIGUEL S. DEMAPAN
Justice *Pro Tempore*

Original Signed By: **Richard H. Benson**
RICHARD H. BENSON
Justice *Pro Tempore*

Original Signed By: **Katherine A. Maraman**
KATHERINE A. MARAMAN
Presiding Justice