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with Selected Trial Division and Land Court Decisions

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FIRST COMMERCIAL BANK
Petitioner,

v.

NANCY WONG; and BERLINDA NGIARAUNGIL,
Respondents.

SPECIAL PROCEEDING NO. 12-002
Civil Action No. 07-348

Supreme Court, Appellate Division
Republic of Palau

Decided: September 18, 2012

[1] Appeal and Error: Writs and Petitions

Although Rule 21 petitions are not appeals, we emphasize that the other Rules of Appellate Procedure, to the extent practicable and appropriate, should be followed with respect to any matter filed with the Appellate Division. For example, the Appellate Division will not grant a stay of Trial Division proceedings absent compliance with Rule 8; we will not hesitate to levy sanctions for frivolous petitions based on Rule 38; and we will enforce any applicable form and content requirements found in Rule 28. Labeling one's filing a "petition" instead of an "appeal" does not absolve a litigant of compliance with these Rules.

[2] Appeal and Error: Writs and Petitions

A writ of prohibition will be issued only in extraordinary circumstances. A petitioner must clearly establish that a lower court is about to exercise judicial power in an unauthorized manner and that the exercise of such power result in an injury for which there is no other adequate remedy. We will not issue such writs simply to review and correct errors and irregularities of a lower court.

[3] Property: Attachment

A writ of attachment does not become a lien until it is served on legal authorities.

[4] Appeal and Error: Writs and Petitions

Unless a lower court has clearly overstepped its jurisdictional bounds, a writ of prohibition is improper.

Counsel for Petitioner: David Shadel
Counsel for Respondents: Mariano Carlos and Jason Shaw

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; and HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem.

Special Proceeding arising from the Trial Division, the Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.

PER CURIAM:

Before the Court is First Commercial Bank's ("Bank" or "Petitioner") Amended Emergency Motion to Stay the proceedings before the Trial Division and its Petition for a Writ of Prohibition.[1] For the following reasons, we will not enter a writ of

[1] Although Petitioner styles its filing as a Petition for a Writ of Prohibition or Mandamus, it is clear that the Bank is requesting a writ of prohibition and not mandamus.

prohibition or stay the proceedings before the Trial Division.

BACKGROUND

The pertinent facts are these: Nancy Wong sued First Commercial Bank in 2007. During the pendancy of the law suit, the Bank closed its doors and began to wind down its business in Palau. Accordingly, on March 13, 2012, the Trial Division entered an order issuing a writ of attachment, attaching $420,219.78, which corresponds to the potential amount of a judgment against the Bank. Unfortunately, the Bureau of Public Safety was not served with the Writ, so the funds were not attached at that time. In an affidavit, Wong attested that she was told by a representative of the bank that there are no more funds available. She filed an emergency motion hoping to effect the writ. On August 30, the Trial Division granted Wong's motion and ordered the Bank to deposit the amount with the Director of Public Safety, or explain by affidavit why it is unable to deposit the funds and to post a bond for the amount.

On September 7, 2012, Petitioner Bank filed a Petition for Writ of Prohibition or Mandamus with this Court. In its often unfocused supporting Memorandum, Petitioner appears to object to the Trial Division's August order for two reasons. First, the Bank protests that funds may not be attached if they are no longer within Palau. This point seems to concede that the hearsay attested to in Wong's affidavit is correct, and the funds have left the country. Second, the Bank protests that, because a writ of attachment may not be had, the Trial Division may not require the alternative posting of a bond.

ANALYSIS

[1] We begin with a note regarding the unusual procedural posture of this case. This is not an appeal from a final judgment, nor does the Bank argue that it is an interlocutory or collateral order subject to our appellate jurisdiction. Instead, it is filed as a Special Proceeding pursuant to ROP R. App. P. 21. Rule 21 allows litigants to file petitions for writs of mandamus and prohibition with this Court. It also provides an outline of briefing and filing procedures to be followed when such petitions are filed. ROP R. App. P. 21(b), (d). Although such petitions are not appeals, we emphasize that the other Rules of Appellate Procedure, to the extent practicable and appropriate, should be followed with respect to any matter filed with the Appellate Division. For example, the Appellate Division will not grant a stay of Trial Division proceedings absent compliance with Rule 8; we will not hesitate to levy sanctions for frivolous petitions based on Rule 38; and we will enforce any applicable form and content requirements found in Rule 28. Labeling one's filing a "petition" instead of an "appeal" does not absolve a litigant of compliance with these Rules. This is simple common sense and is consistent with the letter and spirit of the Rules of Appellate Procedure.

[2] A writ of prohibition will be issued only in extraordinary circumstances. "[A] petitioner must clearly establish that a lower court is about to exercise judicial power in an unauthorized manner <u>and</u> that the exercise of such power result in an injury for which there is no other adequate remedy." *Kruger v. Mokoll*, 5 ROP Intrm. 121, 121-22 (1995) (emphasis in original). If an appeal

will serve to return to remedy any potential injury to the Petitioner, we will not issue a writ of prohibition. *Id*. We will not issue such writs simply "to review and correct errors and irregularities of a lower court." *Ngetpak Clan v. Keptot*, 9 ROP 99, 99 (2002). Although Petitioner cites non-Palau cases involving the issuance of such writs in cases involving a clear lack of jurisdiction of the lower court, *see, e.g., Whitney v. Fresno Cnty. Sup. Ct.*, 250 P. 666 (Cal. 1926), we have made clear that a Petitioner must show an irreparable injury in order to attain such a writ. *See id.*; *Kruger*, 5 ROP Intrm. at 121-22.

[3] With respect to the merits of the Petition, we first address the legality of the writ of attachment. Petitioner protests that the Trial Division's August Order "suggests that [the Bank] violated some obligation owing under the March Order." We are at a loss as to how this suggestion created an irreparable injury that justifies the issuance of a writ or prohibition. While Petitioner is correct that a writ of attachment does not become a lien until it is served on legal authorities, the August order issuing a writ remedied the mistake made in March. The writ was served. If the funds are still in Palau, then there is a valid writ of attachment. *See* 6 Am. Jur. *Attachment & Garnishment* §§ 284 (attachment not effective until it is levied), 289 (no authority to execute a writ outside the jurisdiction). Although Petitioner suggests that the money is no longer in Palau, this is not a fact that has been supported by admissible evidence submitted to the Trial Division—this deficiency was noted by Petitioner itself before the Trial Division in its objection to Wong's August motion. Because it is entirely unclear whether any or all of the funds to be attached are still in Palau, it would be woefully premature for this Court to prohibit the Trial Division from seeking out the funds.

[4] Next, we turn to the remainder of the court's order, specifically its requirement that, if the funds are not available to be attached, the Bank instead post a bond in lieu of attachment. Petitioner argues that there is no legal basis for the court to issue such a requirement and that the Trial Division should be prohibited from issuing such an order. This argument fails for two reasons. First, Petitioner has made no showing that furnishing such a bond would cause the type of irreparable injury entitling it to a writ of prohibition. *See Kruger*, 5 ROP Intrm. at 121-22. Petitioner, in its lengthy Memorandum in support of its Petition, fails to articulate *any* injury it would suffer by furnishing a bond pending the completion of the litigation. Second, it is far from "clearly established" that there is no legal basis for the Trial Division's bond requirement. *Id.* Petitioner fails to cite any Palauan authority for its conclusion that the requirement for a bond in lieu of attachment is improper. The remedy crafted by the Trial Division appears designed to further the statutory purpose of 14 PNC § 2101 to ensure that there will be "sufficient [funds] to satisfy the demand set forth" in a future judgment against the Bank, if any. Unless a lower court has clearly overstepped its jurisdictional bounds, a writ of prohibition is improper. *See Kruger*, 5 ROP Intrm. at 121-22; *Ngetpak Clan*, 9 ROP at 99.

CONCLUSION

For the foregoing reasons, the Petition is **DENIED**. The request for a stay is **DISMISSED** as moot.

GOVERNOR KANGICHI UCHAU and PELELIU STATE GOVERNMENT,
Appellants,

v.

ANDRES NAPOLEON, HENCE SOWAD, NIXON ELBELAU, ARSON KODEP, FERLY MTOCHED, and HARLAN NICHOLAS,
Appellees.

CIVIL APPEAL NO. 12-004
Civil Action No. 10-042

Supreme Court, Appellate Division
Republic of Palau

Decided: October 15, 2012

[1] **Employment Law:** Judicial Review of Termination

Whether the employees were fired based solely on their political beliefs is a question of fact. We review such questions for clear error.

[2] **Appeal and Error:** Standard of Review

Questions of fact are reviewed for clear error. This Court will reverse the Trial Division only if the findings so lack evidentiary support in the record that no reasonable trier of fact could have reached the same conclusion.

Counsel for Appellants: Salvador Remoket
Counsel for Appellees: J. Roman Bedor

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; and RICHARD H. BENSON, Part-Time Associate Justice.

Appeal from the Trial Division, the Honorable ALEXANDRA F. FOSTER, Associate Justice, presiding.

PER CURIAM:

Governor Kangichi Uchau appeals the Trial Division's judgment in favor of Appellees Andres Napoleon, Hence Sowad, Nixon Elbelau, Arson Kodep, Ferly Mtoched, and Harlan Nicholas, all of whom were Peleliu State Government employees prior to the election of Governor Uchau. The Trial Division found that the employees were terminated due to their lack of political support for Governor Uchau in violation of their right to freedom of expression. We affirm the Trial Division.

BACKGROUND

This is the second appeal resulting from the unlawful termination claims filed by the employees. The facts are laid out in sufficient detail in our earlier opinion on the matter. *See Uchau v. Napoleon*, App. Div. No. 10-038, slip op. at 2-4 (Oct. 7, 2011). We recite only the facts and portion of the procedural history relevant to this second appeal.

During the trial, which took place before the first appeal, several of the employees testified regarding their termination from positions within Peleliu State Government. They emphasized that, although they did not support the Governor, they generally kept this to themselves and did not advertise their position or campaign for Uchau's opponent. Nonetheless, Governor Uchau testified that he called a meeting of all State employees and asked those who did not support him to resign. Mere days later, according to testimony, Governor Uchau held another meeting at which he announced he would refuse to approve personnel forms for employees who did not support him. The employees' personnel forms were not approved.

The Trial Division initially found that Governor Uchau violated the plaintiff-employees' freedom of expression. However, we vacated the Trial Division's determination for consideration of whether the political patronage exception applied. We also stated that the Trial Division must determine if the employees were "fired based solely on their political beliefs." *Uchau*, slip op. at 12. The Trial Division issued an order upon remand finding that the political patronage exception did not apply and noting that the employees had shown they were fired "based solely on their political affiliations or beliefs."

Governor Uchau's sole argument on appeal is that this finding was clear error.

STANDARD OF REVIEW

Whether the employees were fired based solely on their political beliefs is a question of fact. We review such questions for clear error. *Dilubech Clan v. Ngeremlengui*, 9 ROP 162, 164 (2002). This Court will reverse the Trial Division only if the findings "so lack evidentiary support in the record [that] no reasonable

trier of fact could have reached the same conclusion." *Id.* (quotation marks omitted).

ANALYSIS

The thrust of Governor Uchau's argument on appeal is that the Governor had no way of knowing whether the employees supported him because they kept their beliefs and their votes secret. He points to several places in the employees' testimonies in which they stated that they did not actively campaign for the Governor's opponent. However, the employees also testified regarding what the Governor said at the meeting after the election. Three of the employees, Napoleon, Nicholas, and Mtoched testified that Governor Uchau specifically said that he would not sign off on the personnel forms of those who did not support him. Almost immediately after this announcement, employees were told that their personnel forms were not approved and they were terminated. Governor Uchau's statements, combined with the timing and manner of their terminations, provided sufficient evidence for the Trial Division to conclude that the employees were fired for their lack of support rather than for more benign reasons proffered by the Governor.

CONCLUSION

Because there was sufficient evidentiary support in the record for the Trial Division's findings of fact concerning the employees' terminations, *see Dilubech Clan*, 9 ROP at 164, we **AFFIRM.**

LEE T. OTOBED, SILES NGIRAREMIANG, RIDEP R. EMESIOCHEL, RAZI C-BOY RIMIRICH, ELIN R. KLOULECHAD, FRANCISCA OTONG, JOHNSON EMESIOCHEL, and IBUUCH TOMOICHI,
Appellants,

v.

PALAU ELECTION COMMISSION; SANTOS BORJA, in his official capacity as the Chairman of the Palau Election Commission; and REPUBLIC OF PALAU, Represented by JOHNSON TORIBIONG, in his official capacity as President of Palau,
Appellees.

CIVIL APPEAL NO. 12-011
Civil Action No. 11-148

Supreme Court, Appellate Division
Republic of Palau

Decided: October 18, 2012

[1] **Appeal and Error:** Standard of Review

Constitutional interpretation is a matter of law which is reviewed de novo.

[2] **Appeal and Error:** Standard of Review

A trial court's ruling on a motion for summary judgment is reviewed de novo.

[3] **Constitutional Law:** Interpretation

When analyzing a constitution, the Court begins its analysis with the language of the disputed provision itself.

[4] **Constitutional Law:** Interpretation
Where a constitution has both English and Palauan versions, a court should not lightly conclude that there is a conflict between the two versions of the Constitution but should rather strive, if possible, to find a single interpretation that gives effect to both.

Counsel for Appellant: Siegfried Nakamura
Counsel for Appellee: Alexis Ortega

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; and C. QUAY POLLOI, Associate Justice Pro Tem.

Appeal from the Trial Division, the Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.

PER CURIAM:

Appellants filed a motion for summary judgment below. The Trial Division construed certain provisions of the Ngatpang State Constitution and ruled against Appellants. For the following reasons, the decision of the Trial Division is reversed.

BACKGROUND

The Trial Division did not hold a hearing on the motion for summary judgment from which Appellants now appeal. The core facts are not in dispute and are drawn from the Trial Division's Decision and Order and from the record before the trial court.

I. Ngatpang State Constitution and 2010 Election.

Appellants in this case are would-be Ngatpang State legislators. In the 2010 elections, each Appellant received a majority of the votes cast in Ngatpang State. The Palau Election Commission ("PEC") interpreted the Ngatpang State Constitution to require that legislators be elected by a majority of the registered voters instead of a majority of the votes cast. PEC certified the election results but, based on its interpretation of the Constitution, refused to seat the Appellants as legislators.

The English and Palauan version of Article IV, Section 2 of the Ngatpang State Constitution providing for the election of Ngatpang legislators is as follows, with emphasis added:

Article IV, Section 2
Legislature

> Palauan: A rechedal a mo mengilt <u>er a rubdois er a rechad el sengkyo</u> er a beluu er a Ngatpang el mo eua (4) el rak a klsir.
>
> English: Members shall be elected at large in the general or special election <u>by the majority of registered voters of Ngatpang State who voted in such election</u> for the term of four (4) years.

II. Palau Election Commission.

PEC determined that there was a conflict between the English and Palauan versions of Article IV, Section 2 ("Section 2"), of the Ngatpang State Constitution. The

English version of Section 2 provides that legislators are to be elected "by the majority of the registered voters of Ngatpang State *who voted in such election*." Emphasis added. In contrast, PEC interpreted the Palauan version of Section 2, which reads in relevant part, "er a rubdois er a rechad el sengkyo," to mean that legislators must be elected by the "majority of registered voters," whether or not such registered voters actually cast a vote in the election. PEC determined the Palauan version should control over the English version based on Ngatpang law. Because none of the Appellants obtained enough votes to satisfy the "majority of registered voters" threshold, PEC refused to seat Appellants as Ngatpang State legislators.

III. Trial Division.

Appellants sued PEC, and on February 1, 2012, the Trial Division issued its Decision and Order denying Appellants' motion for summary judgment and dismissing Plaintiffs' complaint. Like PEC, the Trial Division found a conflict between the Palauan and English version of Article IV, Section 2, of the Ngatpang State Constitution, and it concluded the Palauan phrase "er a rubdois er a rechad el sengkyo" could not be interpreted to include the English phrase "who voted in such election." In light of the conflicting language, the Trial Division looked to Article VI, Section 3, of the Ngatpang State Constitution ("Section 3"), concerning the election of a governor, for guidance on how to interpret the Palauan version of Section 2. Article VI, Section 3, of the Ngatpang State Constitution provides as follows, with emphasis added:

Article VI, Section 3
Governor

> Palauan: A governor a mengilt <u>er a rubdois el chad el sengkyo</u> er a beluu er a Ngatpang el mo euang (4) el rak a klsel e diak el bol betook er a erung el kabechebech.
>
> English: Governor is elected <u>by the majority of registered voters of Ngatpang State</u> for the term of four (4) years and for not more than two (2) consecutive terms.

Based on the trial court's conclusion that the language in the Palauan versions of Section 2 and Section 3 are identical, the court held that the translation of the phrase "er a rubdois er a rechad el sengkyo" is unambiguously defined by the English translation of Section 3, which provides for election of a governor by "the majority of the registered voters."

To harmonize the conflicting English and Palauan versions of Section 2 in accordance with established rules of constitutional interpretation, the Trial Division struck the words "who voted in such election" from the English version, thereby requiring that legislators be elected by "a majority of registered voters."

In support of its interpretation that the English phrase "who voted in such election" was "misplaced" and was "inserted by mistake," the Trial Division noted that Section 2's English phrase "who voted in such election" does not appear anywhere else in either the English or Palauan versions of the Ngatpang State Constitution. It also found the English version of Section 2

"terribly awkward" because it expressed a concept that was more easily articulated as "majority of votes cast" rather than by reference to registered voters "who voted in such election." The trial court concluded: "Common sense dictates that one does not choose a convoluted way of expressing a well-known practice when there exists a better and well-known way to express it." Tr. Div., at 5.

Moreover, the trial court reasoned that because no other state in Palau requires the election of its representatives by a majority of registered voters, "it follows that the framers of the [Ngatpang State] Constitution deliberately went out of their way to be different," and their intent to require the higher election threshold "is clear from the very text of the document." Tr. Div., at 6. Thus, the Trial Division declined to turn to extrinsic evidence in the form of, among other things, affidavits by the framers of the Ngatpang State Constitution.

Accordingly, the Trial Division denied Appellants' motion for summary judgment and dismissed the case.

STANDARD OF REVIEW

[1, 2] Constitutional interpretation is a matter of law. *See The Ngaimis v. Republic of Palau*, 16 ROP 26, 28 (2008) (reviewing constitutional interpretation de novo); *Gibbons v. Seventh Koror State Legislature*, 13 ROP 156, 158 (2006) (reviewing de novo a disposition of summary judgment based on interpretation of state constitution). A lower court's conclusions of law are reviewed de novo. *See Wong v. Obichang*, 16 ROP 209, 211-12 (2009); *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001). Specifically, a trial court's ruling on a motion for summary judgment is reviewed de novo, "employing the same standards that govern the trial court and giving no deference to the trial court's findings of fact." *Gibbons*, 13 ROP at 158 (citing *ROP v. Reklai*, 11 ROP 18, 20-21 (2003)).

ANALYSIS

The constitutional interpretation issue on appeal is whether, under Article IV, Section 2, of the Ngatpang State Constitution, legislators must be elected by a majority of votes cast in the election or by a majority of the registered voters in Ngatpang State.

The parties submitted substantial briefs in support of their interpretations of Section 2, which include extensive reference to various canons of constitutional interpretation, extrinsic evidence, and other provisions of the Ngatpang State Constitution.[1] This Court has carefully considered the Trial Court's decision and the extensive briefs filed on appeal. Because this Court rules that the plain language of Section 2 is not ambiguous, the various

[1] For example, much reference is made to Article VI, Section 3, of the Ngatpang State Constitution, which addresses the election of a governor in Ngatpang. The Court notes that both the English and the Palauan versions of Section 3 are worded differently from both versions of Section 2. "[W]here two parts of a constitution use different language to address the same or similar subject matter, a difference in meaning is presumed as a result of using the different language." 16 Am. Jur. 2d *Constitutional Law* § 79 (2009). In any event, for the reasons set out herein, the Court concludes it is unnecessary to turn to Section 3 under these circumstances.

arguments that presuppose ambiguity need not be addressed.

[3, 4] When analyzing a constitution, the Court begins its analysis with the language of the disputed provision itself. *See Seventh Koror State Legislature v. Borja*, 12 ROP 206, 208 (Tr. Div. 2005) ("In the ordinary course of constitutional interpretation, the Court begins with the constitutional language and, only if that language is ambiguous, does it then turn to constitutional history and other secondary evidence."); *Senate v. Nakamura*, 7 ROP Intrm. 212, 214 (1999) (same). Specifically, where a constitution has both English and Palauan versions, a court "should not lightly conclude that there is a conflict between the two versions [of the Constitution] but should rather strive, if possible, to find a single interpretation that gives effect to both." *Borja*, 12 ROP at 208 ("[A] construction must be sought which will bring the terms of the two languages into harmony with the other."). *See also* 16 Am. Jur. 2d *Constitutional Law* § 66 ("[H]armony in constitutional construction should prevail whenever possible . . . . Every effort should be made to construe constitutional provisions harmoniously, and no provision should be construed to nullify or impair another."). It is "[o]nly where an irreconcilable conflict exists between different provisions of the constitution [that] the office of judicial construction is to determine which shall prevail." *Id.* at § 67.

Here the Court concludes the language of the English version of Section 2, which provides for election "by the majority of registered voters of Ngatpang State <u>who voted in such election,</u>" is not ambiguous. Emphasis added. The Court must give meaning to the adjective clause "who voted in such election." That adjective clause modifies the preceding noun-phrase "registered voters." Thus, the entire subordinate clause "by the majority of registered voters of Ngatpang State who voted in such election" states plainly, even if inartfully, that legislators are elected by a majority of the votes cast.

The Court also concludes that, as to Section 2, the English phrase, "by the majority of the registered voters of Ngatpang State who voted in such election" can be translated in Palauan as "er a rubdois er a rechad el sengkyo er a beluu ra Ngatpang". Technical differences are insignificant and, ultimately, are reconcilable because a single interpretation that gives effect to both versions is possible. In accordance with the Court's duty to harmonize the English and Palauan versions of a constitution, the Court concludes the English and Palauan versions of Section 2 mean the same thing: under Article IV, Section 2, of the Ngatpang State Constitution, candidates for the legislature in Ngatpang State are elected by a majority of the registered voters of that State who voted in the election. This holding effectuates the intent of the drafters of the Ngatpang State Constitution based on a plain reading of Section 2, and further analysis of the language of Section 2 or other sections of the Constitution is not required.

CONCLUSION

For the foregoing reasons, the February 1, 2012, Decision and Order of the Trial Division denying Appellants' motion for summary judgment is **REVERSED**.

BENEDICTA NGOTEL,
Appellant,

v.

DUTY FREE SHOPPERS PALAU, LTD., DFS PALAU LTD.,
Appellees.

CIVIL APPEAL NO. 12-014
Civil Action No. 11-124

Supreme Court, Appellate Division
Republic of Palau

Decided: October 29, 2012

[1] **Employment Law:** Breach of Contract

A breach of contract action arises out of a discharge from employment when an employee is terminated in a manner inconsistent with the terms of the employment contract.

[2] **Contracts:** Duration

Generally, a contract for services which does not specify the duration of the contract is terminable at will by either party at any time.

[3] **Employment Law:** Employment at Will

Contracts for employment that do not specify grounds for termination are terminable at will by either party at any time.

[4] **Employment Law:** Breach of Contract

A former employee may sustain a breach-of-contract claim against their former employer by establishing a breach of an implied-in-fact contract. In such an action, the burden of proving the terms and existence of the contract must lie with the employee.

[5] **Contracts:** Offers

An offer is not made when it is posted, but when it is received.

[6] **Employment Law:** Implied-in-Fact Contracts

To the extent that an employee seeks to establish an implied-in-fact contract predicated upon specific conduct, that employee must, at the very least, show knowledge of such conduct.

[7] **Employment Law:** Implied-in-Fact Contracts

A former employee establishes a breach of an implied-in-fact contract claim against her former employer by showing: (1) conduct by the employer constituting an offer of employment in abrogation of the at-will rule; (2) the employee accepted the offer by continuing her employment after learning of the offer-creating conduct; and (3) breach of the terms of the offer.

[8] **Employment Law:** Implied-in-Fact Contracts

Generally, a clear and unambiguous at-will provision in a written employment contract, signed by the employee, cannot be overcome by evidence of a prior or contemporaneous implied-in-fact contract requiring good cause for termination.

[9] **Employment Law:** Progressive Discipline

The promulgation of "progressive discipline" policies by an employer may bind an employer to those policies. Under such circumstances, a termination in contravention of the progressive discipline will be considered a breach of contract.

[10] **Employment Law:** Termination

'Good cause' in the context of implied employment contracts is defined 'as fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual. A reasoned conclusion, in short, supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond.

[11] **Employment Law:** Good Faith and Fair Dealing

Within in the context of an employment contract, a breach of the covenant of good faith and fair dealing is solely contractual.

[12] **Employment Law:** Good Faith and Fair Dealing

Where a termination is based on alleged wrongful conduct on the part of an employee, absent evidence of bad faith, where it is undisputed the employer has conducted an investigation and determined the issue against the employee, there is no breach of the implied covenant of good faith and fair dealing, even if the employee could subsequently prove that the factual finding of misconduct was a mistake.

Counsel for Appellant: Yuwiko Dengokl
Counsel for Appellee: Kevin N. Kirk

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and LOURDES F. MATERNE, Associate Justice.

Appeal from the Trial Division, the Honorable ALEXANDRA F. FOSTER, Associate Justice, presiding.

PER CURIAM:

This case concerns a wrongful termination and breach of contract action brought by Appellant Benedicta Ngotel against her former employer, Appellee Duty Free Shoppers Palau, LTD, DFS Palau, LTD. Ngotel challenges the Trial Division's decision granting summary judgment in favor of Appellee. For the following reasons, the decision of the Trial Division is affirmed.

BACKGROUND

Appellee DFS Palau (DFSP) is a Palauan corporation that controls three retail stores throughout the country. The corporation is owned wholly by DFS Ventures Singapore (PTE) Limited. Within the corporate structure of DFS Ventures, DFSP is considered a part of the "Midpac Division" and is overseen by a separate entity, DFS Saipan.

From approximately 1987 to 1998, Ngotel worked at DFS Saipan. On March 30, 1996, Ngotel signed a document acknowledging both receipt of a copy of a

"DFS Employee Handbook" and an understanding that "the Company c[ould] terminate the employment relationship at will, with or without cause, at any time."

Sometime in 1999, Ngotel was hired by Gregory Gordon, the general manager of DFSP, to work as a sales associate at DFSP's retail stores in Palau. Ngotel's employment was terminated on June 8, 2005. On June 8, 2011, Ngotel filed a two-count complaint in the Supreme Court, Trial Division, alleging "Wrongful Termination or Discharge" and "Breach of Contract" arising from her termination. DFSP filed a motion for summary judgment, arguing that Ngotel was an at-will employee and that, as such, her employment was terminable without justification.

In support of its motion for summary judgment, DFSP submitted an affidavit from Gordon in which he attested that, at the time he hired Ngotel, he "gave her a copy of the then current DFS Employee Handbook and went over with [Ngotel] the contents of the Handbook section by section, including the section regarding . . . employment status." Gordon also attested that Ngotel had been disciplined sixteen times and had been suspended for three days in June of 2004 "due to her having had four cash handling errors within one month."

On May 31, 2005, Gordon conducted a "cash handling" test in which he placed an additional twenty dollars in Ngotel's "change fund (the amount of change each employee is given to open their cash register at the start of their shift)." According to Gordon Ngotel failed to report the overage and, when questioned about the alleged failure, denied any wrong doing. Gordon terminated Ngotel after consultation with the DFS Saipan Human Resources Department.

In addition to the affidavit from Gordon, Appellee submitted into evidence a series of internal memorandums regarding Ngotel's termination and excerpts of versions of the DFSP Employee Handbooks from 1995, 2001, 2002, and 2008. The memorandums reflect that Ngotel was terminated following a cash-handling test in which she failed to count her change-fund as required by company policy.[1]

The 1995 version of the Handbook included a section titled "Your Employment at DFS" which provided that "[y]our employment at DFS is **'at will.'** This means that your employment is entered into voluntarily and you are free to resign at any time, for any reason, with or without notice." Emphasis in original. The 1995 version included a disclaimer that "[t]his Handbook is presented as a matter of information and its contents should not be interpreted as a contract between DFS and any of its employees. It is not intended to be an enforceable legal document, and it does not alter the employment at-will relationship between DFS and its employees. With the exception of at-will employment, DFS reserves the right to change any of the policies contained in this Handbook at any time."

[1] Gordon's affidavit explained that these documents were "records of regularly conducted business activities of the Defendant made at or near the time by, or from information transmitted by, a person with knowledge, and were all kept in the course of the Defendant's regularly conducted business activities." Accordingly, while hearsay, the termination memorandums are admissible under the business records exception to the hearsay rule. *See* ROP Rule of Evidence 803(6).

The 2001 and 2002 versions of the Handbook define at-will employment as that which "can be terminated, with or without cause, and with or without notice, at any time at the option of DFS."[2] However, there is no evidence that Ngotel was shown any version other than the 1995 version of the Handbook.

In response to the motion for summary judgment, Ngotel submitted an affidavit in which she claimed, in relevant part, that: (1) she did not remember meeting with Gordon at the outset of her employment with DFSP; (2) she only recalled making four "counting errors" during her employment, and that Gordon's statements to the contrary were not true because she could not remember them; (3) the reasons stated for her suspension were inaccurate; (4) DFSP had a cash handling policy which provided her certain rights prior to termination; and (5) the reason given for her termination "is not true or accurate because [she] follow[ed] established cash handling procedures." She also recounts in her affidavit events in which Gordon "either terminated . . . or recommended [the] termination of [an employee and t]hat termination was reversed by higher ups in Saipan." Finally, the affidavit identifies documents attached to the affidavit as Exhibit A ("the relevant pages of the cash handling policy, including those for retail operations over/short policy for the position that I held while employed by defendant") and Exhibit B ("the Leave & Termination Personal Action Form").

The document identified as Appellant's Exhibit A includes two separate documents (the Policy Documents). The first document, a 1996 "Cash Handling Policy for Sales Associates" is printed on a DFS MidPacific-Region letterhead and sets forth thirteen procedures which would "lead to disciplinary action up to and including termination of employment." The second document, bearing an effective date of June 1, 1992, is titled "RETAIL OPERATIONS OVER/SHORT POLICY" and provides for escalating discipline for "any variance between the actual sales of any individual employee from the register versus the actual deposits on money turned in." Under the terms of the Over/Short Policy, "major infractions," defined as variances between ten and fifty dollars, would be punished in the following way: (1) first offense—first written warning; (2) second offense—second written warning; (3) third offense—third written warning with a notification to Security and the human resources department; (4) fourth offense—one week suspension (without pay); and (5) fifth offense—subject to termination. "Critical infractions," defined as variances greater than fifty dollars, were terminable after the fourth offense.

DFSP filed a timely reply, contending that Ngotel's response was insufficient to create a genuine issue of material fact. Addressing the Policy Documents, DFSP argued that the documents were not authenticated properly, and that, even if they had been, "the number [of] infractions committed by the Plaintiff over the course of her employment with the Defendant fully justifies her termination under the policies." The Reply also included an additional affidavit from

[2] The 2008 version, in contrast, defines "at-will" employment as employment which can be "terminated, with or without cause, and with or without notice by you or DFS."

Gordon; fourteen warning notices issued to Ngotel by Appellee for various infractions; and a May 16, 2005, memorandum purporting to memorialize an incident in which Ngotel had been given a "notice for not following instructions."

On February 14, 2012, the Trial Division issued an order granting summary judgment in favor of Appellee. In its decision, the trial court found that DFSP's employee handbook created an at-will employment relationship between DFSP and Ngotel, and that Ngotel had failed to show a genuine issue of material fact as to the existence of an implied contract. Ngotel filed a timely appeal with this Court.

STANDARD OF REVIEW

We review a lower court's grant of summary judgment de novo. *See Becheserrak v. Eritem Lineage*, 14 ROP 80, 81 (2007). In considering whether summary judgment is appropriate, all evidence and inferences are viewed in the light most favorable to the non-moving party. *See Obeketang v. Sato*, 13 ROP 192, 194 (2006). Summary judgment is therefore not appropriate when genuine issues of material fact persist. *See id.*

ANALYSIS

Ngotel's complaint asserted two claims based on her allegedly wrongful discharge: (1) breach of contract and (2) "wrongful termination or discharge." The trial court granted summary judgment in favor of DFSP on both counts based upon a finding that Ngotel was an at-will employee. As her sole grounds for appeal, Ngotel asserts that the grant of summary judgment was in error because there was a genuine issue of material fact as to whether she was an at-will employee.

I. Breach of Contract

[1] Ngotel contends that DFSP was required to follow certain procedures when dealing with cash handling discrepancies and that its failure to do so constituted a breach of contract. A breach of contract action arises out of a discharge from employment when an employee is terminated in a manner inconsistent with the terms of the employment contract. *Owens v. House of Delegates*, 1 ROP Intrm. 320, 325 (Tr. Div. 1986). Where the grounds and procedures for termination are set forth in a signed contract of employment, the wrongful discharge analysis normally will be straight-forward. *Id.* Here, no such contract exists.

[2, 3] "Generally, a contract for services which does not specify the duration of the contract is terminable at will by either party at any time." *Ngiratkel Etpison Company, Ltd. v. Rdialul*, 2 ROP Intrm. 211, 221 (1990). Employment contracts are considered contracts for services. *See Foster v. Bucket Dredger S/S "Digger One*," 7 ROP Intrm. 234, 235-36 (Tr. Div. 1997) (referring to an employment contract as "oral contract for services."). Thus, under general principles of contract law, contracts for employment that do not specify grounds for termination are terminable at will by either party at any time. *Rdialul*, 2 ROP Intr. at 221. This rule, establishing "at-will" employment in the absence of a contract to the contrary, is followed throughout the United States. *See e.g., Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 665, 765 P.2d

373 (Cal. 1988) (Under California law, "[a]bsent any contract . . . the employment is **'at-will'** and the employee can be fired with or without good cause.") (emphasis in original); *Sheets v. Knight*, 779 P.2d 1000, 1006 (Or. 1989) (describing Oregon as an "at will" jurisdiction); *Ford v. Trendwest Resorts, Inc.*, 43 P.3d 1223, 1226 (Wash. 2002) ("In Washington, the general rule is that an employer can discharge an at-will employee for no cause, good cause or even cause morally wrong without fear of liability.") (internal quotation marks omitted).

Despite the foregoing, American courts have recognized implied employment contracts that modify the at-will employment rule. *Vice v. Conoco Inc.*, 150 F.3d 1286, 1288-89 (10th Cir. 1998) (Under Oklahoma law, "an implied or express contract that restricts an employer's power to terminate the employee can alter the employment relationship."); *Fox v. MCI Communications Corp.*, 931 P.2d 857, 859 (Utah 1997) ("An at-will employee may overcome that presumption by demonstrating that [there] is an implied or express agreement that the employment may be terminated only for cause or upon satisfaction of another agreed-upon condition."). As the California Supreme Court has stated, despite the at-will rule,

> [t]he parties may define for themselves what cause or causes will permit an employee's termination and may specify the procedures under which termination shall occur . . . . The contractual understanding need not be express, but may be *implied in fact*, arising from the parties' *conduct* evidencing their actual mutual intent to create such enforceable limitations.

Guz v. Bechtel National, Inc., 100 Cal. Rptr. 2d 352, 365, 8 P.3d 1089 (Cal. 2000) (emphasis in original). Under this formulation, courts consider the policies and practices of an employer "as being in effect offers of a unilateral contract which offer is accepted if the employee continues in employment." *Id.* at 371.

[4] This Court has given effect to implied-in-fact contracts. *Loitang v. Jesus*, 5 ROP Intrm. 216, 218 (1996); *see also Ho v. Liquidation Comm. of Nanjing Orientex Garments, Co.*, 11 ROP 2, 5 (2003). Thus, we adopt the framework of the American Courts and hold that a former employee may sustain a breach-of-contract claim against their former employer by establishing a breach of an implied-in-fact contract. In such an action, the burden of proving the terms and existence of the contract must lie with the employee. *ROP v. Reklai*, 11 ROP 18, 18 (2003) (to state a claim for breach of contract the non-breaching party must establish the existence of a contract).

[5, 6] "An offer is not made when it is posted, but when it is received." 17A Am. Jur. 2d *Contracts* § 46 (2004); *see also Kuta v. Joint Dist. No. 50 (J)*, 799 P.2d 379, 382 (Colo. 1990) ("To be effective, an offer must be communicated."). Accordingly, to the extent that an employee seeks to establish an implied-in-fact contract predicated upon specific conduct, that employee must, at the very least, show knowledge of such conduct. *See Tritle v. Crown Airways, Inc.*, 928 F.2d 81, 85 (4th Cir. 1990) (declining to find a written policy created an implied contract where "there is

no evidence in the record . . . to indicate that the document was ever provided to employees . . . ."); *see also Kuta*, 799 P.2d at 382 (affirming summary judgment in favor of defendant employer because "prior to learning of [the] policy [plaintiffs] had no expectation that their assent to the bargain was invited by the employer and that the employee's assent would conclude the bargain."); *Manning v. Cigna Corp.*, 807 F.Supp. 889, 893-95 (D.Conn. 1991) (collecting cases).

[7] In summary, we hold that a former employee establishes a breach of an implied-in-fact contract claim against her former employer by showing: (1) conduct by the employer constituting an offer of employment in abrogation of the at-will rule; (2) the employee accepted the offer by continuing her employment after learning of the offer-creating conduct; and (3) breach of the terms of the offer. Here, Ngotel contends that the Policy Documents created a binding procedure on DFSP which governed its ability to terminate for cash handling errors. In the alternative, Ngotel argues DFSP's purported reversal of another employee's termination and its past decisions not to terminate her for cash handling errors created a policy whereby she "would not be terminated without good cause or reason." DFSP responds that the foregoing could not create an implied contract and that even if it could, an implied contract could not be created in the face of Ngotel's express acknowledgment of at-will employment during her employment with DFS Midpac or by the promulgation of the employee handbooks that state employment is only at will.

A. Do the Handbooks and DFS Saipan Contract preclude a finding of an implied contract abrogating the at-will rule?

[8] DFSP submits that the Handbooks and the DFS Saipan contract signed by Ngotel prohibit the implication of an implied contract to the contrary. Generally, a "clear and unambiguous at-will provision in a written employment contract, signed by the employee, cannot be overcome by evidence of a prior or contemporaneous implied-in-fact contract requiring good cause for termination." *Dore v. Arnold Worldwide, Inc.*, 46 Cal. Rptr. 3d 668, 671, 139 P.3d 56, (Cal. 2006).

As an initial matter, it is beyond clear that a previous employment contract between an employee and one entity does not control the subsequent employment terms between that person and a second entity. *See Perrin v. Remengesau*, 11 ROP 266, 268 (Tr. Div. 2004) ("Only a party to a contract can be liable for breaching it.") (citing 17A Am. Jur. 2d *Contracts* § 412 (2004)). Thus, the 1996 acknowledgment Ngotel signed while employed with DFS Saipan has no bearing on her subsequent employment rights with DFSP. *Id.*

Furthermore, even though it is undisputed that Ngotel was shown a handbook providing that her employment was "at will," the handbook went on to define at-will employment as meaning "that your employment is entered into voluntarily and [you] are free to resign at any time, for any reason, with or without notice." This language contains no provision, clear or otherwise, regarding DFSP's ability to terminate Ngotel at will. Thus, Ngotel's

acknowledgment of the 1995 Handbook cannot preclude a finding of an implied-in-fact contract abrogating the at-will doctrine.[3] *Id.* Because neither the Handbooks nor the DFS Saipan contract prohibit the existence of an implied-in-fact contract, we next consider whether, under the totality of the circumstances, DFSP's conduct created an implied-in-fact contract altering the default at-will relationship between itself and Ngotel.

B. Was there sufficient evidence of an implied contract abrogating the at-will rule?

Ngotel contends that the trial court erred in finding that she was an at-will employee because: (1) DFSP was bound by the terms of the Policy Documents; or, in the alternative (2) DFSP could only terminate Ngotel for "good cause or reason" because it had reversed a previous termination recommendation regarding another employee and had excused at least one cash handling error on the part of Ngotel.

1. Did the Policy Documents create an implied-in-fact contract that was violated?

[9] The promulgation of "progressive discipline" policies by an employer may bind an employer to those policies. *Mobil Coal Producing, Inc., v. Parks*, 704 P.2d 702, 705-07 (Wyo. 1985). Under such circumstances, a termination in contravention of the progressive discipline will be considered a breach of contract. *Id.* On appeal, Ngotel submits that DFSP was bound by the terms of the Policy Documents.

As explained above, to establish an implied-in-fact contract, Ngotel must establish: (1) conduct of DFSP sufficient to constitute an offer of employment abrogating the at-will rule; and (2) that she accepted such offer by continuing her employment after acquiring knowledge of the conduct. The Trial Division found that the Policy Documents failed to raise a genuine issue of material fact as to the existence of an implied-in-fact contract because Ngotel did not "state how she came by the[] documents, who gave them to her, when they were given to her, when they were applicable . . . who told her to rely upon them, or whether and when she relied on them." We disagree.

Ngotel submitted an affidavit to the trial court in which she attested the Policy Documents are "the relevant pages of the cash handling policy, including those for retail operations over/short policy . . . for the position that I held while employed by defendant." Although it is true that Ngotel did not attest that she received the documents from DFSP, two write-ups of Ngotel from October of 2000, both for twenty-dollar shortages, include language that "[y]ou have read and sign [sic] the Cash Handling Policy and you are aware that any overage or shortage will be written up." Thus, the uncontradicted evidence of record is: (1) the Policy Documents are the relevant pages of DFSP's cash handling policy from the time Ngotel was employed; and (2) Ngotel was given DFSP's Cash Handling Policy by DFSP. Drawing every inference

[3] Although the later versions of the handbook include provisions allowing DFSP to terminate employees at-will, such changes provide no relief to Appellee because there is no evidence that Appellant was ever shown the later versions. *See supra* Section III(A).

in favor of Ngotel, we conclude that the evidence was sufficient to conclude that she was given the Policy Documents by DFSP in 2000. We further conclude that DFSP's provision of the Policy Documents constituted an offer to abrogate the at-will rule with respect to cash handling errors and that Ngotel's continued employment constituted acceptance of this offer. Having found offer and acceptance, we conclude that Ngotel established an implied-in-fact contract with regard to the terms of the Policy Documents.

We now turn to the question of whether Ngotel established a breach of the implied-in-fact contract. In this regard, we note that the Cash Handling Policy for Sales Associates provides, in relevant part, that "[w]hen change fund is received, it must be counted immediately to verify accuracy of amount received. If any discrepancies are found, a supervisor must immediately be notified to address the situation." The Cash Handling Policy further provides that "[a]ny violation of the cash handling policies listed above will lead to disciplinary action up to and including termination of employment." This term controls over the progressive discipline set forth in the Over/Short Policy. *See Estate of Rechucher v. Seid*, 14 ROP 85, 90 (2007) ("A general principle of contract interpretation is that 'specific terms and exact terms are given greater weight than general language.'") (quoting Restatement (Second) of Contracts § 203(c) (1981)).

Here, Ngotel was terminated after she failed to count the change fund provided to her at the start of her shift.[4] This was an explicit grounds for termination under the Policy Documents. Thus, her termination was not a breach of the implied-in-fact contract based upon the Policy Documents' terms.

2. Did DFSP breach an implied promise to terminate Ngotel only for good cause?

Ngotel next contends that DFSP was limited to terminating her only for good cause by virtue of: (1) DFSP's reversal of the termination of another employee; (2) her general experience with DFSP; and (3) the fact that she was not terminated for four previous cash handling errors. We conclude that, even if such a contract existed, it was not breached.

> **[10]** Good cause' in the context of implied employment contracts is defined 'as fair and honest reasons, regulated by good faith on the part of the employer, that are not trivial, arbitrary or capricious, unrelated to business needs or goals, or pretextual. A reasoned conclusion, in short, supported by substantial evidence gathered through an adequate investigation that includes notice of the claimed misconduct and a chance for the employee to respond. *Cotran v. Rollins Hudig Hall Intern., Inc.*, 17 Cal.4th 93, 107-108, 69 Cal.Rptr.2d 900, 948 P.2d 412 (1998).

[4] Although Ngotel contends that she followed "established cash handling procedures," she does not deny that she failed to count the change fund, as alleged. Furthermore, when considering the propriety of a termination, "the focus must be on whether the employer reasonably determined it had cause to terminate." *Soalablai v. Palau Nat'l Communications Corp.*, 13 ROP 199, 201 (Tr. Div. 2005).

Pomeroy v. Wal-Mart Stores, Inc., 834 F.Supp.2d 964, 977 (E.D.Cal. 2011) (emphasis in original).

As explained above, Ngotel's employment was terminated for failing to count her change fund. It is indisputable that a failure to count and report errors in a change fund is related to DFSP's business needs and goals. Furthermore, the conclusion regarding Ngotel's error was reached in controlled circumstances, by employing a standardized test issued to all employees and after giving Ngotel an opportunity to respond. The internal memorandums also reflect that, when reaching the decision to terminate, DFSP considered Ngotel's "other work performance."[5] Accordingly, we conclude that Ngotel was fired with good cause and that, therefore, she may not sustain a breach of contract action based upon an implied contract to terminate only for cause. *Id.*

[11] Similarly, in the wrongful discharge section of her complaint, Ngotel invoked "a breach of good faith and fair dealing on the part of the defendant." Within in the context of an employment contract, a breach of the covenant of good faith and fair dealing is "*solely contractual*," and we treat it as such. *See Guz*, 100 Cal. Rptr. 2d at 377 (emphasis in original).

[12] Where a termination is based on alleged wrongful conduct on the part of an employee, "absent evidence of bad faith, where it is undisputed the employer has conducted an investigation and determined the issue against the employee, there is no breach of the implied covenant of good faith and fair dealing, even if the employee could subsequently prove that the factual finding of misconduct was a mistake." *Rodriguez v. International Business Machines*, 960 F. Supp. 227, 232 (N.D. Cal. 1997) (emphasis omitted). Ngotel has pointed to absolutely no evidence of bad faith. Thus, because we conclude that Ngotel was terminated in good faith, any claim based on the implied covenant of good faith and fair dealing must also fail.

In summary, we conclude that DFSP did not breach a contract with Ngotel when it terminated her for failing to count her change fund. Accordingly, we affirm the trial court's dismissal of Ngotel's breach of contract claim.

II. Wrongful Discharge

On appeal, Ngotel does not challenge the trial court's grant of summary judgment against her wrongful discharge claim or state the legal grounds on which such a claim rests. Her response to DFSP's motion for summary judgment also fails to address any grounds for wrongful discharge (apart from the breach of contract issues raised above). Thus, the wrongful discharge claim may be deemed waived. *Dalton v. Borja*, 12 ROP 65, 75 (2005) ("merely mentioning a claim in a complaint but failing to advance any

[5] DFSP's records reflect that Ngotel had been written up fifteen times for various infractions of company policy. Of these write-ups, seven were for "major" or "critical" over/short errors. Even though Ngotel contends that she can only recall four errors, there is no genuine issue of material fact as to whether DFSP reasonably believed that she had committed the infractions. *See Ace Rent-A-Car, Inc., v. Empire Fire & Marine Ins.*, 580 F.Supp. 2d 678, 690 n.5 (N.D. Ill. 2008) ("His inability to recall is not a denial, and is not sufficient to raise a genuine issue of material fact . . . . ").

argument on that claim, does not preserve that issue.”).

Nevertheless, we note that, although wrongful discharge claims sound primarily in contract, courts have held that a tort claim for wrongful discharge may be asserted “when an employer terminates an employee for reasons that contravene a clearly mandated public policy.” *Danny v. Laidlaw Transit Services, Inc.*, 193 P.3d 128, 131 (Wash. 2008). Ngotel does not allege that her termination violated public policy. Accordingly, we conclude that her wrongful discharge claim, to the extent it existed as an independent tort, was dismissed properly. *Id.*

CONCLUSION

For the foregoing reasons, the order of the trial court is **AFFIRMED.**

ABEL SUZUKY,
Appellant,

v.

MARIO GULIBERT,
Appellee.

CIVIL APPEAL NO. 12-033
Civil Action No. 11-266

Supreme Court, Appellate Division
Republic of Palau

Decided: November 26, 2012

[1] **Appeal and Error:** Procedure

Republic of Palau Rule of Appellate Procedure 28 governs the form of appellate briefs filed in this Court. Specifically, Rule 28(a) requires, among other things, that a brief must be typed and double-spaced, must include a properly formatted Table of Contents and Table of Authorities, must list clearly and concisely each question presented on appeal, and must be accompanied by a copy of the judgment or orders appealed from.

[2] **Appeal and Error:** Procedure

As a general matter, the burden of demonstrating error on the part of a lower court is on the appellant.

[3] **Appeal and Error:** Procedure

Failure to adhere to the Rules of Appellate Procedure with respect to citation to the factual record is fatal to a party’s factual allegations.

[4] **Appeal and Error:** Burden of Proof

With respect to specifications of legal error, the burden is on the party asserting error to cite relevant legal authority in support of his or her argument.

[5] **Appeal and Error:** Pro Se Litigants

Pro se litigants have a duty to inform themselves of the requirements for proceeding with an appeal.

Counsel for Appellant: Pro Se
Counsel for Appellee: Rachel A. Dimitruk

BEFORE: KATHLEEN M. SALII, Associate Justice; ROSE MARY SKEBONG, Associate Justice Pro Tem; and HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem.

Appeal from the Trial Division, the Honorable LOURDES F. MATERNE, Associate Justice, presiding.

PER CURIAM:

This case concerns a long-running dispute between members of the Orakiblai Clan—Appellant Abel Suzuky and Appellee Mario Gulibert—which resulted in a Trial Division Decision and Judgment in favor of Appellee on his claims of defamation against Appellant. For the following reasons, the Court **DISMISSES** this appeal for Appellant's failure to comply with the Republic of Palau Rules of Appellate Procedure and for inadequate briefing.

BACKGROUND

Despite Appellant's reference to numerous facts that are beyond the scope of his appeal, the factual background relevant to this appeal is limited and largely undisputed.

The subject of this dispute is a trust fund known as the Angaur Municipal Fund, which was established with approximately $10,000,[1] for which Appellee and Andres Uherbelau served as trustees since November 15, 1999.

On September 23, 2011, Appellant delivered a letter he wrote to Ms. Lbong Walter at Pacific Savings Bank, which he copied to Obak Andres Uherbelau, Appellee Mario Gulibert, and Angaur Rubak. In the letter Appellant asserted, among other things, that Andres Uherbelau and Appellee improperly took control of and misused a trust fund managed by "the Board" by dissolving the Board and changing their titles to "Trustees" without a meeting of the "Angaur Rubak."

Appellee issued a letter to Appellant on October 6, 2011, demanding that Appellant retract his false statements and cease and desist from further accusations. On December 15, 2011, Appellee filed a lawsuit for defamation in the Trial Division of the Supreme Court.

Protracted litigation between the parties resulted in Appellant being sanctioned for his failure to follow the

[1] The Court notes that Appellant appears to make reference to multiple trust funds and to numerous sources of the money in those trusts in his Opening Brief, but he neither clearly establishes to which trusts he refers nor addresses the Trial Division's factual findings with respect to the corpus and control of the trust fund at issue.

Court's orders and rules, partial summary judgment in favor of Appellee, and a temporary restraining order against Appellant prohibiting continued dissemination of defamatory statements. After a trial on the remaining issues of fact, on August 22, 2012, the Trial Division issued its Decision and Judgment in favor of Appellee and awarded Appellee $9,115.00 in punitive damages for Appellant's malicious defamation. Appellant filed his timely appeal on August 27, 2012.

ANALYSIS

On appeal, Appellant appears to assert a number of factual and legal challenges to the Trial Division's rulings without citation to the record or to any legal authority.

I. Appellant's Challenges on Appeal

Appellant's Opening Brief is three pages. Two of Appellant's pages assert a number of factual matters that are either beyond the scope of the underlying proceeding or are entirely new at this stage.[2] In addition, Appellant asserts facts contrary to those the Trial Division found conclusively proven as a sanction for Appellant's disregard of court orders and procedure, such as Appellant's continued assertion that Appellee misused funds in the disputed trust. In any event, Appellant does not make a single citation to the record to support his numerous assertions of fact.

Appellant's argument on appeal is limited to one page that only purports to set out two issues. The first issue appears to assert that the Trial Division improperly defined, and ostensibly confused, the terms "trustee" and "depositor" in reaching its conclusion that Appellant's statements about Appellee's mismanagement of the trust were false. This argument also seems to imply that Appellee and Andres Uherbelau received but failed to deposit into the trust an additional sum of money to which the Angaur Rubak is entitled.

The second issue appears to present a general challenge to the Trial Division's conclusion that Appellant's letter of September 23, 2011, was unlawful and an implicit challenge to the Trial Division's grant of a temporary restraining order preventing Appellant's dissemination of materials related to his accusations of wrongdoing against Appellee in this matter.

Neither of Appellant's issues refer to specific rulings by the trial court, cite to any portion of the record, nor provide any legal citations in support of his argument.

II. Standards for Adequate Appeals

The Republic of Palau Rules of Appellate Procedure and the Court's case law impose both formal and substantive requirements for adequate appellate briefing.

A. Formal requirements

[1] Republic of Palau Rule of Appellate Procedure 28 governs the form of appellate briefs filed in this Court. Specifically, Rule

[2] For example, Appellant asserts Appellee was able to "make a loan of $900,000" based "on this Rubak's money" and that Masao Gulibert improperly transferred Orakiblai Clan shares in Western Caroline Trading Company to Appellee. Neither "fact" appears properly to be a part of the trial court record, nor does it appear the Trial Division made any express related findings.

28(a) requires, among other things, that a brief must be typed and double-spaced, must include a properly formatted Table of Contents and Table of Authorities, must list clearly and concisely each question presented on appeal, and must be accompanied by a copy of the judgment or orders appealed from.

In addition, Rule 28(a)(7) provides in relevant part:

> In the body of all briefs shall be the Statement of the Case. This shall set forth, in clear and concise terms and in substantially the following order, the following: the nature of the action, suit, or proceeding, [and] the relief sought . . . ; the nature of the judgment, decree, or other order to be reviewed; a concise but complete statement of all facts material to the determination of the question(s) presented for appellate decision, such statement to be presented in narrative form, with reference to the portion of the record or recording of the hearing where such facts appear; and any other matters necessary to inform the Appellate Division concerning the questions and contentions raised in the appeal.

Rule 28(e) further provides with respect to citation to the record:

> References to evidence must be followed by a pinpoint citation to the page, transcript line, or recording time in the record. Only clear abbreviations may be used. Any pinpoint citation to an audio recording must include the day, hour, minute, and second the testimony was offered. Factual arguments or references to the record not supported by such an adequately precise pinpoint citation may not be considered by the Appellate Division. A party referring to evidence whose admissibility is in controversy must specifically identify the point at which the evidence was identified, offered, and received or rejected.

B. Substantive requirements

[2] As a general matter, the burden of demonstrating error on the part of a lower court is on the appellant. *Ngetchab v. Lineage v. Klewei*, 16 ROP 219, 221 (2009) ("[I]t is the job of Appellant, not the Court, to search the record for errors."). Lacking clarity and precision in the appellant's argument, this Court will not "trawl the entire record for unspecified error." *Id. See also Idid Clan v. Demei*, 17 ROP 221, 229 n.3 (2010) ("It is not the Court's duty to interpret . . . broad, sweeping argument, to conduct legal research for the parties, or to scour the record for any facts to which the argument might apply."). This general burden applies both to an appellant's specifications of factual and legal error, each of which requires clarity and proper citation.

[3] With respect to assertions of factual error, the Court's prior enforcement of Rule 28 makes clear that a failure to adhere to the Rules of Appellate Procedure with respect to citation to the factual record is fatal to a party's factual allegations:

> With a single exception (see Appellant's Br. at 10), Beches failed to include a pinpoint citation to the

> record in support of any of his asserted facts. He occasionally refers to documentary evidence, but the lack of citation to the witnesses' testimony—especially where there is no transcript of the proceedings—is inappropriate and contrary to Palau's Rules of Appellate Procedure.
>
> * * *
>
> [Rule 28] is clear and unambiguous, and it permits this Court to disregard Beches's unsupported factual arguments—which is nearly all [of] them. The Court finds this recourse appropriate in light of the violation of Rule 28(e), and it will not consider Beches's specific factual arguments.

Beches v. Sumor, 17 ROP 266, 272 (2010). *See also Ngetchab Lineage*, 16 ROP at 221 ("[A]n appellant must 'point out specifically where the findings are clearly erroneous.'") (quoting *Pachmayr Gun Works, Inc. v. Olin Mathieson Chem. Corp.*, 502 F.2d 802, 807 (9th Cir. 1974)).

[4] With respect to specifications of legal error, the burden is on the party asserting error to cite relevant legal authority in support of his or her argument. *Aimeliik State Pub. Lands. Auth. v. Rengchol*, 17 ROP 276, 282 (2010) ("Litigants may not, without proper support, recite a laundry list of alleged defects in a lower court's opinion and leave it to this Court to undertake the research."). Unsupported legal arguments need not be considered by the Court on appeal. *See Gibbons v. Seventh Koror State Legislature*, 13 ROP 156, 164 (2006). *See also Idid Clan*, 17 ROP at 229 n.3 ("[A]ppellate courts generally should not address legal issues that the parties have not developed through proper briefing."). Issues raised but not addressed in the argument section in accordance with Rule 28(a)(8) are also deemed waived by the appellant. *Dalton v. Borja*, 12 ROP 65, 75 (2005) ("identifying an issue in the 'issues raised' section of a brief but omitting any discussion of that issue in the 'argument' section renders that issue waived").

DISCUSSION

Appellant's brief is rife with formal and substantive shortfalls. In violation of Rule 28(a), Appellant's brief is not double-spaced, lacks a table of contents and a table of authorities, lacks a clear specification of the factual and legal errors asserted, and does not include a copy of the decisions or orders from which Appellant appeals. In addition, Appellant did not cite to the record in support of the facts set out in his statement of facts in violation of Rule 28(a)(7) and 28(e).

With respect to Appellant's assertions of factual and legal error, as noted, his Opening Brief lacks citations to the record, to the rulings by the Trial Division, or to any legal authority. Additionally, Appellant's arguments are so poorly developed that it is within the Court's discretion to ignore them entirely.

[5] We acknowledge Appellant has appeared pro se and that the Court should permit parties to represent themselves to ensure adequate access to this tribunal for all citizens of Palau. Nevertheless, pro se litigants "have a duty to inform themselves

of the requirements for proceeding with an appeal." *Estate of Masang v. Marsil*, 13 ROP 1, 1-2 n.1 (2005) (recognizing it as a "harsh remedy" but dismissing a pro se appeal for failure to comply with the ROP Rules of Appellate Procedure). Appellant's status as a pro se party does not relieve him of the burden to provide clear and concise bases for appeal, and it does not impose on the Court a duty to act as Appellant's counsel or to sweep the record for potential errors of law and fact that are not clearly developed.

Based on the foregoing grounds, the Court concludes that Appellant's Opening Brief is so inadequate and poorly developed that it fails to set out any issues on appeal that the Court must resolve. In light of the numerous formal and substantive shortfalls of Appellant's brief, the Court dismisses this appeal in its entirety.

CONCLUSION

The Court **DISMISSES** this appeal for Appellant's failure to comply with the Republic of Palau Rules of Appellate Procedure and for wholly inadequate briefing.

VICTOR M. YANO,
Appellant,

v.

JENNIFER SUGIYAMA YANO,
Appellee.

CIVIL APPEAL NO. 11-011
Civil Action No. 09-287

Supreme Court, Appellate Division
Republic of Palau

Issued: December 14, 2012

[1] **Courts:** Recusal

Under Canon 2.5, a judge facing a motion for disqualification must address his actual and apparent ability to decide the case impartially. First, the judge must decide whether he is able to decide the matter impartially. If he is unable to do so, he must recuse himself unless one of the emergency exceptions is implicated. If the judge concludes he is able to decide the matter impartially, the question becomes whether his impartiality would be questioned by a reasonable observer. If his impartiality would be questioned, then disqualification is required unless an emergency exception is present. If his impartiality would not be questioned, then the motion for disqualification must be denied.

[2] **Courts:** Recusal

Prejudice growing out of business, political, or social relations generally is insufficient to disqualify a judge.

[3] **Courts:** Recusal

The general rule against business or social relationships serving as a basis for disqualification carries particular weight when a judicial district lies in rural or sparsely populated area where a judge is likely to interact frequently with attorneys and potential litigants.

[4] **Courts:** Recusal

A party seeking to disqualify a judge based on a familial relationship not enumerated in Canon 2.5.5 must show additional circumstances that would lead a reasonable observer to question the judge's impartiality.

[5] **Courts:** Recusal

Palau, like the less populous judicial districts in the United States, has a limited supply of businesses and professionals. To hold that a judge could be disqualified automatically based on any business (or personal) relationship with a party, particularly one which ended years ago, would be to severely limit a judge's ability to function in the community, to function as a judge, or both. A previous business relationship with one of the few medical doctors on the island is a sufficiently common occurrence so as to deprive such relationship of any appearance of partiality

Counsel for Appellant: John K. Rechucher, Jeffrey L. Beattie, Steven R. Marks
Counsel for Appellee: Siegfried Nakamura, Clara Kalscheur

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and LOURDES F. MATERNE, Associate Justice.

Appeal from the Supreme Court, Trial Division, the Honorable ALEXANDRA F. FOSTER, Associate Justice, presiding.

PER CURIAM:

This matter is before the Court on Appellee Jennifer Sugiyama Yano's Motion to Disqualify the above-named panel from assignment to this appeal. For the reasons set forth below, Appellee's motion is **DENIED**.

BACKGROUND

On November 5, 2012, this Court issued an order advising the parties that each of the Justices assigned to the appeal had potential conflicts of interest with regard to the parties to this proceeding ("Notification Order"). In particular, we informed the parties that:

1. Chief Justice Arthur Ngirakl-song has had a long-time relationship with Appellant Victor M. Yano as a medical patient of the Appellant;

2. Associate Justice Kathleen M. Salii has had a long-time relationship with Appellant Victor M. Yano as a medical patient of the Appellant; and

3. Associate Justice Lourdes F. Materne has had a long-time relationship with Appellant Victor M. Yano as a medical patient of the Appellant [and] is related to the Appellant through her mother, who is a first cousin to the Appellant's father.

Although we disclaimed any actual bias against any part, we afforded "the parties and their counsel an opportunity to consider the conflicts of interest disclosed . . . and to file . . . either: (1) a signed conflict waiver . . . or (2) the parties' specific objections to the continued service of the Justices on this panel." Appellant filed a signed waiver; Appellee moved to disqualify all three Justices on the panel.

DISQUALIFICATION STANDARD

Canon 2.5 of the ROP Code of Judicial Conduct provides, in relevant part, that "[a] judge shall disqualify himself . . . from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially." The Canon also enumerates a non-exhaustive list of situations when disqualification is required and a corresponding exception whereby "disqualification of a judge shall not be required if constituting another tribunal to deal with the case is not practical or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice."

[1] Thus, under Canon 2.5, a judge facing a motion for disqualification must address his actual and apparent ability to decide the case impartially. First, the judge must decide whether he is able to decide the matter impartially. If he is unable to do so, he must recuse himself unless one of the emergency exceptions is implicated. If the judge concludes he is able to decide the matter impartially, the question becomes whether his impartiality would be questioned by a reasonable observer. If his impartiality would be questioned, then disqualification is required unless an emergency exception is present. If his impartiality would not be questioned, then the motion for disqualification must be denied.

All Justices on this panel have disclaimed any actual bias or prejudice against either party. Accordingly, we now address whether disqualification is warranted under the apparent partiality standard. In this regard, Appellee seeks recusal based on the argument that the Justices' familial relations with Appellant and Appellee and their doctor-patient relationships with Appellant would cause a reasonable observer to question the panel's impartiality.

I. Doctor-Patient Relationships

[2, 3] "Prejudice growing out of business, political, or social relations generally is insufficient to disqualify a judge." 46 Am. Jur. *Judges* § 141. The general rule against business or social relationships serving as a basis for disqualification carries particular weight when a judicial district lies in rural or sparsely populated area where a judge is likely to interact frequently with attorneys and potential litigants. *U.S. v. DeTemple*, 162 F.3d 279, 287 (4th Cir. 1998) (quoting *In re Allied-Signal Inc.*, 891 F.2d 967, 971(1st Cir. 1989) (Breyer, J.)) ("[T]he more common a potentially biasing circumstance and the less easily avoidable it seems, the less that circumstance will appear to a knowledgeable observer as a sign of partiality."); *see also* 46 Am. Jur. *Judges* § 141 (2006) ("Disqualification generally has not been mandated simply because a judge

knows socially one or more of the parties, particularly in rural districts, where it is not at all uncommon for a judge to have a friendly relationship with numerous members of the community, [and to] adjudicate legal issues which arise among community members."). As the Supreme Court of Wyoming wrote:

> A judge would not be very effective or efficient in a [small] community, if he were bound to recuse himself from cases involving those with whom he had 'close political affiliations and social relationships' or with whom he had been 'a close personal friend throughout a greater part of' his life. There is no more of a disposition for a judge to rule in favor of an acquaintance or friend because of that fact than there is a disposition for him to rule against an acquaintance or friend because of that fact. The fact of friendship could result in a 'leaning over backwards' to maintain impartiality, or it could result in the opposite.

Kobos By and Through Kobos v. Sugden, 694 P.2d 110, 111–12 (Wyo. 1985).[1]

II. Familial Relationships

With regard to familial relations, Canon 2.5.5 provides that grounds for disqualification will be present where "the judge is related within the first or second degree, either by consanguinity or affinity, to a party, lawyer, or material witness." "'Within the first degree' includes persons related to the judge by consanguinity or affinity as a natural or adoptive child, grandchild, great-grandchild, parent, brother, sister, nephew, niece, great-grand nephew, or great-grand niece." ROP Code of Judicial Conduct, Canon 8.4.8. "'Within the second degree' includes persons related to the judge by consanguinity or affinity as a natural or adoptive grandparent, uncle, aunt, first cousin, first cousin once removed, first cousin twice removed, or first cousin thrice removed." ROP Code of Judicial Conduct, Canon 8.4.9.

[4] Where members of a list are part of an "associated group or series," an inference arises that "items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003). When read together, Canons 2.5.5, 8.4.8, and 8.4.9 set forth a specific grouping of familial relations justifying disqualification. The enumerated relationships are sufficiently similar to justify the conclusion that the absence of additional relationships from 2.5.5 was intentional. *Id.* This intentional exclusion convinces us that Canon 2.5.5 was intended to represent the complete list of per se disqualifying familial relationships. Thus, we hold a party seeking to disqualify a judge based on a familial relationship not enumerated in Canon 2.5.5 must show additional circumstances that would lead a reasonable observer to question the judge's impartiality.

DISCUSSION

I. Chief Justice Ngiraklsong

Chief Justice Ngiraklsong maintained a doctor-patient relationship with Appellant for a number of years. However,

[1] Although *Kobos* involved a claim of actual (rather than apparent) bias, the reasoning underlying the decision applies here.

such relationship ended many years ago. Appellee seeks disqualification of the Chief Justice based on this doctor-patient relationship and on the fact that he is a "close relative" of Appellee. Specifically, Appellee claims that the "Chief Justice is a relative of Appellee's mom via Esuroi of Idid to Milong and from Milong to Ngiribkal of Ngerbeched."

[5] Palau, like the less populous judicial districts in the United States, has a limited supply of businesses and professionals. To hold that a judge could be disqualified automatically based on any business (or personal) relationship with a party, particularly one which ended years ago, would be to severely limit a judge's ability to function in the community, to function as a judge, or both. We decline to do so here. Rather, we conclude that a previous business relationship with one of the few medical doctors on the island is a sufficiently common occurrence so as to deprive such relationship of any appearance of partiality.[2] *In Re Allied Signal Inc.*, 891 F.2d at 971.

Appellee also seeks to disqualify the Chief Justice based on familial relationship not listed in 2.5.5. For the reasons set forth above, we hold that these two grounds for disqualification (either on their own or together) would not cause a reasonable observer to question the Chief Justice's impartiality.

[2] In her motion for disqualification, Appellee analogizes a doctor-patient relationship to an attorney-client relationship. Assuming without deciding the validity of this comparison, we note that an appearance of bias based on an attorney-client relationship lessens over time and that, therefore, such analogy would provide no relief to Appellee here. *See* 46 Am. Jur. *Judges* § 145 (2004).

II. Justice Salii

Justice Salii saw Appellant as a physician for an extended period of time before changing doctors approximately seven years ago. Appellee seeks to disqualify Justice Salii based on Justice Salii's doctor-patient relationship with Appellant and based on the fact that "Appellee's mother and Associate Justice Salii's mom are relatives of the Clan of Ilou of Ngerbeched." As explained above, such grounds (a past doctor-patient relationship and an attenuated familial connection) are insufficient to support a finding of an appearance of partiality.

III. Justice Materne

Justice Materne has elected to recuse herself from hearing this appeal. Accordingly, Appellee's motion seeking the disqualification of Justice Materne must be denied as moot.

Pursuant to Article X, Section 12 of the Palau Constitution, Guam Supreme Court Justice Katherine A. Maraman is hereby appointed to serve on the appellate panel as Associate Justice Pro Tem.

CONCLUSION

For the reasons set forth above, Appellee's motion for disqualification is **DENIED**. Finally, it appearing that this Case presents novel questions of law, oral argument in this matter is set for 10:00 a.m. on February 26, 2013.

F. KAZUO ASANUMA,
Appellant,

v.

GOLDEN PACIFIC VENTURES, LTD. And KOROR STATE PUBLIC LANDS AUTHORITY,

Appellees.

CIVIL APPEAL NO. 12-017
Civil Action No. 09-065

Supreme Court, Appellate Division
Republic of Palau

Decided: December 18, 2012

[1] **Appeal and Error:** Standard of Review

A lower court's conclusions of law are reviewed de novo.

[2] **Civil Procedure:** Preservation

We do not reach that issue because Appellant failed to properly raise such a claim before the Trial Division.

[3] **Equity:** Restitution

The general rule is that one who improves the property of another does so at his own peril, and only under certain exceptional circumstances will a mistaken improver be entitled to restitution for the value of improvements.

[4] **Equity:** Restitution

A person who has been unjustly enriched at the expense of another is required to make restitution to the other. Restitution is awarded based on the value added by the improver, which may be measured by the lesser of the cost of the labor and materials or the resulting increase in market value.

[5] **Equity:** Restitution

The person entitled to restitution is the one who went to the expense to improve the land.

Counsel for Asanuma: Siegfried B. Nakamura
Counsel for Golden Pacific Ventures: William L. Ridpath
Counsel for KSPLA: Raynold B. Oilouch

BEFORE: KATHLEEN M. SALII, Associate Justice; ROSE MARY SKEBONG, Associate Justice Pro Tem; and HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem.

Appeal from the Trial Division, the Honorable ALEXANDRA F. FOSTER, Associate Justice, presiding.

PER CURIAM:

This case concerns Appellant F. Kazuo Asanuma's claims for restitution for improvements made to land under the mistaken belief that he owned the premises. For the following reasons, the Trial Division's decision to not award restitution to Appellant is **AFFIRMED**.

BACKGROUND

All of the parties incorporate the factual findings by the Trial Division in its March 30, 2012, Decision. The Court, therefore, incorporates those facts by this reference but also offers the following summary of the facts and procedural history for purposes of setting out the relevant background.

I. Factual Background

This case concerns a piece of disputed property (Cadastral Lot 073 B 02, hereinafter, the Lot) along the main road in Medalaii Hamlet, Koror, on which the five-story Hanpa Building is currently located.[1] In 1949, Appellant's parents, Asao and Sechedui Asanuma, moved into a house across the road that runs behind the current Hanpa Building. Between 1949 and 1961, the Asanumas built a series of buildings on the Lot and on adjacent properties, including the Palau General Store (and, subsequently, Palau Wholesalers), a warehouse, and a residence. After an extended stay in the United States, Appellant returned to Palau in 1964, took over a portion of the family businesses on the Lot from his deceased father, and rented out some of the commercial space on the Lot.

Specifically, beginning in 1993, Appellant entered into a series of agreements with Soon Seob Ha and his company, Hanpa Industrial Development Corporation[2] (HIDC), under which Appellant represented he was the fee-simple owner of the Lot. Appellant first leased to HIDC the original buildings on the Lot and then reached an agreement with HIDC to demolish the old buildings and to build a new structure, the Hanpa Building. Under an agreement dated February 16, 1995, HIDC was to build a beauty shop and a residence for Appellant on the second floor of the Hanpa Building, and HIDC would occupy or sublease the rest of the building. In return, Appellant's significant debts to Ha would be forgiven, and HIDC would make escalating monthly rental payments to Asanuma for a term of 25 years (a date which Appellant and HIDC subsequently agreed to extend to 30 years). Accordingly, HIDC was scheduled to return the Hanpa Building to Appellant in 2025.[3]

In 2001, during the pendency of the lease agreements between Appellant and HIDC, ownership of the Lot and several surrounding parcels was disputed in the

[1] The Lot was one parcel among several that were the subjects of a 2001 return-of-public-lands case that was appealed to this Court. *See Idid Clan v. Olngebang Lineage*, 12 ROP 111 (2005). In that matter, the trial court considered the much-disputed claims of the parties to property that "spans an entire block south of the main road (where the Post Office, Fuji Restaurant, and the Seventh Day Adventist Office are located), to the area across the street (where the Internet Café, KR Hardware, and the Hanpa Building are located), and continuing north behind that block, all the way to the mangroves." *Id.* at 112. On appeal, this Court upheld the trial court's decision that, inter alia, Appellant did not own the "Hanpa Lot," which was awarded to Koror State Public Lands Authority. *Id.* at 120–24. Appellant does not dispute that holding here.

[2] Soon Seob Ha, along with his wife and sons, also own Golden Pacific Ventures, Ltd., Appellee in this matter.

[3] In 2000, HIDC sued Appellant for control of the Hanpa Building. *See Hanpa Indus. Dev. Corp. v. Asanuma*, 10 ROP 4 (2002). Although it modified the applicable square-footage finding by the trial Division, this Court upheld the trial court's determination that Appellant was entitled to the second floor of Hanpa Building and did not disturb the trial court's conclusion that Asanuma owed Hanpa nearly $65,000 in rental credits. *Id.* at 4–10.

Trial Division of the Supreme Court. The trial court ultimately awarded ownership of the Lot to Koror State Public Lands Authority, and that decision was upheld on appeal to this Court. *See generally Idid Clan v. Olngebang Lineage*, 12 ROP 111 (2005). At no time prior to the Court's ownership determination did KSPLA expressly notify Appellant of its ownership interest in the Lot. Although Appellant twice sought KSPLA's approval in 2007 of a lease agreement that would permit Appellant to lease the Lot from KSPLA, KSPLA instead entered into a long-term lease in 2008 with Appellee Golden Pacific Ventures, Ltd.

In December 2008 and January 2009, GPV's counsel wrote letters to Appellant's counsel demanding Appellant vacate the premises or negotiate a new sublease with GPV. Appellant did neither, and GPV filed this action.

II. Procedural Background

On March 25, 2009, GPV filed its complaint in the Trial Division in which it alleged KSPLA was the rightful owner of the Lot and that GPV was the rightful lessor of the Lot and the Hanpa Building. GPV claimed Appellant was a trespasser and sought an injunction preventing Appellant from using the second floor of the Hanpa Building along with damages, costs, and attorneys' fees.

On June 12, 2009, Appellant filed an answer and counterclaim against GPV and a third-party complaint against KSPLA. Appellant asserted that he and his family had lived on the Lot since the 1950s, had mistakenly believed they were the rightful owners of the property, and had made substantial improvements to the Lot without any objection from the rightful owner, KSPLA. Appellant, therefore, sought damages against KSPLA for unjust enrichment and detrimental reliance; damages against GPV for unjust enrichment; foreclosure on an equitable lien against GPV and KSPLA; and pre-judgment interest, attorneys' fees, and costs.

On July 13, 2009, GPV filed an answer to Appellant's counterclaim in which it alleged it was an entity distinct from HIDC and, therefore, should not be liable for agreements between Appellant and HIDC. Furthermore, GPV argued Appellant received substantial benefits from the relevant agreements that should offset any liability to Appellant.

On March 11, 2011, KSPLA filed an amended answer and counterclaim in which it asserted that Appellant occupied the Lot with KSPLA's consent and had refused KSPLA's request to vacate the premises. KSPLA, therefore, sought a declaration that the Lot and the Hanpa Building belong to KSPLA; damages for lost benefits from the Lot during Appellant's occupation of the property; and punitive damages, attorneys' fees, and costs for Appellant's allegedly egregious refusal to vacate the second floor of the Hanpa Building.

The trial court held a five-day trial from February 27, 2012, to March 2, 2012, and heard the parties' closing arguments on March 5, 2012. The Trial Division issued its Decision and Judgment on March 30, 2012, in which it: (1) concluded the Lot and the Hanpa Building belong to KSPLA; (2) enjoined Appellant and his agents and

lessors from occupying the second floor of the Hanpa Building; (3) ordered Appellant and his agents to vacate the premises in an orderly and peaceful manner by April 30, 2012; and (4) denied each of the parties' requests for damages, fees, and costs.

STANDARD OF REVIEW

[1, 2] Appellant challenges the trial court's legal conclusion that Appellant is not a "mistaken improver" of the Lot and is, therefore, not entitled to restitution for improvements made on the Lot. A lower court's conclusions of law are reviewed de novo. *See Wong v. Obichang*, 16 ROP 209, 211-12 (2009); *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001). Although Appellant also appears to contest the trial court's findings of fact by asserting the court failed to explicitly resolve Appellant's claim for restitution based on the value of the buildings on the Lot that HIDC destroyed in order to build the Hanpa Building, we do not reach that issue because Appellant failed to properly raise such a claim before the Trial Division.

ANALYSIS

On appeal, Appellant asserts two grounds of error by the Trial Division related to the trial court's denial of Appellant's counterclaim for unjust enrichment against GPV and KSPLA: (1) the trial court erred when it concluded Appellant was not a mistaken improver who is entitled to restitution for the value of the improvements to the Lot that he "caused," and (2) the trial court erred when it concluded Appellant was not entitled to restitution for the value of the buildings on the Lot that HIDC demolished to make way for the Hanpa Building.

I. Mistaken Improver

Appellant does not challenge the Trial Division's factual findings with respect to any aspect of his equitable claim for restitution based on his status as a "mistaken improver" of the Lot. Rather, Appellant limits his challenge to the trial court's definition of "improver" by arguing that the trial court erred as a matter of law when it relied on the Second Restatement of Restitution §§ 10 and 49 in reaching its conclusion that an "improver" may be entitled to restitution only to the extent that he is the person who actually improved the real property. Appellant contends that it was error to rely on the Second Restatement because it was "presumably adopted in 2011 [and cannot] define the rights and claims of the parties that arose in 2003." According to Appellant, the definition of "improver" under the first Restatement of Restitution § 42 permits an award of restitution to the "improver" who "causes" an improvement to the real property rather than to the person who actually improves the property.

The Court points out even though the trial court and the Appellant both reference the "Second" Restatement of Restitution, it does not appear that such a volume exists. The introduction to the Third Restatement of Restitution and Unjust Enrichment makes plain that a second restatement was drafted but never completed. Based on the Trial Division's citations to the "second" Restatement, it is apparent the Trial Division was actually citing to the Third Restatement of Restitution and Unjust Enrichment when

it referenced §§ 10 and 49 and the comments thereto.

With respect to Appellant's claim of unjust enrichment based on his alleged status as a "mistaken improver," the Trial Division concluded Appellant did not have notice of any competing ownership claims to the Lot until he received notice of the ownership dispute concerning the Lot on November 30, 2000. Accordingly, up to that point, the trial court concluded Appellant was mistaken in his belief that he owned the Lot and could be entitled to restitution if he improved the Lot, but the trial court concluded Appellant would not be entitled to restitution for the improvements made to the property after he received notice. Ultimately, the Trial Division decided Appellant was not a mistaken improver with respect to the Hanpa Building because, among other things, he did not actually improve the Lot. Instead, the trial court concluded HIDC expended its resources to build the Hanpa Building and that Appellant was not entitled to recover for those expenses.

The Court stresses Appellant does not dispute that HIDC paid for and built the Hanpa Building. Nevertheless, Appellant argues he is entitled as a mistaken improver to receive restitution damages for unjust enrichment of the full market value of the Hanpa Building (which Appellant asserts is approximately $1.75 million), because he permitted HIDC to build the Hanpa Building and therefore "caused" those improvements.

[3] In *Giraked v. Estate of Rechucher*, this Court quoted the first Restatement of Restitution §§ 40–42 for the general principles of restitution in the context of improvements made to land:

> The applicable law for this Court to apply is set forth in the Restatement, given that Palau has no governing written or customary law on this issue. 1 PNC § 303. If an owner knows of another's construction activities on his property but takes no steps to correct the improver's mistaken belief of ownership, then the improver is entitled to restitution. Restatement of Restitution § 40(c) (1937); *see also id. cmt.* d & illus. 7. If an owner does not know of another's improvements to the land, then as a general rule, the owner need not pay restitution, *id.* § 41(a)(i), except as provided in § 42. Section 42 explicitly governs improvements to land and provides:
>
> > [A] person who, in the mistaken belief that he . . . is the owner, has caused improvements to be made upon the land of another, is not thereby entitled to restitution from the owner for the value of such improvements, but if his mistake was reasonable, the owner is entitled to obtain judgment in an equitable proceeding or in an action of trespass or other action for the mesne profits only on condition that he makes restitution . . . .

> *Id*. § 42(1). The comments to this section note that the rule is harsh to the person making improvements and that it is "not wholly consistent with the principles of restitution for mistake." *Id*. § 42 *cmt.* a. Section 42, however, does not apply to a landowner who had "notice of the error and of the work being done [and] stands by and does not use care to prevent the error from continuing." *Id*. § 42 *cmt.* b.

12 ROP 133, 139–40 (2005). Thus, the general rule is that one who improves the property of another does so at his own peril, and only under certain exceptional circumstances will a mistaken improver be entitled to restitution for the value of improvements.

Appellant contends the language "has caused improvements" under § 42 is sufficiently broad to warrant the Court's grant of $1.75 million in restitution for a building that Appellant did not expend any money or labor to build. Appellant, however, is wrong both as a matter of law and as a matter of sound reason.

[4] First, as the trial court observed, the principle of restitution as damages for unjust enrichment is based on equity and is awarded when one person is enriched "at the *expense* of another." Restatement of Restitution § 1 (1937) (emphasis added). The most basic statement of the law relating to unjust enrichment in the first Restatement and the present third Restatement refers to and relies upon enrichment at the expense of another. *See* Restatement of Restitution § 1 (1937); Restatement (Third) of Restitution § 1 (2011). Indeed, this Court has recently cited the first Restatement for the very same principle. *See Isechal v. Umerang Clan*, 18 ROP 136, 147–48 (2011)("[A] person who has been unjustly enriched at the expense of another is required to make restitution to the other."). Moreover, the comments to § 42(1) make clear that restitution is awarded based on the value added by the improver, which may be measured by the lesser of the cost of the labor and materials or the resulting increase in market value. Restatement of Restitution § 42(1) *cmt.* c. (An improver is entitled to the value of his "labor and materials or to the amount which *his improvements* have added to the market value of the land, whichever is smaller.") (emphasis added).

[5] As the trial court pointed out, §§ 10 and 49(3) of the third Restatement (cited by the trial court as the "second" Restatement) and the comments thereto also clarify that the person entitled to restitution is the one who went to the expense to improve the land. *See* Restatement (Third) of Restitution § 10 *cmt.* h (recovery limited to "the cost to the improver or the value realized by the owner, whichever is less"); *id*. § 49(3)(b) (also measuring restitution by the "cost to the claimant of conferring the benefit"). Here where the evidence does not show Appellant expended any labor or resources to improve the Lot, neither law nor equity nor justice demand that he be reimbursed for any benefit conferred on the actual landowner.

Second, if we were to adopt Appellant's view of an entitlement to restitution based on a mere causal connection to the improvements made, it could be the case that several persons might allege he or she "caused" the improvements

to a property, whether that person might be a builder or one who issued a permit or one who merely opened the gate to the property for the actual improver. Any of those persons might claim they were a "cause" of the improvements, but only one who paid for or made the improvements by their labor would have a basis in justice and equity to seek reimbursement from the owner of the property. The Court will not reward one windfall with another.

Finally, Appellant's argument that the Court must make reference solely to the first Restatement of Restitution because the "second" Restatement was published after the dispute between the parties arose is unsupported by any reference to legal authority and is based on flawed reasoning. Again, it appears Appellant is referring to the Third Restatement, which was published in March 2011. Appellant, nevertheless, contends that the Trial Division's reference to that Restatement is akin to a Court applying a criminal statute ex-post facto to an action that was not unlawful before the statute was passed. This analogy fails. The Restatements are a compilation of general common-law principles derived from decades and sometimes centuries of case law from across various jurisdictions. *See* Restatement on Restitution, Ch. 1 Introductory Matters, Topic 1: Underlying Principles 11 (1937) ("The rules stated in this Restatement . . . depend for their validity upon certain basic assumptions in regard to what is required by justice . . . . [T]hese are stated in the form of principles. They cannot be stated as rules . . . . They are distinguished from rules in that they are intended only as general guides for the conduct of the courts . . . ."). Thus, the Restatements are not statutes and do not constitute any sort of formal code. They are a guide to the case law that discusses the principles presented. In any event, the analogy to a criminal-law setting in which there are heightened constitutional protections at play is inappropriate. This is a civil matter in which Appellant has invoked the Trial Division's equitable discretion based on certain common law principles of restitution. The Court finds no error in the Trial Division's reliance on the Third Restatement of Restitution and Unjust Enrichment to provide an understanding of the principles that govern restitution damages resulting from claims of unjust enrichment. Having found no error in the Trial Division's statement of those principles or their application to this matter, Appellant's argument fails.

II. Destroyed Buildings

Appellant also contends the trial court erred when it failed to award Appellant restitution damages for the value of the buildings on the Lot that HIDC destroyed to clear the Lot for construction of the Hanpa Building. Specifically, Appellant contends the Court should award him between $120,000 and $155,144 in damages based on the evidence at trial of the value of the second floor of the Hanpa Building, which Appellant now asserts is the value of the destroyed buildings.

In its Response KSPLA contends Appellant did not raise this argument below. The Court is inclined to agree. Although Appellant notes that he made reference in his complaint to the improvements his family made to the Lot before they were destroyed in order to make way for the Hanpa Building, Appellant did not at any

stage of the underlying proceedings expressly argue that he was entitled to restitution for the value of the destroyed buildings, nor did he assert that their value should be determined by the value of the second floor of the Hanpa Building.[4] In fact, in his closing argument before the Trial Division, Appellant did not make any argument related to his claim for restitution based on the value of the destroyed buildings. "Merely mentioning a claim in a complaint, but failing to advance any argument on that claim, does not preserve that issue." *Tulop v. Palau Election Comm'n*, 12 ROP 100, 106 (2005) (citing *Badureang Clan v. Ngirchorachel*, 6 ROP Intrm. 225, 226 n.1 (1997)).

As GPV points out in its Response, Appellant did not present any evidence at trial as to the cost of the destroyed buildings or of the value they added to the current market value of the Lot, which, as noted, are the two measures for restitution damages. *See* Restatement of Restitution § 42(1) *cmt.* c. Appellant only now contends that the value of those buildings must be equal to the second floor of the Hanpa Building. Appellant, however, does not address either of GPV's arguments in his Reply, choosing instead to dwell at length on the evidence of the value of the second floor of the Hanpa Building.

Ultimately, the Court concludes the trial court properly weighed the equities in this matter and determined that, in the balance, none of the parties was entitled to damages or to attorneys' fees and costs. The Court will not disturb the Trial Division's Decision now based on Appellant's new and poorly developed theory of recovery.

CONCLUSION

For the foregoing reasons, the decision of the Trial Division is **AFFIRMED**.

[4] We note Appellant's failure to raise and to develop this argument at trial has its consequences on appeal. First, it is far from evident that the destroyed buildings enriched anyone. The evidence at trial does not show that the demolished structures contribute to the present value of the Lot in any way or otherwise benefitted GPV or KSPLA specifically. Second, it is also not plain on this record that there was anything unjust about the destruction of Appellant's buildings. In the relevant lease agreement Ha forgave significant debts Appellant owed to him for the right to destroy the existing buildings on the Lot to make way for the Hanpa Building. Thus, it appears Appellant was compensated for the buildings that HIDC destroyed. Moreover, as GPV points out, the evidence at trial demonstrated Appellant stayed nearly three years rent-free on the second floor of the Hanpa Building after he was asked to vacate the premises at a rental value established at trial of more than $51,000 per year, which would offset any recovery to which Appellant is entitled.

UCHELIOU CLAN and NOAH SECHARRAIMUL,
Appellants,

v.

OIREI CLAN,
Appellees.

CIVIL APPEAL NO. 11-038
LC/N 09-0352 & 09-0353

Supreme Court, Appellate Division
Republic of Palau

Decided: December 19, 2012

[1] **Land Commission/LCHO/Land Court**: Procedural Errors

Procedural errors by the Land Court and Bureau of Lands and Surveys may be the basis for successful appeals and even collateral attack. However, there must be some showing that the error actually affected the rights of the appealing or attacking party. Otherwise, the error is harmless and we will not reverse the Land Court's determination.

Counsel for Appellant Ucheliou Clan:
J. Uduch S. Senior
Counsel for Appellant Secharraimul:
J. Roman Bedor
Counsel for Appellee: Oldiais Ngiraikelau

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and LOURDES F. MATERNE, Associate Justice.

Appeal from the Land Court, the Honorable SALVADOR INGEREKLII, Associate Judge, presiding.

PER CURIAM:

Appellants Ucheliou Clan and Noah Secharraimul each appeal the Land Court's determination that Worksheet Lot Numbers 05N001-98 and 05N001-99 (Lots 98 and 99) belong to Oirei Clan. Because the Land Court's decision does not contain a legal error or clear factual error, we affirm.

BACKGROUND

Lots 98 and 99 are located in Ngetkib Village, Airai State. The Land Court held proceedings to determine ownership of the lots on August 5, 2010. Among the claimants were Ucheliou Clan, Secharraimul, and Oirei Clan. Rosania Masters presented Ucheliou Clan's case. She stated that the lots were part of land known as *Ikidel*. During her testimony, it became clear that a mistake was made by the Bureau of Lands and Surveys (BLS) during the monumentation process. Specifically, she stated that two monumentation markers—denoted 43 and 46—should have been connected to indicate a boundary line within Lot 99 between Ucheliou land and Oirei land. When Masters testified to the discrepancy between her description of the claim during monumentation and the map produced by BLS, the Land Court immediately rectified the error, ordering BLS to connect the monuments and produce a map reflecting the purported boundary.

Noah Secharraimul sought individual ownership of Lots 98 and 99, which he claimed are called *Bersoech* and *Ngeyaol*,

respectively. According to Secharraimul, *Bersoech* was given to his mother, Kamerang Secharraimul ("Kamerang"), by the women of Ngermellong for her services to that house. A portion of Lot 99 was farmed by Kamerang. According to Oirei Clan's representative, Timothy Ngirdimau, Kamerang received permission from Ngirdimau's mother to farm the land.

Oirei Clan contended that the lots are part of land called *Sangelliou*. Ngirdimau testified that the lots were given to Oirei Clan by "the last remaining person" of Ngermelkii Clan, the previous owner of the land. According to Ngirdimau, the last member of Ngermelkii Clan was a man who married a woman from Oirei Clan.

The Land Court determined that the lots belonged rightfully to Oirei Clan. In its findings of fact, the court stated that the lots were *Sangelliou* and were "among the properties conveyed to Oirei Clan by Ngermelkii [C]lan." The court emphasized that the lack of any Tochi Daicho records in Airai meant that the court had to rely on "multiple level hearsay and . . . testimony of competing claimants [that] are largely self-serving and affected with bias." Thus, the court's decision turned "on the credibility or lack thereof in the testimony and evidence" submitted by the parties. The court rejected Masters' claim on behalf of Ucheliou Clan because it concluded that the documentary evidence supported the conclusion that both lots were part of *Sangelliou*. Similarly, with respect to Secharraimul's claim, the court found that Lot 98 is not *Bersoech* and Lot 99 is not *Ngeyoal*. Further, to the extent that Secharraimul's family farmed on the lots, such activity was permitted by Ngirdimau's mother.

Ucheliou Clan appeals, contending that the discovery of BLS's error in recording Masters' claim required suspension of the hearing and a new round of monumentation. By proceeding with the hearing, the Clan claims, the Land Court committed legal error. Secharraimul also appeals, arguing that Lot 99 was adversely possessed by his family and Lot 98 was not properly claimed by Oirei Clan.

STANDARD OF REVIEW

We review the Land Court's legal conclusions de novo and its factual findings for clear error. *Children of Dirrabang v. Children of Ngirailid*, 10 ROP 150, 151 (2003).

ANALYSIS

I. Ucheliou Clan's Appeal

Section 1307(a) of Title 35 of the Palau National Code requires BLS to conduct a monumentation of land subject to ownership determination, with input from all claimants. According to the statute, a BLS Registration Officer is to record the results and "forward to the Land Court all documentation relating to the monumented parcel and the claims filed." Here, it is uncontested that the records initially submitted by BLS failed to accurately depict Masters' claim on behalf of Ucheliou Clan, which should have included a line between two markers splitting Lot 99. Ucheliou Clan now suggests that the failure of the Land Court to adjourn the hearing and order a new monumentation was error.

[1] Other than 35 PNC § 1307(a), Ucheliou Clan cites no authority for this drastic proposition. Certainly, procedural

errors by the Land Court and BLS may be the basis for successful appeals and even collateral attack.[1] *See Nakamura v. Isechal*, 10 ROP 134, 136 (2003). However, there must be some showing that the error actually affected the rights of the appealing or attacking party. *See Ngiraiwet v. Telungalek ra Emadoab*, 16 ROP 163, 165 (2009). Otherwise, the error is harmless and we will not reverse the Land Court's determination. *Id.* In this case, the error was immediately corrected by the Land Court once it came to the court's attention. BLS was ordered to prepare a map depicting the claim as Masters described it during her testimony. Even Ucheliou Clan's counsel acceded to the Land Court's solution without objection. The procedural rules outlined by statute for the settlement of land disputes in Palau are not mere formalities, but a party seeking to set aside a determination of ownership must show that a procedural error prejudiced it in some manner in order to prevail.

II. Secharraimul's Appeal

We turn to Secharraimul's allegation of error as to Lot 99, which he contends was owned by his mother by virtue of adverse possession. Secharraimul claimed that his grandfather and father owned Lot 99 and rented the land to Okinawans during the Japanese time. He testified that he and his mother also farmed the land. On appeal, Secharraimul argues that decades of open use of the land, under claim of right, entitled him to ownership of Lot 99 by adverse possession. However, this argument is premised on the conclusion that Lot 99 is *Ngeyaol*, the land that Secharraimul's grandfather leased to Okinawan tenants. The Land Court concluded that Lot 99 is *not Ngeyaol*. Secharraimul does not contend, on appeal, that this determination was clear error.

The Land Court did, however, find that Kamerang cultivated a portion of Lot 99. However, upon questioning by the court, Ngirdimau explained that his mother gave permission to Kamerang to use the land. Although Secharraimul's argument on appeal contains a correct recitation of the law of adverse possession, he does not explain why the Land Court erred in crediting Ngirdimau's testimony. Because there is evidence that Kamerang's use of the land was permitted by a representative of the true owner, it was not error for the Land Court to reject Secharraimul's adverse possession claim.[2]

As to Lot 98, Secharraimul's argument proceeds along two lines. First, he objects that Oirei's claim at the initial monumentation did not include Lot 98, only Lot 99. However, the Land Claim Monumentation Record in the case file clearly states that Ngirdimau claimed Lot 98. Second, Secharraimul recites the evidence that supported his contention that Lot 98 is *Bersoech*, and argues that there is no evidence to support the Land Court's conclusion that Lot 98 is part of *Sangelliou*.

[1] The burden of proof in a collateral attack is distinct from that applicable on appeal, but in both cases, procedural error may be the basis for vacating or reversing a Land Court's determination of ownership.

[2] A party advancing an adverse possession theory must show by clear and convincing evidence that "possession is actual, continuous, open, visible, notorious, hostile or adverse, and under a claim of right for twenty years." *Petrus v. Suzuky*, Civ. App. No. 10-044, slip op. at 4 (Nov. 23, 2011). Permissive use is inconsistent with the hostility element. *See id.* at 5-6.

In determining that the land was *Sangelliou*, the Land Court relied on Ngirdimau's testimony that *Bersoech* was located "way down below" the disputed lots. Although this testimony was self-serving, it was supplemented by land acquisition records from 1976 relied upon by the Land Court. These records reflect the borders between Ucheliou Clan land, *Sangelliou*, and *Bersoech*, and are consistent with Ngirdimau's description of *Sangelliou's* location.

CONCLUSION

For the foregoing reasons, we **AFFIRM.**

PALAU RED CROSS,
Appellant,

v.

MIRIAM CHIN,
Appellee.

CIVIL APPEAL NO. 12-019
Civil Action No. 10-168

Supreme Court, Appellate Division
Republic of Palau

Decided: December 27, 2012

[1] **Appeal and Error:** Procedure

Republic of Palau Rule of Appellate Procedure 31(c) provides: If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal, or the Appellate Division may so dismiss on its own motion.

Counsel for Appellant: Moses Y. Uludong
Counsel for Appellee: Uduch Senior

BEFORE: ROSE MARY SKEBONG, Associate Justice Pro Tem; KATHERINE A. MARAMAN, Part Time Associate Justice; and RICHARD H. BENSON, Part Time Associate Justice.

Appeal from the Trial Division, the Honorable LOURDES F. MATERNE, Associate Justice, presiding.

PER CURIAM:

Appellant Palau Red Cross filed this appeal on May 16, 2012, and its opening

brief was due on July 2, 2012. On July 6, 2012, four days after the deadline to file its opening brief, Appellant sought an extension of time to file its opening brief based on Appellant's contention that it had not had time to meet and confer with its counsel. In its Order issued on July 10, 2012, this Court concluded Appellant did not show good cause for why it missed the deadline to file its opening brief nor for why it sought an extension of time after that deadline had passed. Accordingly, the Court denied Appellant's request for an extension.

Republic of Palau Rule of Appellate Procedure 31(c) provides: "If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal, or the Appellate Division may so dismiss on its own motion." *See Estate of Masang v. Marsil*, 13 ROP 1, 2 (2005) ("[W]e take this opportunity to warn all appellants and their counsel, and we direct the Clerk of Courts to provide a copy of this Order to all active members of the Palau Bar, that while we will continue to consider timely and reasonable requests for extensions of time, any failure to timely file an appeal or opening brief . . . will result in the dismissal of the appeal without further notice and that such dismissal will not be undone absent truly extraordinary and unanticipated circumstances.")

Accordingly, the Court **DISMISSES** this appeal for Appellant's failure to comply with the Republic of Palau Rule of Appellate Procedure 31 and for lack of prosecution of this matter.

NGIRAIKELAU BEOUCH,
Appellant,

v.

ASAKO K. SASAO, NGIRNGESIS MAD, AND WATARU ELBELAU,
Appellees.

CIVIL APPEAL NO. 11-043
Civil Action No. 04-143

Supreme Court, Appellate Division
Republic of Palau

Decided: January 3, 2013

[1] **Custom:** Clan Membership

A person's status within a clan is a matter of custom.

[2] **Custom:** Burden of Proof

There are four requirements for a custom to be considered traditional law under Article V, § 2: (1) the custom is engaged voluntarily; (2) the custom is practiced uniformly; (3) the custom is followed as law; and (4) the custom has been practiced for a sufficient period of time to be deemed binding.

[3] **Custom:** Judicial Notice

When confronted with a question of a custom, a court should first ask whether the traditional law requirements (voluntary practice, uniform practice, recognition as law and long and general usage) are so firmly established and widely known as to justify taking judicial notice of the custom.

[4] **Custom:** Judicial Notice

Past judicial recognition of a traditional law as binding will be controlling as a matter of law, absent evidence that the custom has changed.

[5] **Custom:** Burden of Proof

If the traditional law question is not resolvable purely through judicial notice, then the court must determine whether the judicially noticeable facts and the record as a whole satisfy the court that the traditional law requirements have been met.

[6] **Custom:** Judicial Notice

In the event a court utilizes judicial notice to find existence of a traditional law, a party may challenge the court's decision to do so.

[7] **Custom:** Burden of Proof

Courts determining whether a traditional law exists must be mindful of their duty to find and apply the correct law. Where an issue of traditional law is unresolvable on the record, a trial judge must develop the record in order to allow for resolution. Of course, this duty does not relieve the parties of their respective burdens to introduce facts justifying relief under the applicable traditional laws

[8] **Custom:** Expert Testimony

A trial court need not accept the testimony of an expert witness on custom.

[9] **Appeal and Error:** Standard of Review; **Custom:** Judicial Review

Whether a given custom has met the traditional law requirements is a mixed question of law and fact.

[10] **Appeal and Error:** Standard of Review; **Custom:** Judicial Review

The definitive statement as to whether a custom is or is not binding law is a pure determination of law

[11] **Appeal and Error:** Retroactive or Prospective Application of Decision

Generally, judicial decisions are applied retroactively to all civil matters that have not reached final judgment. However, rulings may be applied "purely prospectively," meaning that the ruling does not apply to the parties before the court.

[12] **Appeal and Error:** Retroactive or Prospective Application of Decision

A decision of the Appellate Division should be given retroactive effect unless: (1) the decision overruled past precedent or decided an issue of first impression whose resolution was not foreshadowed clearly; and (2) consideration of the purpose and effect of the underlying rule and the inequities of retroactive application weigh in favor of prospective application. The considerations in the second prong are properly viewed as objective inquiries that examine the impact of a newly announced rule on the entire class of persons potentially affected by the new rule, rather than the impact on any specific litigant.

[13] **Custom:** Burden of Proof

A party claiming to be a strong senior member of a clan has the burden of proving such status by a preponderance of the evidence. Where a party seeks to prove not that she is a strong member, but that instead another individual is a weak member, the burden of proof is placed on the party that would lose if no evidence were presented.

PE

[14] **Custom:** Clan Membership

It is well-established in Palau that clan members have the following ranks, in declining order of strength: (1) ochell members; (2) ulechell members; (3) rrodel members; (4) mlotechakl members; and (5) terruaol.

[15] **Civil Procedure:** Res Judicata

A judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as res judicata and as collateral estoppel.

[16] **Custom:** Clan Membership

Where a clan member traces his connection to a clan to a male progenitor, the clan member will be ulechell of that clan, not ochell.

[17] **Custom:** Clan Membership

An ulechell female may become an ourrot member of a clan based on contributions to the Clan.

Counsel for Appellant: Siegfried B. Nakamura
Counsel for Appellees: Salvador Remoket

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; ROSE MARY SKEBONG, Associate Justice Pro Tem

Appeal from the Trial Division, the Honorable LOURDES F. MATERNE, Associate Justice, presiding.

PER CURIAM:

This is an appeal of a Trial Division judgment finding Appellant Ngiraikelau Beouch to be a weaker member of the Mochouang[1] Clan ("the Clan") than Appellee Asako K. Sasao. For the following reasons, the decision of the Trial Division is **REVERSED.**

BACKGROUND

This case began on May 17, 2004, when Appellees filed a complaint and a motion for a temporary restraining order in the Supreme Court's Trial Division, seeking: (1) injunctive relief (both temporary and permanent) to prevent Appellant from entering the land known as *Brekong* or from altering a vacant building located on said land; (2) a declaration "that Plaintiffs as strong senior members of Mochouang Clan cannot be denied the right to manage and possess said land and building;" (3) a declaration "that [Appellant] has no right to enter and occupy said land and building because he is not a member of Mocho[u]ang Clan;" and (4) damages arising from Appellant's past efforts to enter *Brekong*.

[1] At different times in this litigation the name of the Clan has been spelled "Mochowang" and "Mochouang." We will use the latter spelling for consistency.

Appellant filed a timely answer and complaint for counterclaims, in which he sought the following declarations: (1) that he "is the strongest senior male ochell member Mocho[u]ang Clan today, bearing the chief title 'Renguul Ra Mocho[u]ang' of said clan;" (2) that he is "the chief of Mocho[u]ang Clan [and] the proper representative of said clan with authority over its properties, including the land in question;" (3) that he "has rights and interests in the building in question;" (4) that Appellees "are not members of Mocho[u]ang Clan, or in the alternative, that [they] are not strong senior members of said clan;" (5) that Appellees "do not represent Mocho[u]ang Clan and have no say or authority over the clan's properties, including the land and building in question;" and (6) that Appellees "have no rights or interests in the land and building in question." Additionally, Appellant sought injunctive relief to prevent Appellees from interfering with his right to enter the property and sought certain unspecified damages.

Trial in the matter began in April 2005. It was continued until November of 2005, and then again to January and February 2006. On August 29, 2007, then-Justice Larry Miller issued a decision and order in which he: (1) declined to "issu[e] any decision concerning the chief's title Renguul ra Mochouang;" (2) found that each side failed to establish that the other was not a member of the clan; (3) "reject[ed] both sides' claims to declare themselves stronger and to declare the other side weaker . . . members of [the] Clan;" and (4) "reject[ed] defendant's claim for damages arising from plaintiffs' interference with his title . . . ." In so holding, and of relevance here, Justice Miller found that Appellees were "ulechell members of the Clan." The August 29, 2007, order also found that Appellant's request for injunctive relief was not "unreasonable" and scheduled a hearing to address the issue of Appellant's proposed construction. That hearing was held on September 17, 2007, and on September 21, 2007, Justice Miller issued an order granting Appellant's request for injunctive relief. Subsequently, Appellant appealed the denial of his remaining demands for relief to this Court.

On January 21, 2009, we issued an opinion finding that "[t]he trial court did not fulfill its duty to resolve the parties' disputes and did not provide enough information to allow for meaningful appellate review." *Beouch v. Sasao*, 16 ROP 116, 119 (2009). Accordingly, we vacated the judgment and decision of the trial court and remanded "the case so the trial court c[ould] make the factual findings necessary to resolve the conflicts between the parties." *Id*. In particular, we noted that the Trial Division failed to "make explicit findings as to the parties' relative status in the Clan or the bearer of the Renguul ra Mochouang title." *Id*.

On remand, the Trial Division held a trial from May 17–20, 2011. On September 12, 2011, the Trial Division issued a judgment containing four specific findings: (1) Appellees "are ochell member[s] of Mochouang Clan and are strong members;" (2) Appellant "is an ochell member of Mochouang Clan and is a strong member;" (3) Appellant "does not hold the title of Renguul ra Mochouang;" and (4) Appellee Sasao "is a senior strong member of Mochouang."

In the accompanying findings of fact, the Trial Division explained that all litigants are ochell (thus, strong) members because they can "trace their membership in the clan to female members." The lower court further found that Appellee Sasao is a senior strong member of the Clan because "she has been involved in major customary events for the Clan [such as] the appointment and the blengur of Masami Elbelau to become Renguul ra Mochouang."

Finally, the trial court found that to become a rubak or title bearer in the Clan, a person must be appointed by the ourrot members of the Clan and then accepted by the klobak following a blengur. In this regard, the trial court found that Appellant did not hold the title Renguul ra Mochouang because "[u]ndisputed evidence show[s] that [he] did not have a blengur whereby the klobak of Ngermetengel accepted him as their friend."

Appellant filed a timely appeal in which he contends that the trial court erred in finding: (1) Appellees were ochell members of the Clan; (2) Appellee Sasao was a senior strong member; and (3) Appellant did not hold the title Renguul ra Mochouang.

STANDARD OF REVIEW

Appellant challenges the Trial Division's conclusions regarding the manner in which a Clan member achieves the status of an ochell, senior strong member, or Renguul ra Mochouang within the Clan.

[1] "A person's status within a clan is a matter of custom." *Estate of Rdiall v. Adelbai*, 16 ROP 135, 137. For some time now we have held "the existence of a claimed customary law is a question of fact that must be established by clear and convincing evidence and is reviewed for clear error." *Koror State Pub. Lands Auth. v. Ngirmang*, 14 ROP 29, 34 (2006). We are convinced that this current approach is incorrect and must be reexamined. In this regard, to understand where we are and where we are going, it is instructive to look at where we have been. *See* Paul J. De Muniz, *Past is Prologue: The Future of the Oregon Supreme Court*, 46 Williamette L. Rev. 415, 419 (Spring 2010) (quoting Oliver Wendell Holmes for the statement: "The law embodies the story of a nation's development . . . . In order to know what it is, we must know what it has been, and what it tends to become.").

I. Development of Palau's Customary Law Jurisprudence

Under Trust Territory jurisprudence, "custom in the legal sense" was defined as "[s]uch a usage as by common consent and uniform practice has become the law of the place, or of the subject matter, to which it relates [and which has been] established by long usage." *Lalou v. Aliang*, 1 TTR 94, 99–100 (Palau Tr. Div. 1954) (internal punctuation omitted). The Appellate Division of the Trust Territories employed a two-step process in reviewing a court's application of customary law. First, it would consider whether a particular custom was so "firmly established and widely known [as to justify] tak[ing] judicial notice of it." *Lajutok v. Kabua*, 3 TTR 630, 634 (1968). If, however, there was a "dispute as to the existence or effect of a local custom, and the court [was] not satisfied as to either its existence or its applicability, such custom

bec[ame] a mixed question of law and fact." *Id.* Under this formulation, the party relying on the custom was required to prove the custom's existence and application to "the satisfaction of the court." *Id.* Appellate review as to whether this burden was satisfied was deemed a mixed question of law and fact. *Id*. This rule was followed in trial courts throughout the Trust Territories. *See Basilius v. Rengiil*, 2 TTR 430, 432 (Palau Tr. Div. 1963); *see also Mutong v. Mutong*, 2 TTR 588, 593 (Panope Tr. Div. 1964).

On January 1, 1981, the Palau Constitution became the supreme law of the land. Of relevance here, Article V, Section 2, of the Constitution provides: "Statutes and traditional law shall be equally authoritative. In case of conflict between a statute and a traditional law, the statute shall prevail only to the extent it is not in conflict with the underlying principles of the traditional law."

In the Supreme Court's first case interpreting the foregoing provision we wrote:

> Although a . . . presentation of facts is required at trial, we hold that a higher standard of proof is necessary to sort out the complexities of this unique unwritten law. Normally, an expert witness will assist the court by tracing the historical application of customary law to the facts. The court will frequently appoint an assessor to resolve any conflict in the expert testimony.
>
> The use of custom is not unique to Palau or other places in Micronesia. Custom has its place in modern society in various fields of the law. The most common usage of custom in the law in the United States appears in business and trade. Although business and trade custom and cultural custom are in no way similar, the concepts of proof of custom are analogous.

Udui v. Dirrecheteet, 1 ROP Intrm. 114, 115–16 (1984).

From this starting point, we held that, insofar as United States law required a clear and convincing showing of a business custom, Palauan law of custom should require the same. *Id*. at 116–17. We further held that the question of the existence of the custom remained a question of law. *Id*. ("An expert witness on custom must state facts clearly supporting a *conclusion of law*, and may not offer his opinion as to what the custom is. This . . . is accomplished by clear and convincing evidence." (emphasis added)).

In subsequent years we cited *Udui* for the proposition that, despite requiring clear and convincing evidence, determinations of custom were conclusions of law. *See e.g., Ngirmang v. Orrukem*, 3 ROP Intrm. 91, 92 (1992) (citing *Udui* and referring to "[c]onclusions of law regarding custom."). However in 1996, with a reference to both *Ngirmang* and *Udui*, we held that "[t]he existence of a claimed customary law is a question of fact" and we applied for the first time a "clearly erroneous" standard of review. *Remoket v.*

Omrekongel Clan, 5 ROP Intrm. 225, 227 (1996). Based on the conclusion that the existence of custom was a question of fact, we held that a resolution of custom "requires that the outcome of a case be decided on the basis of its own record." *Arbedul v. Emaudiong*, 7 ROP Intrm. 108, 110 (1998) (citing *Udui*). This practice has continued in recent years. *See Delbirt v. Ruluked*, 13 ROP 10, 11–12 (2005); *Ramarui v. Eteet Clan*, 13 ROP 7, 8–9 (2005).

Notwithstanding the foregoing, we embraced sporadically the practice of taking judicial notice of customary laws established in previous cases, but only in circumstances where the custom was not contradicted by the record. *Ngirmang* 3 ROP Intrm. at 95; *Mikel v. Saito*, Civ. App. 11-041, slip op. at 4 n.1 (May 15, 2012); *but see Ruluked v. Delbirt*, 14 ROP 179, 179–80 (2007) (holding past cases alone did not establish custom). In light of the foregoing, it is clear our present jurisprudence on the issue of custom stands on shifting and uncertain grounds. Our Constitution demands better.

II. Clarification of the Proper Customary Law Standard

Having set forth the history of our customary law jurisprudence, we now clarify the tests for establishing customary law and for seeking review of such determinations.

As an initial matter, we reject *Udui*'s rationale that the "complexities" of customary law require a higher standard of proof. We are unaware of any legal doctrine that ties the burden of proof of a particular issue to the issue's complexity and we decline to set such a standard here. We also reject *Udui*'s analogy of Palauan traditional law to the treatment of business customs in the United States. When United States courts look to a business practice, they do so as an aid in interpreting an ambiguous contractual term. *See* 5 Williston on Contracts, Usage and Custom § 648. Indeed, each of the cases cited by the *Udui* Court discussed custom within the context of a business contract.[2] *See Udui*, 1 ROP Intrm. at 116.

In contrast, Palauan traditional or customary law[3] stands as "equally authoritative" to statutes. Palau Const. art. V, § 2. Thus, while business custom is used as a rule of law regarding the interpretation of contracts, Palauan custom exists as a *source* of law. This distinction renders

[2] *See Robinson v. United States*, 80 U.S. 363, 366 (1872) ("If a person of a particular occupation in a certain place makes an agreement by virtue of which something is to be done in that place, and this is uniformly done in a certain way by persons of the same occupation in the same place, it is but reasonable to assume that the parties contracting about it, and specifying no manner of doing it different from the ordinary one, meant that the ordinary one and no other should be followed."); *Shipley v. Pittsburgh & Lake Erie R.R.*, 83 F. Supp. 722, 749 (W.D. Pa. 1949) (considering whether "a nationwide custom and practice exist[ed] that the parties recognized and intended to be a part of [their] contracts."); *United States ex rel. E & R Constr. Co. v. Guy H. James Constr. Co.*, 390 F. Supp. 1193, 1203–04 (M.D. Tenn. 1972) (addressing custom in contract claim).

[3] Although Section 2 references "traditional law," the Committee Comments from the Constitutional Convention's Committee on General Provisions reveal that "traditional" and "customary" laws were seen as one and the same. *See* Palau Constitutional Convention, Standing Committee Report No. 39 (March 7, 1979) ("[Section 2] recognizes that traditional or customary laws are authoritative . . . "). We use "traditional law" for the sake of consistency.

inapposite any analogy between the two doctrines. Accordingly, insofar as the analogy on which the clear and convincing standard was based is inapplicable, we hereby expressly overrule the *Udui* rule requiring that traditional law be proven by clear and convincing evidence.

Having found our current approach to determining traditional law inadequate, the question becomes how customarylaw must be established under Article V. In this regard, we note initially that the Trust Territory cases treated questions of traditional law as mixed questions of law and fact to be proved to the satisfaction of the court. *See Lajutok*, 3 TTR at 634. To aid in determining whether that approach is consistent with the Palauan Constitution's recognition of traditional law as equal to statute, we turn to the Constitutional Convention's Committee on General Provisions ("CGP").

[2] The Committee Comments from the CGP define "custom" as "such usage which by common consent and uniform practice has become the law of the place or of the subject matter to which it relates and becomes binding when established by long usage." Palau Constitutional Convention, Standing Committee Report No. 39 (March 7, 1979). This language mirrors the traditional law requirements set forth by the Trust Territory.[4] Thus, we conclude the CGP contemplated four requirements for a custom to be considered traditional law under Article V, Section 2: (1) the custom is engaged voluntarily; (2) the custom is practiced uniformly; (3) the custom is followed as law; and (4) the custom has been practiced for a sufficient period of time to be deemed binding.[5]

[3, 4] In applying the four-element test, the two-step Trust Territory inquiry is instructive. When confronted with a question of a custom, a court should first ask whether the traditional law requirements (uniform practice, voluntary practice, recognition as law and long and general usage) are so "firmly established and widely known [as to justify] tak[ing] judicial notice of [the custom]." *Lajutok*, 3 TTR at 634; *Ramarui*, 13 ROP at 9. To this end, we note our past judicial recognition of a traditional law as binding will be controlling as a matter of law, absent evidence that the custom has changed. *See Obeketang v. Sato*, 13 ROP 192, 198 (2006) ("[T]his Court is

[4] *See Lalou*, 1 TTR at 99–100
Custom in the legal sense, is defined in part in Bouvier's Law Dictionary (Third Revision) as, "Such a usage as by common consent and uniform practice has become the law of the place, or of the subject matter, to which it relates," with the further statement, "Custom is a law established by long usage." Customs may change gradually, and changes may be started by some of the people affected agreeing to some new way of doing things, but such new ways will not become established and legally binding or accepted customs until they have at least existed long enough to have become generally known and have been peaceably and fairly uniformly acquiesced in by those whose rights would naturally be affected.

[5] In reaching this conclusion, we note the jurisprudence of Hawaii, which like Palau, and "[u]nlike any other American jurisdiction, [recognizes that] custom . . . actually preempts the common law," David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 Colum. L. Rev. 1375, 1427 (October 1996), has adopted a multi-part test which incorporates all four of the foregoing requirements. *See Public Access Shoreline Hawaii v. Hawaii County Planning Commission*, 903 P.2d 1246, 1262 n.26, 1269 n. 39 (Haw. 1995).

the ultimate interpreter of the Constitution with the duty to say what the law is.") (internal punctuation omitted). For example, we have recognized the binding traditional law that ourrout of each lineage of a clan must agree on the selection of the clan's female titleholder. *See Ngirmang*, 3 ROP Intrm. at 95. Absent a decision overruling this holding, or evidence the custom has changed, this statement of law is binding on the lower courts and would be determinative on the issue of the manner in which a female titleholder is selected.[6] *Obeketang*, 13 ROP at 198

[5] If there is no controlling Appellate Division case law, a trial court should consider whether it may take judicial notice of facts justifying the treatment of a custom as traditional law under the four-element test articulated above.[7] ROP R. Evid. 201. If the traditional law question is not resolvable purely through judicial notice, then the court must determine whether the judicially noticeable facts and the record as a whole satisfy the court that the traditional law requirements have been met.[8] *Lajutok*, 3 TTR at 634; *see also Alexander v. Hart*, 64 A.D.3d 940, 940 (N.Y. App. Div. 3rd Dep't 2009) (for Native American tribal law to be deemed controlling, the existence of such law must be proven to "the court's satisfaction.").

[9, 10] Whether a given custom has met the traditional law requirements is a mixed question of law and fact. *See* 75A Am. Jur. Trial § 604 (2007) ("in resolving a mixed question of law and fact, a reviewing court must determine whether established facts satisfy applicable legal rules."). However, the definitive statement as to whether a custom is or is not binding law is a pure determination of law. *See Atkinson v. Board of Parole and Post-Prison Supervision*, 143 P.3d 538, 541 (Or. 2006) ("A 'question of law,' however, is a question framed in such a way that it is susceptible of adjudication by way of pronouncement as to what the law is." (internal punctuation omitted)).

We review mixed questions of law and fact and pure questions of law under a

[6] Although, the standard for proving traditional law has changed with today's decision, we hold previous opinions made under the higher standard of proving traditional law should be entitled to binding effect, absent evidence the custom is inapplicable. *See infra* note 7.

[7] **[6]** Although we acknowledge the role of judicial notice in establishing the requirements of traditional law where the facts are beyond any reasonable dispute, we recognize that customs may change. *Ngiraremiang v. Ngiramolau*, 4 ROP Intrm. 112, 116–17 (1993) (holding previous custom no longer applied). In the event a court utilizes judicial notice to find existence of a traditional law, a party may challenge the court's decision to do so. *See* ROP Rule of Evidence 201(e) ("A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed."). In the event of such a challenge, the party attacking the judicially noticed custom must prove to the court's satisfaction that the custom is no longer binding.

[8] **[7, 8]** Courts determining whether a traditional law exists must be mindful of their "duty to find and apply the correct law." *See U.S. v. Irey*, 612 F.3d 1160, 1215 n. 33 (11th Cir. 2010). Accordingly, a trial court need not accept the testimony of an expert witness. *See Iderrech v. Ringang*, 9 ROP 15, 160 (2002). Where an issue of traditional law is unresolvable on the record, a trial judge must develop the record in order to allow for resolution. Of course, this duty does not relieve the parties of their respective burdens to introduce facts justifying relief under the applicable traditional laws.

de novo standard. *Ngiralmau v. ROP*, 16 ROP 167, 169 (2009) (holding mixed questions of law and fact are reviewed de novo); *Blesoch v. Republic of Palau*, 17 ROP 198, 200 (2010) (determinations of law are reviewed de novo). Accordingly, this Court will review a lower court's determination as to what the customary law in Palau is under a de novo standard. We conclude that this practice is necessary to give the customary rule of law its rightful place in Palauan national jurisprudence.

ANALYSIS

As noted above, Appellant contends the Trial Division erred in concluding: (1) Appellees were ochell members of the Clan; (2) Appellee Sasao was a senior strong member of the Clan; and (3) Appellant did not hold the title Renguul ra Mochouang. In resolving these questions we first must address whether our decision today, and the attendant changes to the applicable law, apply retroactively.

I. Whether Today's Decision is Retroactive

[11] "[G]enerally, judicial decisions are applied retroactively to all civil matters that have not reached final judgment." 20 Am. Jur. 2d Courts § 152 (2005). However, rulings may be applied "purely prospectively,"[9] meaning that the ruling "does not apply to the parties before [the court]." *Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 828 (9th Cir. 2011) (Tashima, J., concurring).

The Appellate Division has yet to address the factors to be considered when determining whether a decision should be given prospective or retroactive effect. However, in 2007, the Trial Division wrote:

> The United States federal courts start with a presumption of retroactivity and then apply a three factor test derived from *Chevron Oil Co. Inc. v. Huson*, 404 U.S. 103, 92 S.Ct. 349 (1971). First, the decision must establish a new principle of law either by overruling past precedent or by deciding an issue of first impression whose resolution is not clearly foreshadowed. Second, the court must weigh the merits and demerits of each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective application will further or retard its operation. Finally, the court must weigh the inequity imposed by retroactive application, for "where a decision . . . could produce substantial inequitable results if applied retroactively, there is ample basis . . . for avoiding the injustice or hardship by a holding of nonretroactivity." *Id.*

Temol v. Tellei, 15 ROP 156, 157–58 (Tr. Div. 2007).

[12] We believe the test articulated by *Chevron* (and applied in *Temol*) is the correct one and should be adopted. Accordingly, a decision of this Court should

[9] "Modified" prospectivity –where retroactivity decisions are determined on a case-by-case basis – has been rejected by the United States Supreme Court in civil cases. *See Glazner v. Glazner*, 347 F.3d 1212, 1217–18 (11th Cir. 2003) (citing *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 94–99 (1993); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534–544 (1991).

be given retroactive effect unless: (1) the decision overruled past precedent or decided an issue of first impression whose resolution was not foreshadowed clearly; and (2) consideration of the purpose and effect of the underlying rule and the inequities of retroactive application weigh in favor of prospective application. The considerations in the second prong "are properly viewed . . . as objective inquiries that examine the impact of a newly announced rule on the entire class of persons potentially affected by the new rule, rather than the impact on any specific litigant." *Glazner v. Glazner*, 347 F.3d 1212, 1219 (11th Cir. 2003).

Needless to say, the first hurdle of the *Chevron* test (an overruling of past precedent) is cleared easily here. Accordingly, the Court will consider whether the purpose and effect of the traditional law rule and the inequities of retroactive application weigh in favor of prospective application.

As to the second prong, the Preamble to the Constitution states expressly the purpose of "preserv[ing] and enhanc[ing] traditional heritage." Insofar as our decision finds that the previous standard placed too high a burden on proving traditional law, it is arguable that retroactive effect would enhance rather than undermine the purpose of the provision.

In contrast, the equity of retroactive application weighs in favor of prospective application because the pending cases were brought and tried ostensibly in reliance on the previous rules governing proof of custom. *See Garfias-Rodriguez v. Holder*, __ F.3d __, 2012 WL 5077137 at *40 (9th Cir. 2012) (Reinhardt, J., dissenting) ("Our precedent suggests that, in the usual case, where the first factor is met, so is the third, because inequity necessarily results from litigants' reliance on a past rule of law.") (citing *Holt v. Shalala*, 35 F.3d 376, 380–81 (9th Cir. 1994) and *Nunez–Reyes v. Holder*, 646 F.3d 684, 692–93 (9th Cir. 2011)). Were we to give our holding retroactive application we would be left with two options: (1) apply a standard of proof to trial records created in reliance on a different standard; or (2) force litigating parties to undergo the expense of a new trial. Although it is a close call, we believe that the inequities of retroactive application under either option would be sufficiently severe to warrant prospective application of our holding here.[10] Accordingly, we will apply the previous standard for proving traditional law when addressing the merits of Appellant's appeal.

[13] With these principals in mind, we turn to Appellant's arguments that the Trial Division erred in concluding: (1) Appellees were ochell members of the Clan; (2) Appellee Sasao was a senior strong member of the Clan; and (3) Appellant did not hold the title Renguul ra Mochouang. In this regard, we note that "[a] party claiming to be a strong senior member of a clan has the burden of proving such status by a preponderance of the evidence. Where a party seeks to prove not that she is a strong member, but that instead another individual is a weak member, the burden of proof is placed on the party that would lose if no evidence were presented." *Dokdok v. Rechelluul*, 14 ROP 116, 118 (2007).

[10] Accordingly, courts should apply the previous traditional law standard to all cases filed before this date.

II. Whether Appellees are Ochell Members of the Clan

[14] "[I]t is well-established in Palau that clan members have the following ranks, in declining order of strength: (1) ochell members . . .; (2) ulechell members . . .; (3) rrodel members . . . ; (4) mlotechakl members . . . ; and (5) terruaol." *Estate of Rdiall v. Adelbai*, 16 ROP 135, 138 n.3 (2009). The Trial Division found all parties were ochell members of the Clan. Appellant appeals this conclusion with respect to Appellees.

[15] As an initial matter, Appellant asserts that Appellees are barred by the doctrines of res judicata, collateral estoppel and waiver from arguing they are ochell members of the Clan. Appellant submits that Appellees are so barred because they did not appeal the first trial order. "A judgment that has been vacated, reversed, or set aside on appeal is thereby deprived of all conclusive effect, both as res judicata and as collateral estoppel." Accordingly, Appellant's res judicata and collateral estoppel arguments are without merit. *Kosinski v. C.I.R.*, 541 F.3d 671, 676 (6th Cir. 2008).

As to waiver, Appellant cites to American Jurisprudence for the proposition that "[a] party to a judgment who voluntarily acquiesces in, or recognizes the validity of, such judgment, or who otherwise takes a position which would be inconsistent with any other theory other than the validity of the judgment is said to have implicitly waived the right to contest the validity of the judgment on appeal or to be procedurally [e]stopped from taking an appeal." (quoting 5 Am. Jur. 2d *Appellate Review* § 578 (2007)). Because Appellees have not attempted to appeal or otherwise to contest the validity of the vacated judgment, the doctrine of waiver has no bearing on these proceedings.

[16] On the merits of the issue, the Trial Division appeared to base a finding of ochell status on the fact that Appellees' mothers were members of the clan. However, the expert in this matter testified where a clan member traces his connection to a clan to a male progenitor, the clan member will be ulechell of that clan, not ochell. This testimony is supported by our past findings of custom. *See Soaladaob v. Remeliik*, 17 ROP 283, 290 (2010) ("Siual's ochell status was clearly called into question by her failure to trace her lineage back further than two generations."); *Orak v. Ueki*, 17 ROP 42, 47 (2009) ("[O]chell [status] is traced through the matrilineal line."); *Louch v. Mengelil*, TTR 121, 122 (Palau Trial Div. 1960) (defining ochell as a "true member of female line").

It is undisputed that Appellees are children of female members of the clan, but that they only can trace their ancestry back to male brothers Serui and Etmengeed, who are of an indeterminate ochell/ulechell classification. Accordingly, it appears that the Trial Division committed clear error in finding the Appellees were ochell and that, therefore, reversal on this issue is warranted.

III. Whether Appellee Sasao is a Senior Strong Member of the Clan

The Trial Division found that Appellee Sasao was a senior strong (ourrot) member by virtue of her "involve[ment] in major customary events for the Clan," such

as the appointment and blengur of Masami Elbelau to become Renguul ra Mochouang. Appellant submits this finding was in error because: (1) Appellee Sasao was ulechell, not ochell; (2) "[t]here is nothing in the record stating that Sasao performed extraordinary services to the Clan or that she bears a title;" and (3) Appellees failed to sustain their burden of proving that, under customary law, "an ulechell can be a senior strong member in the clan like an ochell by virtue of the services she/he performed."

[17] As to the first and third contentions, the customary expert in this matter testified that a "senior female members [ourrot] are the older women who have done *ocheraol* and have contributed money towards the debts of people." While the expert did not address the issue specifically,[11] previous Supreme Court case law has held that an ulechell female may become an ourrot member of a clan based on contributions to the Clan.[12] *See Ngirmang v. Filibert*, 9 ROP 226, 299 (Tr. Div. 1998) ("[I]t is not impossible for an ulechell female to become a senior ourrot, depending upon her age and contributions to the clan."). Accordingly, Appellee's status as an ulechell member would not prevent her from becoming ourrot, so long as she made sufficient contributions to the Clan. *Id*.

On the second issue – the evidence of Appellee's Sasao's services to the Clan – Appellant submits that the record shows only one instance of Appellee Sasao's involvement in Clan matters: her alleged involvement in the appointment of Masami Elbelau to become Renguul ra Mochouang. In response, Appellees do not cite to any testimony or documentary evidence which would tend to show that Sasao performed services for the Clan. Accordingly, the only evidence of record before us regarding Appellee Sasao's contributions to the Clan is a 1985 letter signed by Sasao and others as ourrot appointing Masami Elbelau as Renguul ra Mochouang. We conclude this evidence falls short of the clear and convincing evidence required to prove ourrot status.

The undisputed expert testimony in this matter was that ourrot status requires involvement in *ocheraol* and contributions of money towards the debts of people. There is no such evidence here with regard to Appellee Sasao. Accordingly, we reverse the Trial Court's determination that Appellee Sasao sustained her burden of showing that she is ourrot by clear and convincing evidence.

IV. Whether Appellant holds the title Renguul ra Mochouang

Finally, Appellant argues that the Trial Division erred in finding that he did not hold the title Renguul Ra Mochouang because he had not had a blengur. At trial, two witnesses testified regarding the manner in which a Clan member becomes a chief. Demei Otobed, an expert witness testified that it is customary for the ourrot to appoint a rubak, that the rubak is accepted by the

[11] The expert testified that a *ultechakl* – a non-blood member of a clan – may become ourrot. This is consistent with our case law. *See Sengebau v. Balang*, 1 ROP Intrm. 695 (1989) (affirming Trial Division's finding that adopted members of a clan could become senior strong members of that clan).

[12] There being no evidence to the contrary, we take judicial notice of this traditional law. *Ramarui*, 13 ROP at 9

members of the council of chiefs, and then the rubak has a blengur (feast). Otobed testified that in his State of Ngatpang the feast was a requirement for the first four ranking chiefs in the state of Ngatpang and that there "may be little differences" in other states regarding the appointment of council of chiefs. On the issue of appointment, Otobed explained that the senior female members bring their candidates for chief to a meeting, but that they "will disregard their candidate and follow what the matriarch of the senior female members says."

Ngirturong Yamazaki Rengiil (the highest chief in Ngeremlengui) testified that, in the *osebek* hamlets, a person becomes a chief as soon as he is appointed by the senior female members. Accordingly, in Ngermetengel, a male appointed to chief by the senior female members assumes the title upon appointment and is not required to have a blengur or to be accepted by the chiefs as their friends.

Neither party disputes the Trial Division's finding that the Clan is the fourth ranking Clan of Ngermetengel Hamlet of Ngermlengui and that Renguul ra Mochouang is the fourth ranking rubak of Ngarabedechal, the klobak of Ngermetengel Hamlet. However, the trial court found Appellant could not establish he held the title because there was no evidence he had a blengur or that the chiefs accepted him as a friend. Because Renguul ra Mochouang is not one of the four highest ranking titles in the State of Ngatpang, it does not fall within the ambit of Otobed's expert testimony. Accordingly, the only record evidence on point was the testimony that blengur and acceptance were not required for a person to become Renguul ra Mochouang. The Trial Division's finding to the contrary was clear error and must be rejected. Nevertheless, and despite Appellant's urgings, we cannot find he holds the title Renguul ra Mochouang.

As explained above, the customary law expert testified that a chief is appointed by the matriarch of the senior female members and then sanctioned by the remaining ourrot. Here, evidence shows that Appellant was appointed by women named Obechou and Ngeruangel. While there is some evidence Ngeruangel was the matriarch of the Clan, the decision below is silent on this point, and so determination in this regard is best left to the Trial Division. *Rebluud v. Fumio*, 5 ROP Intrm. 55, 57 (1995) (weighing of evidence is "the province of the trial court."). Accordingly, we conclude this matter should be remanded for a determination as to whether Appellant sustained his burden of establishing his status as Renguul ra Mochouang.[13]

CONCLUSION

In sum, we hold as follows: (1) Appellant is ochell; (2) Appellees are ulechell; (3) Appellee Sasao is not a senior strong member of the clan; and (4) Appellant was not required to show he had a blengur and was accepted by the relevant klobak. Thus, for the foregoing reasons, the

[13] The Trial Division found non-party Masami Elbelau "made a prima facie showing that he holds the title of Renguul ra Mochouang." It is unclear what the Trial Division meant by this statement, particularly in light of the fact that Wataru Elbelau (a witness for Appellees) testified unequivocally that Masami could *not* hold the title Renguul ra Mochouang. We find the Trial Division's conclusion regarding Masami to be without legal effect.

decision of the trial court is **REVERSED**. This case is **REMANDED** for proceedings consistent with this opinion. On remand the Trial Division should determine what effect the foregoing conclusions have on the parties' rights to access *Brekong*.[1]

[1] Although we are loathe to remand this case for a third time, the record does not provide a sufficient basis for us to adjudicate rights to *Brekong* in light of our conclusions here. Our reluctance to remand is outweighed by our duty to ensure the parties receive the fair and sound decision to which they are entitled.

EVELYN NGIRTURONG,
Appellant,

v.

JOHN RECHUCHER and MARIANO TELLEI,
Appellees.

CIVIL APPEAL NO. 12-005
LC/H 08-1171

Supreme Court, Appellate Division
Republic of Palau

Decided: January 10, 2013

[1] **Appeal and Error:** Procedure

Republic of Palau Rule of Appellate Procedure 31(c) provides: If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal, or the Appellate Division may so dismiss on its own motion.

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; and KATHERINE A. MARAMAN, Part-Time Associate Justice.

Appeal from the Land Court, the Honorable ROSE MARY SKEBONG, Associate Judge, presiding.

PER CURIAM:

Appellant Evelyn Ngirturong filed this appeal on February 3, 2012. Since that time, Appellant has not filed her opening brief, has not sought any extension of time,

nor has she responded to the Court's November 30, 2012, Order to Show Cause why this matter should not be dismissed.

[1] Republic of Palau Rule of Appellate Procedure 31(c) provides: "If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal, or the Appellate Division may so dismiss on its own motion."

Accordingly, the Court **DISMISSES** this appeal for Appellant's failure to comply with the Republic of Palau Rule of Appellate Procedure 31 and for lack of prosecution of this matter. *See Estate of Masang v. Marsil*, 13 ROP 1, 2 (2005) ("[W]e take this opportunity to warn all appellants and their counsel, and we direct the Clerk of Courts to provide a copy of this Order to all active members of the Palau Bar, that while we will continue to consider timely and reasonable requests for extensions of time, any failure to timely file an appeal or opening brief . . . will result in the dismissal of the appeal without further notice and that such dismissal will not be undone absent truly extraordinary and unanticipated circumstances.").

MARGIE BECHAB,
Appellant,

v.

IGNACIO ANASTACIO,
Appellee.

CIVIL APPEAL NO. 12-007
Civil Action No. 09-206

Supreme Court, Appellate Division
Republic of Palau

Decided: January 11, 2013

[1] **Appeal and Error:** Jurisdiction

The Appellate Division is without jurisdiction to entertain an appeal where the notice of appeal is untimely filed.

[2] **Appeal and Error:** Standard of Review

Motions to enforce judgments are reviewed for abuse of discretion.

[3] **Appeal and Error:** Standard of Review

However, issues regarding the scope of the judgment to be enforced are reviewed de novo.

[4] **Appeal and Error:** Standard of Review

Factual determinations made in connection with a motion to enforce a judgment are reviewed on a clearly erroneous standard.

[5] **Appeal and Error:** Standard of Review

Determinations of the admissibility of evidence are in the discretion of the trial

judge and will not be reversed by an appellate court unless there is an abuse of discretion.

[6] **Evidence:** Admissibility

Relevant evidence obtained in violation of the Constitution will be deemed admissible in civil proceedings.

[7] **Civil Procedure:** Motion to Enforce Judgment

Courts grant motions to enforce judgments when a prevailing plaintiff demonstrates that a defendant has not complied with a judgment entered against it, even if the noncompliance was due to misinterpretation of the judgment. Under this formulation, the proponent of a motion to enforce a judgment bears the burden of proof as to non-compliance.

[8] **Appeal and Error:** Harmless Error

A misallocation of the burden of proof is harmless error where the record is so clear that the allocation of the burden of proof would make no difference.

[9] **Courts:** Inherent Power

Every court that has the jurisdiction to render a particular judgment has the inherent power to enforce it. Such authority inheres in the judicial power.

[10] **Constitutional Law:** Due Process

The hallmark of procedural due process is the requirement that the government provide notice and an opportunity to be heard before depriving a person of life, liberty, or property.

Counsel for Appellant: J. Roman Bedor
Counsel for Appellee: Yuwiko Dengokl

BEFORE: LOURDES F. MATERNE, Associate Justice; HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem; KATHERINE A. MARAMAN, Part-Time Associate Justice.

Appeal from the Trial Division, the Honorable KATHLEEN M. SALII, Associate Justice, presiding.

PER CURIAM:

This is an appeal of a Trial Division Order directing Appellant Margie Bechab to vacate Cadastral Lot No. 020 D 29, formerly described as Lot 020 D 08 B2. For the following reasons, the decision of the Trial Division is **AFFIRMED.**

BACKGROUND

The relevant history of Tochi Daicho lot numbers 806, 807 and 808 (collectively known as *Imekang*), the land at issue here, begins with a man named Bechab. Bechab had several children, but a LCHO decision issued in 1995 awarded ownership of the land to two of his sons – Mesubed and Markus. In June of 2007, after a series of legal challenges and one sale, Appellee Ignacio Anastacio and the estate of Markus were issued Certificates of Title to the three lots in fee simple.

On September 1, 2009, Anastacio filed in the Trial Division of the Supreme Court a Petition to Partition three parcels of

land: (1) Cadastral Lot Number 020 D 08, formerly Tochi Daicho Lot 806; (2) Cadastral Lot Number 020 D 07, formerly Tochi Daicho Lot 807; and (3) Cadastral Lot Number 020 D 06, formerly Tochi Daicho Lot 808. A Notice of the Partition was issued on October 7, 2009. Claims and Objections regarding the Petition were filed by: (1) Appellant, on behalf of herself and her siblings, as children of Markus; and (2) Erica Bechab Siang, "on behalf of herself and her natural siblings / nieces and nephews by adoption," as children of Bechab.

A hearing on the objections to the Petition was set for November 19, 2009. At the hearing, Siang's objection to the partition was dismissed on the grounds that the 1995 Land Court decision awarded Bechab's interest in the properties to Markus and Mesubed only. Also at the hearing, Appellant claimed that Markus and Mesubed had reached a binding agreement on how the lands were to be partitioned. Subsequent to the hearing, Anastacio submitted a proposed partition, set forth in an attached Exhibit A, whereby the three lots would be split into six separate parcels: (1) A (the southern half of 020 D 06); (2) B (the northern half of 020 D 06): (3) A1 (the southern half of 020 D 07); (4) B1 (the northern half of 020 D 07); (5) A2 (the southern half of 020 D 08); and (6) B2 (the northern half of 020 D 08).

On December 15, 2009, the Trial Division granted "the petition to partition the lands . . . in accordance with . . . Exhibit A," and directed Anastacio to "have a survey conducted in accordance with said sketch to monument and delineate the boundaries so that new certificates of title can be issued thereafter."

On November 23, 2010, Anastacio filed a Request to Partition Lands in Accordance with Proposal of Petitioner, in which he sought to receive lots B, B1 and B2 of the newly partitioned properties. In his request, Anastacio represented that he sought "this particular division because the B lots are located closest to property he already owns and it makes sense to partition the lots this way." The request further sought an order directing "Margie Bechab and the other co-owners of the remainder of the lots, to remove within 45 days from the date of the entry of the Court's order . . . any of their structures, house, debris, and other matters located, or which are, on petitioner's lots once the Court orders the division of the lots."

Appellant objected to Appellee's proposal on the grounds that: (1) the proposal would "violate their perpetual right to live and use land upon which their house is situated;" and (2) Appellee was subject to the terms of a purported agreement between Markus and Mesubed, under which "Mesubed . . .agreed to have . . . Marcus . . . live on one of the land by the beach front and to use it perpetually."

Appellee replied that the purported perpetual-use claim was "foreclosed and precluded by the doctrines of res judicata, issue preclusion, and collateral estoppels in that such issue should have been raised during the initial litigation over the ownership of the lots at issue, particularly petitioner's ownership."

On February 1, 2011, the Trial Division granted Appellee's request to partition and ruled that the perpetual-use right was barred by res judicata and/or collateral estoppel. The order dividing the property further provided that "Margie Bechab and all other co-owners of the remainder of the lots shall have Ninety (90) days from the date of this order to remove any structures, debris, and other matters located on Petitioner's Lots."

On July 29, 2011, the Trial Division issued an Order Correcting Clerical Errors in Feb. 1, 2011 Partitioning Order (Correction Order), in which it purported to correct typographical errors[1] contained in the February 1, 2011, Partition Order (February Partition Order). The Correction Order also provided that "Margie Bechab and all other co-owners of the remainder of the lots shall have up to **November 1, 2011** to remove any structures, debris, and other matters located on Petitioner's lots." (emphasis in original). Finally, the Correction Order set a hearing for November 4, 2011, to address such removal.

The aforementioned hearing was reset for November 8, 2011. At the hearing, Appellee testified that the Bureau of Land Surveys (BLS) had surveyed and placed monuments on the portioned parcels and that by looking at the monuments placed, it was clear Appellant's home fell on Appellee's side of the partition of B2 (lot 020 D 29). Additionally, Appellee introduced into evidence a survey map purporting to show the locations of said monuments. Margie testified that, as far as she was aware, her home fell wholly on A2 (lot 020 D 30).

On November 16, 2011, the Trial Division issued an order which directed Appellant to "see to it that BLS conducts a survey of the lots in accordance with this order, and that such completed survey be provided to Petitioner within (7) days of completion." With regard to Lots B and B1, the order directed Margie to "clear all debris and crops therefrom by December 16, 2011."

One week later, on November 23, 2011, Mario Retamal, the National Surveyor, transmitted the final parcel split map to the Trial Division.

On January 5, 2012, Appellee filed a motion in which he sought enforcement of the previous orders directing Appellant to vacate Cadastral Lot No. 020 D 29, formerly described as Lot No. 020 D 08 B2 (Motion to Enforce). In support of the Motion to Enforce, Appellee attached two pages of documents, which he represented to be the results of a BLS survey showing Appellant's home encroaching upon Lot B2. Appellant did not respond to this motion, and on January 20, 2012, the Trial Division entered an order granting the motion and directing Appellant to vacate the property (Enforcement Order). This appeal followed on February 14, 2012.

STANDARD OF REVIEW

At the outset of this Opinion it is important to clarify the issues on appeal. Appellant's appeal arises from the

[1] The February Partition Order incorrectly identified lot 020 B 07 B1 as "020 B 07 BI" and lot 020 B 07 A1 as "020 B 07 AI." Despite purporting to correct these errors, the Order Correcting Clerical Errors once again identified the lots as 020 B 07 BI and 020 B 07 AI.

Enforcement Order of the Trial Division directing her to vacate the lands partitioned in favor of Appellee in the February partition order. However, in her appeal, Appellant also seeks to overturn the partition of the property.

Rule 4(a) of the Appellate Rules of Procedure, provides:

> Every appeal shall be directed to the Appellate Division of the Supreme Court. The notice of appeal shall be filed within thirty (30) days after the imposition of sentence in a criminal case or service of a judgment or order in a civil case, unless otherwise provided by law. The time for filing an appeal is terminated by the timely filing, in accordance with the Rules of Civil Procedure or Rules of Criminal Procedure, of a motion to alter or amend the judgment or a motion for a new trial or in a criminal action, a motion in arrest of judgment.

[1] We are without jurisdiction to entertain an appeal where the notice of appeal is untimely filed. *Pamintuan v. ROP*, 14 ROP 189, 190 (2007).

It is undisputed that the First Partition Order was docketed on December 15, 2009, that the Second Partition Order was docketed on February 1, 2011, and that the Correction Order was docketed on July 29, 2011. Appellant's Notice of Appeal was filed on February 14, 2012. Even measuring timeliness from the latest correction date, this Court is without jurisdiction to review either partition order. Accordingly, the sole issue on appeal is whether the Trial Division erred in directing Appellant to remove her home and other items from Appellee's land.

[2-4] Motions to enforce judgments are reviewed for abuse of discretion. *See Harvey v. Johanns*, 494 F.3d 237, 240 (1st Cir. 2007) (citing *McDowell v. Phila. Hous. Auth.*, 423 F.3d 233, 238 (3d Cir. 2005)). However, issues regarding the scope of the judgment to be enforced are reviewed de novo. *Johanns*, 494 F.3d at 241; *see also Ren Int'l Co. v. Garcia*, 11 ROP 145, 150 (2004) ("A trial court's legal conclusions are reviewed de novo on appeal."). Factual determinations made in connection with a motion to enforce a judgment are reviewed on a clearly erroneous standard. *See Chase Lumber & Fuel Co. Inc. v. Chase*, 228 Wis. 2d 179, 206 (Wis. Ct. App. 1999); *see also Edaruchei Clan v. Sechedui Lineage*, 17 ROP 127, 128 (2010) ("When two permissible competing views of the evidence are present, a lower's court decision between the competing views cannot be considered clearly erroneous.").

ANALYSIS

Appellant raises three issues on appeal: (1) the trial court erred in partitioning the land as it did because Appellant "was denied . . . her right to participate in the survey of the partial split;" (2) the trial court applied the wrong standard of proof in deciding that Appellant's home was on Appellee's property; and (3) the Enforcement Order violated Article IV, section 6 of the Palau Constitution.

I. The BLS Survey

Appellant claims that the BLS Survey was not "legally binding" because she was entitled to notice of the BLS

monumentation and survey and that she did not receive such notice. Accordingly, Appellant asks this Court to "set aside the partition of the foregoing lots . . . and to remand the case back to the Trial Court." Alternatively, Appellant contends that the survey could not be used to lend support to Appellee's claim for eviction.

[5] First, to the extent Appellant seeks to set aside the partition based on the purported deficiency in the BLS Survey, for the reasons set forth above, such claim must be dismissed as untimely. Thus, the question becomes whether the Trial Division erred in relying on the survey when issuing the eviction order. To this end, we note "[d]eterminations of the admissibility of evidence are in the discretion of the trial judge and will not be reversed by an appellate court unless there is an abuse of discretion." *Temaungil v. ROP*, 9 ROP 139, 140 (2002).

[6] ROP Rule of Evidence 402, which is modeled after the U.S. Federal Rules of Evidence, dictates that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the Republic of Palau, by these rules, or by other rules prescribed by the Supreme Court pursuant to constitutional authority." Under this broad standard, relevant evidence obtained in violation of the Constitution will be deemed admissible in civil proceedings. *See* 29 Am. Jur. Evidence § 604 ("The exclusionary rule is not applied in civil cases where private parties seek to introduce evidence obtained through unauthorized searches made by state officials."). Relevant evidence means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ROP Rule of Evidence 401.

In the present matter, Appellant contends that she had a right to notice of the survey and the underlying monumentation rooted in the constitutional rights to due process and cross-examination. It is beyond dispute that the motion for relief filed January 6, 2012, contained copies of the BLS survey showing the partition of the parties' lands and a map showing structures on the property. The maps were relevant to the issue of the location of Appellant's structures. Appellant chose not to contest the motion, leaving the maps available to the Trial Division for its use without objection. Thus, Appellant's argument that the survey could not be relied upon because the underlying monumentation had occurred without notice is without merit. *See id.*

II. Burden of Proof and Necessity of Survey Map

Next, Appellant contends that the Trial Division erred because it misallocated the burden of proof and because it issued the eviction order without admitting into evidence a completed survey map.

A. The Allocation of the Burden of Proof

[7] "Courts grant motions to enforce judgments when a prevailing plaintiff demonstrates that a defendant has not complied with a judgment entered against it, even if the noncompliance was due to misinterpretation of the judgment." *Heartland Hosp. v. Thompson*, 328 F.Supp.2d 8, 11–12 (D.D.C. 2004). Under

this formulation, the proponent of a motion to enforce a judgment bears the burden of proof as to non-compliance. *Id.*

[8] Here, Appellee filed his Motion to Enforce along with two BLS documents showing that Appellant's structure was located on his property. After Appellee failed to respond to the foregoing motion, the Trial Division issued its Enforcement Order upon a finding of "good cause" for the relief sought. Although, Appellant had been directed previously to produce a survey showing that her property was *not* encroaching over the partition line, there is no indication that the Enforcement Order was issued *because* Appellant did not produce such evidence. Accordingly, Appellant's contention that the Trial Division misallocated the burden of proof is without merit. *See Obakerbau v. Nat'l Weather Serv.*, 14 ROP 132, 135 (2007) ("It is appellant's burden to demonstrate, based on the record on appeal, that an error occurred in the trial court."). However, even assuming the burden of proof was misallocated to Appellant, any such error was harmless.

"The Appellate Division will not reverse a lower court decision due to an error where that error is harmless." *Ngiraiwet v. Telungalek Ra Emadaob*, 16 ROP 163, 165 (2009). A misallocation of the burden of proof is harmless error where the record is "so clear that the allocation of the burden of proof would make no difference." *Whiteside v. Gill*, 580 F. 2d 134, 139 (5th Cir. 1978).

The record is clear that Appellant's home rests on Appellee's property. Appellee testified that a straight line drawn between the monuments dividing the properties clearly showed Appellant's home encroaching on his property. Additionally, Appellee submitted survey documents purporting to be from BLS showing Appellant's structure straddling the partition line between lots B2 and A2. The only evidence to the contrary was Appellant's conclusory and unsupported opinion that the structure was located on A2. We conclude that, under either allocation of the burden of proof, Appellee would have been entitled to the relief provided and that, therefore, any error in this regard was harmless.

B. The Necessity of a Completed Survey

Finally, Appellant submits an argument, which we quote in full:

> Further, the Trial Court could not have speculated that three lots 020 D 08, 020 D 07 and 020 D 06 had been officially split between appellant and appellee and that appellant is on the portion of lot 020 D 08 given to appellee when the Survey of Lands and Survey did not complete the survey map of the partial split of three lots and have it admitted into evidence below. It would be speculative on the part of the court below to consider that three said lots had been officially split between appellant and appellee and appellant should vacate because she is on appellee' [sic] share of lot 020 D 08. The court does not work by speculation but by evidence to support its order.

Although difficult to discern, it appears that Appellant argues the Trial Division could not have found Appellant to be on Appellee's property because there was no evidence that the properties had been "officially split" by BLS.

[9] "Every court that has the jurisdiction to render a particular judgment has the inherent power to enforce it." 30 Am. Jur. 2d Executions and Enforcement of Judgments § 3 (2004). Such "authority inheres in the judicial power." *Zbaraz v. Madigan*, 572 F.3d 370, 385 (7th Cir. 2009).

Here, the Trial Division issued a valid partition order (which cannot be challenged on appeal) awarding specific property to each party and directing the parties to remove all items and structures from the land parcels granted to the other side. That BLS did not "officially split" the land — a term Appellant never defines — did not alter Appellant's obligations under the judgment nor did it deprive the Trial Division of its inherent power to enforce the terms of its order. *Id*. Thus, the lack of BLS action with regard to the partitioned properties could not deprive the trial court from directing Appellant to comply with its previous orders.

III. Appellant's Property Interest in Her Home

Finally, Appellant argues that any destruction of her property would be an unconstitutional deprivation under Article IV, Section 6 of the Palau Constitution. Appellant Brief, at 12.

[10] The relevant section of the Constitution provides that "[t]he government shall take no action to deprive any person of life, liberty, or property without due process of law . . . ." ROP Const. art. IV, § 6. Thus, the Due Process Clause of the Palau Constitution does not prohibit all deprivations of property. Rather, the provision prohibits deprivations *without due process*. Because it cannot be disputed that Appellant has a property interest in her home and that the Enforcement Order deprives Appellant this interest, the question becomes whether Appellant was provided appropriate due process prior to the issuance of the order.

"The hallmark of procedural due process is the requirement that the government provide notice and an opportunity to be heard before depriving a person of life, liberty, or property." *April v. Palau Pub. Utils. Corp.*, 17 ROP 18, 22 (2009).

Here, Appellant was provided ample notice and opportunities to be heard with regard to the location of her structure. Before the Trial Division granted its Enforcement Order, Appellant was provided: (1) a hearing regarding the location of her home, at which she testified; (2) time to produce further evidence regarding the location of the structure; and (3) an opportunity to respond to the Motion to Vacate. We conclude that the Trial Division provided a meaningful opportunity for Appellant to be heard and that, therefore, her due process claim must be rejected. *See Renguul v. Elidechedong*, 11 ROP 11, 13 (2003) (rejecting due process claim where appellant was given opportunity to testify at hearing).

CONCLUSION

For the foregoing reasons, the order of the trial court is **AFFIRMED**.

NGEPTUCH LINEAGE,
Appellant,

v.

AIRAI STATE,
Appellee.

CIVIL APPEAL NO. 11-045
Civil Action No. 02-111

Supreme Court, Appellate Division
Republic of Palau

Decided: January 14, 2013

[1] **Appeal and Error:** Standard of Review

The allocation of the burden of proof in a case is a question of law, which we review de novo, giving no deference to the decision of the trial court.

[2] **Appeal and Error:** Standard of Review

Challenges related to the sufficiency of the evidence are questions of fact, which we review for clear error, only reversing the trial court's decision if its findings are not supported by such relevant evidence that a reasonable trier of fact could have reached the same conclusion.

[3] **Civil Procedure:** Burden of Proof

A plaintiff bears the burden of establishing the elements of his or her case.

Counsel for Appellant: J. Roman Bedor
Counsel for Appellee: John K. Rechucher

BEFORE: ROSE MARY SKEBONG, Associate Justice Pro Tem; HONORA E.

REMENGESAU RUDIMCH, Associate Justice Pro Tem; KATHERINE A. MARAMAN, Part-Time Associate Justice.

Appeal from the Trial Division, the Honorable KATHLEEN SALII, Associate Justice, presiding.

PER CURIAM:

This case concerns whether the Trial Division correctly placed the burden of proof on Appellant to show that it did not receive just compensation for land that was taken for construction of the Palau National Airport. For the following reasons, the decision of the Trial Division is **AFFIRMED.**[1]

BACKGROUND

A parcel of land that was previously owned by Appellant, commonly known as *Llakel*, was condemned in conjunction with other similarly situated parcels for the Palau National Airport in 1979. In accordance with this condemnation, the Trust Territory Government paid a sum of $500,000 to Airai State for disbursement to all affected land owners. In 1986, Airai State quitclaimed all of its interest in the land to the Republic of Palau, including the portion belonging to Appellant.

In 2002, Appellant filed this case, claiming that it did not receive compensation for the land it had previously owned that was taken for the airport. The Trial Court heard testimony from Appellant, which consisted of hearsay statements claiming that Airai State never paid Appellant for *Llakel*. The Court determined that Appellant did not present sufficient evidence to show that it did not receive compensation. Appellant appeals this decision, arguing that the Trial Division inappropriately placed the burden of proof on Appellant.

STANDARD OF REVIEW

[1] The question presented by Appellant is whether the Trial Division correctly placed the burden on Appellant to show that Appellant was not compensated for the *Llakel* land. The allocation of the burden of proof in a case is a question of law, which we review de novo, giving no deference to the decision of the trial court. *See Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001).

[2] Companion to Appellant's contention that it should not have held the burden is its assertion that it presented sufficient evidence to prove its case and that any burden it may have had was thus satisfied. Challenges related to the sufficiency of the evidence are questions of fact, which we review for clear error, only reversing the trial court's decision if its findings are not "supported by such relevant evidence that a reasonable trier of fact could have reached the same conclusion." *Dmiu Clan v. Edaruchei Clan*, 17 ROP 134, 136 (2010) (internal quotation marks and citation omitted).

ANALYSIS

[3] First, this Court rejects Appellant's contention on appeal that the Trial Division should have placed the burden on Airai State

[1] Although Appellant requests oral argument, we determine pursuant to ROP R. App. P. 34(a) that oral argument is unnecessary to resolve this matter.

to prove that it did in fact pay the funds to Appellant. We have long held that a plaintiff bears the burden of establishing the elements of his or her case. *See, e.g.*, *Ho. v. Liquidation Comm. of Nanjing Orientex Garments, Co.*, 11 ROP 2, 6 (2003); *see also Wolff v. Sugiyama*, 5 ROP Intrm. 105, 111 (1995) (same). Specifically, the plaintiff has the burden of proving "'those facts that are necessary elements of [his or her] claim.'" *Ngirmang v. Filibert*, 9 ROP 226, 228 (Tr. Div. 1998) (quoting 29 Am. Jur. 2d *Evidence* § 158).

Appellant was the plaintiff at the trial level and brought its claim against Airai State, alleging that Airai State failed to compensate Appellant for the land taken for the airport. The Trial Division properly held Appellant to its burden to show that its claim had merit. Specifically, Appellant was asked to show by a preponderance of the evidence that it did not receive any payment from Airai State for land that it owned, taken for the Palau National Airport. It would be not only inconsistent with this Court's jurisprudence, but wholly counter-intuitive if a plaintiff could bring a claim against another party and, without more, force upon that party the burden of proving that the claims are unsubstantiated. Accordingly, the Trial Division did not err in placing the burden of proof on Appellant.

It is true that once a plaintiff meets his or her burden of proving the elements of the claim, the opposing party then has an opportunity to rebut that evidence. *See Palau Marine Indus. Corp. v. Seid*, 11 ROP 79, 82 (2004) (noting in a contract dispute that the plaintiff must establish the elements of his or her claim before the burden may shift to the other party to rebut the evidence). In this way, the burden of proof shifts to the opposing party when the plaintiff's case is strong enough that a reasonable trier of fact could conclude that the claim is substantiated. *Id.* However, this burden-shifting takes place only once the plaintiff has met his or her initial burden. *See id.*

Although not fully developed, it appears that Appellant also argues that it met the burden that it argues should not have been placed upon it, anyway. Nonetheless, even if Appellant's arguments in its brief do amount to a charge that it met its burden and, consequently, that that burden of proof shifted to Airai State, this Court is inclined to dismiss that contention. Appellant's attack on the court's finding of insufficiency of the evidence presents a question of fact before this Court and we will only reverse the Trial Division's decision if it is clearly erroneous. *Dmiu Clan*, 17 ROP at 136.

Appellant's only evidence before the Trial Division, which it characterized as "scant," was hearsay testimony from one person who spoke to Appellant's trustee and claimed that the trustee told her he never received payment. This Court concludes that a reasonable trier of fact could have found, as the Trial Division did, that this hearsay testimony did not meet the burden placed upon Appellant to show that it was more likely than not that Appellant was not compensated for its land. *Id.* Appellant has failed to persuade this Court that "a reasonable trier of fact could [not] have reached the same conclusion." *Id.* (internal quotation marks and citation omitted). Accordingly, the Trial Division did not err in placing the burden upon Appellant and concluding that Appellant failed to meet its

initial burden. The burden never shifted to Appellee. The trial court did not err in finding for Appellee based on Appellant's failure of proof.

CONCLUSION

For the foregoing reasons, the decision of the Trial Division is **AFFIRMED**.

TELUNGALEK RA KEBUI,
Appellant,

v.

NGIRIRS CLAN,
Appellee.

CIVIL APPEAL NO. 12-026
LC/R Nos. 09-0235, 09-0237, 09-0243, 09-0244, 09-0252 & 09-0253

Supreme Court, Appellate Division
Republic of Palau

Decided: January 14, 2013

[1] **Appeal and Error:** Procedure

Republic of Palau Rule of Appellate Procedure 31(c) provides: If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal, or the Appellate Division may so dismiss on its own motion.

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and LOURDES F. MATERNE, Associate Justice.

Appeal from the Land Court, the Honorable SALVADOR INGEREKLII, Associate Judge, presiding.

PER CURIAM:

Appellant Telungalek Ra Kebui filed this appeal on July 3, 2012. Since that time, Appellant has not filed an opening brief, has not sought any extension of time, nor responded to the Court's August 21, 2012,

Order to Show Cause why this matter should not be dismissed.

Republic of Palau Rule of Appellate Procedure 31(c) provides: "If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal, or the Appellate Division may so dismiss on its own motion."

Accordingly, the Court **DISMISSES** this appeal for Appellant's failure to comply with the Republic of Palau Rule of Appellate Procedure 31 and for lack of prosecution of this matter. *See Estate of Masang v. Marsil*, 13 ROP 1, 2 (2005) ("[W]e take this opportunity to warn all appellants and their counsel, and we direct the Clerk of Courts to provide a copy of this Order to all active members of the Palau Bar, that while we will continue to consider timely and reasonable requests for extensions of time, any failure to timely file an appeal or opening brief . . . will result in the dismissal of the appeal without further notice and that such dismissal will not be undone absent truly extraordinary and unanticipated circumstances.").

NGERMENGIAU LINEAGE,
Appellant,

v.

ESTATE OF ILONG ISAOL,
Appellee.

CIVIL APPEAL NO. 11-046
LC/B 08-0089

Supreme Court, Appellate Division
Republic of Palau

Decided: January 14, 2013

[1] **Appeal and Error:** Credibility Determination

A party seeking to set aside a credibility determination must establish extraordinary circumstances for doing so.

[2] **Appeal and Error:** Credibility Determination

Extraordinary circumstances to set aside a credibility determination do not exist where the record shows the trial judge considered the content of one side's testimony and their credibility, did the same to the other side's witnesses, weighed the competing stories, and concluded that one side was un-persuasive.

[3] **Appeal and Error:** Credibility Determination

Absent additional indices of incredibility, a trial judge does not commit reversible error when he credits self-serving and un-supported testimony.

[4] **Descent and Distribution:** Applicable Law

In determining who shall inherit a decedent's property, the Court applies the statutes in effect at the time of the decedent's death.

[5] **Descent and Distribution:** Statutes

Eligibility for inheritance under Section 801 was not dependent upon the filing of a claim for the land. Rather, the statute provided that, in the absence of eligible male heirs, fee simples in an intestate estate would pass to the oldest living female issue (either natural or adopted) of sound mind.

Counsel for Appellant: John T. Sugiyama
Counsel for Appellees: Raynold Oilouch

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; KATHERINE A. MARAMAN, Part-Time Associate Justice

Appeal from the Land Court, the Honorable SALVADOR INGEREKLII, Associate Judge, presiding.

PER CURIAM:

This is an appeal of a Land Court Determination awarding ownership of land known as *Telbong* to the Estate of Ilong Isaol, Appellee in this matter. For the following reasons, the decision of the Land Court is **AFFIRMED.**

BACKGROUND

This case involves four competing claims of ownership for the land known as *Telbong*,[1] listed in the Tochi Daicho as Lot 397 and owned by Iterir. Specifically, the claims of: (1) Antonina Sokok (also known as Antonina Olkeriil); (2) the Estate of Ilong Isaol, represented by Sokok as Isaol's adopted daughter; (3) the Ewang Lineage, represented by George Kebekol; and (4) the Ngermengiau Lineage, represented by John Sugiyama. On September 8, 2011, the Land Court held a hearing at which the claimants presented testimony regarding their claims to *Telbong*.

At the hearing, Sokok testified that Iterir purchased *Telbong* with her husband Rubasech. Sokok further testified that her mother Ilong Isaol was adopted by Iterir and Rubasech together and that sometime after the adoption Iterir transferred ownership of *Telbong* to Isaol when she stated "Child, these are your properties." Finally, Sokok testified that she entered the land in 1972 upon the advice of Rubasech, and that she has lived there ever since. Sokok sought Lot 397 based on the purported conveyance from Rubasech to her.

Kebekol testified: (1) in the 1960s Iterir told his mother Rose that all her properties in Koror "a bloungerachel a Rose;" and (2) at a 2005 hearing regarding other land owned previously by Iterir, Ilong told Rose "Ros[e], this will be the only land that we will divide and as for all the other lands, you will remain entrusted with them based on what my mother said to you, to me and then to you." Additionally, Kebekol called Wataru Elbelau as a customary

[1] Identified as Worksheet Lot No. 181-100 on BLS Worksheet No. 2005 B 06.

expert. Elbelau testified that: (1) a clan cannot take over a lineage's properties unless the lineage lost all its members; and (2) if a man brings a child into an already conceived marriage, the child is not automatically adopted into the marriage.

Sugiyama testified: (1) he was told that Rubasech brought Isaol into his marriage with Iterir; (2) that Ewang is a lineage within Ngermengiau Lineage; and (3) that Ngermengiua Lineage members do not know whether Isaol was adopted. Ngermengiua Lineage also called Ebil Ngiriou Kadoi as a witness. Kadoi testified that Isaol was brought into the marriage by Rubasech and that she was never adopted formally.

On November 16, 2011, the Land Court issued its Summary of Proceedings, Findings of Fact, Conclusions of Law, and Determination (Judgment), in which it found that Lot 397 belonged to Isaol's estate. In reaching this conclusion the Land Court rejected Sokok's "unsupported testimony regarding an alleged purchase of [Lot 397] by Rubasech and Iterir." The Land Court also rejected the "self-serving testimony" of Kadoi and Sugiyama that Isaol was not adopted. With regard to Sugiyama's testimony, the Court noted that Sugiyama testified that he was told by 82-year-old Yamazaki Rengiil and 82-year-old Beouch Ngiraikelau that when Rubasech and Iterir were married, Isaol was 11 or 12 years old, was already with them, and was not adopted. The Land Court found this testimony incredible because Rengiil and Ngiraikelau would have been approximately two years old when Isaol was 11 or 12 years old and because "[t]he court is not convinced that a 2 year old child has developed the mental capacity to distinguish things around him, and [be] able to tell if a child was adopted or not."

In contrast, the Land Court noted Sokok's testimony that Isaol was the only adopted heir of Iterir was supported by a previous Land Court decision[2] that concluded such and by specific details in Sokok's testimony regarding the manner in which Isaol was raised by Iterir. Accordingly, the Land Court found that Isaol was an adopted child of Iterir.

Additionally, the Land Court found that Iterir made an inter vivos transfer of *Telbong* to Isaol. Alternatively, the Land Court found that, pursuant to Section 801 of the Palau District Code, ownership of *Telbong* passed to Isaol in 1965 when Iterir died intestate.

The Court rejected Kebekol's claim that in 1965 Iterir transferred ownership of the lands to Rose Kebekol when Isaol was present. The Land Court noted that such a claim was contradicted by the fact that on July 23, 1993, Isaol filed a claim of ownership of the Land, whereas Rose Kebekol never filed a claim.[3] Finally, the Land Court rejected a claim that Iterir was holding the Land in trust for the benefit of Ngermengiau Lineage. In rejecting this contention, the Court noted that in the Tochi Daicho, Iterir was listed as the sole owner of Lot 397, while for other parcels she is listed as a trustee for lands owned by the Ewang Lineage. Based on the difference in listings, the Land Court concluded that the Tochi Daicho listing for the Land "was not listed

[2] *In re Takudel*, Land Court Case No. LC/B99-150.
[3] This finding has not been challenged on appeal.

as such because Ngermengiau Lineage did not own it."

The Ngermengiau Lineage appealed.

STANDARD OF REVIEW

On appeal, Appellant challenges: (1) the Land Court's decision to credit the testimony of Sokok regarding the adoption of Isaol and the inter vivos transfer of the Land and (2) the Land Court's application of Section 801.

[1, 2] "We generally defer to the credibility determinations of the trial court, and we will only overturn them in extraordinary cases." *Palau Cmty. Coll. v. Ibai Lineage*, 10 ROP 143, 149 (2003). We review the Land Court's factual findings for clear error and "will set aside the lower court's factual determinations only if no reasonable trier of fact could have reached the same conclusion based on the evidence in the record." *Azuma v. Ngirchechol*, 17 ROP 60, 63 (2010). We review the Land Court's conclusions of law de novo. *Id*.

ANALYSIS

As explained above, Appellant contends that the Land Court: (1) abused its discretion when it credited Sokok's testimony and (2) erred in applying Section 801 to the disputed property. We will address each contention in turn.

I. The Land Court's Credibility Determination

First, Appellant asserts that, on the issue of Isaol's purported adoption, the Land Court erred by rejecting the testimonies of Kadoi and Sugiyama "in favor of equally self-serving and unsupported testimony of . . . Claimant Antonina Sokok."

We have held previously that the "weighing and evaluating [of testimony] is precisely the job of the trial judge, who is best situated to make such credibility determinations." *Kotaro v. Ngotel*, 16 ROP 120, 124–25 (2009) (internal quotation marks and citations omitted). Accordingly, a party seeking to set aside a credibility determination must establish "extraordinary circumstances" for doing so. *Id.* at 123. Extraordinary circumstances do not exist where the record shows the trial judge "considered the content of [one side's] testimony and their credibility, did the same to the other side's witnesses, weighed the competing stories, and concluded that [one side] was unpersuasive." *Ngirasechedui v. Whipps*, 9 ROP 45, 47 (2001); *see also Kotaro*, 16 ROP 124–25 (no extraordinary circumstances where "[t]he decision show[ed] that the land court considered the content and credibility of the testimony of all the witnesses and weighed the competing stories . . . before coming to a conclusion.").

In reaching its credibility determination on the issue of adoption, the Land Court rejected Sugiyama's testimony as implausible and self-serving and rejected Kadoi's testimony as self-serving. Turning to Sokok, the Land Court noted that Sokok's testimony regarding adoption was supported by a previous determination on the issue and by the presence of specific details in her testimony. Thus, it is clear that the trial judge considered the content and credibility of the conflicting testimony on the issue of adoption and found Sokok's testimony more persuasive than the testimonies offered by Sugiyama or Kadoi. This decision does not

rise to the level of extraordinary circumstances needed to overturn a credibility determination. *Ngirasechedui*, 9 ROP at 47.

[3] In a similar vein, Appellant contends that it was error for the trial judge to reject some of Sokok's testimony and then credit her testimony on the issue of the inter vivos transfer of the property to Isaol because such testimony was unsupported by extrinsic evidence and was self-serving. However, absent additional indices of incredibility, a trial judge does not commit reversible error when he credits self-serving and unsupported testimony. *Compare Kotaro*, 16 ROP at 123 (declining to reverse credibility determination on grounds that testimony was self-serving and unsupported by extrinsic evidence) *with ROP v. Tmetuchl*, 1 ROP Intrm. 443 (1988) (reversing credibility determination where witness told three different stories to the police; had told at least three different versions of the facts incriminating the defendants; and had failed three separate polygraph tests, twice recanting her statements and admitting she had lied only to re-recant twice more). Accordingly, Appellant has not shown extraordinary circumstances to set aside the Land Court's credibility determination on the issue of the inter vivos transfer.[4] *Kotaro*, 16 ROP at 123.

More broadly,

> Appellant argues that in an attempt to ameliorate and justify the obvious contractions [sic] in its findings of fact, the Land Court, after finding Antonina not credible on her claim based on Rubasech's purchase of Telbong, and denying her claim based on that point, Antonina would, in the final analysis, prevail on her claim for Telbong through her late mother Ilong Isaol unless this Court reverses the Determination below. Continuing on the claimed abuse of discretion argument, Appellant . . . further points out that the Land Court did not consider and give significant weight to Antonina's credibility on the other two disputed issues.

In essence, Appellant contends that an adverse credibility determination as to a witness on one issue precludes a positive credibility determination on related issues. We already have held this argument is without merit. *See Palau Cmty. College*, 10 ROP at 149 ("the Trial Division did not commit clear error by accepting part and rejecting part of Techitong's claim to reach its determination in favor of Ibai Lineage.").

In light of the foregoing, we conclude Appellant has failed to show the extraordinary circumstances required to set aside any of the trial court's credibility determinations and that, therefore, its first enumeration of error is without merit.

II. The Land Court's Application of Section 801

Finally, Appellant submits that the Land Court erred in finding that even if there had been no inter vivos transfer of the Land, Isaol would have received *Telkong*

[4] Even if the Land Court erred in finding an inter vivos transfer, such error would be harmless given our conclusion, set forth below, that Isaol would have inherited Lot 397 upon the death of Iterir.

under the intestacy statute in effect at the time of Iterir's death.

[4] "In determining who shall inherit a decedent's property, we apply the statute[s] in effect at the time of the decedent's death." *Ngiraswei v. Malsol*, 12 ROP 61, 63 (2005) (internal punctuation omitted). Here, it is undisputed that Iterir died intestate in 1965 and that the 1959 version[5] of Section 801 of the Palau District Code was the intestacy statute in effect at the time of Iterir's death.

At the time of Iterir's death Section 801(c) provided:

> In the absence of instruments and statements . . . lands held in fee simple by an individual shall, upon the death of the owner, be inherited by the owner's oldest living male child of sound mind, either natural or adopted, or, if male heirs are lacking, by the oldest living female child of sound mind, natural or adopted, or in the absence of any issue, by the spouse of the deceased . . . .

In applying the foregoing in its decision, the Land Court wrote:

> Iterir was survive[d] by her spouse Rubasech but Rubasech did not file a claim for the ownership of Lot 397. Thus, he is not an eligible spouse because he did not file a claim. Evidence established that no disposition of Iterir's properties was held during the cheldecheduch after her death. Therefore, ownership of Lot 397 must go to Iterir's child. Ilong was the only child or "issue" under the statute. On July 23, 1993, Ilong filed her claim for individual ownership of Lot 397. Therefore, pursuant to the statute, the land Telbong, Lot 397, became owned by Ilong Isaol in fee simple after Iterir's death.

Seizing on the Land Court's discussion, Appellant now argues:

> The Land Court . . . pointed out that Iterir was survived by her spouse Rubasech who was eligible to inherit the land but concluded that since he did not file a claim for the ownership of Lot 397, he is not eligible. Ilong did not file a claim for ownership of Lot 397 either until July 23, 1993 or some 28 years after Iterir had died and over 18 years after Section 801 had been repealed by the Palau District Legislature.

[5] Put differently, Appellant contends the Land Court erred in finding Isaol inherited the land pursuant to Section 801 based upon a claim for ownership filed after Section 801 had been repealed. While it is axiomatic that a person may not inherit land pursuant to a repealed intestacy statute,[6] we conclude Isaol inherited the land pursuant to Section 801 in 1965—when her mother died—not in 1993. Although both the Land Court and Appellant focused on claims of ownership, eligibility for inheritance under Section 801 was not dependent upon the filing of a claim for the land. Rather, the statute provided that, in the absence of

[5] Section 801 went into effect in 1959 and was amended in 1975. *See* PL 5-3S-2 (Effective July 24, 1975).

[6] *Ngiraswei*, 12 ROP at 63.

eligible male heirs, fee simples in an intestate estate would pass to the oldest living female issue (either natural or adopted) of sound mind.

Here, with the exception of its already-rejected argument regarding credibility, Appellant does not challenge the Land Court's determination that Isaol was an adopted daughter of Iterir. At the time of Iterir's death, Isaol was her only child. Accordingly, we agree that Lot 397 passed to Isaol pursuant to then-existing Section 801 and that Appellant's contention to the contrary is without merit.

CONCLUSION

For the foregoing reasons, the order of the Land Court is **AFFIRMED**.

KALISTUS NGIRTURONG and PAUL I. REKLAI,
Appellants,

v.

PALAU ELECTION COMMISSION, SANTOS BORJA and MARINO O. NGEMAES,
Appellees.

CIVIL APPEAL NO. 12-052
Civil Action No. 12-156

Supreme Court, Appellate Division
Republic of Palau

Decided: January 14, 2013

[1] Constitutional Law: Interpretation

When constitutional language is clear and unambiguous, courts must apply its plain meaning.

[2] Elections: Residency and Domicile

The term "resident" under Article IX, Section 6 of the Constitution can be interpreted to mean domicile. The terms "resident" and "domicile" are used interchangeably, such that the term "resident" includes "domicile."

[3] Elections: Residency and Domicile

Key in reviewing the residency requirements of Article IX, § 6, is the *contacts* that the person has with the relevant area. The existence of a permanent family home may be one helpful factor in establishing these contacts, but they may also be proven a

number of other ways, including through the person's involvement in the jurisdiction, the family ties that person has, the amount of time that person has spent in the area, the level of participation in community and civic activities, and so on.

Counsel for Appellants: Siegfried B. Nakamura
Counsel for Appellees:[1] Oldiais Ngiraikelau & Timothy S. McGillicuddy

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; ROSE MARY SKEBONG, Associate Justice Pro Tem; and KATHERINE A. MARAMAN, Part-Time Justice.

Appeal from the Trial Division, the Honorable LOURDES F. MATERNE, Associate Justice, presiding.

PER CURIAM:

This case concerns the trial court's decision that a citizen running for public office met the residency requirements found in the Constitution and in a corresponding statute. For the following reasons, the decision of the Trial Division is **AFFIRMED**.

BACKGROUND

Appellee, Marino O. Ngemaes, was born in Koror State in 1966, where he has lived for most of his life. During his youth, Ngemaes attended high school abroad but returned to Palau to graduate. When he turned 18 in 1984, Ngemaes registered to vote in Aimeliik. After a few periods in which Ngemaes lived in Palau and abroad for years at a time, he returned in 2005 and has lived in Palau ever since.

Ngemaes appeared on the November 2012 ballot for the House of Delegates of the Olbiil Era Kelulau for the State of Aimeliik. Ngemaes filed his nominating petition with the Palau Election Commission (PEC) on May 12, 2012. On July 17, 2012, Plaintiffs, who are voters in Aimeliik State, filed a complaint with the PEC, alleging that Ngemaes's candidacy in Aimeliik violated Article IX section 6(4) of the Constitution of the Republic of Palau. Specifically, Plaintiffs argued that Ngemaes has not been "a resident of the district in which he wishes to run for office for not less than one (1) year preceding the election."

After a short investigation, the PEC responded on August 13, 2012, finding that Ngemaes met the Constitutional requirements to appear on the ballot. On August 20, 2012, Plaintiffs filed a second challenge with the PEC, again contesting Ngemaes's residency. The PEC reportedly intimated to Plaintiffs that it had no intention of changing its position and, thus, referred Plaintiffs back to its August 13 findings.

In response to the PEC's second refusal to find that Ngemaes failed to meet the residency requirement to appear on the ballot, Plaintiffs filed a complaint with the Trial Division, challenging the PEC's findings on September 4, 2012. Ngemaes filed a Motion to Dismiss, or a Motion for Summary Judgment in the alternative, on September 26, 2012. On October 8, 2012, the Court granted the Motion to Dismiss

[1] Although named as Appellees, neither the Palau Election Commission nor Santos Borja participated in the appeal, leaving the matter for the real party in interest, Marino O. Ngemaes.

Plaintiffs' Complaint for relief under 23 PNC section 1107 with prejudice. But the Court allowed Plaintiffs to file an amended complaint under an alternative legal basis to section 1107.

Plaintiffs filed an Expedited Amended Petition or Complaint for Declaratory Judgment and Injunctive Relief on October 11, 2012. Ngemaes responded with another Motion for Summary Judgment on November 2, 2012. Because of its timing, the Court treated the motion as a Motion to Dismiss at a hearing it held on November 14, 2012. The Court then denied Ngemaes's motion and the case proceeded to trial on November 27, 2012. Closing arguments in the case were heard on November 30, 2012.

At trial, Plaintiffs complained that allowing Ngemaes's name on the ballot constitutes both a Constitutional and statutory violation and that it interfered with Plaintiffs' fundamental right to vote. Plaintiffs called several long-term residents of Aimeliik to testify that they had never seen Ngemaes living in Aimeliik. Included in these testimonies was that of Brian Simers, Ngemaes's first cousin, who asserted that Ngemaes had never lived in his home or in Aimeliik at all.

Notwithstanding the testimony from residents that Ngemaes has not lived in Aimeliik, counter-testimony, potential bias, and conflicting statements were also exposed during the trial. Ultimately, the trial court found that according to its interpretation of the law defining "residency" and in conjunction with its findings of fact, Ngemaes was a resident for purposes of eligibility for office. Thus, the Court concluded that the PEC's decision to allow Ngemaes's name to be listed on the ballot did not violate the Constitutional or statutory requirements and was not a violation of Plaintiffs' right to vote. Plaintiffs now appeal this decision. Due to the impendency of the upcoming inaugural process, we ordered that the appeal be handled on an expedited calendar, to which the parties agreed.

STANDARD OF REVIEW

On review, we are asked to determine whether the trial court properly defined the word "resident" as it is used in the Constitution of Palau and in the applicable section's corresponding statute. Additionally, we are asked to review the trial court's mixed findings of fact and law regarding whether or not Ngemaes's actions and whereabouts caused him to meet the residency requirements for being listed as a candidate on the ballot. Thus, our review concerns both questions of law and fact. The trial court's conclusions of law are reviewed de novo. *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001). Factual findings of the trial court are reviewed using the clearly erroneous standard. *Dilubech Clan v. Ngeremlengui State Pub. Lands Auth.*, 9 ROP 162, 164 (2002).

DISCUSSION

The Constitution of Palau sets forth the requirements for eligibility for office in the OEK. The only contested requirement in this case is found in Article IX, § 6(4), that the person has been "a resident of the district in which he wishes to run for office for not less than one (1) year immediately preceding

the election." The identically worded enabling legislation is found in 23 PNC § 1102.

[1] The first question we must address is a legal one—one of interpretation. That question concerns the meaning of the word "resident" as it is used in the Constitution and its corresponding statute. "[T]his Court [is] the ultimate interpreter of the meaning of the age, residency and citizenship requirements set forth in Article IX, Section 6." *Francisco v. Chin*, 10 ROP 44, 50 (2003). When interpreting a word or phrase in the Constitution, we always attempt to find a plain meaning for the word or words and refrain from using other interpretive tools where there is no ambiguity. *See Seventh Koror State Legislature v. Borja*, 12 ROP 206, 207 (Tr. Div. 2005) (explaining that a court only looks to other canons after it first determines that there is an ambiguity).

[2] We have addressed this question on prior occasions. In *Nicholas v. Palau Election Commission*, we reiterated that a person is not required to "live continuously within the jurisdiction to maintain the status of resident." 16 ROP 235, 238 (2009) (internal quotation marks and citation omitted). We also held, however, that the word "resident" as it is used in Article IX, section 6, is to be interpreted equivalently with the word "domicile." *Id.* at 242. This declaration has caused some confusion and we seek to clarify its meaning further here.

Some problems surface in equating the word "resident" with "domicile." Primarily, it is difficult to define "domicile" without resorting back to the word "resident." This task of interpreting "resident," then, becomes circular without more direction. In *Nicholas*, we had cause to review various sources that provide a concrete definition for "domicile." *Id.* We also reviewed our own case law that interpreted the word "resident" in Article IX, § 6, and we noted that those interpretations are consistent with the common definitions for "domicile." *Id.* Domicile, we held, is a place in which a person dwells and which that person intends to make his or her permanent home. *Id. See also Kasiano v. Palau Election Comm'n*, 18 ROP 10, 14 (Tr. Div. 2010) (explaining that domicile "is where a person has (1) an actual residence and (2) an intention to make a permanent home in the jurisdiction"). While the definition chosen in *Nicholas* sought to clarify the meaning of resident through a better understanding of domiciliary requirements, it is clear that there is still some confusion regarding what it means to *actually* reside in a place for purposes of Article IX, § 6.

One description of "domicile" used in *Nicholas* that most accurately captures the spirit of the *Nicholas* analysis and our prior case law comes from the Restatement. That is that a domicile is where a person's home is, or, "the place where a person dwells and which is the *center of his domestic, social and civil life*." Restatement (Second) of Conflict of Laws § 11, *cmt.* a, 12 (emphasis added). In *Nicholas*, we then went on to discuss Nicholas's "domicile" using more considerations than merely where he has a home. *Nicholas*, 16 ROP at 242. We explained that the conclusion that Nicholas did not meet the residency requirement was based on the analysis of where his "home, work, and family life t[ook] place." *Id.*

[3] This sort of analysis contemplates that what really matters in reviewing the residency requirements of Article IX, § 6, is the *contacts* that the person has with the relevant area. The existence of a permanent family home may be one helpful factor in establishing these contacts, but they may also be proven a number of other ways, including through the person's involvement in the jurisdiction, the family ties that person has, the amount of time that person has spent in the area, the level of participation in community and civic activities, and so on.

Using these types of considerations is consistent with the Restatement, which offers that a person's true home for domiciliary or residency purposes may be identified by considering seven factors:

> 1. [The home's] physical characteristics; 2. The time [the candidate] spends therein; 3. The things [the candidate] does therein; 4. The persons and things therein; 5. [The candidate's] mental attitude toward the place; 6. [The candidate's] intention when absent to return to the place; [and] 7. Other dwelling places of the person concerned, and similar factors concerning them.

Restatement (Second) of Conflicts of Law §12, *cmt.* c. In this way, the test employed to determine residency for purposes of Article IX is one of totality of circumstances. Here, the trial court interpreted "resident" in the manner similar to that just described, and thus, it defined "resident" in the context of Article IX properly. The trial court's conclusion of law was not in error.

We next turn to the trial court's factual determinations regarding Ngemaes's residency according to the definition articulated above. The court made several findings and concluded that Ngemaes met the residency requirement by establishing his continuous contacts with Aimeliik. The court determined that the evidence clearly showed Ngemaes's intent for Aimeliik to be his permanent residence. The court made this determination after considering Ngemaes's voter registration in the state, voting history, family history and their property ownership, and Ngemaes's other actions that indicate that he considers Aimeliik to be his home.

Further, the Court's analysis focused on whether Ngemaes "spent enough time in Aimeliik to meet the one year residency requirement." The court discussed Ngemaes's whereabouts and noted that Ngemaes has lived in Koror, on and off, since childhood. The court also noted that Ngemaes currently stays in Koror on the second floor of his parents' house. In their brief, appellants argue that this court's analysis in *Nicholas* on this point should lead us to conclude that because Ngemaes lives in Koror, he is not a resident of Aimeliik. This is because in *Nicholas*, the court determined that the person in question was not a resident of Palau, in part, because he had no permanent home in *any* state. *Nicholas*, 16 ROP at 243.

Nicholas lived in Saipan, outside of Palau, and stayed in hotels when he visited. *Id.* It is true that Ngemaes and his family do not stay in Aimeliik on a daily basis. However, Ngemaes does not occasionally visit his home state and stay in hotels as Nicholas did. Ngemaes and his wife and

children frequently stay in homes of close relatives in Aimeliik. Further, when Ngemaes has stayed outside of Aimeliik, he has still remained geographically close to Aimeliik, which has aided in his ability to maintain close contacts with the state. This is a far cry from the situation in *Nicholas* where the candidate lived in another country entirely and could not reasonably associate face-to-face with his constituents in their home territory on a regular basis. *Id.*

It appears that Ngemaes has no permanent abode outside of the state in which he has sought office. Considering this, and in conjunction with the close contacts that Ngemaes has maintained with Aimeliik, the trial court determined that Ngemaes met the residency requirements for purposes of having his name on the ballot for Aimeliik. These close contacts include his long voter history in Aimeliik, his family's civic involvement in Aimeliik over the years, testimony of other Aimeliik residents that Ngemaes has stayed in Aimeliik and has been in attendance in community events, and other evidence that the trial court referred to as "overwhelming" proof of Ngemaes's residency. We are not inclined to disagree with this determination and hold that it is not clearly erroneous. *See Dilubech Clan*, 9 ROP at 164.

Time spent outside of one's "home" state for the convenience of a job or other obligations cannot alone be a disqualification for candidacy for office in the OEK. The Constitution does not mandate this, and we hold that the trial court did not err in its decision that Ngemaes met the Constitutional and statutory requirements to be certified as a candidate for delegate of Aimeliik in the OEK.

CONCLUSION

For the foregoing reasons, the decision of the Trial Division is **AFFIRMED**.

BADUREANG CLAN, represented by TULIK MARTIN MISYUSCH NGCHAR,
Appellant,

v.

KOROR STATE PUBLIC LANDS AUTHORITY and ALFONSO DIAZ,
Appellees;

KOROR STATE PUBLIC LANDS AUTHORITY,
Appellant,

ALFONSO DIAZ,
Appellee.

CIVIL APPEAL NOS. 12-003 & 12-008
(Consolidated)
LC/B Nos. 09-0268, 09-0269, 09-0270, 09-0851 & 09-0852

Decided: January 15, 2013

[1] **Appeal and Error:** Standard of Review

We review the Land Court's conclusions of law de novo.

[2] **Appeal and Error:** Standard of Review

We review the Land Court's factual determinations for clear error and will reverse its findings of fact only if the findings so lack evidentiary support in the record that no reasonable trier of fact could have reached the same conclusion. We will not substitute our view of the evidence for the Land Court's, nor are we obligated to reweigh the evidence or reassess the credibility of witnesses.

[3] **Land Commission/LCHO/Land Court:** Appeals

Empirically, appeals challenging the factual determinations of the Land Court . . . are extraordinarily unsuccessful. Given the standard of review, an appeal that merely re-states the facts in the light most favorable to the appellant and contends that the Land Court weighed the evidence incorrectly borders on frivolous.

Counsel for Badureang Clan: Yukiwo P. Dengokl
Counsel for KSPLA: Oldiais Ngiraikelau, J. Uduch Sengebau Senior
Counsel for Diaz: Pro Se

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem.

Appeal from the Land Court, the Honorable RONALD RDECHOR, Associate Judge, presiding.

PER CURIAM:

This case concerns two appeals from the same Land Court Findings of Fact, Conclusions of Law, and Determination issued on September 9, 2011. For the following reasons, the decision of the Land Court is **AFFIRMED**.[1]

[1] Although Appellant Koror State Public Lands Authority requests oral argument, we determined

BACKGROUND

The appeals by both Koror State Public Lands Authority and Badureang Clan concern a single parcel of land in Ngermid Hamlet, Koror. The matter from which Appellants now appeal consolidated the claims of many parties to numerous parcels of land adjacent to, and in the vicinity of, the parcel in dispute on appeal.

In resolving the many competing claims before it, the Land Court determined Appellant KSPLA is the owner of all but three of the more than twenty disputed parcels in the underlying matter. One of those three parcels was a 2,266 square meter area awarded to the Children of Yaeko Ngirchorachel, who were represented by Appellee Alfonso Diaz.

Appellants each claim they are the lawful owners of the parcel of land awarded to the Children of Yaeko Ngirchorachel, which is located on the Tochi Daicho index 4005/85 within lot 178-2 and on Worksheet Map No. 2007 B 01A within lot 014 B 04, and is generally known as *Ngeanges*.[2] That parcel was designated 014 B 04B (the Land). The factual history of the Land's ownership and use is much disputed by the parties.[3]

At the Land Court, KSPLA asserted its ownership of all of the lands in question. In addition, Diaz asserted superior title to the Land for the Children of Yaeko Ngirchorachel, and Badureang Clan sought ownership of the same Land on the basis of a return-of-public-lands claim.

In resolving the multi-party claim[4] to the Land, the Land Court held trial from July 11–21, 2011, and issued its Findings of Fact, Conclusions of Law and Determination on September 9, 2011. With respect to the Land, the Land Court heard conflicting testimony by Diaz; members of Badureang Clan, including Martin Ngchar, Remeliik Ngchar, Owens Otei, Sisilianged Moros, Francisca Yalap Soaladaob, and Tutoud Elis Ngiralmau; and by Josephine Ulengchong (representing the claim of Ngerukebid Lineage). The testimony was in substantial conflict as to the ownership, maintenance, and use of the Land.

Ultimately, the Land Court determined that Badureang Clan's claim for return of public land failed because the Clan failed to meet its burden to show its ownership of Lot 178-2 or that it was taken wrongfully by the Japanese. In reaching that conclusion, the Land Court recounted at length the inconsistent, conflicting, and vague testimony concerning the ownership history of *Ngeanges*. Instead the Land Court found compelling the testimony by Diaz and Tutoud that a portion of Lot 178-2 never became public land and was inherited by

pursuant to ROP R. App. P. 34(a) that oral argument is unnecessary to resolve this matter.

[2] *Ngeanges* is adjacent to land known as *Ngeruledong*, which includes, in part, Lots 216-1 (012 B 06) and 216-2 (012 B 08), owned by Appellee's family. The shared boundaries of those two lands form a significant aspect of the dispute on appeal.

[3] Although Appellee Alfonso Diaz is a named party in both appeals, he did not file any briefs or pleadings in this matter.

[4] Lot 178-2, otherwise known as *Ngeanges*, was the subject of numerous claims by individuals representing clan and lineage ownership claims. Several members of Badureang Clan, for example, filed claims representing the clan's claim of ownership.

Diaz's mother. Accordingly, the Land Court concluded Diaz had adequately demonstrated superior title to the Land, a 2,266 square-meter portion of Lot 178-2 (014 B 04B), adjacent to Lots 216-1 (012 B 06) and 216-2 (012 B 08). KSPLA and Badureang Clan appeal that determination.

STANDARD OF REVIEW

Appellants raise both legal and factual challenges to the Land Court's Findings of Fact, Conclusions of Law, and Determination.

[1] KSPLA challenges the Land Court's conclusions as to the timeliness of Diaz's claim and as to whether KSPLA is entitled to the Land based on adverse possession. We review the Land Court's conclusions of law de novo. *Rengchol v. Uchelkeiukl Clan*, Civ. App. Nos. 10-018 & 10-024, slip op. at 6 (Oct. 7, 2011) (citing *Sechedui Lineage v. Estate of Johnny Reklai*, 14 ROP 169, 170 (2007)).

[2] Additionally, KSPLA and Badureang Clan each challenge the Land Court's factual findings. We review the Land Court's factual determinations for clear error and will reverse its findings of fact "only if the findings so lack evidentiary support in the record that no reasonable trier of fact could have reached the same conclusion." *Ngirakesau v. Ongelakel Lineage*, Civ. App. Nos. 10-037, slip op. at 5-6 (Nov. 11, 2011) (citing *Palau Pub. Lands Auth. v. Tab Lineage*, 11 ROP 161, 165 (2004)). We will not substitute our view of the evidence for the Land Court's, nor are we obligated to reweigh the evidence or reassess the credibility of witnesses. *See Rengchol*, slip op. at 9 (citing *Ebilklou Lineage v. Blesoch*, 11 ROP 142, 144 (2004). *See also Ngarngedchibel v. Koror State Pub. Lands Auth.*, Civ. App. Nos. 10-047 & 11-002, slip op. at 5 (Feb 23, 2012). "Where there are two permissible views of the evidence, the court's choice between them cannot be clearly erroneous." *Rengchol*, slip op. at 6 (citing *Ngirmang v. Oderiong*, 14 ROP 152, 153 (2007)).

[3] With respect to appeals that challenge a court's factual findings, this Court recently held:

> Empirically, 'appeals challenging the factual determinations of the Land Court . . . are extraordinarily unsuccessful.' *Kawang Lineage v. Meketii Clan*, 14 ROP 145, 146 (2007). Given the standard of review, an appeal that merely restates the facts in the light most favorable to the appellant and contends that the Land Court weighed the evidence incorrectly borders on frivolous.

Koror State Pub. Lands Auth. v. Tmetbab Clan, Civ. App. No. 11-014, slip op. at 6 (July 2, 2012). *See also Estate of Dingilius v. Peleliu State Pub. Lands Auth.*, Civ. App. No. 11-005, slip op. at 5 (June 5, 2012) (citing *Kawang Lineage v. Meketii Clan*, 14 ROP 145, 146 (2007)).

ANALYSIS

I. KSPLA's Appeal.

KSPLA frames its issue on appeal as a single challenge to the Land Court's determination that Diaz met his "burden of proof in a superior title claim" against KSPLA. A review of its brief, however,

reveals KSPLA asserts three separate issues on appeal: (1) the Land Court failed to properly consider the evidence when it concluded Diaz had met his burden to show ownership of the Land; (2) Diaz's claim is untimely; and (3) KSPLA owns the Land by means of adverse possession.

A. Evidence of Ownership

KSPLA urges the Court to reverse the Land Court's determination that Diaz demonstrated his superior title to the 2,266 square-meter parcel of land within Lot 178-2 on the ground that the Land Court clearly erred when it concluded Diaz met his evidentiary burden to show "by clear and convincing evidence that the Tochi Daicho listing is incorrect." *Wasisang v. Peleliu State Pub. Lands Auth.*, 16 ROP 83, 84–85 (2008) (A claimant in a superior title action asserts the claimed land never became public and has the burden to prove any adverse Tochi Daicho listing by clear and convincing evidence.). KSPLA contends that in reaching its conclusion, the Land Court ignored the evidence submitted by KSPLA showing that it owned and leased the Lot 178 for more than twenty years.

The Land Court concluded in relevant part:

> Although the superior title claims fail for the most part, the Court agrees with Diaz and Rose [Ngirturong Adelbai, represented by Tutoud Elis Niralmau] as to a portion of Lot 178-2 on Exhibit 1. On September 23, 1986, the Palau Land Commission determined that Ngirturong [brother of Yaeko Ngirchorachel] owned Tochi Daicho Lot No. 178, and it would pass on to Yaeko Ngirchorachel [Diaz's mother]. It determined that the land *Ngeruledong*, Tochi Daicho Lot 178, shown on Exhibit 2 as Lot No. 012 B 06 and Lot No. 012 B 08, was owned by Ngirturong and would pass on to Yaeko. The Tochi Daicho stated that Ngirturong owned 5,746.14 square meters, but Yaeko's Certificate of Title for Lot No. 012 B 06 and Lot No. 012 B 08 included only 3,840 square meters. Therefore, the remaining 2,266 square meters—presently a part of Lot 178-2 on Exhibit 1—should have been awarded to Yaeko. Rose and Diaz dispute the ownership of the 2,266 square meters, so the Court will resolve ownership of that land.
>
> * * *
>
> The persuasive evidence regarding the proper ownership of the 2,266 square meters is the determination of Yaeko's ownership of Ngirturong's land, and her subsequent transfer of that land to Diaz and Kerai [Diaz's sibling]. The Court therefore finds that the Children of Yaeko Ngirchorachel own the 2,266 square meters comprising the remainder of Tochi Daicho Lot 178 that should have been awarded along with what is shown on Exhibit 2 as Lot No. 012 B 06 and Lot No. 012 B 08.

Although KSPLA maintains it presented overwhelming evidence to show the lands at issue were owned by KSPLA, including a dozen leases, it does not point to a single specific Exhibit or piece of evidence

that contradicts the Land Court's specific determination as to the Land. The Court performed its own review of those leases—KSPLA Exhibits 6–16 and 19—which revealed only a single lease relevant to Lot 178-2. That lease, Exhibit 11, reflects KSPLA leased only a "part" (only 1,500 square meters) of the sizable Lot 178-2 / 014 B 04 (which is in excess of 60,000 square meters). KSPLA did not include the map that is referenced in the lease to aid the Court's assessment of its argument, nor does KSPLA identify any other evidence to suggest the 1,500 square meter area it leased is part of the 2,266 square meters of Land awarded to Diaz by the Land Court.

In addition, KSPLA maintains Diaz did not meet his burden to prove the Tochi Daicho incorrectly listed Lot 178-2 as public land. The Court notes that KSPLA's Exhibit 2, which is a portion of the Compilation of the Japanese Tochi Daicho for Koror, lists Lot 178 as owned by Ngirturong and shows the land area to be 5,746.14 square meters, in accordance with the Land Court's findings. Furthermore, as the Land Court pointed out, the Palau Land Commission's decision issued on September 23, 1986, which concerned Lot 179 (commonly known as *Ngeruledong*), found that the adjacent Lot 178 "was clearly Ngirturong's." KSPLA does not address or challenge that determination. The Land Court found this evidence to be a clear and convincing basis to determine that a portion of Lot 178-2 was never publicly owned and that any adverse Tochi Daicho listing was in error insofar as it related to the 2,266 square meters adjacent to 012 B 06 and 012 B08 that the Palau Land Commission awarded to Yaeko Ngirchorachel in 1986.

We acknowledge that this history of the lands known as *Ngeanges* and *Ngeruledong*, which appear at least to encompass parts of Lots 178, 179, and 216, is somewhat unclear and overlapping. Such is the difficulty faced by the Land Court with nearly every dispute before it. Nonetheless, KSPLA has not provided any basis for this Court to conclude that the Land Court clearly erred in concluding the Land awarded to Diaz was never publicly owned, and the Court is unwilling to disturb that finding on this record because the Land Court's findings are rational and are supported by substantial evidence in the record.

B. Timeliness of Diaz's Claim

KSPLA also contends Diaz's claim is untimely. In its written closing argument, the entirety of KSPLA's argument with respect to the statute of limitations is as follows: "Moreover, the claim is clearly barred by the statute of limitations." This argument borders on being so poorly developed in the underlying proceeding as to fail to preserve the issue, but the Court will address the merits of KSPLA's argument.

On appeal, KSPLA contends Diaz's claim is barred by the twenty-year statute of limitations set out in 14 PNC § 402(a)(1), because Diaz must file any challenge to the November 27, 1987, judgment by the Palau Land Commission awarding lands to Yaeko Ngirchorachel as discussed above. As the Land Court stated, however, Diaz filed his claim on March 6, 2006. Thus, even if Diaz's actions were determined to be a challenge to that decision by the Palau Land Commission, Diaz's claim was filed within the twenty-year limitations period. Without

further explanation or development, this argument fails.

KSPLA also contends Diaz failed to meet the twenty-year statute of limitations set out in 14 PNC § 402(a) because "[a]ll public lands at issue here were subsequently transferred to the Koror Municipal Land Authority in 1982. Appellee . . . should have filed his claim by 2002 for the recovery of any portion [of] Tochi Daicho Lot 178 that was included in the public lands." This argument presumes what the Court has already determined is incorrect. The Land Court properly concluded that the portion of Lot 178 at issue was never publicly owned. Thus, the alleged transfer of lands to Koror Municipal Land Authority in 1982 does not bear on the superior-title claim by Diaz.

Neither argument advanced by KSPLA is a basis for finding that the Land Court erred in determining Diaz filed a timely superior-title claim, and KSPLA did not otherwise explain the accrual of Diaz's superior-title claim or why it would be considered untimely.

C. Adverse Possession

Finally, KSPLA contends that even if Diaz has demonstrated ownership of the Land, KSPLA has maintained control of that land for more than 20 years and should therefore be awarded ownership of the Land on the basis of adverse possession. KSPLA does not point to any portion of the trial record showing that it made this argument to the Land Court. The Court has gone beyond its duty and has reviewed the extensive record to see if this argument was raised below. *See Ngetchab Lineage v. Klewei*, 16 ROP 219, 221 (2009) ("[I]t is the job of Appellant, not the Court, to search the record for errors."). Neither KSPLA's written or oral closing arguments set out the basis for their adverse possession argument that would have given the Land Court the opportunity to rule on this issue. Having found no record of KSPLA's preservation of this issue, the Court deems it waived. *See Tulop v. Palau Election Comm'n*, 12 ROP 100, 106 (2005) (citing *Badureang Clan v. Ngirchorachel*, 6 ROP Intrm. 225, 226 n.1 (1997)) (Mere mention of a claim without additional development and argument is insufficient to preserve an issue, and the failure to mention an issue at all waives that position on appeal).

II. Badureang Clan's Appeal.

Badureang Clan raises two issues on appeal, challenging the Land Court's factual findings as to whether Badureang Clan's evidence was sufficient to satisfy its burden to prove that: (1) Badureang Clan was the prior owner of lot 178-2, otherwise known as *Ngeanges*; and (2) *Ngeanges* was wrongfully taken from Badureang Clan by the Japanese. As noted, we rarely disturb the Land Court's factual determinations and only if the Court is convinced that "no reasonable trier of fact could have reached the same conclusion." *See Ngirakesau*, slip op. at 5-6.

As the Land Court noted, and Badureang Clan concedes, the Clan had the burden to prove the elements of its return-of-public-land claim under 35 PNC § 1304(b). Among those elements, Badureang Clan had the burden to prove that it owned the claimed land prior to its acquisition "through force, coercion, fraud, or without just compensation or adequate

consideration." 35 PNC §§ 1304(b)(1), (2). Badureang Clan contends the Land Court erred when it concluded the Clan failed to prove these elements of its claim.

The Land Court summarized the conflicting testimony taken at trial as to the ownership of *Ngeanges*, noting that even the members of Badureang Clan testified inconsistently as to the area of land that the Clan allegedly owned and as to the nature of the alleged taking by the Japanese. For example, there was conflicting testimony about the boundary lines for the portion of Lot 178-2 belonging to Badureang Clan suggesting both that Lot 178 was divided into East and West and, alternatively, North and South parcels with various parcels belonging to Badureang Clan. Tr. Vol. I, at 47, 73–75, 131. In addition, Clan members testified inconsistently as to whether the Japanese took the land by force or whether they paid for the land. Tr. Vol. I, at 86–89, 105–112, 114–15, 120, 159–60. The Land Court concluded the testimony by Badureang Clan members was "inconsistent, lacking in detail, and ultimately insufficient."

Badureang Clan acknowledges in its briefs that there was conflicting testimony as to the ownership of *Ngeanges* and as to whether the Japanese acquired the lands wrongfully. Badureang Clan, however, merely recasts the testimony in the record in a light that favors its claim, emphasizing, despite the contrary testimony, the statements that support their position that the Clan owned a specific portion of *Ngeanges* that was taken wrongfully by the Japanese. In essence, Badureang Clan counts the witnesses that testified in its favor and likens the total to a "preponderance of the evidence." The Land Court, however, weighs not only the amount of evidence, but assesses its quality based on, among other things, its consistency, detail, and the credibility of each witness. This Court will not reweigh the evidence nor reassess the credibility of witnesses on appeal. *See Rengchol*, slip op. at 9. Instead, the Court has reviewed the relevant portions of the record and concludes that there is sufficient evidence on which a reasonable trier of fact could reach the same conclusion as the Land Court. Accordingly, finding no clear error, the Court cannot undermine the Land Court's factual findings on appeal.

CONCLUSION

For the foregoing reasons, the decision of the Land Court is **AFFIRMED**.

ELSAU CLAN and EDARUCHEI CLAN,
Appellants,

v.

PELELIU STATE PUBLIC LANDS AUTHORITY,
Appellee.

CIVIL APPEAL NO. 12-009 & 12-010
LC/R 10-0129

Supreme Court, Appellate Division
Republic of Palau

Decided: January 30, 2013

[1] **Land Commission/LCHO/Land Court:** Evidence

Challenges to the sufficiency of the evidence in Land Court proceedings are extra-ordinarily unsuccessful. The appellant must show that no reasonable finder of fact could have reached the same conclusion. In situations where there are two permissible views of the evidence, the court's choice between them cannot be clearly erroneous.

[2] **Land Commission/LCHO/Land Court:** Return of Public Lands

There are three requirements under 35 PNC § 1304(b) that a claimant must meet in order to prevail on his or her claim. To successfully prove a claim for the return of public lands, claimant must show that (1) the claimant is a citizen who filed a timely claim, on or before January 1, 1989; (2) the claimant is either the original owner of the claimed property or a proper heir of the original owner; and (3) the claimed property became public land as a result of a wrongful taking (through force, coercion, fraud, or without just compensation or adequate consideration) by a foreign government.

[3] **Appeal and Error:** Fact Finding

An appellate court's role is not to determine issues of fact or custom as though hearing them for the first time. The trial court is in the best position to hear the evidence and make credibility determinations, and if the evidence before it is insufficient to support its findings, the Court should remand rather than determine unresolved factual or customary issues on appeal.

Counsel for Appellant Elsau Clan:
Salvador Remoket
Counsel for Appellant Edaruchei Clan:
Yukiwo P. Dengokl
Counsel for Appellee: William L. Ridpath

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice.

Appeal from the Land Court, the Honorable ROSE MARY SKEBONG, Associate Judge, presiding.

PER CURIAM:

This opinion consolidates the claims of both Elsau Clan and Edaruchei Clan, which appeal from a Land Court proceeding concerning both parties' claims on the same piece of property. Because both parties appeal the Land Court's decisions regarding the same piece of property, and appeal on the same ground, we consider their claims together. After careful consideration of the arguments and record, we **AFFIRM** the

decisions of the Land Court as to both Clans.

BACKGROUND

This case concerns a small island, known as Mesmurs, located near the island of Ngercheu within Peleliu State. The island is uninhabited but has been visited by neighboring islands for many years. Four Clans, Edaruchei Clan of Ngerkeyukl, Elsau Clan, Edaruchei Clan of Ngerdelolk, and Ucheliou Clan, brought Return of Public Lands claims under Article 13, Section 10 of the Palau Constitution. The Land Court conducted proceedings on the claims from August 23 to September 1, 2011.

At the hearing discussing the use of the land, the Land Court dismissed the claim of Edaruchei Clan of Ngerdelolk because the Clan missed the deadline for filing of claims mandated under 35 PNC §1304(b). The Court also dismissed Ucheliou Clan's claim because it failed to prove that it had owned the property before it became public land. Neither Edaruchei Clan of Ngerdelolk nor Ucheliou Clan appealed the Land Court's decision.

The remaining two claimants, Edaruchei Clan of Ngerkeyukl and Elsau Clan, presented testimony from various witnesses at the hearing, all of whom sought to establish the exclusive use of the land by their respective Clans for the purpose of showing ownership. Testimony included declarations that the Clans used the property without having to seek permission from any other group and other statements intending to establish that each Clan was viewed by neighboring groups to be the rightful owners of the island. The vast majority of this testimony consisted of members of each Clan reminiscing about the use of the property and recounting hearsay statements by Clan leaders who had indicated to the witnesses that the island belonged to their Clan.

The Land Court considered the testimony and found that, although Edaruchei Clan and Elsau Clan timely filed their claims, both Clans failed to present sufficient evidence of exclusive control of the island and, thus, failed to prove that their respective Clan owned the property prior to it becoming public land. This was in part due to the Clans' competing testimony that they each had exclusive control.

Edaruchei and Elsau Clans appeal the decision of the Land Court, each arguing in favor of the sufficiency of the evidence they presented.

STANDARD OF REVIEW

[1] Challenges regarding the sufficiency of evidence in Land Court proceedings are questions of fact, which we review for clear error, only overturning the Land Court's decision if we determine that no reasonable finder of fact could have reached the same conclusion. *Marino v. Andrew*, 18 ROP 67, 68 (2011). Because of this high burden, "challenges to the sufficiency of the evidence in Land Court proceedings are extraordinarily unsuccessful." *Id.* at 69 (internal quotation marks and citation omitted). This is partly because where there are two permissible views of the evidence, the Land Court's findings cannot be clearly erroneous. *Id.*

DISCUSSION

[2] Return of Public Lands claims are governed by Article 13, Section 10 of the Palau Constitution and 35 PNC §1304(b). Section 1304 requires a claimant seeking the return of public land to prove that: (1) the claimant is a citizen who filed a timely claim on or before January 1, 1989; (2) the claimant is either the original owner of the claimed property or a proper heir of the original owner; and (3) the claimed property became public land as a result of a wrongful taking by a foreign government. 35 PNC §1304(b). One way that a party may show that it is the original owner of the claimed property is to establish its exclusive use of the property. *See Ilebrang Lineage v. Omtilou Lineage*, 11 ROP 154, 156 (2004) ("[A] court may find that long, uninterrupted use by one party is proof that the party has always owned the land."). Further, the government's obligation in Return of Public Lands cases is very minimal, with the burden of proof resting on the claimant at all times during the course of the proceedings. *In re Tabkusik*, 18 ROP 16, 20 (Land Ct. 2010). Thus, the Land Court begins with the presumption that the land in question is to remain public land and will only decide otherwise where the claimant is able to meet the elements of Section 1304. *Id.*

Here, the Land Court determined that both Elsau Clan and Edaruchei Clan failed to meet the second element of Section 1304(b), specifically, that their respective Clans were the original owners of the property. The Clans attempted to prove ownership through testimony that sought to establish exclusive control. The parties contend that because the evidence they each presented established that their respective Clan had been *exclusively* using the land, this was sufficient to meet their burden of proving the second element of Section 1304(b).

[3] The Land Court, however, astutely observed that with two essentially opposing parties presenting relatively equally-weighed evidence to show their use of the land, neither established exclusivity. The Land Court is in the best position to determine the credibility of evidence presented before it. *See Imeong v. Yobech*, 17 ROP 210, 215 (2010) ("The trial court is in the best position to hear the evidence and make credibility determinations . . ."). Here it appears that the Land Court found each Clan's evidence sufficient to undercut the opposing Clan's claim for exclusive use of the property. We see no clear error in the Land Court's determination that neither party met its burden to show that it owned the property. Thus, viewing this decision in light of the competing testimony presented before the Land Court, we hold that a reasonable fact finder could have come to the same conclusion. *See Marino*, 18 ROP at 68. Accordingly, we decline to disturb the decision of the Land Court.

CONCLUSION

For the foregoing reasons, the decisions of the Land Court are **AFFIRMED**.

TERRY ELEDUI NGIRAINGAS,
Appellant

v.

ELLEN TELLEI,
Appellee.

CIVIL APPEAL NO. 12-013
Civil Action No. 11-056

Supreme Court, Appellate Division
Republic of Palau

Decided: February 11, 2013

[1] **Deeds:** Presumption of Validity

Presumptions of validity exist when a court examines recorded deeds.

[2] **Civil Procedure:** Burden of Proof

Presumptions may be rebutted, resulting in a burden shift. This burden-shifting is a natural part of the litigation process, which is triggered once a party has met his or her initial burden to rebut a presumption or establish the elements of his or her case. Key in determining whether a burden was improperly placed is identifying who had the *initial* burden.

[3] **Appeal and Error:** Fact Finding

An appellate court's role is not to determine issues of fact or custom as though hearing them for the first time. The trial court is in the best position to hear the evidence and make credibility determinations, and if the evidence before it is insufficient to support its findings, the Court should remand rather than determine unresolved factual or customary issues on appeal.

Counsel for Appellant: Raynold B. Oilouch
Counsel for Appellee: Moses Uludong

BEFORE: C. QUAY POLLOI, Associate Justice Pro Tem; ROSE MARY SKEBONG, Associate Justice Pro Tem; and HONORA E. REMENGESAU RUDIMCH; Associate Justice Pro Tem.

Appeal from the Trial Division, the Honorable ALEXANDRA F. FOSTER, Associate Justice, presiding.

PER CURIAM:

This case concerns the estate of Adalbert Eledui and the Trial Division's decisions concerning various pieces of property previously held or owned by Eledui. For the following reasons, the decisions of the Trial Division are affirmed.[1]

BACKGROUND

This appeal concerns the property of Decedent, Adalbert Eledui. Upon Decedent's death in 2010, the named parties became involved in an extensive trial at the end of which the trial court determined the ownership of various properties and houses. The following is a summary of the trial court's findings relevant to this appeal.

Ngertimiked House

Ellen Tellei was married to Decedent. The two built a house on a piece of land in Airai called Ngertimiked and held

[1] Although Appellant requests oral argument, we determine pursuant to ROP R. App. P. 34(a) that oral argument is un-necessary to resolve this matter.

a customary Ocheraol. The underlying land belonged to the children of Emau Kus, which included Decedent and Ngiraingas. Per tradition, Decedent's family contributed the money to build the house.

Decedent and Tellei lived in the Ngertimiked house until December 14, 2010, when Decedent passed away. In May 2010, several months before Decedent died, he held a meeting in which he made some of his wishes known concerning his property. At this meeting, Decedent explained that he wanted Tellei to live in the Ngertimiked house until the first anniversary of his death at which point he wanted the house to go to the lineage of Emau Kus, of which Decedent was a member, and which undisputedly owns the underlying land.

A few months later, in November 2010, Decedent called an attorney to prepare his will. However, after having some conversations about Decedent's wishes, the will was not completed before Decedent's death. Nonetheless, his attorney relayed the contents of the unfinished will to the parties, including confirmation that Decedent wanted Tellei to live in the Ngertimiked house for one year following Decedent's death.

At the trial, Ngiraingas called a customary expert witness to testify that when the husband's family contributes the money to build a house, that family has rights to the house after the husband's death. Another customary expert disagreed and testified that in such a circumstance, the wife of the deceased has the right to remain in the house until her death. Customary expert witnesses were unclear about the effect of the person's final wishes if that person subsequently attempts to have a will drafted.

The court determined that because the case revolved around Palauan custom, resolution should be sought through a cheldecheduch. After attempting a cheldecheduch, the parties responded that they were unable to resolve the issues. Accordingly, the court issued a Final Decision and determined that Tellei was to move out of the Ngertimiked House to comply with Decedent's final wishes. In so doing, the court evidently accepted the testimony provided by the expert witness who asserted that property paid for by the husband's family does not automatically transfer to the wife of the deceased husband upon his death. The court reasoned that Decedent's final wishes as to the Ngertimiked house were unaltered during his final months and that sufficient testimony was provided to establish that the meeting Decedent called in order to convey these wishes was understood to be official under Palauan custom. The court noted that even Tellei's customary expert witness testified that a surviving spouse must follow the known final wishes of their deceased spouse. Thus, because Tellei knew of Decedent's final wishes, the court concluded that Palaun custom dictated that Tellei move out of the house on the one year anniversary of Decedent's death.

Ngerkesoaol Land

In 2008, Decedent entered into a transaction wherein a parcel of land in Ngerkesoaol, which was owned by the children of Eledui Omeliakl, including Decedent, Terry Eledui Ngiraingas, Doris Eledui Ito, and Kenny Eledui, was allegedly

transferred to Decedent as the sole owner. Tellei asserted that the children of Eledui conveyed their interests in the property through a quitclaim deed to Decedent. Tellei and Decedent subsequently purchased a house on the land from Willy Eledui and renovated it for use as a rental property.

After Decedent's death, the land and house were considered during the extensive trial concerning his estate. Tellei claimed the Ngerkesoaol property, asserting that it belonged to solely to Decedent pursuant to the 2008 quitclaim deed. The trial court heard evidence regarding the transfer of the property from the other children of Eledui to Decedent. There was some confusion as to whether the quitclaim deed had all of the necessary signatures from the children of Eledui. Doris, Kenny, and Terry each testified that they did not intend to convey the property and did not sign a quitclaim deed. Further, the notary testified that when she notarized the deed, only Decedent had signed. Because the other children of Eledui were not present to sign, the notary did not fill out the bottom portion of the deed because that portion stated that the above listed people, which included Doris, Kenny, and Terry, appeared before her and signed the document.

After the parties were unable to obtain a resolution through a cheldecheduch, the trial court determined that there were too many unanswered questions regarding the validity of the quitclaim deed that Tellei was unable to answer. As a result, the court awarded the land to the children of Eledui collectively. Tellei appeals this ruling, arguing that the court improperly placed the burden on her to prove the authenticity of the deed and contending that the court erred in finding that the deed was invalid. The court also awarded the house on the Ngerkesoaol land to Tellei, counting it as marital property. Ngiraingas appeals the court's decision concerning the house, arguing that the court misinterpreted the applicable customary law.

STANDARD OF REVIEW

The trial court's factual findings concerning the quitclaim deed are reviewed using the clearly erroneous standard. *Dilubech Clan v. Ngeremlengui State Pub. Lands Auth.*, 9 ROP 162, 164 (2002). Further, "the existence of a claimed customary law is a question of fact that must be established by clear and convincing evidence and is reviewed for clear error." *Koror State Pub. Lands Auth. v. Ngirmang*, 14 ROP 29, 34 (2006).[2]

ANALYSIS

I. The trial court did not commit plain error when it determined that Tellei was to comply with Decedent's final wishes to vacate the Ngertimiked house.

Tellei argues on appeal that Decedent had no authority to include disposition of the house in his customary will. Tellei asserts that the Ngertimiked house was marital property and that upon Decedent's death, she became the sole owner of the house. The customary experts gave conflicting statements about whether custom would dictate that Tellei owned the

[2] The standard of review for issues of customary law was recently altered in *Beouch v. Sasao*, Civ. App. No. 11-034 (Jan. 3, 2013). However, that ruling was to apply prospectively only and will not apply to any appeal filed prior to the issuance of that opinion.

house with Decedent or whether Decedent's family should have rights to the house. Some of the testimony asserted that while customary for the husband's family to front the cost for building a home, the home is still considered marital property. In this vein, the home would belong to the wife, even after her husband's death. Other testimony, however, explained that a home paid for by the husband's family is not viewed as marital property, but rather as a home owned by the husband's family and available for use by the couple. Ultimately, the court accepted the theory that Tellei did not have ownership of the home as part of the marital property she shared with Decedent and ordered that Tellei vacate the home.

Reviewing the trial court's determination of the applicable customary law, we can find no evidence of record that this determination was clearly erroneous. *See id.* Accordingly, we decline to overturn the trial court's decision concerning the Ngertimiked house.

II. The trial court did not improperly place the burden on Tellei to prove the transfer of the Ngerkesoaol property, and its ruling that the quitclaim deed was invalid was not clearly erroneous.

Tellei contends that the trial court improperly placed the burden on her to prove that the quitclaim deed was authentic and properly executed. Tellei asserts that this burden was placed on her by citing the court's language that "Tellei ha[d] not shown a viable agreement between Decedent [and the Children of Eledui], nor . . . shown a mutual assent to an exchange between" the parties. Tellei further argues that duly recorded deeds are presumed to be valid.

[1, 2] It may be true that presumptions of validity exist when a court examines recorded deeds. *See Ketebengang v. Sechedui Clan*, 16 ROP 101, 104–05 (2008) (recognizing strong presumptions of validity in properly recorded quitclaim deeds). However, presumptions may be rebutted. We have recognized burden-shifting as a natural part of the litigation process, which is triggered once a party has met his or her initial burden to rebut a presumption or establish the elements of his or her case. *See Palau Marine Indus. Corp. v. Seid*, 11 ROP 79, 82 (2004) (noting in a contract dispute that the plaintiff must establish the elements of his or her claim before the burden may shift to the other party to rebut the evidence); *Ngeptuch Lineage v. Airai State*, Civ. App. No. 11-045 (2013) ("[O]nce a plaintiff meets his or her burden of proving the elements of the claim, the opposing party then has an opportunity to rebut that evidence."). Key in determining whether a burden was improperly placed is identifying who had the *initial* burden.

The court's indication that Tellei did not show a viable agreement is *not* necessarily indication that the court placed the initial burden on Tellei. Rather, the court gave the other children of Eledui the opportunity to attack the presumption of authenticity of the deed. In so doing, the court heard testimony and reviewed evidence provided by the children of Eledui. The court determined that this evidence was sufficient to overcome any burden the children of Eledui may have had to undermine the authenticity of the quitclaim deed. The court *then* indicated that Tellei

failed to provide evidence of a valid deed that could sufficiently counter the evidence presented by the children of Eledui. The burden was not improperly placed on Tellei.

[3] Tellei's other arguments regarding the quitclaim deed amount to attacks on the trial court's findings of fact concerning the quitclaim deed and its authenticity. We will only overturn the trial court's findings of fact regarding this deed if they are clearly erroneous. *Dilubech Clan*, 9 ROP at 164. The trial court is in the best position to weigh evidence, determine the credibility of witnesses, and make findings of fact concerning whether the quitclaim deed went through the proper process to effectively transfer the land. *Imeong v. Yobech*, 17 ROP 210, 215 (2010) ("The trial court is in the best position to hear the evidence and make credibility determinations . . . and as an appellate tribunal, our review is limited.").

At the trial, besides Decedent, the children of Eledui testified that they did not sign any document to pass title of the land to Decedent. Further, the notary alleged to have notarized the deed testified that she notarized Decedent's signature but that his was the only signature she notarized on the quitclaim deed. She further explained that she saw the typed names of the other children of Eledui on the deed and that because they were not present to sign she did not fill out the bottom portion of the deed because it stated that each of the named persons had appeared before her. This bottom portion of the deed remains blank. The court noted that this witness was not impeached with bias or motive and that she seemed to have no interest in the outcome of the matter. Considering these findings, we cannot conclude that the court's decision was clearly erroneous. We affirm the decision of the trial court to grant the land to the children of Eledui.

III. The trial court's decision to award the house in Ngerkesoaol to Tellei was not clearly erroneous.

Finally, Ngiraingas contends that the trial court's decision to award the house in Ngerkesoaol to Tellei was incorrect and that the trial court misinterpreted customary law. Again, we will only overturn the trial court's conclusions concerning customary law if they are clearly erroneous. *Ngirmang*, 14 ROP at 34.

Here, both parties called expert witnesses to testify concerning customary practices in accumulating and assigning marital property. The trial court recognized that each of the experts agreed "that property purchased by the husband and wife went to the surviving spouse." The court also recognized the undisputed claim that Tellei and Decedent together bought the house from William Eledui. Considering the expert testimony the trial court heard, we can see no clear error in its conclusion that the house in Ngerkesoaol belongs to Tellei.

Ngiraingas asserts also for the first time on appeal that because the house is on the Ngerkesoaol land, its ownership cannot be separated from it. We will not consider this argument because it was not preserved at trial. *See Aimeliik State Pub. Lands Auth. v. Rengchol*, 17 ROP 276, 281–82 (2010).

CONCLUSION

For the foregoing reasons, the decision of the Trial Division is **AFFIRMED**.

PETER MIKEL,
Appellant

v.

ISEBONG SAITO,
Appellee.

CIVIL APPEAL NO. 12-032
Civil Action No. 11-041

Supreme Court, Appellate Division
Republic of Palau

Decided: February 28, 2013

[1] **Appeal and Error:** Standard of Review

Interpretations of documents are reviewed de novo.

[2] **Land Commission/LCHO/Land Court:** Certificates of Title

A certificate of title issued pursuant to a Land Court Determination of Ownership is conclusive as to all persons who had notice of the proceedings. 35 PNC § 1314(b). This preclusive rule applies to successors in interest of persons who had notice of such proceedings. Succession in interest is defined as succession by purchase (including a mortgage), gift, devise, and involuntary transfer.

[3] **Land Commission/LCHO/Land Court:** Certificates of Title

Because a certificate of title arising from a determination must be issued "pursuant" to such determination, it follows any ambiguity

as to the meaning of a certificate must be resolved by reference to the underlying determination.

[4] **Courts:** Judgments

As a general rule, judgments are to be construed like other written instruments, and the legal effect of a judgment must be declared in light of the literal meaning of the language used. The unambiguous terms of a judgment, like the terms in a written contract, are to be given their usual and ordinary meaning. The determinative factor in interpreting a judgment is the intention of the court, as gathered, not from an isolated part thereof but from all parts of the judgment itself.

[5] **Courts:** Judgments

In construing a judgment, it may be presumed that the court intended to render a valid, and not a void, judgment. Hence, if a judgment is susceptible of two interpretations, one of which would render it legal and the other illegal, the court will adopt the interpretation which will render the judgment legal.

[6] **Land Commission/LCHO/Land Court:** Determinations of Ownership

The phrase "Ongalk ra," when used in a determination, may create individual ownership interests in the various members of the class or may designate a form of communal ownership similar to clan or lineage ownership.

[7] **Land Commission/LCHO/Land Court:** Determinations of Ownership

It is a practice in the Land Court to grant ownership of lands to a clan or lineage, but to name a person as a trustee of the land.

[8] **Descent and Distribution:** Applicable Law

Where ownership rights to a decedent's property are to be adjudicated amongst heirs, a court must consider the applicable statutory and customary laws relevant to inheritance.

[9] **Land Commission/LCHO/Land Court:** Determinations of Ownership

Taken together, the identification of a trustee and the lack of any discussion of inheritance law suggest a determination intended to create a form of communal ownership similar to that of clan or lineage ownership.

[10] **Descent and Distribution:** Applicable Law

Inheritance rights are governed by statutes and, in the absence of applicable statutes, by customary law.

[11] **Custom**: Proof of Custom

Dating back to the Trust Territory days, the Appellate Division has recognized that custom in the legal sense is defined as such a usage as by common consent and uniform practice which has become the law of the place, or of the subject matter, to which it relates and which has been established by long usage.

[12] **Custom**: Proof of Custom

Expert testimony that a custom has "evolved" over the past forty years is insufficient to prove customary law by clear and convincing evidence.

Counsel for Appellant: Pro se
Counsel for Appellee: Yukiwo Dengokl

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and LOURDES F. MATERNE, Associate Justice.

Appeal from the Trial Division, the Honorable ALEXANDRA F. FOSTER, Associate Justice, presiding.

PER CURIAM:

This is an appeal of a Trial Division decision awarding ownership of land known as *Metuker* to Isebong Saito, Appellee in this matter. For the following reasons, the decision of the Trial Division is **REVERSED and REMANDED.**

BACKGROUND

On September 6, 1995, the Land Claims Hearing Office (LCHO) held a hearing regarding claims to the land known as *Metuker* made on behalf of: (1) John O. Ngiraked, as the representative "for all the children of Techeboet;" (2) Ana Timarong; (3) West U. Saiske; (4) Tewid Ongebei; (5) Christian Ngiraked; and (6) Kelau Gabriel. Although filed as individual claims for ownership, the claims of Christian Ngiraked (a male) and Kelau Gabriel (a female) were consolidated with the claims of "all the children of Techeboet," as represented by John Ngiraked. Approximately three weeks after the hearing, the LCHO issued an Adjudication and Determination ("the Determination") awarding *Metuker* to "Ongalek ra Techeboet and John O. Ngiraked [as] the trustee." Specifically, the LCHO decision found:

> Metuker was originally owned by Ngemelas clan and became listed in the Tochi Daichio as owned by Kubarii during the time he held chief title Riumd of said clan . . . . Techeboet as the oldest adopted daughter of Kubarii and natural daughter of Ngowakl from Ngemelas clan is found to have assumed control of Metuker property after Kubarii's death . . . . After Techeboet's death control of said property continued with her children. Hence, the claim of Ongalek ra Techeboet is found to have merit.

(emphasis omitted).

After the Determination was affirmed on appeal, a Certificate of Title for *Metuker* was issued to "Ongalk ra Techeboet" on September 29, 2004. On February 23, 2010, Isebong Saito purchased the interests in *Metuker* of Kelau Gabriel, John O. Ngiraked, Moses Sam and Kristian Ngiraked through a judicial sale of the Estate of John O. Ngiraked. On March 23, 2010, the Land Court issued Certificate of Title for *Metuker* to "Ongalk ra Techeboet and Isebong Saito – who owns the interests of John O. Ngiraked, Moses Sam, Kristian Ngiraked and Kelau Gabriel Renguul."

On February 11, 2011, Saito filed an action to quiet title to *Metuker*. Appellant, appearing pro se, filed a timely Notice of Objection on behalf of himself through his

mother Maria Paulis, as a daughter of Techeboet; and on behalf two other female children of Techeboet Rosania—Olgeriil (represented by her eldest child, Jeff Olgeriil) and Irene Obeketang (represented by her eldest child, Gilham Obeketang). In his objection, Appellant argued that Paulis, Rosania Olgeriil, and Irene Obeketang (collectively, "Female Children"), as children of Techeboet, held title to *Metuker* as "ongalk" of Techeboet.

Noting that Appellant did not dispute the sale of *Metuker* and that Appellee did not dispute Paulis, Rosania, and Irene were Techeboet's children, the Trial Division conducted a trial on whether the Female Children maintained valid claims to *Metuker*. During the trial, the Trial Division took testimony from Jeff Olgeriil, Gilham Obeketang, and Moses Uludong, the latter of whom testified as a Palauan customary expert. On September 1, 2011, the Trial Division issued a Decision and Judgment finding Appellee to be the sole owner of *Metuker*.

In its decision, the Trial Division found that the phrase "Ongalk ra Techeboet," as it was used by the LCHO, meant "children of Techeboet," but that "[s]ince the parties and the [LCHO] used the Palauan version and not the English version . . . Palauan custom is applicable." On the issue of custom, the Trial Division credited the expert testimony "that under Palauan custom, male children get dry land, and female children get the msei or taro patch." Because *Metuker* is dry land, the Trial Division found title to the land passed only to Techeboet's male children and that, therefore, Appellant's objection was without merit. Title to *Metuker* was thus awarded solely to Appellee.

On November 7, 2011, Appellant, once again acting pro se, appealed the Trial Division's decision to this Court. On appeal, Appellant raised two issues: (1) the Trial Division "err[ed] in construing the meaning of 'ongalk' to exclude female children;" and (2) the Trial Division "err[ed] in its procedural changes to the detriment of Appellant." Of relevance, here, Appellant argued "it is obvious the LCHO and Land Court construed the term [ongalk] to mean 'all of the children.'" We held there was no error in the Trial Division's application of procedural rules, but remanded the case because the lower court applied the wrong evidentiary standard in reaching its conclusion regarding the custom of inheritance. *Mikel v. Saito*, 19 ROP 113, 116–17 (2012).

On remand, the Trial Division asked the parties to file proposals on how the matter should proceed. Appellee filed a notice asking the court to "proceed to issue its judgment based on the Appellate Court's Opinion and . . . the evidence admitted during the trial or hearing before [the Trial Court]." Appellant filed a notice "request[ing] that a hearing be scheduled at which he could present evidence relating to the inheritance of land pursuant to Palauan custom."

The Trial Division elected to decide the matter on the record before it, and issued a second Decision and Order in which it found the custom of male children inheriting dry land had been proven by clear and convincing evidence. Noting Appellant did not "contest" the previous determination

regarding the applicability of inheritance custom to the Land Court's Decision, the Trial Division again awarded *Metuker* to Appellee. Appellant appealed again.

STANDARD OF REVIEW

Appellant raises one overarching issue on appeal – that the Trial Division "erred in construing the meaning of 'ongalk' to exclude female children." In this regard, Appellant argues the Trial Division improperly used custom to interpret the Determination and, in the alternative, that even if customary law applied, the Trial Division misapplied such law.

[1] "The existence of a claimed customary law is a question of fact that must be established by clear and convincing evidence and is reviewed for clear error."[1] *Koror State Pub. Lands Auth. v. Ngirmang*, 14 ROP 29, 34 (2006). Interpretations of documents are reviewed de novo. *Western Caroline Trading Co. v. Philip*, 13 ROP 28, 30 n.3 (2005). More generally, we review determinations of law de novo and determinations of fact for clear error. *Estate of Tmetuchl v. Siksei*, 18 ROP 1, 5 (2010) (legal determinations reviewed de novo); *Melekeok State Gov't v. Megreos*, 18 ROP 29, 33 (2011) (factual determinations are reviewed for clear error).

DISCUSSION

As explained above, Appellant challenges: (1) the Trial Division's recourse to custom in its interpretation of the Determination; and (2) the Trial Division's conclusion regarding the effect of the customary law. We address each contention in turn.

I. Reliance on Customary Law

[2] A certificate of title issued pursuant to a Land Court Determination of Ownership is conclusive as to all persons who had notice of the proceedings. 35 PNC § 1314(b). This preclusive rule applies to successors in interest of persons who had notice of such proceedings. *See* Restatement (Second) of Judgments § 43 (1982) ("A judgment in an action that determines interests in real or personal property . . . [h]as preclusive effects upon a person who succeeds to the interest of a party to the same extent as upon the party himself."). Succession in interest is defined as "succession by purchase (including a mortgage), gift, devise, and involuntary transfer[] . . . ." *Id.* at *cmt.* f.

There is no dispute the 2004 certificate of title to *Metuker* was issued pursuant to the LCHO determination and that both parties here are successors-in-interest to parties who received notice of the LCHO proceedings. Thus, the 2004 Certificate of Title to *Metuker* is conclusive in this matter. 35 PNC § 1314(b).

As explained above, the 2004 Certificate of Title was issued to "Ongalk ra Techeboet." Appellant contends the document created property rights to *Metuker* in his mother and the other female children of Techeboet. Appellee submits the

[1] This standard was revised in *Beouch v. Sasao*, Civ. App. 11-034, slip op. at 10-14 (Jan. 3, 2013). However, because the *Beouch* decision has been given purely prospective effect, it does not apply to cases, such as the one at bar, filed before January 3, 2013. *Id.* at 17.

Certificate of Title was limited to Techeboet's male children. Put differently, the sole issue on appeal is what "Ongalk ra Techoet," as it was used in the Certificate of Title and Determination, meant.

[3] Because a certificate of title arising from a determination must be issued "pursuant" to such determination, *see* 35 PNC § 1314(b), it follows any ambiguity as to the meaning of a certificate must be resolved by reference to the underlying determination. Accordingly, the question becomes whether the LCHO's Determination granted Appellant—through his mother, as a daughter of Techeboet—ownership rights to *Metuker*. *Id*. In resolving this question in the negative, the Trial Division held "Ongalk ra Techeboet" translated to "Children of Techeboet," but that the use of the Palauan words was an indication the LCHO intended to limit rights in the property to children entitled to inherit the land under Palauan custom. Appellant submits the plain meaning of "ongalk" controls and that, therefore, the Determination was meant to grant rights in *Metuker* to all of Techeboet's children.[2]

> **[4, 5]** As a general rule, judgments are to be construed like other written instruments, and the legal effect of a judgment must be declared in light of the literal meaning of the language used. The unambiguous terms of a judgment, like the terms in a written contract, are to be given their usual and ordinary meaning. The determinative factor in interpreting a judgment is the intention of the court, as gathered, not from an isolated part thereof but from all parts of the judgment itself.

46 Am. Jur. 2d *Judgments* § 74 (footnotes omitted). However, "[i]n construing a judgment, it may be presumed that the court intended to render a valid, and not a void, judgment. Hence, if a judgment is susceptible of two interpretations, one of which would render it legal and the other illegal, the court will adopt the interpretation which will render the judgment legal." 46 Am. Jur. 2d *Judgments* § 75 (footnotes omitted).

[6] We have held the phrase "Ongalk ra," when used in a determination, may create "individual ownership interests in the various members of [the class] or [may] designate a form of communal ownership similar to clan or lineage ownership." *Children of Dirrabang v. Children of Ngirailild*, 10 ROP 150, 152–53 (2003). We conclude the Determination created the latter type of interest.

[7] It is a practice in the Land Court to grant ownership of lands to a clan or lineage, but to name a person as a trustee of the land. *See e.g. Estate of Remed v. Ucheliou Clan*, 17 ROP 255, 260, 265

[2] Appellee submits that Appellant failed to raise this argument on remand and should not be permitted to raise it now. "There is a long standing . . . tradition in the United States and here in Palau of courts employing a heightened duty to . . . pro se litigants . . . . [T]his tradition serves the interest of justice in helping to ensure meaningful access to the courts of Palau to all Palauan citizens, regardless of their socio-economic status." *Whipps v. Nabeyama*, 17 ROP 9, 12 n.2 (2009). Commensurate with this duty, courts must construe pro se filings liberally. *Suzuky v. Petrus*, 17 ROP 244, 244 n.1 (2010). Throughout this litigation, Appellant has advanced one argument: that Ongalk ra Techeboet, as the phrase was used in the Determination and Certificate of Title, means all children. This position was articulated at trial and both appeals and has not been waived.

(2010) (affirming determination of ownership in favor of clan with named trustee); *Estate of Rdiall v. Adelbai*, 16 ROP 135, 136 (2009) (noting LCHO awarded ownership of land to lineage, with person serving as trustee). Here, the decision awarded ownership of *Metuker* to Ongalk ra Techeboet, with John O. Ngiraked to serve as the trustee for such ownership.

[8] Furthermore, where ownership rights to a decedent's property are to be adjudicated amongst heirs, a court must consider the applicable statutory and customary laws relevant to inheritance. *See Marsil v. Telungalk ra Iterkerkill*, 15 ROP 33, 36 (2008) ("Absent an applicable decent and distribution statute, customary law applies."); *see also Ruluked v. Skilang*, 6 ROP Intrm. 170 (1997). Here, the Determination did not discuss statutory or customary laws of inheritance and did not attempt to identify the nature of the interests granted.

[9] Taken together, the identification of a trustee and the lack of any discussion of inheritance law convince us the LCHO intended to create in *Metuker* a form of communal ownership in the children of Techeboet similar to that of clan or lineage ownership. This conclusion is consistent with the Land Court practice of granting determinations of ownership to clans with trustees.

Having found the Determination created a communal ownership in the nature of lineage or clan ownership, the question becomes what rights in the communal ownership the individual children of Techeboet possess. The LCHO did not consider this question and we turn to it now.

[10] As explained above, inheritance rights are governed by statutes and, in the absence of applicable statutes, by customary law. *Marsil*, 15 ROP at 36 (2008); *see also Temael v. Tobiason*, 18 ROP 53, 55 (2011). Here, there is no applicable statute regarding inheritance of *Metuker*. Accordingly, the rights of the children of Techeboet must be determined by reference to customary law. Thus, the Trial Division did not err when it considered customary law in resolving this matter.

II. The Application of Customary Law

Having found rights to *Metuker* to be dependent on customary law, we turn to Appellant's remaining enumeration of error—that the Trial Division erred in its application of the customary law standard. For cases filed before January 3, 2013, customary law must be proven by clear and convincing evidence. *Beouch*, slip op. at 5, 17 n. 10. A party seeking to rely on a customary law bears the burden of proof of establishing the existence of such law. *Tellames v. Isechal*, 15 ROP 66, 68 (2008). Thus, as the proponent of the customary law in question, Appellee bore the burden of establishing its existence by clear and convincing evidence.

In considering the issue of custom, the Trial Division took testimony from a customary law expert who testified that the Palauan custom under which men would inherit land, unless the land was a taro patch, "has evolved in the last forty years . . .

where . . . the female children of [a decedent] take the land or distribute the land to their children . . . ." No additional evidence was presented on the issue of the alleged customary law.

[11, 12] Dating back to the Trust Territory days, we have recognized "custom in the legal sense" is defined as "[s]uch a usage as by common consent and uniform practice has become the law of the place, or of the subject matter, to which it relates [and which has been] established by long usage." *Lalou v. Aliang*, 1 TTR 94, 99–100 (Palau Tr. Div. 1954) (internal punctuation omitted). We conclude Appellee failed to establish that the purported customary law regarding male inheritance was supported by uniform practice. *Id.*; *see also Ngiraremiang v. Ngiramolau*, 4 ROP Intrm. 112, 116–17 (1993) (holding previous custom no longer applied). Accordingly, we **VACATE** the Trial Division's holding that Appellee met her burden of establishing the existence of the claimed customary law by clear and convincing evidence.

CONCLUSION

For the foregoing reasons, we conclude the LCHO Determination created a form of communal ownership in *Metuker* amongst the children of Techeboet. We further conclude the children's rights vis a vis the Determination are governed by customary law. Finally, we conclude the custom of dry land inheritance claimed by Appellee was not proven by clear and convincing evidence.

This matter is **REVERSED and REMANDED** for proceedings consistent with this opinion.

KUMER CLAN/LINEAGE and ESTATE OF NGIRDEMEI NGIRAMERES,
Appellant,

v.

KOROR STATE PUBLIC LANDS AUTHORITY,
Appellee.

CIVIL APPEAL NO. 12-016
LC/B 09-0114

Supreme Court, Appellate Division
Republic of Palau

Decided: March 1, 2013

[1] **Appeal and Error:** Preserving Issues

Generally, arguments not raised in the Land Court proceedings are deemed waived on appeal.

[2] **Appeal and Error:** Preserving Issues

The waiver rule is particularly important in land litigation because in order to bring stability to land titles and finality to disputes, parties to litigation are obligated to make all of their arguments, and to raise all of their objections in one proceeding.

[3] **Appeal and Error:** Preserving Issues

The Court may decline to deem an issue waived where: (1) addressing the issue would prevent the denial of a fundamental right, especially in criminal cases where the life or liberty of an accused is at stake; or (2) the general welfare of the people is at stake.

[4] **Appeal and Error:** Preserving Issues

The public welfare exception applies only when the case itself implicates the public welfare—not where the only interest at stake is the right of a civil litigant to recover.

[5] **Appeal and Error:** Preserving Issues

To invoke the constitutional exception to the waiver rule, a litigant must show something more than the existence of a fundamental right, such as the risk of losing life or liberty.

[6] **Appeal and Error:** Preserving Issues

Constitutional challenges to statutes of limitations are insufficient to trigger application of the fundamental right exception.

[7] **Return of Public Lands:** Elements of Proof

Although we have referred to 1304(b) as having three elements (previous ownership, wrongful taking, and timely filing), the text of the statute requires a claimant make only the first two showings to establish a right of ownership to public lands. Under the plain reading of the statute, a litigant who meets these two requirements has a potential claim of ownership to the land in question. However, the provision requires that all claims for public land by citizens of the Republic must have been filed on or before January 1, 1989.

[8] **Return of Public Lands:** Elements of Proof

1304(b)'s time limitation provision encompasses only claims created by the Constitution. The corollary of this holding is that a claim filed before the ratification of the Constitution is not a claim for public land within the meaning of 1304(b)'s limiting sentence.

[9] **Return of Public Lands:** Claimants

When a person presents a claim as the representative for a clan or lineage, the clan is the party, not its representative.

[10] **Return of Public Lands:** Claimants

A person may claim land for a clan and for himself so long as the alternative claims are presented and preserved as if they were presented by different persons.

Counsel for Appellant: Raynold Oilouch
Counsel for Appellees: Oldiais Ngiraikelau

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem

Appeal from the Land Court, the Honorable ROSE MARY SKEBONG, Associate Judge, presiding.

PER CURIAM:

This is an appeal of a Land Court Determination awarding ownership of land known as *Emmaus* to Koror State Public Lands Authority ("KSPLA"), Appellee in this matter. For the following reasons, the determination of the Land Court is **AFFIRMED.**

PROCEDURAL HISTORY

This appeal concerns a Land Court Determination resolving competing claims of ownership of a parcel of land known as *Ngerkeaielked* or *Emmaus*,[1] located in Ngerchemai Hamlet, Koror State.

Prior to the Land Court proceedings, *Emmaus* was subject to five relevant[2] claims of ownership: (1) a 1955 claim filed by Ngirdemei Ngirameres in the Palau District Land office, which was denied; and (2) four claims from the 1980s filed by Kikuo Remeskang, the son of Ngirameres, on behalf of Kumer Clan.

In its Determination, the Land Court rejected return of public lands claims brought by Kumer Clan and by the Heirs of Ngirdemei Ngirameres. Specifically, the Land Court found that *Emmaus* had been wrongfully taken from Ngirameres but concluded that the claim made on behalf of his heirs was untimely. Conversely, the Land Court found Kumer Clan had filed a timely claim for return of *Emmaus*, but that the Clan failed to show proof of ownership.

Having rejected the return of public lands claims, the Land Court concluded title to *Emmaus* was properly held by KSPLA. Kumer Clan, the Estate of Ngirameres ("the Estate"), and the Heirs of Ngirameres ("the Heirs") appealed.[3]

STANDARD OF REVIEW

We review the Land Court's legal conclusions de novo and its factual findings for clear error. *Children of Dirrabang v. Children of Ngirailid*, 10 ROP 150, 151 (2003).

DISCUSSION

Appellants raise two issues on appeal: (1) the filing deadline set by the return of public lands statute, 35 PNC § 1304(b), is unconstitutional; and (2) the Land Court erred when it found the Heirs failed to file a timely claim. Appellee opposes these enumerations of error and contends that the Estate is not a proper party to this appeal.

I. Is the Estate Entitled to Appeal the Land Court Determination?

Rule 16 of the Land Court Rules of Procedure provides: "[a]ny claimant aggrieved by a Land Court determination of ownership may appeal such determination directly to the Appellate Division of the Supreme Court within 30 days of service of the determination." Appellee submits the Estate is not a claimant within the meaning of Rule 16 because Job Kikuo, the representative of the Heirs who appeared in the Land Court proceedings, "did not file a separate claim . . . either individually as an heir of Ngirdemei Ngirameres or as an administrator or representative of the Estate of Ngirdemei Ngirameres, or any claim whatsoever."

[1] The land is identified as Worksheet Lot B06-101 (40346).

[2] Claims to *Emmaus* made by Metuker Clan and Okelang Clan were denied below but were not appealed.

[3] Although the caption of the case identifies only the Estate of Ngirameres and Kumer Clan, the brief states the appeal was filed on behalf of Kumer Clan, the Estate and the Heirs. *See Becker v. Montgomery*, 532 U.S. 757, 767 (2001) ("[I]mperfections in noticing an appeal should not be fatal where no genuine doubt exists about who is appealing . . . ."). Accordingly, we will treat the Estate, the Clan and the Heirs as distinct appellants.

Even if the Estate had a right to appeal under Rule 16, it would not be entitled to relief from the decision. "In the absence of a statute or a will giving the executor or administrator the right to maintain actions affecting the realty, such right is vested solely in the decedent's heirs." 31 Am. Jur. 2d Executors and Administrators § 1132 (2012). The general rule that heirs (rather than estates) maintain the rights to bring actions affecting realty is reflected in the text of the return of public lands statute, which requires a litigant show he owned the land or is "the proper heir[] to the land." 35 PNC § 1304(b).

In Palau, there is no statute which gives the executor or administrator of an estate the right to maintain an action affecting realty. Accordingly, in the absence of a will granting the rights to realty to a decedent's estate, such estate may not bring a return of public lands action; the action must be brought by the deceased's heirs. *Id.* No such will is present here. Therefore, the Heirs, not the Estate, are the proper litigants in this return of public lands action.

II. Is the Filing Deadline of 35 PNC § 1304(b) Unconstitutional?

Appellants submit the filing deadline of 1304(b) conflicts with the express command of the Constitution that all wrongfully taken public lands must be returned and is, therefore, invalid. Appellee opposes this contention on substantive and procedural grounds. First, Appellee contends Appellants may not challenge the constitutionality of the filing deadline because they are estopped from doing so and because such argument was waived below. Appellants respond they were not required to raise the argument below and, that even if they were, they are not barred from raising the constitutional claim here. Appellants have not responded to the assertion of judicial estoppel.

[1-3] Generally, arguments not raised in the Land Court proceedings are deemed waived on appeal. *Ngiratereked v. Erbai*, 18 ROP 44, 46 (2011). "The waiver rule is particularly important in land litigation because in order to bring stability to land titles and finality to disputes, parties to litigation are obligated to make all of their arguments, and to raise all of their objections in one proceeding." *Id.* (internal punctuation and quotation marks omitted). Despite the foregoing, we may decline to deem an issue waived where: (1) addressing the issue would "prevent the denial of a fundamental right, especially in criminal cases where the life or liberty of an accused is at stake;" or (2) the general welfare of the people is at stake. *Kotaro v. Ngirchechol*, 11 ROP 235, 237 (2004).

On appeal, Appellants submit "35 PNC § 1304(b)(2) is invalid to the extent it imposes deadline[s] for filing of claims to public lands." It is undisputed this argument was not raised below. Nevertheless, to escape the waiver rule Appellants seek to recast their constitutional argument as a "disagree[ment] with the Land Court's interpretation of 35 PNC § 1304(b)" with regard to the application of the statute's requirements. This is a mischaracterization of Appellants' argument in their opening brief, which argues explicitly that the filing deadline is invalid on constitutional grounds. We will treat the argument on appeal as stated in the opening brief: that the

timeliness requirement of section 1304(b) is unconstitutional.

At the Land Court proceedings, Appellants claimed *Emmaus* under section 1304(b) and presented arguments regarding the provision's timely filing requirement without once challenging the validity of the statute. Absent an exception to the waiver rule, they may not now claim the very statute they sought to litigate under was invalid. *See* 5 Am. Jur. 2d Appellate Review § 618 (The waiver "rule is based on the principle that it is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider.").

[4] Appellants further assert that even if the constitutional argument should have been raised below, they are not barred from raising it here because the argument implicates a fundamental right and "represents a major issue affecting the general welfare of the people of Palau." As to the latter contention, Appellants argue "the constitutionality of 35 PNC § 1304(b) is not only an issue for Appellants in the case at bar but rather represents a major concern for the general public in Palau." In this argument, Appellants misunderstand the application of the public welfare exception which applies only when the case itself implicates the public welfare—not where "the only interest at stake is the right of a civil litigant to recover . . . ." *Tell v. Rengiil*, 4 ROP Intrm. 224, 226 (1994). Here, the only interest at stake is the right of Appellants to recover *Emmaus*. This interest is insufficient to invoke the public welfare exception to the waiver rule.

Turning to the fundamental right inquiry, as explained above, we have declined to deem an issue waived where addressing the issue would "prevent the denial of a fundamental right, especially in criminal cases where the life or liberty of an accused is at stake." *Kotaro*, 11 ROP at 237. "This exception to the waiver rule is only to be applied in exceptional circumstances . . . ." *Tell*, 4 ROP Intrm. at 226.

[5, 6] To invoke the constitutional exception, a litigant must show something more than the existence of a fundamental right, such as the risk of losing life or liberty. *Id.*; *see also Neil S. v. Mary L.*, 131 Cal. Rptr. 3d 51, 62 (Cal. App. 4th Dist. 2011) ("Typically, constitutional issues not raised in earlier civil proceedings are waived on appeal."). Constitutional challenges to statutes of limitations are insufficient to trigger application of this exception. *Bettencourt v. City and County of San Francisco*, 53 Cal. Rptr. 3d 402, 410 (Cal. App. 1st Dist. 2007) (The waiver "rule has been specifically applied to bar consideration of issues involving constitutional challenges to statutes of limitations.").

Here, Appellants assert a constitutional challenge to a statute of limitations. Thus, even assuming the right to return of public lands is a fundamental right, Appellants have not shown sufficient grounds to warrant an abrogation of the waiver rule. Accordingly, because neither of the two exceptions advanced by Appellant justify setting aside the waiver rule, we decline to address Appellants' constitutional argument.

III. Did the Appellants Meet the Requirements of § 1304(b)?

Appellants contend that the Land Court erred when it found no party had met the requirements of the return of public lands statute.

The right to return of public lands derives from Article XIII, § 10 of the Constitution, which provides, "[t]he national government shall, within five (5) years of the effective date of this Constitution, provide for the return to the original owners or their heirs of any land which became part of the public lands as a result of the acquisition by previous occupying powers or their nationals through force, coercion, fraud, or without just compensation or adequate consideration." Because the provision is self-executing, it created a right whereby "original owners of land which became public land through force or coercion are entitled to the return of their lands." *Ngerungel Clan v. Eriich*, 15 ROP 96, 99 (2008). The constitutional provision was implemented by 35 PNC § 1304(b), which provides:

> The Land Court shall award ownership of public land, or land claimed as public land, to any citizen or citizens of the Republic who prove:
>
> (1) that the land became part of the public land, or became claimed as part of the public land, as a result of the acquisition by previous occupying powers or their nationals prior to January 1, 1981, through force, coercion, fraud, or without just compensation or adequate consideration, and
>
> (2) that prior to that acquisition the land was owned by the citizen or citizens or that the citizen or citizens are the proper heirs to the land.. . . . All claims for public land by citizens of the Republic must have been filed on or before January 1, 1989 . . . .

35 PNC § 1304(b).

We have held a claimant under this section must show: "(1) she is a citizen who has filed a timely claim; (2) she is either the original owner of the land, or one of the original owner's 'proper heirs'; and (3) the claimed property is public land previously acquired by a government through force or fraud, or without just compensation or adequate consideration." *Ngarameketii v. Koror State Pub. Lands. Auth.*, 18 ROP 59, 63 (2011); *see also Omechelang v. Ngchesar State Pub. Lands Auth.*, 18 ROP 131, 134 (2011).

The Land Court rejected the 1304(b) claim of Kumer Clan because "not a single [piece of] evidence supported Kumer Clan's claim that it owned *Emmaus* before it became public land." Conversely, although the Land Court found the Heirs met the second and third prongs of 1304(b), it denied their claim because "[t]he heirs . . . did not file a claim by the January 1, 1989, deadline as required by 1304(b)." Specifically, the Land Court found the four claims filed by Kikuo Remeskang (Remeskang Claims) were claims for Kumer Clan and thus could not satisfy the Heirs' timely filing requirement. Similarly, the Land Court held the 1955 claim of

Ngirameres was not a "claim" within the meaning of 1304(b), and that even if it were, it was a claim of Ngirameres, not his heirs. Appellants challenge both conclusions.

A. Ngirameres Claim

[7, 8] Although we have referred to 1304(b) as having three elements (previous ownership, wrongful taking, and timely filing), the text of the statute requires a claimant make only two showings to establish a right of ownership to public lands. Under the plain reading of the statute, a litigant who meets these two requirements has a potential claim of ownership to the land in question. However, the provision requires that "[a]ll claims for public land by citizens of the Republic must have been filed on or before January 1, 1989." *Id.* We have held 1304(b)'s time limitation provision encompasses only claims created by the Constitution. *Kerradel v. Ngaraard State Pub. Lands Auth.*, 9 ROP 185, 185 (2002); *Carlos v. Ngarchelong SPLA, 8 ROP Intrm.* 270 (2001). The corollary of this holding is that a claim filed before the ratification of the Constitution is not a "claim for public land" within the meaning of 1304(b)'s limiting sentence.

The Ngirameres Claim was filed approximately twenty-five years before the enactment of the Constitution and may not, therefore, be considered a "claim for public land" under section 1304(b). Thus, the claim may not be used to satisfy the timely filing requirement of a section 1304(b) claim.

B. The Remeskang Claims

As set forth above, Job Kikuo, acting as a representative of Kumer Clan, filed four claims for *Emmaus*. Although Appellants concede the Remeskang Claims were filed on behalf of Kumer Clan, they contend they may now pursue an alternative claim of ownership on behalf of the Heirs.

[9, 10] "[W]hen a person presents a claim as the representative for a clan or lineage, the clan is the party, not its representative." *Idid Clan v. Koror State Public Lands Auth.*, 9 ROP 12, 14 (2001). Despite this rule, a person may claim land for a clan and for himself so long as the alternative claims "are presented and preserved as if they were presented by different persons." *Id.* at 14 n. 3. Put differently, while an individual may pursue alternative claims of ownership, such pursuit does not alter the claimant's responsibility to ensure that *each* claim is presented and preserved properly. *See id.*

There is no indication any of the Remeskang Claims were filed on behalf of any entity other than Kumer Clan. Accordingly, although Kikuo was entitled to file alternative claims on behalf of Kumer Clan and the Heirs of Ngirameres, it is clear on this record that he did not. The Land Court did not err when it found Kikuo's claims could not be considered claims made on behalf of the Heirs of Ngirameres.

CONCLUSION

For the foregoing reasons, the determination of the Land Court is **AFFIRMED**.

THE REPUBLIC OF PALAU,
Appellant,

v.

RAYNOLD B. OILOUCH,
Appellee.

CIVIL APPEAL NO. 12-021
Civil Action No. 11-249

Supreme Court, Appellate Division
Republic of Palau

Decided: March 4, 2013

[1] Appeal and Error: Standard of Review

We review grants of summary judgment de novo.

[2] Constitutional Law: Interpretation

We attempt to identify a plain meaning whenever we are tasked with defining a term or word within a statute or constitution. Where there is no ambiguity, we refrain from straying to other canons of interpretation.

Counsel for Appellant: Timothy S. McGillicuddy
Counsel for Appellee: Yukiwo P. Dengokl

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; and ROSE MARY SKEBONG, Associate Justice Pro Tem.

Appeal from the Trial Division, the Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.

PER CURIAM:

This case concerns Appellee Raynold B. Oilouch's[1] work with the Koror State Public Lands Authority (KSPLA) and Appellant, Republic of Palau's[2] charge that such work constituted both Constitutional and statutory violations. For the following reasons, the Trial Division's summary judgment is **AFFIRMED**.

BACKGROUND

This case concerns Raynold B. Oilouch's legal representation of KSPLA while sitting as a senator in the OEK. The Republic of Palau alleged in the Trial Division that this representation violated Article IX, section 10 of the Constitution and 33 PNC §§ 604(b) and (e), of the Ethics Act.

The Republic sought declaratory relief for the alleged Constitutional and statutory violations as well as an injunction to prevent Oilouch from serving as a member of the OEK while under contract for legal services with KSPLA. Both Oilouch and the Republic filed motions for summary judgment. The Trial Division denied the Republic's motion and granted Oilouch's, concluding that Oilouch's contract with KSPLA violated neither the Constitution nor the Ethics Act. The lower court examined and explained the plain meaning of "public employment" as being a relationship "established not in a contract

[1] The Court recognizes that Appellee is a sitting senator in the 9th OEK, but for ease of discussion, he will be referred to throughout this opinion as Oilouch, without reference to his official title.
[2] Appellant Republic of Palau will be referred to throughout this opinion as the Republic.

but by statute." Further, the court found that "[a]n employee is . . . distinct from an independent contractor."

The court justified its decision to separate independent contracting from the Constitutional prohibition against additional public employment, in part, by noting the absurdity of coming to a different conclusion. Specifically, the court explained that a finding that mere payment for services was sufficient to constitute "public employment" would prohibit a range of innocuous activities, including something as simple as a senator selling concessions at an inauguration.

Regarding the alleged violations of the Ethics Act, the court found the connection between Oilouch's duties with the OEK far too attenuated from his work with KSPLA to constitute a violation of that statute. Specifically, the court found that Oilouch had no reason to believe that his position as a senator could have a direct effect on his relationship with KSPLA. As such, the court found that Oilouch did not violate the Ethics Act. The Republic appeals this decision.[3]

STANDARD OF REVIEW

[1] We review the trial court's grant of Oilouch's motion for summary judgment de novo, giving no deference to the lower court's legal determination. *House of Traditional Leaders v. Koror State Gov't*, 17 ROP 101, 105 (2010). Accordingly, we review the motion for summary judgment through the same legal standard used by the Trial Division. *Id.*

ANALYSIS

The Republic challenges the lower court's determination that Oilouch's work for KSPLA should not be considered "public employment" for purposes of Article IX Section 10 of the Constitution of Palau. The Republic also challenges the lower court's determination that Oilouch's actions did not violate the Ethics Act.

According to the Rules of Civil Procedure, summary judgment is appropriate if "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." ROP R. Civ. P. 56(c). In making such a determination, the court will draw all inferences in light most favorable to the non-moving party. *House of Traditional Leaders*, 17 ROP at 105.

I. Violation of Constitutional Provisions

First, regarding the Constitutional claim, the Appellate Division considers whether Oilouch's representation of KSPLA constitutes "public employment." This is because the Constitution prohibits anyone from "hold[ing] any other public office or public employment while a member of the Olbiil Era Kelalau." Palau Const. art. IX, § 10.

[3] Oral argument was heard in this case on January 21, 2013. On January 18, 2013, Oilouch filed a Motion to Dismiss Appeal, arguing the issue was moot on the basis that Oilouch was no longer serving as legal counsel for KSPLA. While this change in circumstance would make the Republic's desire for injunctive relief moot, the Republic also sought declaratory relief that Oilouch was in violation of the Constitution and the Ethics Act. Accordingly, the questions before this Court concerning this declaratory relief are not moot and will still be considered in this opinion.

[2] The Constitution does not define "public employment" and the trial court determined that, despite the lack of a definition in the Constitution, the term has a plain meaning. We attempt to identify a plain meaning whenever we are tasked with defining a term or word within a statute or constitution. Where there is no ambiguity, we refrain from straying to other canons of interpretation. *See Otobed v. Palau Election Comm.*, Civ. App. No. 12-011, slip op. at 7 (Oct. 18, 2012) (noting that because the court found no ambiguity, it needed not consider other arguments concerning the meaning of a provision); *Seventh Koror Legislature v. Borja*, 12 ROP 206, 207 (Tr. Div. 2005) (explaining that a court only looks to other canons after it first determines that there is an ambiguity).

Black's Law Dictionary defines "employment" as an employer-employee relationship that reflects that of a master and servant. *Black's Law Dictionary* 566 (8th ed. 1999). It further defines "employee" as a "person who works in the service of another person under an express or implied contract of hire, under which the employer has the right to control the details of work performance." *Id.* at 564; *see also Sakuma v. Borja*, 11 ROP 286, 287 (Tr. Div. 2004) (adopting the *Black's Law Dictionary* definition). In *Sakuma v. Borja*, the court determined that an employee is one who works under contract and whose work the employer has a right to control, even down to the small details. *Id.* Further, *public* employment is characterized as employment created under the direction or with the approval of a governmental agency. 63C Am. Jur. 2d *Public Officers & Employees* § 8 (2009).

To contrast, independent contracting is defined in a way that is mutually exclusive to the definition of employment. The Restatement (Second) of Torts defines "independent contractor" as "any person who does work for another under conditions which are not sufficient to make him a servant of the other." *Restatement (Second) Torts* § 409 cmnt. a (1965). The United States Supreme Court has addressed the distinction between an employee and an independent contractor, noting a number of factors that help courts to distinguish the two. *Nationwide Mut. Ins. Co. v. Darden*, 303 U.S. 318, 323 (1992). Some of these factors include the hiring party's right to control the work, the duration of the relationship, "whether the hiring party has the right to assign additional projects to the hired party," and "the hiring party's role in hiring and paying assistants." *Id.* (internal quotation marks omitted) (citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751–52 (1989)).

The Republic urges this Court to look to the Ethics Act, which also discusses public employment, for guidance in defining the term as it is used in the Constitution. This Court has explained on prior occasions its hesitation to defer to legislative interpretations of words in the Constitution. *See Nicholas v. Palau Election Comm'n*, 16 ROP 235, 239 (2009). Interpretation of the Constitution is the role of the judiciary and subsequent legislation defining the same words is not authoritative for the judiciary in performing this function.

In line with the Trial Division's discussion of what constitutes an "employee," and reviewing the definition for "independent contractor" and the factors

described by the United States Supreme Court, we hold that Oilouch's work for KSPLA is much more akin to that of an independent contractor. Oilouch was hired for one very specific purpose. It is undisputed that Oilouch's work for KSPLA was temporary and that he was asked to represent KSPLA in his capacity as an attorney. His work with KSPLA looks nothing like regular employment. Oilouch provided an uncontested affidavit indicating that he is not listed as an employee on any KSPLA records. Furthermore, his work with KSPLA did not prohibit Oilouch from representing other clients in his law practice, hiring assistants to help him in his work, nor did it grant KSPLA the authority to control the details of Oilouch's work for KSPLA or any other client Oilouch may have decided to represent. These circumstances sufficiently establish that Oilouch was an independent contractor for KSPLA and was not an employee, as that word is defined in the Constitution.

This Court recognizes the possibility that the Constitutional prohibition may be avoided by labeling additional governmental employments as independent contracting. However, the question before the court today is a question of whether Oilouch's one-time representation of KSPLA should be considered other public employment. Today, our holding is limited, as we hold only that Oilouch's work for KSPLA is not in violation of the Constitution. Accordingly, the trial division's granting of summary judgment on this ground is affirmed.

II. Violation of Statutory Provisions

The Republic challenges Oilouch's representation of KSPLA pursuant to the Ethics Act, 33 PNC §§ 605 (b) and (e). The relevant sections forbid any government employee, including elected officials, from acquiring "a financial interest in any business or other undertaking which he has reason to believe may be directly affected by official actions to be undertaken by him." *Id.* at § 605(b). A financial interest in this context means "employment" or "any rendering of services for compensation." *Id.* at §§ 601 (h) and (i).

Oilouch's involvement with KSPLA is undisputedly an undertaking of a financial interest. Thus, we must only determine whether this specific activity is of the type that Oilouch should have had reason to believe would directly affect his official actions in his public office. The lower court determined that the Republic failed to prove this aspect and explained that Oilouch's actions as a senator are far too attenuated from his involvement as temporary counsel for KSPLA.

The record below contains no evidence, and not even a charge, that the OEK is contemplating any action that might affect KSPLA or its funding. This is relevant to the Republic's contention that Oilouch has violated § 604(b) of the Ethics Act, which prohibits officials from "engage[ing] in any outside employment or other outside activity that is incompatible with the full and proper discharge" of the official's duties. This provision also notes that "[t]he Ethics Commission shall, for each government agency, designate those outside activities that are deemed to be incompatible with the duties of the employees of that agency." *Id.* There is no

designation on record for the OEK, nor real direction for what activities should be deemed incompatible in Oilouch's case. Thus, without more from the Republic, there is no factual basis for concluding that the lower court erred in finding that Oilouch has not violated this provision of the Ethics Act.

CONCLUSION

For the foregoing reasons, the Trial Division's grant of summary judgment in favor of Oilouch is **AFFIRMED**.

PALAU RED CROSS and SANTY ASNUMA,
Appellants,

v.

MIRIAM CHIN,
Appellee.

CIVIL APPEAL NO. 12-029
Civil Action No. 10-168

Supreme Court, Appellate Division
Republic of Palau

Decided: March 20, 2013

[1] **Appeal and Error:** Standard of Review

A lower court's discretionary decisions are reviewed for abuse of discretion. This Court will not find an abuse of discretion unless the trial court's decision was arbitrary, capricious, manifestly unreasonable, or because it stems from an improper motive.

[2] **Civil Procedure:** Failure to Respond

Under Republic of Palau Rule of Civil Procedure 8(d), any averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading.

[3] **Courts:** Authority

Rule 55 provides the trial court with authority to resolve a case without a trial upon a party's failure to timely respond to a complaint.

[4] **Courts:** Docket Management

The trial judge has wide latitude in setting his own calendar and managing his docket.

Counsel for Appellant: Moses Y. Uludong
Counsel for Appellee: David W. Shipper, J. Uduch Sengebau Senior

BEFORE: ROSE MARY SKEBONG, Associate Justice Pro Tem; KATHERINE A. MARAMAN, Part Time Associate Justice; and RICHARD H. BENSON, Part Time Associate Justice.

Appeal from the Trial Division, the Honorable LOURDES F. MATERNE, Associate Justice, presiding.

PER CURIAM:

This case concerns the appeal by Appellants Palau Red Cross and Santy Asanuma of the Trial Division's Order of Default and entry of Default Judgment against them that resulted from Appellants' failure to timely respond to the complaint by Appellee Miriam Chin. For the following reasons, the decision of the Trial Division is **AFFIRMED**.[1]

BACKGROUND

Appellee filed her complaint in the Trial Division on September 29, 2010, in which she sought relief including reinstatement and back pay for wrongful termination from her position as Executive Director by Appellant Palau Red Cross and Santy Asanuma. Appellants sought and received an extension of time until October 26, 2010, to file their answer. Appellants did not file a timely answer, and on October 27, 2010, at 8:54 a.m., the Clerk of Courts entered a default against Appellants. Later that day, Appellants filed an answer. They did not, however, seek leave to file their answer late nor make any other motion for relief from the default at that time.

On November 17, 2010, Appellee filed a motion for default judgment, to which Appellants did not respond. On May 25, 2011, the Trial Division issued an Order in which it concluded that a default judgment was appropriate under the circumstances, but the court set a hearing for August 1, 2011, to take evidence regarding Appellee's damages before it would issue a final judgment.

On June 8, 2011, Appellants filed a motion seeking, for the first time since the entry of default in October 2010, relief from the order of default, admission of their answer, and leave to file a counterclaim. On July 6, 2011, the Trial Division recounted the above procedural history, emphasized Appellants' extreme lack of responsiveness in the matter, and denied Appellants' motion in its entirety.

On April 16, 2012, after taking evidence on Appellee's damages, the trial court credited Plaintiff's damages testimony and entered a default judgment in favor of Appellee, ordering (1) Appellee's reinstatement as Executive Director of Palau Red Cross within 14 days of the order; and (2) an award of damages equal to Appellee's compensation from August 28, 2010, the date her suspension began, to be paid within

[1] Although Appellant requests oral argument, we determine pursuant to ROP R. App. P. 34(a) that oral argument is unnecessary to resolve this matter.

30 days of the filing by Appellee updating her damages calculation. After receiving Appellee's updated calculation of damages, the Court issued a final judgment on May 23, 2012, directing Appellee's reinstatement in accordance with the April 16, 2012, order and awarding Appellee lost compensation in the amount of $32,000.

On July 27, 2012, Appellants filed the instant appeal, their second appeal[2] of Civil Action 10-168. Appellee filed her Response on February 5, 2013. Although Appellants filed a Reply, it was untimely, and Appellants did not seek leave of Court to file their Reply late nor provide the Court with any cause to explain the late filing. *See* ROP R. App. P. 26, 31. Accordingly, the Court will not consider Appellants' Reply brief.

STANDARD OF REVIEW

Appellants seek review of the Trial Division's findings with respect to the timing of Appellee's termination from employment with Palau Red Cross. The lower court's factual findings are reviewed using the clearly erroneous standard. *Nebre v. Uludong*, 15 ROP 15, 21 (2008) (citing *Dilubech Clan v. Ngeremlengui State Pub. Lands Auth.*, 9 ROP 162, 164 (2002)). We reverse "only if the findings so lack evidentiary support in the record that no reasonable trier of fact could have reached the same conclusion." *Ngirakesau v. Ongelakel Lineage*, Civ. App. Nos. 10-037, slip op. at 5-6 (Nov. 11, 2011) (citing *Palau Pub. Lands Auth. v. Tab Lineage*, 11 ROP 161, 165 (2004)).

Appellants also contend the Trial Division erred as a matter of law when it awarded Plaintiff relief in its Judgment that Appellants contend Appellee did not seek in her Complaint. A lower court's conclusions of law are reviewed de novo. *See Wong v.* Obichang, 16 ROP 209, 212 (2009); *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001).

[1] In addition, Appellants contend the Trial Division abused its discretion in the manner in which it managed the docket and the proceedings. The above standards of review do not apply to discretionary decisions, which we review for an abuse of discretion. *Ngoriakl v. Gulibert*, 16 ROP 105, 107 (2008). This Court will not find an abuse of discretion unless the trial court's decision was arbitrary, capricious, manifestly unreasonable, or because it stems from an improper motive. *Western Caroline Trading Co. v. Kinney*, 18 ROP 70, 71 (2011).

ANALYSIS

Appellants assert three errors by the Trial Division: (1) the court erred in reaching its factual findings concerning Appellee's termination from employment with Palau Red Cross, (2) the court erred

[2] On May 16, 2012, Appellants filed their first appeal from Civil Action 10-168 in a separate action, Civil Appeal No. 12-019. Four days after the deadline to file its opening brief, on July 10, 2012, Appellants sought an extension of time. This Court concluded Appellants did not show good cause for why they missed the deadline to file its opening brief nor for why they sought an extension of time after that deadline had passed. Accordingly, the Court dismissed that appeal in December 2012 for failure to file a timely opening brief. It now appears Appellants have filed a third appeal of Civil Action 10-168 in Civil Appeal No. 12-040. Appellants have yet to file their opening brief in that matter.

when it awarded Appellee relief in its Judgment that was not originally pled nor added by amendment to her complaint, and (3) the court abused its discretion in its management of the docket and the proceedings.

I. Factual Findings.

As Appellants repeatedly point out, the trial court did not hold a trial on the merits of Appellee's claims. Appellants contend the Court's failure to do so led it to find facts that were either not true or were not supported by the record. In particular, Appellants contend the court erred when it concluded that Appellee was terminated from her employment with Palau Red Cross effective September 27, 2010, pursuant to a telephone conversation between Appellee and Appellant Asanuma.

As noted, Appellants did not file a timely answer to Appellee's complaint in the underlying matter. Although they filed an answer on October 27, 2010, after the court had entered a default, Appellants' untimely answer was never accepted by the court.

[2] Under Republic of Palau Rule of Civil Procedure 8(d), any "[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading." Because Appellants did not deny Appellee's allegations in her complaint through a responsive pleading, they are deemed admitted.

In paragraph 7 of her complaint, Appellee alleged her employment with Palau Red Cross was terminated during a telephone conversation with Appellant Asanuma, chairperson of the Palau Red Cross Board of Directors, on September 27, 2010. Because this allegation was pled and was not denied, it was properly accepted by the trial court as true. Accordingly, the Court does not find any error in the trial court's adoption of the factual allegations contained in Appellee's complaint. Appellants' allegations to the contrary contained in an untimely answer are of no effect, and they may not argue their version of the facts for the first time on appeal.[3] *See "R" Best Produce, Inc. v. DiSapio*, 540 F3d 115, 118 (2d Cir. 2008) ("[T]he entry of a default judgment means that the allegations in the complaint are deemed admitted.").

II. Relief Granted in the Judgment.

Appellants also contend the trial court erred when it granted Appellee relief she did not seek in her complaint and did not amend her complaint to add. Specifically, Appellants contend Appellee sought only back pay for August and September 2010 in her complaint, for a total of $1,500, and that it was error for the trial court to award back pay in excess of $18,000 and attorneys' fees of $11,000.[4] Appellants do not cite to any authority in support of their contention.

[3] Appellants argue at length that Appellee was terminated on October 21, 2010, based on a written letter of termination from Appellants. As already established, Defendants failed to provide a timely answer to Appellee's complaint, and the allegations in the complaint are deemed admitted by rule. Appellants cannot now challenge the facts in the complaint, and Appellants' assertions of error stemming from their allegation that Appellee was fired on October 21, 2010, are unavailing.

[4] Of note, the Judgment issued on May 23, 2012, included an award of $32,000 in lost compensation and did not include an award of attorneys' fees.

Appellants' argument is plainly without merit. As Appellee points out, she sought damages in her complaint in an amount to be determined by the court, reasonable attorneys' fees and costs, and "such other and further relief that this Honorable Court may deem just and appropriate." The fact that Appellee averred she was entitled, at the time of the filing of the complaint, to back pay for August and September 2010 does not limit her request for appropriate damages, nor does it require any specific amendment of her complaint.

In accordance with ROP Rule of Civil Procedure 55(b)(2) governing relief provided in the context of a default judgment, the trial court ordered a hearing[5] and took further evidence on Appellee's damages by affidavit. Based on its assessment of that evidence, not on any specific figure pled in the complaint, the trial court set the amount of damages that resulted from Appellee's claim of wrongful termination at $32,000. Accordingly, the Court finds no legal error in the trial court's assessment of Appellee's damages.

III. Abuse of Discretion.

Finally, Appellants contend the trial court abused its discretion to manage its case docket and the attendant proceedings because it did not hold any trial or hearings during the one year and five months that this case was pending in the Trial Division. Appellants contend the trial court's mismanagement of the case deprived them of their procedural rights. Again, Appellants advance their assertion of error without the support of any legal authority.

[3] It is plain from the procedural history of this matter that a trial was not called for. The trial court issued a default based on Appellants' failure to timely respond to Appellee's complaint, and Rule 55 provides the trial court with authority to resolve the case without a trial under those circumstances.

[4] With respect to the other case management deadlines set by the trial court, this Court has stated:

> [T]he trial judge has wide latitude in setting his own calendar and managing his docket. *BMC*, 3 ROP Intrm. at 338 (citing *Will v. Calvert Fire Ins. Co.*, 98 S. Ct. 2552 (1978)). As a general matter, then, "this Court will not intervene in a trial judge's management of a particular case or of his caseload as a whole, absent a statement or clear showing that he intends to abdicate his judicial responsibilities." *BMC*, 3 ROP Intrm. at 338.

First Commercial Bank v. Mikel, 15 ROP 1, 2-3 (2007) (citing *BMC Corp. v. Ngiraklsong*, 3 ROP Intrm. 336, 338 (1993) ("A busy trial judge, confronted with competing demands on his time and with inevitable scheduling difficulties, is entrusted with wide latitude in setting his own calendar.")).

[5] Appellee subsequently requested that the trial court make its findings as to Appellee's damages based on affidavits alone, rather than by holding a hearing. After Appellants failed to object, the trial court granted Appellee's request, cancelled the hearing, and resolved the damages issues on the parties' affidavits.

"A discretionary act or ruling under review is presumptively correct, and the burden is on the party seeking reversal to demonstrate an abuse of discretion." *Ngoriakl*, 16 ROP at 107 (internal quotation marks omitted).

Appellants argue the trial court "s[a]t on a simple case like this for over a year and then issue[d] and implement[ed] its judgments and order without hearings or trial." As we already explained, a trial was unnecessary in this matter, and the trial court vacated the damages hearing only after Appellants failed to object to Appellee's motion requesting the trial court to do so. In light of the wide latitude given to trial judges to manage their busy schedule, Appellants' vague allegations of an abuse of discretion based on scant references to the timing of resolution of certain motions are insufficient to meet their burden to demonstrate an abuse of discretion. Appellants were given ample time and every opportunity to be heard in this matter. This Court will not confuse Appellants' clear lack of diligence in this matter with an effort on the part of the trial court to deprive them of the process to which they are entitled. On this record, the Court concludes the trial court did not abuse its discretion.

CONCLUSION

For the foregoing reasons, the decision of the Trial Division is **AFFIRMED**.

TAKAMATSU R. EMESIOCHL,
Plaintiff,

v.

JULYNN MEDIOLA MARATITA,
Defendant

CP/CIVIL ACTION NO. 12-089

Court of Common Pleas
Republic of Palau

Decided: March 22, 2013

[1] **Family Law:** Custody

Under common law, the lodestar for the court in any child custody proceeding is the best interest of the child.

[2] **Family Law:** Custody

Looking to common law, the court developed a non-exhaustive framework to weigh the best interest of a child in determining which of the tow parets to award custody of the child. Specifically, the court considered an array of factors, including: the wishes of the parents; the wishes of the child; interaction and interrelationship of the child with his parents, siblings, and other persons who may significantly affect the childe's best interests; adjustment to home, school, community; and the mental and physical health of all individuals involved.

[3] **Family Law:** Custody

A parent does not relinquish parental rights by voluntarily placing a child under the care of a third party.

[4] **Family Law:** Custody

Ideally, in a situation where both parents are fit and proper, an award of joint custody, which will allow both parties to share physical custody and have an equal say over the rearing of their child, is appropriate.

[5] **Attorneys Fees**

Absent a statute or contract to the contrary, each party is responsible for his own attorney fees.

Counsel for Plaintiff: Micronesian Legal Services Corporation, By: Scott Hess

Counsel for Defendant: Law Office of Kirk and Shadel, By: David F. Shadel

The Honorable HONORA E. REMENGESAU RUDIMCH, Senior Judge:

BACKGROUND

Plaintiff Takamatsu R. Emesiochl ("plaintiff") filed this action for custody and visitation seeking an order awarding him sole custody of the parties' minor child R.C.M.II.T.E ("Robert"), born on July 19, 2007 in Saipan, Commonwealth of Northern Mariana Islands ("CNMI"), with reasonable visitations by defendant Julynn Mediola Maratita ("defendant"). Defendant filed an answer and counterclaim, in which she seeks sole custody of all the parties' minor children, T.I.M.E ("T'Keyah"), born on January 05, 2006, in Saipan, CNMI, Robert, and T.E.M.M. ("Tyrese"), born on October 25, 2008, in Saipan, CNMI. She also seeks a judgment establishing paternity and determining plaintiff as the father of each of their children; ordering plaintiff to pay child support; allowing plaintiff reasonable visitations; directing plaintiff and all persons otherwise having physical control over Robert to promptly surrender and deliver Robert to her; and ordering plaintiff to pay her reasonable expenses and attorney fees. The parties in their joint pre-trial statement stipulated that a judgment establishing plaintiff as the father of each of the children should be entered,[1] along with custody of both T'Keyah and Tyrese to defendant, with reasonable visitations by plaintiff, that the parties shall cooperate to arrange. A trial on the remaining issues was held on January 21, 2013. Based on the parties' stipulations and evidence presented, the court hereby enters the following:

FINDINGS OF FACT

Plaintiff is a Palauan citizen. He received his high school diploma from Belau Modekngei School and attended Palau Community College part time for one semester and then University of Hawaii at Hilo for about a year. Later, he attended Northern Marianas College part time for one semester. Defendant is a United States citizen. She is Chamorro and grew up in Rota. She graduated high school in Rota and has a Certificate of Completion in business management from Northern Marianas College that she received in May of 2004.

The parties often lived at relatives' homes in Rota and worked various jobs. As a result of their relationship, T'Keyah was born on January 05, 2006; Robert was born on July 19, 2007, and Tyrese was born on

[1] Plaintiff is listed as the father of T'Keyah and Robert in their birth certificates, but not Tyrese's. Accordingly, the court need only enter a finding as to Tyrese.

October 25, 2008. All the children were born in Saipan, CNMI. Plaintiff is listed as T'Keyah and Robert's father in their birth certificates, except Tyrese's, who does not have a father listed. Plaintiff and defendant, however, agree that plaintiff is Tyrese's father.

Plaintiff moved back to Palau in September of 2008 with T'Keyah and Robert. At that time, defendant was still pregnant with Tyrese and parties agreed that she would move to Palau after she gave birth. Shortly after Tyrese was born, defendant came to Palau with him. Both parties and the three children lived with plaintiff's parents in Ibobang. After a month, however, plaintiff's parents told defendant that she should move back home because she had just given birth and customarily she should not live with the child's father and his family until the child was bigger and stronger. Defendant and Tyrese left Palau in late December of 2008 to Guam and have resided there since. T'Keyah and Robert stayed back with plaintiff. According to plaintiff, sometime after defendant left, he decided he no longer wanted to be in a relationship with her.

Plaintiff, in the meantime, continued to stay with his parents and T'Keyah and Robert until sometime in 2009 when he and T'Keyah moved to Ngerkebesang in Koror to live with plaintiff's grandmother. Robert however continued to stay with plaintiff's parents in Ibobang. In August of 2010, defendant came to Palau and took T'Keyah to Guam. Defendant had told plaintiff it would only be for vacation, however, according to defendant she shortly thereafter found a job and so she did not bring T'Keyah back to Palau. T'Keyah was later enrolled in kindergarten and is now in first grade in Ordot Chalan Pago Elementary School in Guam. Robert, now five years old, will be enrolled in first grade this coming school year.

Defendant had another child, Jacone, with another man who turned one in November of 2012, and of whom she has custody. Defendant and her children, T'Keyah, Tyrese and Jacone, live with her brother, sister and her sister's boyfriend in a three bedroom apartment. She and her children share the master bedroom, while her brother is in one room and her sister and her boyfriend are in another room. According to defendant, she has sought family housing but was told she first needs to have a court order awarding her custody of her children in order to complete her application.

Defendant works at Leo Palace Resort and earns a regular gross of about $580 every two weeks, not including overtime, etc. Her net pay after taxes and medical insurance deductions is about $342.70. She receives $900 a month in food stamps for her and her children as well as her brother and sister, along with about $150-$250 a month from her father. Of their monthly rent, utilities, and water, defendant's share ranges from $150-$200 a month. T'Keyah and Tyrese's expenses are:

a) School supplies (T'Keyah)
   $100/school year ($8.33/mo.)
b) Class pictures (T'Keyah)
   $35/school year ($2.92/mo.)
c) Backpack (T'Keyah)
   $40/school year ($3.33/mo.)

d) Field trips (T'Keyah)
$20/school year ($1.67/mo.)
e) School magazines (T'Keyah)
$50/school year ($4.17/mo.)
f) School programs (T'Keyah)
$33/school year ($2.75/mo.)
g) Medical/dental insurance premiums
$146/bi-weekly ($292/mo.)
h) Medical/dental co-payments
$500-$600/year
($41.67-$50/mo.)
i) Groceries (T'Keyah & Tyrese)
$400-$500/month
j) Clothes (T'Keyah & Tyrese)
$400-$500/year
($33.33-$41.67/mo.)
k) Beddings/Towels/Hygiene
$200-$250/year
($16.67-$20.83/mo.)
l) Laundry (T'Keyah & Tyrese)
$25/bi-weekly ($50/mo.)
m) Gasoline (transportation)
$20/bi-weekly ($40/mo.)
TOTAL
$896.84-$1,017.67 per month

Robert, on the other hand, has since continued to live in plaintiff's parents' house, but plaintiff visits him at least three times during the week and on the weekends. According to his parents, defendant provides the bulk of Robert's needs, including whatever he wants. Currently, Robert does not attend school, but will be enrolled in first grade this coming school year. Each of plaintiff's parents work and so they have a relative watching him during the day until they return home. Plaintiff moved into an apartment with his girlfriend from April to December of 2011, but then moved back with his grandmother in Ngerkebesang and continues to live with her until today.

Plaintiff currently works at POLARIS and earns a gross pay of $410.23 every two weeks. After his regular allotments for tax, social security, pension, medical and life insurance, as well as, his loans, he is left with a net pay of $124.98. He also has been working part-time as a musician at Palau Pacific Resort ("PPR") and currently performs on Mondays, Wednesdays and Sundays at a rate of $75 per performance. His contract at PPR ends in March of 2013 and he is not sure whether it will be renewed. He is enrolled under the national health care insurance, with Robert listed as his dependent. Plaintiff has no other source of income.

Plaintiff's living expenses are:

a) Utilities $60/month
b) Cell phone $50/month
c) Food $40/month
d) Gasoline $100/month
TOTAL **$250 per month**

As for Robert's expenses, plaintiff states he spends about $80-$100 every month for his food and other necessities, including what Robert wants.

Plaintiff has gotten a lease for land and is looking into obtaining a loan to build a house. Once he has his own place, then he plans on taking Robert to leave with him full time. In the meantime, his parents are willing to have Robert live with them until plaintiff gets his own place. According to plaintiff's father, it is customary for grandparents to help raise their grandchildren until their parents are able to take them, especially as in this case, where plaintiff has no place of his own and works.

CONCLUSIONS OF LAW

Defendant seeks a judgment establishing plaintiff as the father of all of the parties' children. Although plaintiff does not object to such a request, the court believes it is not necessary, particularly for T'Keyah and Robert, as plaintiff is already listed in their birth certificates as their father. *See* 41 Am. Jur. 2d *Illegitimate Children* §42 (2005) ("A valid acknowledgment of paternity filed with the proper agency is equivalent to an adjudication of paternity of a child and confers upon the acknowledged father all the rights and duties of a parent."). Tyrese, however, has no father listed in his birth certificate. Accordingly, because both parties are in agreement, the court finds plaintiff is the biological and legal father of Tyrese.

As prior courts have noted, there is little in the way of statutory guidance regarding custody and support of minor children. The current statutes merely authorize the court to order the custody of and support for minor children in divorce proceedings, mandate parents to provide support for their minor children, and establish a duty to provide support regardless of presence or residency of the person owed the support. 21 PNC §§ 302, 335 and 504. Accordingly, the court will turn to common law as applicable. 1 PNC §303.

A. CHILD CUSTODY:

[1] Under common law, the lodestar for the court in any child custody proceeding is the best interest of the child. *See, e.g., Helen S.K. v. Samuel M.K.*, 288 P.3d 463, 474 n. 23 (Alaska 2012); 24A Am. Jur. 2d *Divorce and Separation* § 849 (2008). Furthermore, ". . . there is no prima facie presumption in favor of the mother [or the father], and the parents are to receive equal consideration for custody of a minor child." 24A Am. Jur. 2d *Divorce and Separation* § 851 (2008).

[2] In *Kumangai v. Decherong*, 13 ROP 275 (Tr. Div. 2006), the court touched on the issue of child custody in a manner relevant to the current situation, and, looking to common law, it established a non-exhaustive framework by which a court weighs the best interest of a child in determining which of the two parents to award custody of the child. Specifically, the court considered an array of factors, including: "the wishes of the parents; the wishes of the child; interaction and interrelationship of the child with his parents, siblings, and other persons who may significantly affect the child's best interests; adjustment to home, school, community; and the mental and physical health of all individuals involved." *Id.* at 279.

At the outset, despite the fact that defendant has been residing in Guam with T'Keyah and Tyrese for more than several years and plaintiff, himself, lives in Koror, while Robert lives in his paternal grandparents' house in Ibobang, both parties stipulated that neither of them has abandoned any of their children. In any case, defendant argues, citing *Britt v. Britt*, 567 P.2d 308 (Alaska 1977), and other cases, that parents, not other relatives, are entitled to custody and to allow plaintiff to have custody of Robert "is tantamount to giving his effective custody to his paternal grandparents." (Def.'s Trial Mem. 2). *Britt*

v. Britt is distinguishable from the current case in that the grandparents were originally awarded custody by the court, a ruling that was then contested by the mother. Such is not the case here as the father (and the mother) still retains legal custody.

The parental preference doctrine articulated in *Britt v. Britt* is meant as a safeguard against nonparents using the court to wrest custody away from a parent. *See Evans v. McTaggart*, 88 P.3d 1078, 1084 (Alaska 2004); *C.R.B. v. C.C.*, 959 P.2d 375, 380 (Alaska 1998). It does not apply here.

[3] Plaintiff's parents are not contesting custody. Neither has Plaintiff officially relinquished custody of the child to his parents, either by legal decree or by abandoning the child at his parents' home. *See In re E.S.*, 264 P.3d 623, 627 (Colo. Ct. App. 2011) ("A parent does not relinquish parental rights by voluntarily placing a child under the care of a third party."); *Hanson v. McGowan*, 555 N.E.2d 80, 82 (Ill. App. Ct. 1990) (same).

Further, "[t]he mere fact of separation for several years while the parent permits the child to be raised by others does not in itself establish abandonment." *In re Guardianship of Newell*, 10 Cal.Rptr. 29, 31 (Cal. Ct. App. 1960). In other words, temporary absences do not necessarily evidence an intent to surrender parental rights. As both parties stipulate, neither party has abandoned any of the children. That the child currently lives in the grandparents' house is a factor to be considered, but is a single factor in a multitude which must be weighed by the court.

Accordingly, the court will turn to the factors as set out in *Kumangai v. Decherong* and will begin with the mental and physical health of all individuals involved. Robert appears to be in good health and does not have any special needs for which the court needs to take into consideration. Plaintiff and defendant do not have any special needs either, and no specific mental or physical characteristic was raised to give the court concern.

Both parties each wish to have sole custody of Robert. Parents have the right to custody of their children and make decisions regarding their welfare. 59 Am. Jur. 2d *Parent and Child* §26 (2008). Even though defendant presented some evidence appearing to impeach plaintiff's character, the court finds that each party is a proper person to be awarded custody. Both parties love Robert and want what is best for him. Despite the fact they are not necessarily earning enough money to support themselves and their children, they have steady employment. Plaintiff has taken on a part-time job that allows him to provide for Robert's needs and wants, but at the same time allows him time to visit with Robert on a regular basis. In the meantime, he is trying to get a house for himself so he can bring Robert to live with him. He has the national health insurance which Robert is listed as his dependent and has life insurance with all his children listed as beneficiaries. Defendant, on the other hand, has sought assistance from the government through food stamps and is currently applying for low-income family housing so she can move to a bigger place. She has medical and dental insurance for herself and the children.

[4] Ideally, in a situation where both parents are fit and proper, an award of joint custody, which will allow both parties to share physical custody and have an equal say over the rearing of their child, is appropriate. *See Kumangai*, 13 ROP at 279. Unfortunately, because both parties live in different countries, such an arrangement for its obvious reasons is not practical and would not be in the best interest of Robert.

As to Robert's wishes, the court did not consider it because of his young age, and neither party objected to the court's decision. However, in terms of his interaction and relationship with his parents and other individuals in his life, as well as, adjustment to his living situation, the court notes the following:

Robert first moved to Palau when he was about a year old. He is now five years old. For the past four years, Robert has been with plaintiff, his paternal grandparents, cousins, and relatives here in Palau. This is what he has known. Although he lives with his paternal grandparents, plaintiff visits him almost every day and provides for most if not all of his needs. He has cousins, ages seven and nine that live with him. His aunt watches him whenever his paternal grandparents are at work. As plaintiff states, he is in a good and safe environment. He and plaintiff get along well. They are not just father and son, but friends. His paternal grandparents are there to help take care of him until plaintiff finds his own place and they treat him like their own son. They both work at the school where plaintiff plans on enrolling Robert this coming school year.

On the other hand, although, Robert knows his mother and spent some time with her, most recently, for several days before and after the trial in this case, the court knows very little about his interaction with her, aside from defendant's own testimony, that they get along well.

In addition, Robert has had no significant relationship with his siblings over the past two to four years. There is no dispute that siblings generally should be raised in the same household so they can share their lives together as brothers and sisters. However, some jurisdictions have held that:

> Although it is desirable to keep siblings together, no rigid rule prevents separation. Instead, the matter is committed to the trial court's discretion to best respond to the myriad of factual settings which will invariably arise in custody matters, at all times cognizant that it is the best interests of the child which is the paramount consideration. Though maintaining sibling relationships will typically be in the best interests of the child, cases will undoubtedly arise where the best interests of the child dictate otherwise.

I.J.D. v. D.R.D, 961 P.2d 425, 430-31 (Alaska 1998) (internal citations omitted); *Accord In re Marriage of Morales*, 159 P.3d 1183, 1189 (Or. Ct. App. 2007) (same).

Furthermore, some courts have held that "[s]eparating siblings may be justified for reasons including the relationship between the siblings, the children's respective custodial preferences, the children's prior separations and custodial

placements, or one child's emotional and educational problems while with one parent." *In re Marriage of Morales*, 159 P.3d at 1189; *Accord Matter of Marriage of Scott*, 571 P.2d 1281, 1283 (Or. Ct. App. 1977) ("a preference [for keeping siblings together], in the absence of other factors, carries weight in determining custody in the first instance; however, it is considerably less persuasive where custody was divided initially and a change is sought years later."). Therefore, even though separation of siblings is an important factor to consider, the fact that Robert has been separated from his siblings for about two to four years, (two years from T'Keyah; four years from Tyrese), and has not even met his younger brother Jacone, makes such a factor less persuasive.

What is persuasive is Robert appears to be thriving in his current living arrangement. He is in a stable environment. Despite plaintiff's move to Koror, Robert continues to see plaintiff on a regular basis and is surrounded by the same people he has grown up knowing. The court believes in determining the best interest of Robert, the desirability of maintaining continuity of a stable environment is significant to the court's determination. *See Burns v. Burns*, 737 N.W.2d 243 (N.D. 2007) (finding trial court's consideration of the length of time the child has lived in a stable satisfactory environment and the desirability of maintaining continuity in determining the best interest of the child was not clearly erroneous).

As the court noted above, defendant is a fit and proper person, and the court does not doubt that she is trying her best to raise her children in a stable and thriving environment. What concerns the court, however, is placing Robert with defendant will completely take away from Robert what he has grown up to know. He will move to a completely different country. He will no longer be able to see the people in his life right now that he has lived with for the past four years. Although arrangements could be made for visits, considering the potential costs and the current income of both parties, the likelihood of any significant visitation schedule is minimal. Furthermore, because the court knows very little about defendant and Robert's interrelationship, the court is not confident that Robert will transition smoothly.

Defendant argues, citing *In Re Custody of Anderson*, 890 P.2d 525 (Wash. 1995), that because plaintiff has not been providing a home to Robert, he has not and will not be providing a better home environment for Robert and therefore defendant should be awarded custody. Although, the court agrees that determining the best interest of the child includes considering which of the parents can provide a better home environment, the court is not convinced that defendant will provide a home environment any better than what Robert is receiving now. Defendant currently lives in a three-bedroom apartment with her three children, her brother, her sister and her sister's boyfriend. She and her children share the master bedroom, while her brother is in one room and her sister and her boyfriend are in another room. Although defendant states they have enough room to accommodate Robert if the court awards her custody, looking at the pictures presented, they barely have enough room as it is. (*See* Def.'s Exh. C). All the children's mattresses are lined up next to each other on

the floor and defendant herself sleeps alongside them. The children range in ages from T'Keyah, 7, Tyrese, 4, and Jacone, 1. Defendant herself is 29 years old. None of them have any privacy. They live on the second floor of an apartment complex. The children cannot play outdoors unless they go to a park.

According to defendant, she has sought family housing but was told she first needs to have a court order awarding her custody of her children in order to complete her application. Although the court understands defendant's situation, it would be premature to award her custody, specifically of Robert, just so that she can then qualify for family housing.

From what the court can tell, there are benefits available in Guam that are not available here in Palau, such as food stamps, low-income house, advanced health care, etc. Robert however, does not appear to have any special needs for which any such services (or lack thereof) will have an effect on. Plaintiff has provided the bulk of his needs, including what he wants. Although plaintiff does not have his own place where Robert can live with him, his parents have a house that Robert can live in until he gets his own place.

In addition, despite defendant's emphasis on Robert living in plaintiff's grandparents' house, plaintiff visits with him regularly and provides for his needs. Defendant, herself, works and during those times, Robert would be cared for by her sister, who is already taking care of Tyrese and Jacone.

Based on all of the above, the court therefore believes it is in the best interest of Robert that plaintiff be awarded sole custody over him, with reasonable visitations by defendant. The court realizes the difficulty of arranging visitations as defendant lives in Guam, and hopes that the parties can use their best efforts to arrange such visits to nurture an environment where Robert can enjoy a relationship not only with plaintiff and his family here in Palau, but with defendant and his siblings in Guam, as well.

As for custody of T'Keyah and Tyrese, plaintiff does not object to defendant having sole custody over them. Because they have been living with defendant all this time and seem to be thriving with defendant, the court awards defendant sole custody over them.

B. CHILD SUPPORT:

According to the parties' pleadings, plaintiff is not seeking child support for Robert. Defendant, however, seeks child support for T'Keyah and Tyrese. Defendant initially requested child support in the amount of $125 every month for each child. Later she alleged support of at least $270 every two weeks for the children in Guam is warranted.

Under Palau law, a biological parent of a minor child is obligated to provide support for his or her minor child unless the child was adopted. 21 PNC §335(b). Providing support means providing the minor child with his or her basic necessities of life. 59 Am. Jur. 2d *Parent and Child* §49 (2008). In determining the parents' ability to provide adequate support, the court considers not just the actual income of the

parents, but the earnings capacity and total financial circumstances of each parent. *Id.* at §48.

According to defendant, T'Keyah and Tyrese's monthly expenses range from $896.84-$1,017.67 per month. Of that amount she receives government assistance of about $500 in food stamps, leaving a balance of $517.66 per month. She earns about $342.70 every two weeks (or $685.40 per month), not including overtime. And of the monthly rent, utilities, water, etc. her share is about $150-$200 a month. Her father however sends her about $150-$200 a month.

Plaintiff on the other hand, earns a gross pay of $410.23 every two weeks. After his regular allotments for tax, social security, pension, medical & life insurance, as well as his loans, he is left with a net pay of $124.98 every two weeks (or $249.96 per month). He also earns $300 a month for his part-time employment at PPR, although his contract ends in March of 2013 and he is not sure whether it will be renewed. His monthly living expenses total about $250, while Robert's ranges from $80-$100.

Based on the parties' income and financial circumstances, plaintiff is left with about $199 a month while defendant is left with about $168. Accordingly, the court believes plaintiff should pay child support for his two children in Guam in the amount of $50 every month. This would assist defendant in any unexpected expenses while leaving enough for plaintiff to cover any of his own and Robert's expenses.

C. EXPENSES AND ATTORNEY FEES

[5] Finally, defendant requests the court order plaintiff to pay her reasonable expenses and attorney fees for having to come to Palau to litigate this matter, citing *Crowe v. Crowe*, 134 N.E.2d 211 (Ind. 1965) and others. The cases defendant cites held that courts have inherent authority to award attorney fees in custody hearings. Palau case law however, is clear that "[a]bsent a statute or contract to the contrary, each party is responsible for his own attorney fees." *WCTC v. Kloulechad*, 15 ROP 127, 128-129 (2008); *Accord Rdialul v. Kirk & Shadel*, 12 ROP 89 (2005).

As for defendant's expenses, pursuant to 14 PNC §702, courts may award costs which the court finds has been necessarily incurred. Defendant argues that plaintiff could have filed the suit in Guam where defendant resides but chose to bring the lawsuit here in Palau making it necessary for her to come to Palau to defend it. On the contrary, it was proper for plaintiff to file this complaint here in Palau as he and Robert both reside here, and he is not seeking support for Robert from defendant. Defendant's argument is therefore without merit. Defendant's request for plaintiff to pay her reasonable expenses and attorney fees is therefore denied.

JUDGMENT

Pursuant to the above findings and conclusions, the court HEREBY ENTERS the following judgment:

1st. Plaintiff Takamatsu R. Emesiochl is the biological and legal father of T.E.M.M.

("Tyrese"), born on October 25, 2008, in Saipan, CNMI.

2nd. Defendant Julynn Mendiola Maratita is awarded sole custody of T.I.M.E ("T'Keyah"), born on January 05, 2006, in Saipan, CNMI and T.E.M.M. ("Tyrese"), born on October 25, 2008, in Saipan, CNMI. Plaintiff Takamatsu R. Emesiochl is awarded reasonable visitations. Parties shall use their best efforts to arrange such visits to nurture an environment where both children can enjoy a relationship with plaintiff and his family here in Palau.

3rd. Plaintiff Takamatsu R. Emesiochl shall pay child support for T'Keyah and Tyrese in the amount of $50 every month, beginning March 29, 2013 and every end of the month thereafter. Payments shall be made to the parties' joint account at Bank of Guam.

4th. Plaintiff Takamatsu R. Emesiochl is awarded sole custody of R.C.M.II.T.E ("Robert"), born on July 19, 2007 in Saipan, CNMI. Defendant Julynn Mediola Maratita is awarded reasonable visitations. Parties shall also use their best efforts to arrange such visits to nurture an environment where Robert can enjoy a relationship with defendant and his siblings in Guam.

5th. Each party shall bear their own costs and fees.

6th. This court has continuing jurisdiction over this matter. Parties should inform each other and the court of any change in circumstance affecting the custody and support of the children.

SANTOS IKLUK,
Appellant,

v.

KOROR STATE PUBLIC LANDS AUTHORITY,
Appellee.

CIVIL APPEAL NO. 12-020
(LC/B 04-137 and LC/B 04-138)

Supreme Court, Appellate Division
Republic of Palau

Decided: March 28, 2013

[1] **Land Commission/LCHO/Land Court:** Claims

Where land is claimed by a governmental entity, a person desiring to claim such land may assert two types of claims. First, under the authority of Article XIII of the Constitution and 35 PNC § 1304(b), its implementing provision, a litigant may assert a claim for return of public of lands. In a return of public lands case pursuant to Article XIII and § 1304, the claimant acknowledges that an occupying power acquired the land but attempts to prove that the acquisition was wrongful. Alternatively, the claimant may bring a quiet title claim asserting that he has superior title to the piece of property than the governmental entity claiming ownership of it.

[2] **Land Commission/LCHO/Land Court:** Claims

Superior title and return of public lands claims may be asserted individually or together. Where distinct claims are asserted

for the same parcel, the Land Court must consider such claims separately.

[3] **Land Commission/LCHO/Land Court:** Claims

If the Land Court fails to consider an argument before it, the case must be remanded to allow the Land Court an opportunity to address the issue.

[4] **Courts:** Duty to Pro Se Litigants

There is a long standing, and oftentimes unspoken, tradition in the United States and here in Palau of courts employing a heightened duty to its pro se litigants.

[5] **Land Commission/LCHO/Land Court:** Claims

When interpreting what type of claim a pro se litigant has raised, a court should read "the pleadings to raise the strongest claims that they suggest."

Counsel for Appellant: Mariano W. Carlos
Counsel for Appellee: Debra B. Lefing

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem.

Appeal from the Land Court, the Honorable RONALD RDECHOR, Associate Judge, presiding.

PER CURIAM:

This case concerns an appeal from a Land Court Findings of Fact, Conclusions of Law, and Determination issued on May 7, 2012. For the following reasons, the Determination of the Land Court is **REVERSED and REMANDED**.

BACKGROUND

This appeal concerns two parcels of land in Ngerkesoaol Hamlet, Koror, known as *Olang*.[1] On July 20, 2000, Appellant Santos Ikluk, acting pro se, filed a Claim of Land Ownership for land known as *Torimong*. Ikluk claimed the land based on the assertion that "Ngmilskak a Adelbai Ollaol ma Aot Ollaol ea Betkii Dirraingel a kilengei."[2] In the area on the form for "Ownership listed in the Tochi Daicho," Ikluk wrote "(None) Traditional owner Ollaol." In the space for "Names of other known claimants," Ikluk wrote "None." Appellee Koror State Public Lands Authority (KSPLA) claimed the land as public lands.

The claims for *Torimong* were consolidated with claims for other parcels of land and a hearing on the consolidated claims began on October 10, 2011. The hearing continued from January 23, 2012, through January 26, 2012, and concluded on February 24, 2012.

At the hearing, Ikluk clarified his claim was for a parcel of land within *Torimong*, known as *Olang*. Ikluk further testified that *Olang* had been owned by Ollaol and that Ikluk received the land from Ollaol's children, in return for the

[1]The land is identified as Worksheet Lots 181-12073 and 181-12074.

[2] This translates roughly to "Adelbai Ollaol and Aot Ollaol gave it to me and Betkii Dirraingel agreed."

performance of customary services. Although Ikluk heard stories the land was taken for the construction of a nearby Japanese shrine, he testified he filed his claim because he saw a home and a "private property" sign on the land. However, when asked whether *Olang* was government property at the time he received it, Ikluk stated he did not know.

At the conclusion of the hearing, Ikluk filed a written closing argument in which he argued "that [KSPLA] has no interest whatsoever in/to the subjected property." In support of this contention, Ikluk cited Determination of Ownership and Release Number 162 of the National Land Commission, which he asserts "determined that one, Adelbai Ollaol, had the absolute right and power over the subjected property . . . ." It is undisputed that Release Number 162, which was never presented to the Land Court, released *Olang* from Trust Territory control and granted ownership in the land to Ngerketiit Lineage.

On May 7, 2012, the Land Court issued its Findings of Fact, Conclusions of Law, and Determination ("Determination"), in which it granted ownership of *Olang* to KSPLA. In reaching this conclusion, the Land Court noted only that *Olang* was listed as public land, and that Ikluk had "provided no evidence to show it was wrongfully taken or taken by force."

STANDARD OF REVIEW

We review the Land Court's conclusions of law de novo. *Rengchol v. Uchelkeiukl Clan*, 19 ROP 17, 21 (2011) (citing *Sechedui Lineage v. Estate of Johnny Reklai*, 14 ROP 169, 170 (2007)). We review the Land Court's factual determinations for clear error and will reverse its findings of fact "only if the findings so lack evidentiary support in the record that no reasonable trier of fact could have reached the same conclusion." *Ngirakesau v. Ongelakel Lineage*, 19 ROP 30, 33 (2011) (citing *Palau Pub. Lands Auth. v. Tab Lineage*, 11 ROP 161, 165 (2004)).

ANALYSIS

Ikluk raises two issues on appeal: (1) the Land Court erred when it evaluated Ikluk's claim under the return of public lands standard; and (2) the Land Court lacked jurisdiction to adjudicate ownership of the lots under the return of public lands standard.

I. Did the Land Court Err When it Applied a Return of Public Lands Standard to Ikluk's Claim?

Ikluk challenges the Land Court's decision to apply the return of public lands standard to his claim. Ikluk asserts this was error because *Olang* was not public lands. In support of this argument, Ikluk relies on two documents mentioned only in his written closing argument at trial: (1) Determination of Ownership and Release Number 162, and (2) a record of hearing Number 69 from the Palau National Land Commission.

[1] Where land is claimed by a governmental entity, a person desiring to claim such land may assert two types of claims. *Ngarameketii v. Koror State Pub. Lands. Auth.*, 18 ROP 59, 63–64 (2011). First, under the authority of Article XIII of the Constitution and 35 PNC § 1304(b), its implementing provision, a litigant may

assert a claim for return of public of lands. "In a return of public lands case pursuant to Article XIII and § 1304, the claimant acknowledges that an occupying power acquired the land but attempts to prove that the acquisition was wrongful." *Espong Lineage v. Airai State Pub. Lands Auth.*, 12 ROP 1, 5 (2004). Alternatively, the claimant may bring a "quiet title claim asserting that [he] has superior title to [the] piece of property than the governmental entity claiming ownership of it." *Palau Pub. Lands Auth. v. Tab Lineage*, 11 ROP 161, 167 (2004).

[2-3] Superior title and return of public lands claims may be asserted individually or together. *Kerradel v. Ngaraard State Pub. Lands Auth.*, 9 ROP 185, 185–86 (2002) ("While the Land Court was correct in determining that Appellant should be barred from filing an untimely claim for the return of public lands, Appellant is nevertheless entitled to proceed on his claim of superior title."). Where distinct claims are asserted for the same parcel, the Land Court must consider such claims separately. *See Airai State Pub. Lands Auth. v. Seventh Day Adventist Mission*, 12 ROP 38, 41 (2004) ("[T]he Land Court must consider any Article XIII claims as analytically separate from determinations of ownership under the land registration program."). If the Land Court fails to consider an argument before it, the case must be remanded to allow the Land Court an opportunity to address the issue. *See Espong Lineage*, 12 ROP at 5–6 (remanding case where opinion did "not appear to address their contention that the Japanese had not acquired title to pass on to ASPLA.").

Below, the Land Court denied Ikluk's claim to *Olang* because "he provided no evidence to show it was wrongfully taken or taken by force." The Determination did not perform a superior title analysis with regard to *Olang*. Accordingly, if Ikluk presented a superior title claim, then remand is warranted to allow the Land Court to consider such a claim. *Id.*

[4, 5] In analyzing whether Ikluk presented a superior title claim, we begin by recognizing "[t]here is a long standing, and oftentimes unspoken, tradition in the United States and here in Palau of courts employing a heightened duty to its pro se litigants." *Whipps v. Nabeyama*, 17 ROP 9, 11 n. 2 (2009). Keeping with this duty, the Land Court Rules of Procedure must "be construed to ensure fairness in the conduct of hearings and presentation of claims with or without assistance of legal counsel." L.C. R. of Proc. 2. When interpreting what type of claim a pro se litigant has raised, a court should read "the [pleadings] to raise the strongest claims that [they] suggest[]." *Hill v. Curcione*, 657 F.3d 116, 122 (2nd Cir. 2011).

Upon consideration, we conclude Ikluk asserted a superior title claim below. Unlike other claims addressed in the consolidated hearing, Ikluk's claim was not filed on a return of public lands form; it was filed as a Claim of Ownership. Furthermore, insofar as Ikluk's claim was filed more than a decade after the expiration of the statute of limitations for return of public lands claims,[3] a superior title claim is Ikluk's strongest possible claim to *Olang*.

[3] Pursuant to 35 PNC § 1304(b), all claims for return of public lands must have been filed prior to January 1, 1989.

Finally, while Ikluk's testimony was ambiguous (he expressed uncertainty as to whether the land was in fact public), any ambiguity was dispelled by his closing argument, which stated explicitly his claim was for superior title. Keeping with its duty to construe pro se claims in the broadest sense possible, the Land Court should have deemed Ikluk's claim to be one for superior title, and considered it as such. The failure to do so warrants remand. *See Espong Lineage*, 12 ROP at 5–6.

II. Did the Land Court Have Jurisdiction to Consider Ikluk's Claim as a Return of Public Lands Claim?

In his second enumeration of error, Ikluk, pointing to Release Number 162, asserts that "[s]ince the land in question ceased to be part of the public lands . . . the Land Court had no jurisdiction to adjudicate ownership of the said land pursuant to 35 PNCA §1304(b)." Because we conclude the Land Court erred in treating Ikluk's claim as one for public lands, we decline to address this issue.

CONCLUSION

For the reasons set forth above, this matter is **REVERSED and REMANDED**.

On remand, the Land Court should re-evaluate Ikluk's claim under the superior title standard.

FIRST COMMERCIAL BANK,
Appellant,

v.

NANCY WONG and BERLINDA NGIRAUNGIL,
Appellees.

CIVIL APPEAL NOS. 12-037, 12-044
(Consolidated)
Civil Action No. 07-348

Supreme Court, Appellate Division
Republic of Palau

Decided: April 30, 2013

[1] **Appeal and Error:** Interlocutory Appeals

With interlocutory appeals, we first must determine whether the issues raised are appealable in advance of a final judgment, and, if so, proceed to a resolution of the merits of the appeal.

[2] **Civil Procedure:** Final Judgment Rule

In considering the proper timing of a review of a lower court's decision, we have applied the "final judgment rule," which holds that a party may not appeal a trial court's orders until a final judgment has been rendered.

[3] **Appeal and Error:** Interlocutory Appeals

The "collateral order" exception to the final judgment rule permits an immediate appeal of an interlocutory order entered during trial that determines important rights of the

parties but that is not related to the relevant cause of action.

[4] **Appeal and Error:** Collateral Order Doctrine

The collateral order doctrine permits immediate appeal of a trial court order when: (1) it conclusively determines a disputed question, (2) resolves an important issue that is completely separate from the merits of the action, and (3) it is effectively unreviewable on appeal from a final judgment.

[5] **Civil Procedure:** Interpretation of the Rules of Civil Procedure

We look to federal law to resolve the application of those rules where Palau has yet to clarify aspects of its rules.

[6] **Appeal and Error:** Jurisdiction

Although most orders fixing an amount of security are not immediately appealable, an appeal challenging the power of the trial court to issue such an order may be appealed immediately.

[7] **Civil Procedure:** Securing Judgment

ROP Rule of Civil Procedure 64 gives the trial court broad authority to enact provisional remedies to secure a potential judgment.

[8] **Civil Procedure:** Securing Judgment

Thus, the Trial Division has broad discretion, at the commencement of a case and without notice to the non-moving party, to fashion provisional remedies, such as a writ of attachment, seizing "property" to secure satisfaction of a judgment that might ultimately issue.

[9] **Civil Procedure:** Seizure of Funds

The purpose of attachment statutes is to permit 'plaintiffs to obtain jurisdiction and secure, for judgment, funds of persons who might otherwise dispose of assets and leave the jurisdiction. In addition, the statutory context of § 2101 makes it clear the legislature contemplated seizure of funds as well as other personal property.

Counsel for Appellant: David F. Shadel, Patrick Civille
Counsel for Appellee Wong: Mariano Carlos
Counsel for Appellee Ngiraungil: Pro Se

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice; and KATHERINE A. MARAMAN, Part-Time Associate Justice.

Appeal from the Trial Division, the Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.

PER CURIAM:

This is an appeal by Appellant First Commercial Bank of certain orders for provisional remedies issued in a pending Trial Division matter. Appellant challenges both the merits of the trial court's orders and its authority to issue them. To the extent Appellant seeks review of the merits of the trial court's orders, we **DISMISS** Appellant's appeal as premature. To the extent that Appellant seeks to challenge the

authority of the Trial Division to issue the challenged orders, the Trial Division is **AFFIRMED**.[1]

BACKGROUND

The relevant facts in this matter are neither complex nor are they in dispute.[2]

In the pending underlying matter, Appellee Wong seeks relief for her claims against Appellant and employees of First Commercial Bank for their alleged conversion of funds she deposited with Appellant.

In December 2011, Appellant issued a public notice in which it announced that it would be closing its Palau Branch operations in the early months of 2012. In February 2012, Appellee Wong sought a Writ of Attachment and requested that the trial court attach $420,219.78 of Appellant's Palau Branch funds to provide security for any judgment that might ultimately issue against Appellant in the case. In her supporting affidavit, Appellee Wong attested to her belief that Appellant was closing its Palau Branch and sending all funds that could potentially satisfy a judgment out of the country and beyond the reach of the Trial Division. Appellant filed an opposition.

On March 13, 2012, the Trial Division found special cause existed to support a writ of attachment, granted Appellee Wong's motion, and directed the Bureau of Public Safety to "attach and safely keep $420,219.78 of [Appellant's] funds pending the outcome of this litigation." For reasons the record does not reflect, it appears the Bureau of Public Safety did not take any action on the March 13, 2012, Order until August 27, 2012, at which time it delivered the writ to Mr. Jing-Fang Huang, a First Commercial Bank manager. According to Appellee Wong, and as reflected in the Bureau of Public Safety's letter of August 28, 2012, after consulting with counsel David Shadel, Huang informed the Bureau of Public Safety that there were not any funds in Appellant's Palau Branch available to satisfy the writ.

On August 29, 2012, Appellee Wong filed an emergency motion seeking to modify the writ of attachment by either requiring the repatriation to Palau of the funds subject to the attachment or, in the alternative, the posting of a bond by Appellant for the amount of the writ. On August 30, 2012, the trial court granted Appellee Wong's motion and ordered Appellant "to deposit with the Director the amount of $420,219.78 by September 4, 2012. If [Appellant] cannot deposit the funds, it should file an affidavit explaining why, and then be prepared to post a bond in the amount of $420,219.78 [within] five days after filing the affidavit." Appellant did neither, and instead filed a motion to enlarge the time to respond to the trial court's order on September 4, 2012.

On September 7, 2012, the trial court denied Appellant's motion to enlarge time and ordered Appellant to "post a bond in the amount of $420,219.78 with the Clerk of Courts at the Palau Supreme Court by September 12, 2012 at 9 a.m. Palau time." The order further provided: "Refusal to

[1] Although Appellant requests oral argument, we determine pursuant to ROP R. App. P. 34(a) that oral argument is unnecessary to resolve this matter.

[2] Appellee Wong accepted Appellant's statement of the case in her Response.

follow the Court's orders may result in sanctions." Due to a service oversight, the Court subsequently extended the deadline to file the bond to September 18, 2012.

On September 7, 2012, Appellant filed in the Appellate Division its Petition for Writ of Prohibition or Mandamus in Special Proceeding No. 12-002, seeking to prohibit or stay the Trial Division's Orders relating to the attachment of Appellant's funds. On September 13, 2012, citing difficulty communicating with his client and the filing of Appellant's Petition, counsel for Appellant moved to stay the action in the Trial Division to permit this Court to rule on the challenge to the trial court's orders. The trial court denied Appellant's motion that same day and reiterated its order to file a bond no later than September 18, 2012. On September 17, 2012, this Court denied Appellant's petition in Special Proceeding 12-002.

On September 18 and October 3, 2012, Appellant filed consecutive notices regarding their unsuccessful efforts to obtain a surety bond in compliance with the trial court's orders. On October 8, 2012, the trial court issued its "Final Order Directing Compliance" in which it stated:

> [Appellant] has now been ordered four times to obtain a surety bond by a certain date. The last deadline for obtaining a bond passed nearly three weeks ago and still, [Appellant] has failed to provide such a bond. The Court now issues its final warning. [Appellant] is ordered to deliver a bond to the Clerk of Courts by October 16. If [Appellant] fails to deliver a surety bond in the amount of $420,219.78 by that date, the Court will strike [Appellant's] Answer in the case, enter a default against [Appellant], and the case will imminently proceed to judgment. Further, the Court will consider whether sanctions are appropriate against counsel, depending on whether the Court determines that counsel's actions constitute delay tactics or otherwise gross misconduct in this case.

On October 12, 2012, Appellant submitted "under protest" a surety bond in accordance with the trial court's order of October 8, 2012.

This matter remains pending in the Trial Division, and Appellant seeks this Court's immediate review of the Trial Division's orders of August 30, 2012; September 7, 12, and 13, 2012; and October 8, 2012 (hereinafter, the Orders).

STANDARD OF REVIEW

For the reasons that follow, we conclude only one legal issue raised by Appellant is immediately appealable. We review that question of law de novo. *See Wong v. Obichang*, 16 ROP 209, 212 (2009); *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001).

ANALYSIS

[1] Appellant appeals both the merits of the Orders and the Trial Division's authority to issue the provisional remedies granted therein. With interlocutory appeals, we first must determine whether the issues raised are appealable in advance of a final judgment,

and, if so, proceed to a resolution of the merits of the appeal.

[2, 3] Under Article X, § 6 of the Constitution, we have jurisdiction to review all decisions by the lower courts. In considering the proper timing of such review, we have applied the "final judgment rule," which holds that a party may not appeal a trial court's orders until a final judgment has been rendered. *See ROP v. Black Micro Corp.*, 7 ROP Intrm. 46, 47 (1998). In *ROP v. Black Micro Corporation*, we clarified the basis for the application of the rule in Palauan jurisprudence:

> There is nothing unusual about our adoption of the "final judgment" rule; it was the rule at common law and is the historic rule of the United States federal courts. 4 Am. Jur. 2d *Appellate Review* § 85 (1995); 9 James W. Moore, *Moore's Federal Practice* ¶ 110.07 (2d ed. 1991). Piecemeal appeals disrupt the trial process, extend the time required to litigate a case, and burden appellate courts. It is far better to consolidate all alleged trial court errors in one appeal. *See Spiegel v. Trustees of Tufts College*, 843 F.2d 38, 42 (1st Cir. 1988) ("[T]here is a long-settled and prudential policy against the scattershot disposition of litigation.").
>
> Some of the appellants have argued that "blind, unyielding adherence to the final judgment rule" does not serve the needs of modern jurisprudence. We agree, and for that reason have recognized certain exceptions to the rule. Some interlocutory orders will have an impact, not only on the course of the litigation in which they are entered, but also on "real world" events. If the impact on real world events is of a nature that it cannot be easily undone after judgment, we have held that the final judgment rule has sufficient flexibility to allow for an immediate appeal of such an order. Thus, we have held that an order granting or denying a request for a preliminary injunction is immediately appealable. *See Olikong v. Salii*, 1 ROP Intrm. 406, 411 (1987).

Id. Accordingly, the *Black Micro* Court recognized the "collateral order" exception to the final judgment rule, which permits "an immediate appeal of an interlocutory order entered during trial that determines important rights of the parties but that is not related to the relevant cause of action." *Id.* (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1945)).

Appellant maintains the challenges it has raised to the Orders are subject to immediate appeal and review.

I. Appealability of the Merits of the Orders.

As noted, Appellant seeks to appeal the merits of the Orders attaching Appellant's funds and ordering it to post a surety bond. Appellant contends the Orders are appealable under the collateral order doctrine.

[3] The collateral order doctrine permits immediate appeal of a trial court order

when: (1) it conclusively determines a disputed question, (2) resolves an important issue that is completely separate from the merits of the action, and (3) it is effectively unreviewable on appeal from a final judgment. *Heirs of Drairoro v. Yangilmau*, 10 ROP 116, 118 (2003) (citing *Richardson-Merrell, Inc. v. Koller*, 105 S. Ct. 2757, 2761 (1985)). Appellant contends the Orders meet each of the three elements of the exception. We disagree.

With respect to the first element, conclusive resolution of a disputed question, the Trial Division's Orders only directed the attachment of funds and, subsequently, the provision of a bond pending the outcome of the case. Liability has not yet been established, and the bond may not have to be forfeited if Appellant defeats Appellee Wong's claims. Thus, the Orders are not final as a matter of the collateral order doctrine. *See In Re Norman B. Jenson*, 980 F.2d 1254, 1257 (9th Cir. 1992) (A prejudgment attachment order does not resolve the matter in any final sense and is not appealable on the basis of the collateral order doctrine.). In support of its position that the trial court's Orders are immediately appealable, Appellant cites to *Wolff v. Sugiyama*, in which the Court permitted an interlocutory appeal from trial court order directing a party to pay another party's attorneys' fees as a sanction. *Wolff v. Sugiyama*, 5 ROP Intrm. 10, 11 (1994). In *Wolff*, we held:

> In the ordinary course, an order directing the payment of money is subject to review and revision by the trial court at any time prior to final judgment and therefore is not enforceable or appealable until after final judgment. Conversely, if payment is directed on a date certain before final judgment then a party should ordinarily be entitled to a prompt appeal.

Id. Appellant, however, misses the distinction the Court relied on in *Wolff*. Here, because the "order to pay money" is provisional and for security purposes only, it is "subject to review and revision by the trial court at any time prior to judgment," and is, therefore, not a final resolution on the issue of payment of money to Appellee as was the case in *Wolff*. Thus, Appellant's reliance on *Wolff* is misplaced.

[5] Appellant also contends generally that provisional remedies, such as prejudgment attachment, are immediately appealable and cites a case from the Maine Supreme Court in the United States so holding. *See Official Post Confirmation Comm. of Holding Unsecured Claims v. Markheim*, 877 A.2d 155, 157 (Me. 2005) (concluding prejudgment attachment orders are immediately appealable). We note, however, the writ of attachment in Palau is made pursuant to ROP Rule of Civil Procedure 64, which is an analogue of the U.S. Federal Rule of Civil Procedure 64. We look to federal law to resolve the application of those rules where Palau has yet to clarify aspects of its rules. *See, e.g., Ngarmesikd Council Chiefs v. Rechucher*, 15 ROP 46, 48 n.4 (2008). To that extent, Appellant has overlooked the relevant body of law by citing to a state supreme court's interpretation of its rules.

A cursory examination of federal law on the matter reveals the bulk of federal appeals courts in the United States do not

permit immediate appeals from a grant of writs of attachment pursuant to Rule 64. *See Perpetual Am. Bank v. Terrestrial Systems Inc.*, 811 f2d 504, 505-06 (1987) ("Most circuits that have addressed the issue have concluded that a grant of attachment [pursuant to Rule 64] is not appealable" as a collateral order.) (citing *Swift & Co. Packers v. Compania Colombiana Del Caribe*, 339 U.S. 684 (1950) (distinguishing between the appealability of an order *vacating* an attachment and an order *granting* an attachment on the ground that when such an order is granted "the rights of all the parties can be adequately protected while the litigation on the main claim proceeds.")). Appellant does not cite a single federal case from the United States that provides any basis for this Court to depart from the general rule that a grant of an order for security under Rule 64 is not immediately appealable.

Based on the foregoing, we conclude the Orders are neither final nor subject to the collateral order doctrine, and, accordingly, we decline to address the merits of those Orders. Such an appeal must await a final judgment.

II. Appeal of the Trial Division's Authority to Issue the Orders.

[6] Even if the merits of the Orders are not appealable, Appellant contends it should be able to appeal on the issue of whether the trial court has the authority to issue the writ of attachment or to order Appellant to file a bond as security. Specifically, Appellant appeals whether the trial court had the authority under Republic of Palau Rule of Civil Procedure 64 or under 14 PNC § 2101 to issue the provisional remedies of attachment of funds and requirement of a bond. We conclude that the limited question as to whether the trial court exceeded its authority to issue the provisional remedies at issue is immediately appealable as a matter of law. *See Bancroft Nav. Co. v. Chadade S.S. Co.*, 349 F.2d 527, 529-30 (2d Cir. 1965) (Although most orders fixing an amount of security are not immediately appealable, an appeal challenging the power of the trial court to issue such an order may be appealed immediately). Thus, we limit Appellant's challenge of the Orders to whether the Trial Division has the power to: (1) attach Appellant's funds within the meaning of Rule 64 or 14 PNC § 2101, or (2) to require the provision of a bond for security.

The Trial Division initially ordered the Palau Branch of First Commercial Bank to deposit the attached funds in the sum of $420,219.78 with the Bureau of Public Safety. When it appeared that those funds may have been moved out of Palau and that Appellant would not satisfy the writ, the Trial Division, on Appellee Wong's motion to modify the writ, ordered Appellant instead to file a bond in the same amount to secure a potential judgment in this matter.[3]

[7] ROP Rule of Civil Procedure 64 gives the trial court broad authority to enact provisional remedies to secure a potential judgment:

[3] Appellant repeatedly challenges the Trial Division's authority to issue the writ of attachment on the ground that there were not any funds in Appellant's Palau Branch that were subject to attachment. This argument assumes facts about the funds available in the Palau Branch in March and August 2012 that are not before the Court in an admissible form.

> At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the Republic of Palau existing at the time the remedy is sought. The remedies thus available may include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether the remedy is ancillary to the action or must be obtained by an independent action.

[8] Thus, the Trial Division has broad discretion, at the commencement of a case and without notice to the non-moving party, to fashion provisional remedies, such as a writ of attachment, seizing "property" to secure satisfaction of a judgment that might ultimately issue. *See Richmond Wholesale Meat Co. v. Ngiraklsong*, 2 ROP Intrm. 292, 298 (1991). Rule 64 permits "all remedies providing for seizure of . . . property for the purpose of securing satisfaction of the judgment."

[9] Appellant contends the attachment of its funds exceeded the Trial Division's authority under Palauan law. Under 14 PNC § 2101(a), Palauan statute provides the Trial Division with the power to issue writs of attachment:

> Writs of attachment may be issued only by the Trial Division of the high court or Supreme Court for special cause shown, supported by statement of the high court or Supreme Court for special cause shown, supported by statement under oath. Such writs when so issued shall authorize and require the Director of the Bureau of Public Safety, any policeman, or other person named therein, to attach and safely keep so much of the personal property of the person against whom the writ is issued as will be sufficient to satisfy the demand set forth in the action, including interest and costs. The Director of the Bureau of Public Safety, policeman, or other person named in the writ shall not attach any personal property which is exempt from attachment, nor any kinds or types of personal property which the court may specify in the writ.

14 PNC § 2101(a). The statute does not preclude the attachment of funds and expressly permits the attachment of "personal property." Appellant does not provide, and the Court is not aware of, any legal definition of personal property that does not include money. In addressing § 2101, however, we have held that "[t]he purpose of attachment statutes is to permit 'plaintiffs to obtain jurisdiction and secure, for judgment, *funds* of persons who might otherwise dispose of assets and leave the jurisdiction.'" *Klongt v. Paradise Air Corp*., 7 ROP Intrm. 140, 141 (1999) (citing *Landau v. Vallen*, 895 F.2d 888, 891 (2nd Cir. 1990) (emphasis added)). In addition, the statutory context of § 2101 makes it clear the legislature contemplated seizure of funds as well as other personal property. Sections 2101(b) and 2110(d) both exempt

from attachment certain funds, such as salary, Social Security benefits, and pension benefits, which are necessary for the debtor's subsistence.

Furthermore, the Ninth Circuit has recognized a trial court's authority to attach liquid assets pursuant to the authority granted under Rule 64. *See Reebok Int'l, Ltd. v. Maunatech Enters., Inc.*, 970 F.2d 552, 559 n.10 (9th Cir. 1992) (recognizing an independent authorization under Rule 64 for the attachment of monetary funds); *U.S. v. Cauwenberghe*, 934 F.2d 1048, 1063-64 (9th Cir. 1991) (recognizing appropriate writ of attachment of funds pursuant to Rule 64).

Although Appellant quibbles with the form of the trial court's writ, Rule 64 plainly permits all appropriate remedies, "however designated," and does not specify any particular form. Furthermore, the Trial Division's writ at least facially complied with the requirements of § 2101(a). Accordingly, the Court does not find any ground for error in the form of the writ.

Appellant also contends the Court did not have the authority to require a bond when it the Court determined that the writ would not be satisfied. Nothing in Rule 64 or under Palauan law prohibits the Trial Division from ordering the provision of a bond, ancillary to an unsatisfied writ of attachment, to secure satisfaction of a potential judgment, and Appellant does not cite any binding authority to the contrary. Particularly under the present circumstances, where it appears that a foreign entity may be leaving to the jurisdiction to avoid potential legal obligations, the Court finds the broad authority granted under Rule 64 and pursuant to § 2101 to be a sufficient basis to authorize the bond in this instance. *See Klongt*, 7 ROP Intrm. at 141 ("The purpose of attachment statutes is to permit plaintiffs to . . . secure, for judgment, funds of persons who might otherwise dispose of assets and leave the jurisdiction.") (quotation marks omitted). Because the trial court ordered the provision of a bond as security for a final judgment and pursuant to a writ of attachment it had the authority to issue but was ineffective, we conclude it falls within the Court's broad authority under Rule 64.

Thus, as to the question whether the Trial Division may, as a matter of law, attach funds or require a bond under the circumstances, we conclude that it may do both. Appellant's numerous remaining challenges based on the facts of this matter and concerning whether the writ was procedurally proper or whether it was justified under the circumstances remain for appeal when a final judgment has been issued in this matter.

CONCLUSION

For the foregoing reasons, we **DISMISS** Appellant's appeal as premature to the extent Appellant seeks review of the merits of the trial court's Orders at this time. To the extent that Appellant seeks to challenge the authority of the Trial Division to issue the Orders, the Trial Division is **AFFIRMED**. Having resolved Appellant's appeal in full, the Trial Division may now proceed with the case.

DEBORAH RENGIIL, MARGO LLECHOLCH, and SHERRY TADAO, Appellants,

v.

REPUBLIC OF PALAU, Appellee.

CRIMINAL APPEAL NO.12-001
Criminal Case No. 10-038

Supreme Court, Appellate Division
Republic of Palau

Decided: April 30, 2013

[1] **Criminal Law:** Due Process

According to the *Brady* rule, the suppression of exculpatory evidence by the prosecution in the face of a defendant's request violates the due process clause of the Constitution where that evidence is 'material' to guilt or punishment. Further, evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

[2] **Evidence:** Weight of Evidence

It is not the duty of the appellate court to test the credibility of the witnesses, but rather to defer to a lower court's credibility determination.

[3] **Criminal Law:** Double Jeopardy

Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact that the other does not.

[4] **Criminal Law:** Sufficiency of the Evidence

Courts review the sufficiency of the evidence only to determine whether, viewing the evidence in the light most favorable to the prosecution, and giving due deference to the trial court's opportunity to hear the witnesses and observe their demeanor, any reasonable trier of fact could have found the essential elements of the crime were established beyond a reasonable doubt.

Counsel for Appellants: David W. Shipper, John Rechucher, Mariano Carlos
Counsel for Appellee: Timothy McGillicuddy

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES F. MATERNE, Associate Justice; and KATHERINE A. MARAMAN, Part-Time Associate Justice.

Appeal from the Trial Division, the Honorable ALEXANDRA F. FOSTER, Associate Justice, presiding.

PER CURIAM:

This case concerns the convictions of three defendants who were charged with money laundering and grand larceny due to their unauthorized taking of bank funds while employees of Pacific Savings Bank.

For the following reasons, the decision of the Trial Division is **AFFIRMED**.[1]

BACKGROUND

Defendants Deborah Rengiil, Margo Llecholch, and Sherry Tadao were employees of Pacific Savings Bank (hereinafter, PSB) for over ten years before it was closed by the Financial Institutions Commission in November 2006. Defendants also maintained loans with PSB. During the course of this employment, Defendants aided one another in issuing 52 checks without properly documenting them according to procedures established by the bank. As a result, the checks were not properly attached to Defendants' loans and the bank did not have an accurate record of Defendants' repayment obligations. For this, Rengiil and Tadao were each charged with 208 counts of Cheating, Grand Larceny, Embezzlement and Money Laundering as principals and as aiders and abettors. Llecholch faced 144 counts of the same.

On November 9, 2011, the Trial Division found Defendants guilty as charged. The court explained in detail in its written verdict the procedures that bank employees had to follow in order to borrow money. Simply, checks written by the bank on loans were recorded a number of ways, but the standard practice of PSB, about which Defendants were well aware, was to record any disbursements in an electronic "subsidiary" ledger at the end of each business day. PSB relied heavily on the subsidiary ledger for keeping track of the amount of money that was borrowed against each loan as well as the interest that was accrued.

The Trial Division further explained that PSB's policies allowed multiple loopholes, which Defendants exploited to withdraw funds without triggering red flags. As a result, Defendants issued many checks, often to fictitious construction companies, which they did not record in the subsidiary ledger. Accordingly, their principal loan amounts and the interest they were charged were not affected by these withdrawals. In 2006, an outside accounting firm was asked to review and clean up specific loan files, including the loan files for bank employees, relevant to this case. During the course of this process, Emory Mesubed, the person who was tasked with this job, discovered the discrepancies in the subsidiary ledger. Mesubed testified that when he spoke to Defendants about their loan amounts, Defendants did not mention that they actually owed more money than that reflected in the subsidiary ledger.

Before the Trial Division, the Republic put on evidence to establish that Defendants used PSB funds as their own personal checking accounts while working in concert together to steal money from PSB. Defendants conceded that the checks they wrote were not posted to PSB's electronic system, but maintained that the amounts were each written down on a "grid note," which was kept in their personal loan files. They further asserted that they intended to repay the money they had taken from PSB.

As part of its case, the Republic sought to establish that Defendants did not

[1] Although Defendants request oral argument, we determine pursuant to ROP R. App. P. 34(a) that oral argument is unnecessary to resolve this matter.

properly record the checks they were issuing. The Republic did so by submitting bank records as evidence. Defendants requested and were shown all files in the Republic's possession that related to Defendants' loans with PSB. Nowhere within these files was there any recording of the checks at issue in this case.

Prior to trial, Defendants filed a motion with the court, seeking an order that would allow them to examine bank records for possibly exculpatory evidence. The Trial Division did not immediately respond to this motion but ultimately granted it almost three weeks before trial. Defendants and their counsel then had an opportunity to review bank files under supervision.

On the first day of trial, the Republic supplied Defendants with pictures of a container of documents, at least some of which had been destroyed, explaining that the Republic had discovered that there were some documents that they were unable to review or pass over to Defendants. Defendants used these pictures as a basis for their claim that the Republic violated their Due Process rights by failing to disclose the potential existence of exculpatory evidence. Counsel for the Republic explained that to her understanding, all of the relevant loan files for this case had been entered into evidence and that the documents from the container were from the early 1990s. Witness testimony confirmed these representations, and the Trial Division found this testimony to be credible. Accordingly, the Trial Division concluded that no files relevant to this case were destroyed by PSB employees, PSB receiver employees, or independent counsel.

Ultimately, the Trial Division found that the Republic proved the charges beyond a reasonable doubt. Defendants now appeal their convictions on a number of bases.

STANDARDS OF REVIEW

Defendants argue that the Trial Division violated their Due Process and other constitutional rights, including their right to have exculpatory evidence turned over to them, their right to counsel, and their right against being placed in double jeopardy. Such rights are purely questions of law, which we review de novo. *Lewiil Clan v. Edaruchei Clan*, 13 ROP 62, 66 (2006). "However, factual issues" related to any constitutional claims "are matters for the trial court, not the Appellate Division." *Id.* Accordingly, any factual issues are reviewed for clear error, which includes Defendants' claims concerning the sufficiency of the evidence. *Melekeok State Gov't v. Megreos*, 18 ROP 29, 33 (2011). Finally, Defendants, at least indirectly, challenge the Trial Division's statutory interpretation concerning the elements of the crimes for which they were charged. We review issues of statutory interpretation de novo. *Bandarii v. Ngerusebek Lineage*, 11 ROP 83, 85 (2004).

DISCUSSION

I. Due Process Rights

[1] Defendants argue on appeal that their Due Process rights were violated when the Republic failed to disclose allegedly exculpatory evidence. Defendants assert that this failure amounted to a *Brady* violation, a rule adopted by this Court in *Ngiraked v. ROP*, 5 ROP Intrm. 159, 172

(1996) (citing *Brady v. Maryland*, 373 U.S. 83 (1963)). The *Brady* rule holds that "the suppression of exculpatory evidence by the prosecution in the face of a defendant's request violates the due process clause of the . . . Constitution where that evidence is 'material' to guilt or punishment." *Ngiraked*, 5 ROP Intrm. at 172. Further, evidence is "material" "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* (citation and internal quotation marks omitted).

The basis of Defendants' *Brady* claim surrounds a container of documents that was discovered during the course of the proceedings. This container held PSB documents that had been damaged by water, some of which had become illegible. Accordingly, some of these documents were destroyed.

The Trial Division heard argument from independent counsel and heard testimony from two different witnesses, each of whom explained that the government did not destroy evidence and that the container held documents, mostly transactional in nature, from the early 1990s. Because the conduct charged in this case occurred ten to fifteen years after the dates on these documents, the Republic maintained that these documents could not contain exculpatory evidence. The Trial Division found this testimony credible and concluded that Defendants' Due Process rights were not violated.

[2] We note, as we have done many times before, that "it is not the duty of the appellate court to test the credibility of the witnesses, but rather to defer to a lower court's credibility determination." *Marino v. Andrew*, 18 ROP 67, 69 (2011) (citation and internal quotation marks omitted). The Appellate Division has the authority to override credibility determinations in special situations, but we will only be persuaded to do so when there is a compelling reason amounting to extraordinary circumstances that causes us to distrust the Trial Division's decision. *Kotaro v. Ngotel*, 16 ROP 120, 123 (2009).

Reversal of the Trial Division's credibility determination is not warranted here. Testimony regarding the destroyed documents came from individuals who had seen the files. Rengiil testified that all documents relevant to her loan file were kept in a location entirely different than where the container was found. The documents that were destroyed were not "material" as there is no reasonable probability that their accessibility by Defendants would have led to a different result in the proceeding. *See Ngiraked*, 5 ROP Intrm. at 172. We are satisfied that no wrongdoing concerning the destruction of potentially exculpatory evidence took place and that Defendants' rights to Due Process were not violated.

Defendants' other Due Process claim asserts that the Trial Division did not grant their discovery motion to review bank documents in sufficient time prior to trial. Defendants hoped to examine the documents in an effort to prove that PSB was responsible for generally poor bookkeeping. Defendants' theory was that their conviction relied on the assertion that the lack of electronic recording of their own loan files was a rarity in PSB's practices. Defendants

believed that if they could have found evidence of erroneous or deficient bookkeeping, such evidence could have mitigated proof of the elements of intent and cover up.

The Trial Division has discretion to grant discovery motions. *Ngiraked*, 5 ROP Intrm. at 167. In this case, it granted the discovery motion, and did so nineteen days prior to the trial. Defendants had nearly three weeks to view the documents. We are satisfied that the timing of the response to Defendants' motion did not constitute a violation of their Due Process rights.

II. Right to Counsel

Defendants next contend that their right to counsel was violated because they were unable to access the bank documents, which they requested to view, outside of the presence of prosecution witnesses. Defendants assert that because of this, they were unable to consult confidentially with their counsel during the review process and that such inability violated their right to counsel. ROP Const. art. IV, § 7. This argument has no merit.

Defendants provide only one case as an example of a court discussing the right to consult privately with an attorney. In that case, a United States court examined the question and determined that the lower court's refusal to allow a defendant to consult with his attorney privately during a lunch recess did *not* amount to a deprivation of that right. *See Abrams v. Barnett*, 100 F.3d 485, 490–91 (7th Cir. 1996).

We are aware of no case law in Palau or in the United States, and Defendants have not presented us with any, that suggests that viewing documents under supervision, documents which contained confidential information, could constitute a deprivation of the right to counsel. Defendants were not deprived of their ability to consult their attorney. If they wanted to confidentially discuss these documents, they had the opportunity to pass notes or to talk about them after leaving the supervision of the prosecution witnesses. Accordingly, we deny Defendants' claim that their right to counsel was violated.

III. Convictions for Grand Larceny

Defendants argue that the Trial Division erred in finding that Defendants' actions met the elements for the crime of grand larceny, which are found in 17 PNC § 1902. We dismiss Defendants' argument here as it is based on inconsequential semantics.

The statute defining grand larceny reads:

> Every person who shall unlawfully steal, take and carry away personal property of another, of the value of fifty dollars ($50) or more, without the owner's knowledge or consent, and with the intent to permanently convert it to his own use, shall be guilty of grand larceny . . .

Id. See also ROP v. Avenell, 13 ROP 268, 271–72 (Tr. Div. 2006) (defining the statute). Defendants assert that the statute mandates that in order for conduct to constitute grand larceny, the perpetrator must have no right to the property at the time that it is taken and that here Defendants

did have a right to the property at the time it was taken, through their loans.

It is true that individuals with certain types of loans are able to receive checks issued under their loan agreements. And it is undisputed that Defendants had such loans. However, the trial court made the important and, what it called, "critical" distinction between checks properly recorded and checks not properly recorded. While failing to properly record the checks was not the criminal act itself, doing so would have turned their illegal actions into legal ones. The Republic contended that Defendants only had rights to the checks and funds if the checks were properly drawn from their loans. Importantly, the fact that a person has a loan with a bank does not exempt that person from grand larceny violations when he or she writes a check from the bank. By failing to properly record the checks, Defendants did not show a debt to the bank and instead took the money to convert it to their own undocumented use.

We agree with the Trial Division that so long as a check was not properly recorded, and thus internally tracked, it was not an established disbursement under the loan agreement and, thus, was not available for Defendants' rightful taking. The Trial Division found that the checks were not properly recorded, which meant they were improperly taken, and we see no reason to overturn this ruling.

IV. Double Jeopardy

The next argument Defendants present is that punishing Defendants for both grand larceny and money laundering constituted a violation of the rule against double jeopardy found in Article IV, section 6 of the Palau Constitution. Defendants assert that because the Trial Division used the fact that Defendants failed to record the checks on the subsidiary ledger to establish a violation of both charges, their rights were violated. Further, Defendants claim that the conviction for money laundering did not require proof of any additional element than conviction for the crime of grand larceny.

[3] In *ROP v. Avenell*, 13 ROP 268, 270–71 (Tr. Div. 2006), the court discussed the prohibition against double jeopardy, as articulated through the *Blockburger* test, which we have adopted. *See United States v. Blockburger*, 52 S. Ct. 180 (1932); *Scott v. ROP*, 10 ROP 92, 96 (2003) (explaining that courts in Palau use the *Blockburger* test to determine whether a defendant's right against double jeopardy has been violated). The *Blockburger* court explained that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact that the other does not." *Blockburger*, 52 S. Ct. at 304.

In *Avenell*, the court considered three cases to illustrate how the principles discussed in *Blockburger* apply in a double jeopardy challenge. *Avenell*, 13 ROP at 272. The examples show that the court must look to the elements of each statutory provision and identify at least one element that each requires that the other does not. *Id.*

In this case, the statute defining money laundering requires that the person conceal, acquire, or possess property when that person knows that the property makes

up the proceeds of a crime. *See* 17 PNC § 3802. The statute defining grand larceny does not require this. *See* 17 PNC § 1902. It does, however, require that the perpetrator take property with the intent to convert, which is not required by the statute defining money laundering. Simply, each statute requires proof of an element that the other does not. Accordingly, Defendants' right against double jeopardy was not violated when they were convicted under both statutes.

We agree with the Republic that Defendants confuse indicia of guilt with the elements of the offenses. Defendants appear to assert that because the court relied on the fact that Defendants did not properly record the checks in order to establish a violation of both statutes, this is sufficient to prove that conviction under both statutes is a violation of double jeopardy. However, failing to record the checks was not an element of either offense. It merely provided evidence to support elements of each offense. Using the same evidence to provide support for multiple offenses is not a violation of the Double Jeopardy Clause.

V. Evidence Concerning Llecholch

The next argument for our review concerns only Defendant Llecholch. Llecholch asserts that the Trial Division failed to consider evidence that some of her disbursements were actually placed on the ledger in 2005. We agree with the Republic that the Trial Division did not fail in this regard and that whether or not the relevant disbursements were placed on the ledger in 2005 is immaterial to the charges.

In *Noah v. ROP*, 11 ROP 227, 230 (2004), we explained that although a criminal defendant may not have illegally possessed a firearm at the time of his arrest, "the government is only required to prove that the defendant committed the offense at some point in time." While the circumstances are different here, the principle is applicable. The Republic's job in this case was to prove that at some point in time Defendants committed the crimes for which they were charged.

Llecholch was charged and convicted of grand larceny. She completed the crime each time she stole checks from PSB, which was proven, in part, because she did not follow established procedures to record them by the end of the business day. While recording the checks a year later may have been an attempt to undo the crime, the Trial Division did not err in refusing to consider this as evidence that no crime was ever committed. Accordingly, we dismiss Llecholch's argument.

VI. Evidence Concerning Rengiil

The next point on appeal concerns only Defendant Rengiil. Rengiil argues, essentially, that because she had an $80,000.00 construction loan with PSB, from which she had legal authority to draw funds, she could not logically be convicted of grand larceny for writing the checks from PSB. This argument is nonsensical and possibly frivolous.

The Trial Division took note that the critical piece of evidence in finding Defendants guilty of grand larceny was the fact that Defendants did *not* record their disbursements on the subsidiary ledger.

Where the checks were not properly recorded, no money was drawn on any loans, as far as PSB was concerned. It matters not whether Rengiil had a legal avenue for drawing money from the bank. The point is that she did not pursue that legal avenue and instead pursued an illegal one. Specifically, instead of borrowing money against her loan by properly recording the checks she issued, she issued checks without recording them so that they essentially were not attached to her name or her loan. For this she was charged and convicted on several counts of grand larceny, and the Trial Division did not err in its decision in this regard.

VII. Sufficiency of the Evidence

Defendants' final challenge on appeal is to the sufficiency of the evidence. Defendants assert that there was insufficient evidence to lead to their convictions on any count and that the lack of accurate bookkeeping at PSB precludes a finding of guilt because the court so heavily relied on the omission of records for Defendants' convictions.

[4] "This Court's review of the sufficiency of the evidence to support a conviction is very limited." *Aichi v. ROP*, 14 ROP 68, 69 (2007). "Convincing an appellate court that there was insufficient evidence for a conviction is a tall task; we review such a challenge for clear error and defer to the Trial Court's opportunity to assess the credibility of the witnesses." *Uehara v. ROP*, 17 ROP 167, 181 (2010). In reviewing such challenges, then, "[w]e ask only whether there is evidence, viewed in the light most favorable to the prosecution, from which a rational trier of fact could have found defendant guilty beyond a reasonable doubt." *Id.* Where we conclude that a rational trier of fact could determine such, we will not disturb the conviction. *Id.*

Here, we are satisfied that there was sufficient evidence for the reasonable trier of fact to convict Defendants of their charged crimes. Simply, Defendants were charged with stealing funds from PSB by writing checks and using those bank funds as their own personal checking accounts. The prosecution established through testimony and other evidence that Defendants did not properly record the disbursements that they made. Defendants failed to rebut this evidence. Accordingly, the Trial Division had sufficient evidence before it to conclude that Defendants did in fact improperly take those funds with the requisite intent. Defendants have given us no reason on appeal to question the decision of the Trial Division based on the sufficiency of the evidence.

CONCLUSION

Based on the analysis above, we see no reason to overturn the convictions entered by the Trial Division. Accordingly, we **AFFIRM** on all accounts.

In re: Determination of Ownership of land in Ngersngai Hamlet of Ngiwal State identified as BLS Worksheet Lot 018 D 02,
CHILDREN OF LLECHOLECH INGAIS,
Appellants,

v.

ETUMAI LINEAGE,
Appellee.

CIVIL APPEAL NO. 12-028
LC/D 11-0022

Supreme Court, Appellate Division
Republic of Palau

Decided: May 2, 2013

[1] **Land Commission/LCHO/Land Court:** Evidence

The presumption of accuracy for the listed identity of a lot owner does not extend to the listed sizes of the Tochi Daicho lot. However, the court may use the listed sizes to aide its determinations.

[2] **Evidence:** Judicial Notice

Failure to allow parties an opportunity to request a hearing on the propriety of judicial notice, as required by the Land Court Rules of Procedure, was error.

Counsel for Appellant: Siegfried B. Nakamura
Counsel for Appellee: Oldiais Ngiraikelau

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and LOURDES F. MATERNE, Associate Justice.

Appeal from the Land Court, the Honorable C. QUAY POLLOI, Land Court Senior Judge, presiding.

PER CURIAM:

This case concerns the Land Court's decision, which considered the Tochi Daicho's presumption of accuracy and which took judicial notice of some facts to aid in its decision. For the following reasons, we **REMAND** this case back to the Land Court.

BACKGROUND

Both parties made a claim in front of the Land Court for worksheet Lot 018 D 02, as it is identified on exhibit one, which was entered as evidence in the Land Court. Essentially, Etumai Lineage argued that the lot is part of Tochi Daicho Lot 55, which belongs to them. Children of Ingais did not dispute that Tochi Daicho Lot 55 belonged to Etumai Lineage, but claimed Lot 018 D 02 was part of their land, called *Olsarch*, which runs adjacent to the disputed property.

Both parties presented extensive testimony before the Land Court, seeking to prove their longstanding use and their understanding of the property's ownership. Testimony from both sides indicated that members of both parties used the property for farming and animal grazing, and also gave permission for others to use the land.

Ultimately the court determined that because neither party disputed the ownership of a Tochi Daicho lot, neither party had the benefit or the burden of the

presumption of accuracy typically afforded to the Tochi Daicho's listing of the identity of the owner. Accordingly, each had a burden of proving ownership of worksheet Lot 018 D 02 through a preponderance of the evidence.

The court concluded that Etumai Lineage met its burden primarily because awarding the property to Children of Ingais would dramatically increase the size of their property from what is listed in the Tochi Daicho as their share. Despite its prior declaration that the parties needed not overcome a presumption of accuracy, the court noted twice that the Tochi Daicho receives a presumption of accuracy and that Children of Ingais's claims far exceeded their lot size listed in the Tochi Daicho.

The court also took judicial notice of facts it deduced from reviewing prior land claims and a sketch found in the files relating to the property in question. Through this, the court found that the past actions of Children of Ingais were inconsistent with their current arguments because prior tracings of the property did not reflect their current position and because Llecholech Ingais's daughter, Anastacia, in 1985 asserted that the northern boundary of their land was in a place that was inconsistent with their claim at the hearing. In two different footnotes, the court explained that the parties were free to review the information the court used in taking judicial notice of these facts and could file a motion for reconsideration if it found any discrepancy. The same day it issued its Decision, the Land Court also issued a Determination of Ownership. Children of Ingais appealed.

STANDARD OF REVIEW

Children of Ingais appeal the Land Court's decision on two grounds. First, they argue that the Land Court improperly applied a presumption of accuracy to the size of the Tochi Daicho lots. Second, Children of Ingais contend that the Land Court improperly took judicial notice of facts without providing an opportunity for the parties to be heard, as is required by the Land Court Rules of Procedure. These are both questions of law, which we review de novo. *Omechelang v. Ngchesar State Pub. Lands Auth.*, 18 ROP 131, 133 (2011).

DISCUSSION

I. It is not clear whether the Land Court improperly gave a presumption of accuracy to the Tochi Daicho.

Children of Ingais argue that the presumption of accuracy afforded to the Tochi Daicho extends *only* to the listed identity of the owner of any given lot. Further, they assert that the Land Court's mention of a presumption in favor of the Tochi Daicho amounted to an improper use of that presumption insofar as it was used in reference to the size of the lot rather than in reference to the identity of the lot owner. We agree that the presumption of accuracy does not extend to the listed size of the property in the Tochi Daicho. Additionally, it is not clear whether the Land Court improperly applied this presumption.

We note that the Land Court identified the arguments before it as *not* amounting to a challenge to the identity of the owners listed in the Tochi Daicho. Specifically, the Land Court explained that rather than require any party to overcome the presumption of accuracy associated with the Tochi Daicho, instead, the parties needed

to show their claim to the lot through a preponderance of the evidence. However, the Land Court also stated that "[t]he Tochi Daicho is presumed accurate and, as the foregoing findings of facts show, there is a strong correlation between the listed tsubo size and the final square meter sizes for the various lots in the area." The court found that Children of Ingais's claim to make the contested lot part of their property was wholly inconsistent with the Tochi Daicho's description of the parties' lot sizes, explaining, "[s]ince the Tochi Daicho is presumed accurate and the size correlations of the other nearby lots validate that presumption, such a marked increase of Llecholech's property size runs counter to the presumed accuracy." Accordingly, the Land Court concluded that Children of Ingais could not meet their burden of proof.

The presumption in favor of the Tochi Daicho's accuracy has been identified and discussed by this Court on many occasions. In 1996, this Court explained the reason for the presumption. *See Silmai v. Sadang*, 5 ROP Intrm. 222, 223–24 (1996). We noted that this presumption came about because of both "historical and policy considerations." *Id.* at 223. We also explained that the Japanese program of creating the Tochi Daicho was carried out with great organized effort and that with time, "the presumption gains importance for policy reasons" as first-hand witnesses become more difficult to locate. *Id.* at 223–24.

In an even earlier case, we noted that for decades the Trial Division had been relying on a presumption of accuracy because the program of recording land information in the Tochi Daicho had been carried out "with considerable care and publicity." *Ngiradilubech v. Timulch*, 1 ROP Intrm. 625, 628 (1989) (citation and internal quotation marks omitted). We explained the process the Japanese went through to record the information, which included recording individual land ownership only after "careful provision for proof that the clan or lineage involved had consented to the transfer of particular lands to individual ownership." *Id.* 627–28 (citation and internal quotation marks omitted).

[1] Our prior decisions addressing the presumption of accuracy afforded to the Tochi Daicho have concerned only challenges to the identity of Tochi Daicho lot owners, and our decisions make clear that such a presumption has only been extended to that single aspect of the Tochi Daicho. We will not extend that presumption to the listed size of the lots and we hold that if the Land Court provided the Tochi Daicho's size listing with a presumption of accuracy, it was error to do so. Nonetheless, we maintain that considering the size listing as evidence in making its determination is not inappropriate. We are satisfied that a presumption of accuracy for the listed identity of the owner necessarily carries implications for some of the other information listed in the Tochi Daicho in order to be meaningful.

Corollary to providing a presumption of accuracy for the identity of Tochi Daicho lot owners is an assumption that that Tochi Daicho listing represents *some* amount of real land. Stated differently, a presumption of accuracy concerning the identity of the owner of a certain Tochi Daicho lot is nearly

meaningless unless there is reason to believe that the listing represents an actual piece of property. Accordingly, while the listed size of the lots in the Tochi Daicho does not carry the same presumption of accuracy as the listed identity of the lot owner, it is not inappropriate for a court to consider the description of land in a Tochi Daicho listing, insomuch that it uses that description as a baseline and in conjunction with updated maps for determining the proper land boundaries in a land dispute. Thus, when there is a dispute over whether certain property belongs to one Tochi Daicho lot or another, the Land Court may consider whether or not each claim would be inconsistent with the information contained in the Tochi Daicho. *See Olngebang Lineage v. ROP*, 8 ROP Intrm. 197, 199 (2000) (defending the lower court's practice of considering the Tochi Daicho's size listing in determining land boundaries).

We are also satisfied that the original rationale for providing the Tochi Daicho with a presumption of accuracy—namely, that the Japanese program was carried out with great care—provides a sufficient basis for taking seriously the listed description of the land along with the identity of the owner. *See Ngiradilubech*, 1 ROP Intrm. at 628. Nevertheless, land descriptions in the Tochi Daicho are not as finite as the listed identity of the landowner, and it is perhaps for this reason that the presumption of accuracy has never been afforded to other aspects of the Tochi Daicho listings. As worksheet maps are drawn and new surveys of land are taken, naturally there will be discrepancies in the sizes of the lots compared to their corresponding Tochi Daicho listings. However, the careful process of recording the land justifies the Land Court's consideration of any information listed in the Tochi Daicho.

While the Land Court was free to consider the size of the property as it is listed in the Tochi Daicho, it should not have given it a presumption of accuracy. The Land Court's decision provides conflicting statements concerning the standard it used to reach its conclusion and it is not clear whether it merely considered this evidence in the course of its regular fact-weighing duties or improperly applied a presumption of accuracy. For this reason, we **REMAND** to the Land Court to clarify.

II. The Land Court erred in taking judicial notice of facts and issuing a determination of ownership without allowing Children in Ingais an opportunity to request a hearing.

The Land Court took judicial notice of facts it obtained or deduced by reviewing size comparisons of recently surveyed lots in the area and a sketch of the land in question. Children of Ingais do not dispute the Land Court's authority to take judicial notice of facts but do assert that the Land Court erred in failing to provide an opportunity for them to request a hearing to be heard about the facts of which the Land Court took judicial notice.

[2] Rule 5 of the Land Court Rules of Procedure states that the Land Court may take judicial notice of certain facts but it also requires that the court afford an opportunity for the parties to be heard. The rule notes that if the Land Court takes judicial notice of facts in its findings of fact and conclusions of law then it must allow the party ten days to request a hearing. In *Wasisang v. Remeskang*, 12 ROP 35, 37 (2004), we held

that the Land Court erred in taking judicial notice of certain facts and then issuing its determination of ownership only three days later. We noted that in order to comply with the Land Court Rules of Procedure, the Land Court needed to wait ten days after taking judicial notice before issuing its determination of ownership. *Id.*

Here, although the Land Court explained in a footnote that the parties had the opportunity to file a proper motion if they intended to dispute a fact of which the court took judicial notice, it issued its determination of ownership on the very day that it took judicial notice of the facts and forced the parties into filing a procedurally disfavored motion to challenge that finding. Accordingly, it did not comply with our ruling in *Wasisang* or with Rule 5 of the Land Court Rules of Procedure. Thus, we temporarily **SET ASIDE** the Land Court's decision and give the parties ten days to file a proper motion, if they so choose.

CONCLUSION

For the forgoing reasons, we **REMAND** this case to the Land Court. The parties are on notice that they have ten days to file any motion for a hearing concerning the issue of judicial notice. The Land Court is then instructed to issue a decision consistent with this opinion.

WELDON GIDEON,
Appellant,

v.

REPUBLIC OF PALAU,
Appellee.

CRIMINAL APPEAL NO. 12-002
Criminal Case No. 11-057
Criminal Case No. 11-100

Supreme Court, Appellate Division
Republic of Palau

Decided: May 21, 2013

[1] **Appeal and Error:** Standard of Review; **Criminal Law:** Appellate Review

Appellate review of the sufficiency of evidence supporting a conviction is very limited. Under this standard, the Appellate Division will review the record only to determine whether, viewing the evidence in the light most favorable to the prosecution, and giving due deference to the trial court's opportunity to hear the witnesses and observe their demeanor, any reasonable trier of fact could have found the essential elements of the crime were established beyond a reasonable doubt.

[2] **Appeal and Error:** Standard of Review; **Criminal Law:** Appellate Review

The merger of crimes is a determination of law, which is reviewed de novo.

[3] **Criminal Law:** Aiding and Abetting

To be guilty of aiding and abetting, the defendant must participate in a criminal

offense as something he wishes to bring about and must seek by some act to make it succeed.

[4] **Criminal Law:** Aiding and Abetting

The government need not prove the actual identity of the principal, provided the proof shows that the underlying crime was committed by someone. Rather, in order to obtain a conviction, the prosecution need only prove that the substantive offense had been committed by someone and that the defendant aided and abetted him.

[5] **Criminal Law:** Aiding and Abetting

The test for aiding and abetting comprises two prongs: association and participation. To prove association, the prosecution must establish that the defendant shared the criminal intent of a principal in acting to bring about the criminal offense. To prove participation, the prosecution must establish that the defendant engaged in some affirmative conduct designed to advance the success of the venture.

[6] **Evidence:** Credibility

The weighing and evaluating of testimony is precisely the job of the trial judge, who is best situated to make such credibility determinations. Accordingly, a party seeking to set aside a credibility determination must establish extraordinary circumstances for doing so.

[7] **Evidence:** Credibility

The existence of bias does not preclude a positive credibility determination.

[8] **Criminal Law:** Appellate Review

When weighing the sufficiency of a conviction, the evidence must be viewed in conjunction, not in isolation.

[9] **Criminal Law:** Money Laundering

Giving away and spending money following a robbery is insufficient activity to justify a conviction for money laundering.

[10] **Criminal Law:** Conspiracy

A criminal conspiracy is an agreement between two or more persons to accomplish together a criminal or on unlawful act accompanied by an overt act in furtherance of the agreement.

[11] **Criminal Law:** Conspiracy

As with aiding and abetting, the Government is not required to identify a co-conspirator.

[12] **Criminal Law:** Conspiracy; **Criminal Law:** Aiding and Abetting

Conspiracy and aiding and abetting are distinct crimes.

[13] **Criminal Law:** Conspiracy

In considering whether a conspiracy has been formed, a formal agreement is not necessary; rather, the agreement may be inferred from the defendants' acts pursuant to the scheme, or other circumstantial evidence.

[14] **Courts:** Stipulations

Parties may not stipulate to legal conclusions.

[15] **Criminal Law:** Double Jeopardy

Because Palau's double jeopardy clause is similar to the double jeopardy clause in the United States Constitution, courts in Palau look to United States case law as an aid in interpreting the scope of double jeopardy protection.

[16] **Criminal Law:** Double Jeopardy

In order to protect against the imposition of multiple punishments for the same offense, Palauan courts will "merge" same offenses into a single conviction. Offenses are the "same" where the same act or transaction gives rise to a violation of two distinct statutory provisions, unless each statutory provision requires proof of a fact which the other does not.

[17] **Criminal Law:** Double Jeopardy

A double jeopardy challenge to multiple convictions invokes two inquiries: (1) whether the crimes charged involved distinct elements of proof; and (2) whether, as charged, the crimes arose from a single act or transaction.

[18] **Criminal Law:** Double Jeopardy

Robbery and grand larceny are separate offenses because an essential element of robbery—force or intimidation—is not an element of grand larceny from the person, while an essential element of grand larceny—proof of value—is not an element of robbery.

[19] **Criminal Law:** Double Jeopardy

Malicious mischief requires an element that robbery does not (destruction of property) and robbery requires an element that malicious mischief does not (unlawful taking). Accordingly, the two are separate offenses and do not run afoul of double jeopardy.

[20] **Criminal Law:** Double Jeopardy

False arrest requires the detention of another by force and against his or her will without authority to so detain. Robbery and false arrest are thus separate defenses insofar as robbery requires unlawful taking (which false arrest does not) and false arrest requires wrongful detention (which robbery does not).

[21] **Criminal Law:** Double Jeopardy

Where a statute contains elements in the alternative, a court considering a double jeopardy challenge must construct from the alternative elements within the statute the particular formation that applies to the case at hand. If, as charged, proof of one crime requires conviction of the other, then the two statutes do not contain distinct elements.

Counsel for Appellant: Siegfried B. Nakamura
Counsel for Appellee: R. Victoria Roe, Timothy S. McGillicuddy

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE. Associate Justice; and R. ASHBY PATE, Associate Justice.

Appeal from the TRIAL DIVISION, the Honorable ARTHUR NGIRAKLSONG, Chief Justice; and the Honorable ALEXANDRA FOSTER, Associate JUSTICE, presiding.[1]

PER CURIAM:

This is an appeal from the Trial Division, in which Appellant Weldon Gideon ("Gideon") was convicted of various crimes arising from a break-in of the Asia Pacific Commercial Bank in May 2011. Gideon challenges the sufficiency of the evidence supporting his convictions and the sentence imposed by the Trial Division. For the reasons set forth below, we **AFFIRM in part and REVERSE in part**.

BACKGROUND

I. Factual Background

On the night of May 1, 2011, a burglary occurred at the Ministry of Finance ("MOF"). It is believed the perpetrator (or perpetrators) entered the building through a barred plexi-glass window by removing the bars and breaking the glass. Although the MOF's safe was damaged, only a set of computer speakers were stolen during the burglary.

Less than three weeks later, on the morning of May 19, 2011, Elsie Nestor, an employee at the Asia Pacific Commercial Bank ("the Bank"), reported to work. Before entering the bank building, she noticed a silver Mazda Demio with rear-tinted windows parked near the Bank. Shortly after entering the Bank and clocking in at 6:55 a.m., Nestor was accosted by a male who she described as "built" and approximately 5'3" in height. The male threatened her with a screwdriver, blindfolded her with a bandana and bound her with a blue nylon rope. Nestor then heard what sounded like banging. When the banging ceased, Nestor freed herself, called the police and observed that the second drawer of the safe had been pried open. It is estimated the second drawer contained approximately $42,000 in cash.

Sometime later, Officer John Gabriel questioned Weider Rechuld Debengek (Debengek) regarding the bank robbery. During questioning, Debengek implicated Gideon in the bank robbery and MOF burglary. Following an investigation, the Government filed a nine-count information, charging Gideon with: (1) robbery (Count I); (2) grand larceny (Count II); (3) conspiracy to commit robbery (Count III); (4) money laundering (Count IV); (5) false arrest (Count V); (6) assault (Count VI); (7) two counts of malicious mischief (Count VII and Count IX); and (8) burglary (Count VIII). Counts I-VII charged conduct relating to the Bank robbery (the Bank Counts) while Counts VIII and IX related to the MOF burglary (the MOF Counts). In a separate criminal matter, the Government charged Gideon with obstruction of justice. The criminal cases were consolidated and tried before the Trial Division.

II. Trial

At trial Daniel Masang (Masang) testified that, in mid-April 2011, Gideon approached him about robbing "Pacific Bank." According to Masang, Gideon offered Masang a sketch of the exterior of

[1] Justice Foster presided over the trial, and Chief Justice Ngiraklsong presided over the sentencing.

the Bank and proposed a plan in which Masang would threaten a bank employee named "Gina," use her to get into the safe, tie her up, and then rob the safe. Gideon stated that he would wait with a get-away car.

Debengek recounted a series of similar conversations with Gideon in which Gideon proposed robbing the "Asia Pacific Bank." Specifically, Gideon described a plan in which: (1) Gideon and Debengek would rob the Bank "in the morning when the lady goes in;" (2) Debengek would walk up the stairs, threaten the employee with a fake gun, and tie her up; and (3) once Debengek was finished in the Bank, Gideon would pick him up in a getaway car. In aid of this plan, Gideon discussed ways to crack the safe. Bray Morkesieu Ngiruchelbad (Ngiruchelbad) testified that Gideon approached him with a plan to rob the Bank in a similar fashion.

Imma Salii testified that, between 7:15 and 7:30 a.m. on the morning of the robbery, she saw a man walking down the stairs from the bank and then heard a car door slam. Salii turned and assumed the man had entered the nearby silver Mazda Demio, which she then saw driving away. The prosecution presented testimony that Gideon had rented a 1999 silver Mazda Demio from May 16, 2011, through May 25, 2011. Officers testified that a June 15, 2011, search of Gideon's home uncovered photographs of the Bank safe and blue rope. In addition to the foregoing testimony, evidence also revealed that in May and June of 2011, Gideon and his wife spent or transferred more than $16,000 at various venues.

PH (a minor) testified that Gideon admitted to PH that Gideon's men had committed the bank robbery and that Gideon had turned off the Bank's cameras. Gideon told PH that if anyone found out about Gideon's involvement with the Bank robbery, Gideon or "his men" would shoot PH.

Following the close of testimony, the Trial Division issued a written verdict finding Gideon guilty of the Bank Counts (as an aider and abetter), money laundering, and obstruction of justice. Specifically, the Trial Division found:

> Gideon was the mastermind [of the Bank robbery]: he planned the place, the time, the transportation, and the clothes. He coached the principal on how to jump over the counter, where to find the safe, what drawer to open, how to handle the Bank employee, and to ignore the non-operational cameras . . . . The Court finds beyond a reasonable [doubt] that Gideon recruited the principal to burglarize the bank, break the safe drawer, steal the money, and tie up Nestor and drag her to the back. He also rented the get-away car, and bought tint and tinted two or four of the car windows. Finally, he supplied the rope to tie Nestor up, knowing that his rope would be used for that purpose.
>
> As to conspiracy . . . the Court finds that Gideon conspired with the principal to rob the Bank, and then they both performed acts to effect the object of the conspiracy (the robbery). As to money laundering . . . the Court finds that Gideon transferred property (money to his wife, his brother, Bank Pacific, Surangel's) for the purpose of concealing the illegal origin of that money.

Finally, the Trial Division found that Gideon committed obstruction of justice when he threatened PH. Trial Division found Gideon not guilty on the MOF Counts.

Following the verdict, the case proceeded to sentencing, where the Trial Division sentenced Gideon to a prison sentence of nineteen years for his eight convictions, with all but seven years suspended.

Gideon appealed his convictions and the accompanying sentence.

STANDARD OF REVIEW

Gideon challenges not only the sufficiency of the evidence supporting his convictions but also the Trial Division's sentence, insofar as it punished him for convictions of crimes that should have been merged.

[1, 2] Appellate review of the sufficiency of evidence supporting a conviction is "very limited." *Aichi v. ROP*, 14 ROP 68, 69 (2007). Under this standard, we review the record only to determine "whether, viewing the evidence in the light most favorable to the prosecution, and giving due deference to the trial court's opportunity to hear the witnesses and observe their demeanor, any reasonable trier of fact could have found the essential elements of the crime were established beyond a reasonable doubt." *Id*. The merger of crimes is a determination of law, which we review de novo. *Remengesau v. ROP*, 18 ROP 113, 118 (2011).

ANALYSIS

I. Sufficiency of the Evidence Supporting Gideon's Convictions

The Trial Division convicted Gideon as an aider and abettor of robbery, grand larceny, false arrest, assault and malicious mischief. It convicted him as a principal of obstructing justice, conspiracy to commit robbery, and money laundering.

A. Aiding and Abetting Convictions

[3] "Every person is punishable as a principal who commits an offense against the Republic or aids, abets, counsels, commands, induces, or procures its commission or who causes an act to be done, which, if directly performed by him, would be an offense against the Republic." 17 PNC § 102. "To be guilty of aiding and abetting, the defendant must participate in a criminal offense as something he wishes to bring about and must seek by some act to make it succeed." *Blailes v. ROP*, 5 ROP Intrm. 36, 39 (1994).

[4, 5] "[T]he government need not prove the actual identity of the principal, provided the proof shows that the underlying crime was committed by someone." *U.S. v. Horton*, 921 F.2d 540, 543 (4th Cir. 1990) (internal punctuation omitted).[2] Rather, "[i]n order to obtain a conviction, the prosecution need only prove that the substantive offense had been committed by someone and that the defendant aided and abetted him." *Id*. at 543–44 (internal punctuation omitted). "The test for aiding

[2] Where we are required to interpret a statute or the Constitution, we are "not bound to mechanically embrace United States case law, [but] are certainly free to adopt the rationale set forth therein if we find it persuasive." *Yano v. Kadoi*, 3 ROP Intrm. 174, 184 (1992).

and abetting comprises two prongs: association and participation. To prove association, the prosecution must establish that the defendant shared the criminal intent of a principal in acting to bring about the criminal offense. To prove participation, the prosecution must establish that the defendant engaged in some affirmative conduct designed to advance the success of the venture." *Ngiraked v. ROP*, 5 ROP Intrm. 159, 173 (1996) (internal citations omitted).

Here, there is no dispute that the crimes of robbery, grand larceny, false arrest, assault and malicious mischief were perpetrated by an unknown individual during the Bank robbery.[3] Accordingly, the question becomes whether Gideon associated and participated with such individual in the commission of the crimes. *See Ngiraked*, 5 ROP Intrm. at 173. There is ample evidence he did both.

1. The Evidence of Aiding and Abetting

The Government presented evidence showing that, prior to the robbery, Gideon approached multiple people with a plan to rob the Bank. Specifically, Gideon proposed that: (1) an accomplice would enter the Bank brandishing a toy gun; (2) the accomplice would restrain the female employee on duty with rope; and (3) following the robbery Gideon would pick up the accomplice in a getaway vehicle.

The evidence showed that, on May 16, 2011, Gideon rented a 1999 silver Mazda Demio. Three days later, a man robbed the Bank by following a female employee into the building, threatening her with a weapon (albeit with a screwdriver, not a toy gun), restraining her with rope, and breaking into the safe. The same morning, a man matching the description of the robber was seen on the stairs coming from the Bank. A witness heard a car door slam and then observed a gray Demio drive away. The same witness believed the man entered the Demio. In the wake of the robbery, Gideon spent approximately $16,000. His wife made multiple cash deposits to a new bank account. Gideon boasted of his role in the robbery. A June 15, 2011, search of Gideon's home discovered pictures of the Bank's safe.

2. Sufficiency of the Evidence

Gideon challenges the foregoing evidence by arguing: (1) the rope found at his home was different from the rope used to restrain Nestor; (2) "there were 31 silver Mazda Demios registered in the Republic of Palau;" (3) the pictures of the safe were planted during the police investigation; (4) in May and June of 2011 Gideon and his wife had obtained additional money through legal means and "[t]he Court cannot assume that the money he and his wife spent were proceeds of the Asia Pacific Commercial Bank Robbery;" and (5) the testimony by Debengek, Ngiruchelbad, and Masang was unreliable insofar as each was a convicted felon with a motive to frame Gideon.

[3] The theft of the $42,000 constituted grand larceny. 17 PNC § 1902. The damaging of the safe constituted malicious mischief. 17 PNC § 2101. The physical restraint of the employee constituted assault and false arrest. 17 PNC §§ 501, 1401. The theft of the money in the presence of the restrained employee constituted robbery. 17 PNC § 2701.

[6] The "weighing and evaluating [of testimony] is precisely the job of the trial judge, who is best situated to make such credibility determinations." *Kotaro v. Ngotel*, 16 ROP 120, 125 (2009) (internal quotation marks and citations omitted). Accordingly, a party seeking to set aside a credibility determination must establish "extraordinary circumstances" for doing so. *Iyekar v. ROP*, 11 ROP 204, 206–07 (2004).

[7] Gideon argues Masang and Debengek "would have the motive to frame Gideon because they were probably involved in the robbery and now this was their opportunity to come up with these stories and frame an innocent bystander." Gideon further contends that Ngiruchelbad "does not like Gideon." However, the existence of bias does not preclude a positive credibility determination. *See Iyekar*, 11 ROP at 207 (While possible that witness was biased, "[t]o acknowledge that [his] credibility was subject to legitimate attack, however, does not by itself make it so untrustworthy that no reasonable fact-finder could credit his testimony."). Based on the record, we conclude the testimonies of Masang, Debengek and Ngiruchelbad were not so devoid of credibility as to warrant reversal. *C.f. ROP v. Tmetuchl*, 1 ROP Intrm. 443 (1988) (reversing credibility determination where witness told three different stories to the police; had told at least three different versions of the facts incriminating the defendants; and had failed three separate polygraph tests, twice recanting her statements and admitting she had lied only to re-recant twice more).

Gideon next challenges the evidentiary value of certain items recovered during the search of his home—a segment of blue rope and pictures of the Bank's safe. Specifically, Gideon submits that the rope was different from the rope used to tie up Nestor. However, the Trial Division found, and we agree, that "the rope is not an essential piece of evidence in this case."

Next, pointing to two pictures of a black bag found during the search of his home (Exhibits JJ and KK), one of which shows pictures of the safe, one of which does not, Gideon suggests that the pictures of the Bank's safe were planted by the police. Second, Gideon contends that, at most, Exhibits JJ and KK show that the pictures of the safe were moved during the investigation. The exhibits do not call into question the uncontradicted testimony that the pictures of the safe were discovered at Gideon's home.

[8] Gideon's remaining arguments—that there are innocent reasons for Gideon's increased spending and that the Demio at the crime scene was unrelated to his rental—concern the inferences drawn from the evidence. In essence, Gideon offers reasons why the pieces of evidence were not indicative of guilt. However, when weighing the sufficiency of a conviction, "the evidence must be viewed in conjunction, not in isolation." *U.S. v. Eppolito*, 543 F.3d 25, 45 (2nd Cir. 2008); *see also U.S. v. Valerio*, 676 F.3d 237, 245 (1st Cir. 2012) ("[W]hen this Court reviews a jury verdict for sufficiency of evidence, 'it matters not whether the defendant can raise a plausible theory of innocence: if the record as a whole justifies a judgment of conviction, it need not rule out other hypotheses more congenial to a finding of innocence." (internal punctuation omitted)).

Viewed in the light most favorable to the verdict, the evidence of record—Gideon's attempt to recruit individuals into a plan that mirrored the actual robbery, the presence of photographs of the Bank's safe at Gideon's home, Gideon's rental of a car matching the description of one fleeing the crime scene immediately after the robbery,[4] his June 2011 spending, and his admission that the robbers were "his men"—could lead a reasonable fact finder to conclude that Gideon associated with the bank robber by developing and implementing a robbery scheme that involved the robber restraining a Bank employee and then breaking into the safe. The same reasonable fact finder could have concluded that Gideon participated in the execution of the plan by providing, if not driving, the getaway car.

Because a reasonable fact finder could have found the elements of aiding and abetting for each aiding and abetting conviction beyond a reasonable doubt, [5] we affirm the Trial Division in this regard. *See ROP v. Sisior*, 4 ROP Intrm. 152, 156 (1994) ("[A] crime may be proved beyond a reasonable doubt by purely circumstantial evidence, which may be as satisfactory as direct evidence and even outweigh it."). *See also U.S. v. Fadayani*, 28 F.3d 1236, 1240 (D.C. Cir. 1994) (circumstantial evidence sufficient to support aiding and abetting convictions).

[4] As the Trial Division observed, "[o]nly one silver Demio was rented out at [the] time [of the crime]. That was the Demio rented to [Gideon]." *See ROP v. Kikuo*, 1 ROP Intrm. 254, 255 (1985) ("Circumstantial evidence is evidence which proves a fact or facts from which inferences may be drawn which lead to the conclusion in the mind of the fact finder that another fact or facts are necessarily true.").

[5] *See supra* note 2.

B. Principal Convictions

Gideon also raises challenges to the sufficiency of the evidence supporting his convictions for money laundering, obstruction of justice and conspiracy to commit robbery.

1. Money Laundering

Money laundering is defined as "the conversion or transfer of property for the purpose of concealing or disguising the illegal origin of such property or assisting any person who is involved in the commission of a predicate offense to evade the legal consequences of his or her actions." 17 PNC § 3802(a). "Knowledge, intent, or purpose is required as an element of the offense of money laundering and may be inferred from objective factual circumstances." 17 PNC § 3802(b). The Trial Division found that Gideon "transferred property (money to his wife, his brother, BankPacific, Surangel's) for the purpose of concealing the illegal origin of that money." We reluctantly disagree.

[9] The evidence presented establishes that, following the robbery, Gideon gave away and spent money. That is all. We see nothing in the record from which one could infer that the Government proved that Gideon's intent of parting with the money was to conceal its illegal origins (as opposed to mere spending). To allow the Trial Division's interpretation of money laundering to stand given the lack of evidence presented by the Government of Gideon's improper purpose to conceal the money's illegal origins would be to expand the definition of the crime of money laundering to encompass almost any

situation in which stolen money is spent or given away after the commission of a crime. This simply goes too far based on a fair reading of 17 PNC § 3802(a) and (b) and unnecessarily dilutes the elements of the crime itself. Even viewed in the light most favorable to the verdict, reversal of the money laundering conviction is required. *See generally*, *United States v. Dobbs*, 63 F.3d 391, 398 (5th Cir. 1995) ("where the use of the money was not disguised and the purchases were for family expenses and business expenses . . . there is . . . insufficient evidence to support the money laundering conviction."); *see also U.S. v. Naranjo*, 634 F.3d 1198, 1208 (11th Cir. 2011) ("The spending of illegal proceeds alone is insufficient to prove concealment money laundering."); *U.S. v. Stephenson*, 183 F.3d 110, 120–21 (2nd Cir. 1999) (collecting cases).

2. Obstructing Justice

17 PNC § 2501 provides "[e]very person who shall . . . unlawfully endeavor to influence, intimidate or tamper with a witness . . . shall be guilty of obstructing justice." The Trial Division found that Gideon obstructed justice by threatening PH with violence if he told anyone of Gideon's involvement in the robbery. Gideon submits that it was error for the Trial Division to credit PH's testimony in light of the fact that PH had once been detained for slashing Gideon's tires.

As explained above, credibility determinations will not be disturbed except in the absence of extraordinary circumstances. *Iyekar*, 11 ROP at 206–07. We conclude Gideon has failed to show extraordinary circumstances for reversing the Trial Division's credibility determination regarding PH. *Id*. We thus affirm Gideon's conviction for obstructing justice. *See United States v. Hoskins*, 628 F.2d 295, 296 (5th Cir. 1980) ("A . . . conviction . . . can be based on the uncorroborated testimony of a single witness.").

3. Conspiracy to commit robbery

17 PNC § 901 provides:

> If two or more persons conspire . . . to commit any crime against the Republic, . . . and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be guilty of conspiracy, and upon conviction thereof shall be imprisoned for a period of not more than five years, or fined not more than $2,000.00, or both . . . .

[10-12] Thus, "[a] criminal conspiracy is an agreement between two or more persons to accomplish together a criminal or an unlawful act . . . accompanied by an overt act in furtherance of the agreement." *ROP v. Bells*, 13 ROP 216, 222 (Tr. Div. 2005) (quoting 16 Am. Jur. 2d Conspiracy § 2 (1998)). As with aiding and abetting, the Government is not required to identify a co-conspirator. *Rogers v. United States*, 340 U.S. 367, 375, 71 S.Ct. 438, 95 L.Ed. 344 (1951) ("Of course, at least two persons are required to constitute a conspiracy, but the identity of the other members of the conspiracy is not needed, inasmuch as one person can be convicted of conspiring with persons whose names are unknown."). However, conspiracy and aiding and

abetting are distinct crimes. *U.S. v. Wise*, 221 F.3d 140, 150 (5th Cir. 2000).

> The essence of conspiracy is proof of a conspiratorial agreement while aiding and abetting requires there be a 'community of unlawful intent' between the aider and abettor and the principal. While a community of unlawful intent is similar to an agreement, it is not the same. Thus a defendant may wittingly aid a criminal act and be liable as an aider and abettor, but not be liable for conspiracy, which requires knowledge of and voluntary participation in an agreement to do an illegal act. As a matter of law, aiding and abetting the commission of a crime and conspiracy to commit that crime are separate and distinct offenses.

Id. at 150 (internal punctuation omitted).

Gideon contends that his conspiracy conviction must be overturned because "[t]here is no evidence of conspiracy that Gideon conspired with the person who robbed the bank."

[13] In considering whether a conspiracy has been formed, "[a] formal agreement is not necessary; rather, the agreement may be inferred from the defendants' acts pursuant to the scheme, or other circumstantial evidence." *U.S. v. Chao Fan Xu*, 706 F.3d 965, 980 (9th Cir. 2013). We conclude that the evidence supports a conclusion that Gideon and an unidentified individual entered into an agreement to rob the Bank. Likewise, we conclude that the evidence supported a conclusion that an unidentified co-conspirator committed an act in furtherance of the conspiracy, namely the robbing of the Bank. Accordingly, we affirm Gideon's conviction for conspiracy.

II. Sentencing

[14] Gideon contends that his convictions of grand larceny, false arrest, malicious mischief, and assault should have merged into his conviction for robbery. The Government actually agrees, having entered into a stipulation with Gideon during the sentencing phase. However, parties may not stipulate to legal conclusions. *Weston v. Washington Metropolitan Area Transit Authority*, 78 F.3d 682, 685 (D.C. Cir. 1996) ("[w]hile parties may enter into stipulations of fact that are binding upon them . . . parties may not stipulate to the legal conclusions to be reached by the court."); *see also Neuens v. City of Columbus*, 303 F.3d 667, 670 (6th Cir.2002) ("Parties may not stipulate to . . . legal conclusions"); *In re Foster*, 188 F.3d 1259,1266 n. 7 (10th Cir. 1999) ("Parties may not of course bind [the] court by stipulating to a rule of law."). Thus, merger will be warranted only if the facts and law require it.

[15] Article IV, section 6, of the Constitution of the Republic of Palau, provides "[n]o person shall be placed in double jeopardy for the same offense." This provision prohibits: (1) a second prosecution for the same offense; and (2) multiple punishments for the same offense at a single trial. *Remengesau v. Republic of Palau*, 18 ROP 113, 122–23 (2011). Because Palau's double jeopardy clause is similar to the double jeopardy clause in the United States Constitution, courts in Palau look to United States case law as an aid in

interpreting the scope of double jeopardy protection. *See id*.

[16, 17] In order to protect against the imposition of multiple punishments for the same offense, Palauan courts will "merge" same offenses into a single conviction. *ROP v. Ngiraboi*, 2 ROP Intrm. 257, 269 (1991). Offenses are the "same" where the same act or transaction gives rise to a violation of two distinct statutory provisions, unless each statutory provision requires proof of a fact which the other does not. *Kazuo v. ROP*, 3 ROP Intrm. 343, 347–48 (1993) (adopting the test set forth in *Blockburger v. U.S.*, 284 U.S. 299 (1932)); *see also* 21 Am. Jur. 2d Criminal Law § 301 ("A double jeopardy claim cannot succeed unless the charged offenses are the same in fact and in law."). Thus, a double jeopardy challenge to multiple convictions invokes two inquiries: (1) whether the crimes charged involved distinct elements of proof; and (2) whether, as charged, the crimes arose from a single act or transaction. *Id.*; *see also ROP v. Avenell*, 13 ROP 268, 270 (Tr. Div. 2006) ("If the double jeopardy issue arises from multiple convictions of different statutes, courts utilize the same elements test derived from *Blockburger*.").

Here, it is beyond dispute that all of the relevant conduct occurred during the same transaction (the robbery of the Bank). Thus, double jeopardy will prohibit multiple convictions (and sentences) based on such conduct, unless the offenses require distinct elements of proof. *Kazuo v. ROP*, 3 ROP Intrm. at 347–48.

A. Robbery and Grand Larceny

[18] The elements of robbery are: (1) the unlawful stealing, taking and carrying away of personal property of another; (2) from his person or presence and against his will; (3) by the use of force or intimidation; (4) with the intent to permanently convert said property to his own use. 17 PNC § 2701. The elements of grand larceny are: (1) unlawfully stealing, taking and carrying away of personal property of another; (2) of the value of fifty dollars ($50) or more; (3) without the owner's knowledge or consent, and (4) with the intent to permanently convert it to his own use. 17 PNC § 1902. We conclude that robbery and grand larceny are separate offenses because an essential element of robbery—force or intimidation—is not an element of grand larceny from the person, while an essential element of grand larceny—proof of value—is not an element of robbery. *See Ali v. Virginia*, 701 S.E.2d 64, 67 (Va. 2010) (holding robbery and grand larceny are separate offenses under *Blockburger* test).

B. Robbery and Malicious Mischief

[19] Malicious mischief requires: (1) the willful destruction, damaging or otherwise injuring of property belonging to another; (2) without consent. 17 PNC § 2101. Thus, malicious mischief requires an element that robbery does not (destruction of property) and robbery requires an element that malicious mischief does not (unlawful taking). Accordingly, the two are separate offenses and do not run afoul of double jeopardy.

C. Robbery and False Arrest

[20] False arrest requires the detention of another by force and against his or her will

without authority to so detain. 17 PNC § 1401. Robbery and false arrest are thus separate defenses insofar as robbery requires unlawful taking (which false arrest does not) and false arrest requires wrongful detention (which robbery does not).

D. Robbery and Assault

The assault statute contains two elements: (1) an "offer or attempt;" (2) with force or violence to strike, beat, wound, or to do bodily harm to another. 17 PNC § 501. In turn, robbery requires the use of force *or* intimidation. 17 PNC § 2101. Where a statute contains elements in the alternative, a court considering a double jeopardy challenge "must construct from the alternative elements within the statute the particular formation that applies to the case at hand." *Pandelli v. U.S.*, 635 F.2d 533, 536–37 (6th Cir. 1980) (articulating test pronounced in *Whalen v. U.S.*, 445 U.S. 684 (1980)). If, as charged, proof of one crime requires conviction of the other, then the two statutes *do not* contain distinct elements. *Id.*

Here, the government charged robbery based in part on the threatening of Nestor with a screw driver. If proven, this charge would have required a conviction of assault. See 17 PNC § 501. Accordingly, we conclude that, as charged, the crimes of robbery and assault contained the same elements and that, therefore, the assault conviction should have merged into the conviction of robbery. *Pandelli*, 635 F.2d at 536–37.

CONCLUSION

For the foregoing reasons, Gideon's conviction for money laundering and his sentence are **REVERSED**. The Trial Division's decision is **AFFIRMED** in all other respects. This matter is **REMANDED** for resentencing consistent with this opinion.

YUZI MESUBED,
Appellant,

v.

UREBAU CLAN and TOYOKO SINGEO,
Appellees.

CIVIL APPEAL NO. 12-045
LC/N 09-0402

Supreme Court, Appellate Division
Republic of Palau

Decided: May 21, 2013

[1] **Appeal and Error:** Stipulations

As a general matter, a party may not appeal a judgment to which he consented.

[2] **Appeal and Error:** Stipulations

When, a party appeals a stipulation on the grounds of mistake, the validity of the stipulation is determined by reference to contract law.

[3] **Contracts:** Mistake

Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake, and (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or (b) the other party had reason to know of the mistake or his fault caused the mistake.

[4] **Contracts:** Mistake

A party bears the risk of mistake when he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient.

Counsel for Appellant: Moses Uludong
Counsel for Appellees: Toyoko Singeo, *pro se*

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE. Associate Justice; and R. ASHBY PATE, Associate Justice.

Appeal from the Land Court, the Honorable SALVADOR INGEREKLII, Associate Judge, presiding.

PER CURIAM:

This is an appeal of a Land Court Determination awarding ownership of a parcel of land to Toyoko Singeo (Singeo). For the following reasons, the determination of the Land Court is **AFFIRMED.**

PROCEDURAL HISTORY

On July 20, 2009, Appellant Yuzi Mesubed (Mesubed) filed a claim for land known as *Boirang*. In his claim, Mesubed stated that the land claimed had been monumented and that it comprised Cadastral Lot numbers 05N001-137 and 05N001-140. Competing claims for Lot 140 were filed by Masayuki Adelbai (Adelbai) and Singeo Techong (Techong) (as represented by his daughter, Toyoko Singeo).

The Lot 140 claims were addressed during a mediation at which Adelbai withdrew his claim to the disputed property and Singeo and Mesubed agreed that Lot 140 would be owned by Singeo, but that the road running through the lot would be deemed a public road. The parties also agreed that Lot Numbers 05N001-137 and 05N001-138 would be "transferred" to Mesubed. On October 28, 2009, Mesubed and Techong executed a Settlement Agreement and Stipulation for Entry of Judgment which recited that "[b]oth claimants agreed that lot # 05N001-140 [is] part of Singeo Techong's property (lot # 05N001-141+136) but [is] remain public road . . ."

On October 9, 2012, the Land Court convened a consolidated hearing to determine ownership of Lot 140 and a neighboring lot identified as 05N001-139. Nathan Yuzi, Mesubed's son, appeared as his father's representative. Following the consolidated hearing, the Land Court issued an Adjudication and Determination of Ownership in which it noted that "claimants to [Lot 140] reached a settlement during the mediation process. Claimants all agreed that Lot 05N001-140 shall be part of Singeo Techong's property." Thus, the Land Court awarded ownership of Lot 140 to Singeo.

Mesubed appealed.

STANDARD OF REVIEW

We review the Land Court's legal conclusions de novo and its factual findings for clear error. *Children of Dirrabang v. Children of Ngirailid*, 10 ROP 150, 151 (2003).

DISCUSSION

Mesubed seeks reversal of the Land Court's Determination based on two grounds: (1) neither he nor his son knew that Lot 140 contained "his private concrete road and power pole;" and (2) his "right to due process was violated as he was not able to present his claim to [Lot] 140."

I. Mesubed's "Mistake"

[1] As a general matter, a party may not appeal a judgment to which he consented. 5 Am. Jur. 2d *Appellate Review* § 579.[1] However, this rule does not apply where:

> — the consent was only as to the form of the proposed order.
>
> — the judgment is alleged to have been entered in excess of the court's jurisdiction.
> — it is alleged that the consent to the judgment was coerced or never given at all.
> — a party requested the entry of a final judgment in order to challenge an interlocutory order which he or she wished to appeal without further delay.
> — the question presented by the appeal is one of public interest.

[1] "The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Republic in applicable cases . . . ." 1 PNC § 303. The Restatements do not cover the appealability of consent orders. Accordingly, we turn to the rules of law as applied in the United States. *Id.*

> — the judgment allegedly deviates from the terms of the parties' agreement.
> — the judgment was allegedly obtained by fraud, collusion, or mistake.
> — the party appealing has unequivocally reserved the right to appeal the judgment.
> — the judgment adversely affects the rights of a minor or other incompetent person.

Id.; see also W. Caroline Trading Co. v. Kloulechad, 15 ROP 127 (2008) (court may decline to accept stipulation where the stipulation is not conducive to justice).

[2] When, as here, a party appeals a stipulation on the grounds of mistake, the validity of the stipulation is determined by reference to contract law. *See Anita's New Mexico Style Mexican Food, Inc. v. Anita's Mexican Foods Corp.*, 201 F.3d 314, 319 (4th Cir. 2000) ("Because a stipulated judgment is analogous to a consent order or decree, it is also treated as a contract for the purposes of enforcement . . . ."); *see also United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236 (1975) ("[S]ince consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts . . . .").

[3, 4] "Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or (b) the other party had reason to know of the mistake or his fault caused the mistake." Restatement (Second) Contracts § 153. A party bears the risk of mistake when "he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient." Restatement (Second) Contracts § 154.

In his affidavit submitted with his appeal, Mesubed admits that he was unaware of the contents of Lot 140 when he agreed to the Stipulation. Because Mesubed executed the Stipulation without actual knowledge of the scope of Lot 140, we conclude that he made the agreement while aware that he possessed only limited knowledge with respect to the fact to which the mistake relates. Having reached this conclusion, we further conclude that Mesubed bore the risk of mistake and thus may not void the Stipulation. *See* Restatement (Second) Contracts §§ 153–54.

II. Due Process

"The hallmark of procedural due process is the requirement that the government provide notice and an opportunity to be heard before depriving a person of life, liberty, or property." *April v. Palau Pub. Utils. Corp.*, 17 ROP 18, 22 (2009). Here, Mesubed was provided with the panoply of rights afforded to a Land Court litigant. In this regard, he appeared at a compulsory mediation at which he entered into a stipulation of judgment. Following the entry of the stipulation, his representative was afforded the right to appear at an evidentiary hearing. Only after the hearing was a judgment entered.

We are confident Mesubed received all process that was due and thus conclude that his due process claim is without merit.

CONCLUSION

For the foregoing reasons, the determination of the Land Court is **AFFIRMED**.

DIRRAKLANG NGIRAMETUKER,
Appellant,

v.

OIKULL VILLAGE,
Appellee.

CIVIL APPEAL NO. 12-030
LC/N 02-0159
LC/N 02-0160

Supreme Court, Appellate Division
Republic of Palau

Decided: May 21, 2013

[1] **Land Commission/LCHO/Land Court**: Claims

As a general rule, litigants in a Land Court proceeding may advance two types of claims: (1) a superior ownership claim under which the litigant pursues ownership based on the strength of his title; and (2) a return of public lands claim under which a private party admits that title to the land is held by a public entity, but seeks its return.

[2] **Land Commission/LCHO/Land Court**: Claims

Where parties assert competing claims of superior ownership, the Land Court must award ownership to the claimant advancing the strongest claim.

Counsel for Appellant: Pro Se
Counsel for Appellee: Oldiais Ngirakelau

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII,

Associate Justice; LOUDRES F. MATERNE, Associate Justice.

Appeal from the Land Court, the Honorable RONALD RDECHOR, Associate Judge, presiding.

PER CURIAM:

This case concerns an appeal from a Land Court Findings of Fact, Conclusions of Law, and Determination issued on July 6, 2012. For the following reasons, the decision of the Land Court is **AFFIRMED**.

BACKGROUND

This matter concerns an appeal of a Land Court Determination awarding ownership of a parcel of land known as *Emel-Desolch*[1] (*Emel*) to Appellee Oikull Village. *Emel* along with another parcel of land known as *Iikl-Desolch* (*Iikl*) make up a rock island known as *Ngerdesolch* located in Airai State.

On April 3, 2012, the Land Court convened a hearing to determine ownership of *Emel* and *Iikl*. At the hearing, the Land Court received: (1) claims for *Iikl* by Benancio Blas Sasao; (2) claims for *Emel* and *Iikl* by Airai State Public Lands Authority: (3) a claim for *Emel* by Appellant Dirraklang Ngirametuker; (4) claims for *Emel* and *Iikli* by Obodei Ayar; and (5) claims for *Emel* and *Iikli* by Appellee.

At the hearing, Appellant testified that: (1) a long time ago, before the Spanish administration of Palau, a man named Buikruu landed on *Emel* and acquired ownership of the land; (2) Appellant is the daughter of Merei, who was the son of Ngirachitei Ngiramengior, who was the nephew of Buikruu; (3) upon Buikruu's death, ownership of *Emel* passed to Ngiramengior; (4) in 1938, the Japanese registered *Emel* as owned by Ngiramengior;[2] (5) when Ngiramengior died during the American Administration of Palau, ownership of *Emel* passed to Merei; (6) Merei lived on *Emeli* for approximately three years in the mid-to-late 1960s before moving to Ked, Airai; and (7) upon the death of Merei in 1978, ownership of *Emel* came to rest in Merei's children, including Appellant.

Appellant also presented testimony of Marcelino Augustine that in the late 1960s or early 1970s, the Ngirachtei of Oikull Village told the village's youth that *Emel* was owned by Merei and that the youth must ask Merei for permission to travel to the land.

Isabella Florencio also testified on behalf of Appellant. Florencio testified that in 1979 she wanted to plan a picnic for school children at *Ngerdesolch*, and was told by her mother Omtilou that prior to doing so she needed to obtain the permission of Merei's children. Finally, Valeria Mereb and Rolmii Ngiramelkei Merei testified that Merei lived on *Emel*.

Appellee presented the testimony of Risao Rechirei Bausoch, the Iechadrachodelomel for the Odelomel Clan of Oikull Village. Risao testified that the Iechadrachodelomel is the third ranking title

[1] The land is identified as Lot Numbers 02N007-011 and 02N007-012 on the Bureau of Lands and Surveys (BLS) Worksheet Number 02 N 007.

[2] The Land Court's decision mischaracterized Appellant's testimony as asserting that *Emel* was registered in Merei's name.

of Oikull Village, and that he inherited the title from his father, who also held the position. Risao testified that he did not remember a house on *Emel* and that he was told by his father that prior to fishing near *Emel* or *Iikl*, he needed to ask permission from the Ngirachitei of Oikull Village. Risao recalled an instance where he saw a big pot on *Emel* and that his father told him the pot was used by Merei to boil salt.

Appellee also offered the testimony of Gillian Johanes, the Aderdei (second ranking title) for the Oikull Council of Chiefs. Johanes testified that he had never heard that *Emel* belonged to Merei. Rather, Johans had been told by previous holders of the Ngirachitei title that *Ngerdesolech* was the property of Oikull Village.

In addition to the foregoing, Appellee offered three documents for the proposition that, prior to the arrival of the Spanish, *Emel* was public land and was not amenable to private ownership. Exhibit 1 was a two page photocopy purporting to be from the volume *Land Tenure Patterns: Trust Territory of the Pacific Islands*, which stated that "[i]n aboriginal Palau, land was divided into public domain and clan lands. [For Airai] the public domain consisted of . . . the numerous islands of the Chelebacheb complex, the mangrove swamps and the sea and reefs."[3] Exhibit 2 was a photocopy of our decision in *PPLA v. Salvador*,[4] which emphasized our citation to *Land Tenure Patterns* for the proposition that "[t]raditionally, mangrove swamps, the reef, and the sea were considered public domain, usually under the control of an appropriate village klobak, and members of the village could . . . use the area."

Exhibit 3 was a photocopy of page 691 of the digest from the first Trust Territory Reporter. Under the heading "Individual Ownership," the digest set forth two cases that noted that the concept of individual ownership of land was not a part of Palauan Custom. (citing *Ngiruhelbad v. Merii*, 1 TTR 367 (1958) and *Asanuma v. Flores*, 1 TTR 458 (1958)).

The hearing closed on April 4, 2012. On July 5, 2012, the Land Court issued a Determination of Ownership, finding that *Emel* and *Iikl* belonged to Appellee. In its Determination, the Land Court noted that Appellant derived her claim of ownership to *Emel* through a purported chain of title dating back to Buikruu, who allegedly acquired ownership when he landed on the property before the time of the Spanish. Although it credited the testimony that Merei resided on *Emel*, the Land Court rejected Appellant's claim because she failed to show that at the time Buikruu allegedly made land-fall an individual could acquire ownership of a rock island by landing on it. Additionally, notwithstanding the fact that Appellant testified that *Emel* was registered in the name of Ngiramengior, the Land Court wrote that Appellant's testimony that Ngiramengior owned the land until American times was contradicted by her (nonexistent) testimony that *Emel* was registered in Tochi Daicho the name of Merei.

Having found that rock islands were publicly owned before the Spanish arrival,

[3] 1 OFFICE OF THE HIGH COMMISSIONER TRUST TERRITORY OF THE PACIFIC ISLANDS, LAND TENURE PATTERNS: TRUST TERRITORY OF THE PACIFIC ISLANDS 296 (1958)

[4] 8 ROP Intrm. 73, 75 n.2 (1999).

the Land Court credited the testimony of Appellee's witnesses and concluded that title to *Emel* and *Iikl* lay with Appellee. Appellant appealed.

STANDARD OF REVIEW

On appeal, Appellant contends "the Land Court abused its discretion when it rejected probative evidence from disinterested witnesses . . . and instead . . . accepted self-serving testimonies and irrelevant documents presented by Appellee." In essence, Appellant submits that the evidence she presented required a finding that she held title to *Emel*.

We review the Land Court's factual findings for clear error and its conclusions of law de novo. *Azuma v. Ngirchechol*, 17 ROP 60, 63 (2010). Where a Land Court litigant asks us to "reweigh the evidence in the record and to reach a conclusion different from the Land Court . . . . reversal . . . is warranted only if the findings so lack evidentiary support in the record that no reasonable trier of fact could have reached the same conclusion." *Ngerukebid Lineage v. KSPLA*, 9 ROP 180, 182–83 (2002).

ANALYSIS

[1, 2] As a general rule, litigants in a Land Court proceeding may advance two types of claims: (1) a superior ownership claim under which the litigant pursues ownership based on the strength of his title; and (2) a return of public lands claim under which a private party "admits that title to the land is held by a public entity, but seeks its return." *See Koror State Pub. Lands Auth. v. Wong*, Civ. App. 12-006, slip op. at 4–5 (Oct. 31, 2012) (emphasis omitted). Where, as here, parties assert competing claims of superior ownership, the Land Court must award ownership to the claimant advancing the strongest claim. *See Ngirumerang v. Tmakeung*, 8 ROP Intrm. 230, 231 (2000) ("The Land Court can, and must, choose among the claimants who appear before it and cannot choose someone who did not, even though his or her claim might be theoretically more sound.").

Below, the Land Court concluded that Appellee presented a stronger claim of ownership to *Emel* than any of the other litigants. Appellant contends that the evidence she presented required a finding that Buikruu obtained title to *Emel*, and then passed ownership to Ngiramengior, who passed it to Merei, who passed it to Appellant and her siblings.

Appellant based her claim to *Emel* on the argument that her ancestor Buikruu obtained title to the land pursuant to the custom of *kerdelel*, under which an individual who first lands on land acquires ownership over the property. Accordingly, under the pre-*Beouch* rule, she bore the burden of proving the existence of such custom by clear and convincing evidence. *Tellames v. Isechal*, 15 ROP 66, 68 (2008). Appellant presented no evidence as to the existence of *kerdelel* and thus failed to meet her burden. Accordingly, the Land Court properly held that she could not rely on the doctrine of *kerdelel* to show Buikruu acquired title to *Emel* when he landed. Thus, the sole evidence supporting Appellant's claim was: (1) her testimony that the Tochi Daicho listed Ngiramengior as the owner of *Emel*;[5] and (2) the testimony

[5] As a general matter, "[t]he Tochi Daicho is presumed to be accurate, and a party seeking to rebut it must present clear and convincing evidence."

of various witnesses that Merei lived on *Emel* and that, over the years, numerous people (including at least one chief of Oikull Village) expressed the belief that Merei (and later his children) owned *Emel*.

In contrast, Appellee contended that prior to the Spanish arrival, rock islands were publicly owned. In support of this proposition, Appellee introduced uncontested documentary evidence stating explicitly that in aboriginal Airai State the *chelebacheb* (rock islands) were considered public domain.[6] Appellee also presented testimony to the effect that *Emel* had been the property of Oikull Village for an extended period of time.

Simply put, the Land Court was faced with two competing claims of title based on customary laws. One customary law was proven while the other was not. Based on this evidence of record, the Land Court concluded that Appellant's claim to title of *Emel* was without merit and that Appellee controlled the property since pre-colonial times. The Land Court's decision was not clearly erroneous and must be **AFFIRMED**.[7]

CONCLUSION

For the reasons set forth above, the Land Court's Determination of Ownership is **AFFIRMED**.

Children of Masang Marsil v. Napoleon, 18 ROP 74, 78 (2011). However, it is undisputed that the Tochi Daicho for Airai State was lost or destroyed during World War II and thus is not entitled to the "standard presumption of accuracy." *Rechucher v. Lomisang*, 13 ROP 143, 148 (2006).

[6] *Chelebacheb* translates to "rock island." LEWIS S. JOSEPHS, NEW PALAUAN-ENGLISH DICTIONARY 42 (1990).

[7] We note the Land Court mischaracterized Appellant's testimony as stating that Merei was listed as owner in the Tochi Daicho. This error was compounded by the Land Court's observation that such testimony conflicted with Appellant's testimony that Ngiramengior owned the property until American times. However, such error was harmless insofar as it was unrelated to the Land Court's ultimate conclusion that Appellant's claim to title of *Emel* must fail because she failed to show Buikruu (through whom Ngiramengior and Merei claimed title) acquired ownership of *Emel*. *See Rengiil v. Debkar Clan*, 16 ROP 185 (2009) (A Land Court's error is harmless when it is unrelated to the Determination's ultimate conclusion).

PALAU PUBLIC LANDS AUTHORITY,
Appellant

v.

NGATPANG STATE PUBLIC LANDS AUTHORITY,
Appellee.

CIVIL APPEAL NO. 13-001
Civil Action No. 10-147

Supreme Court, Appellate Division
Republic of Palau

Decided: May 21, 2013

[1] **Administrative Law:** Regulations

Administrative regulations must be consistent with the constitutional or statutory authority by which they are authorized. Administrative rules may not enlarge, alter or restrict the provisions of the statute being administered. Whatever force and effect a rule or regulation has is derived entirely from the statute under which it is enacted, so administrative regulations that are inconsistent or out of harmony with the statute or that conflict with the statute, for instance by extending or restricting the statute contrary to its meaning, or that modify or amend the statute or enlarge or impair its scope are invalid or void, and courts not only may, but it is their obligation to strike down such regulations.

[2] **Administrative Law:** Regulations

An agency cannot expand by its regulations the power granted to it.

[3] **Administrative Law:** Statutes

Pursuant to 35 PNC § 210(e), PPLA has authority "to sell, lease, exchange, use, dedicate for public purposes, or make other disposition of public lands with the approval of the government of the state within whose geographical boundaries the subject lands are situated." The corollary of this provision is that PPLA lacks the authority to sell, lease, exchange, use, dedicate for public purposes or make other disposition of public lands without the approval of the government of the state within whose geographical boundaries the subject lands are situated.

[4] **State Government:** Land

PPLA may not transfer property to a trustee without the permission of the relevant state government.

Counsel for Appellant: Vameline Singeo
Counsel for Appellee: J. Roman Bedor

BEFORE: KATHLEEN M. SALII, Associate Justice; LOUDRES F. MATERNE, Associate Justice; R. ASHBY PATE, Associate Justice.

Appeal from the Trial Division, the Honorable ARTHUR NGIRAKLSONG, Chief Justice, presiding.

PER CURIAM:

This appeal arises from a Trial Division's December 31, 2012, Decision and Order granting summary judgment in favor of Appellee Ngatpang State Public Lands Authority. For the following reasons, the decision of the Trial Division is **AFFIRMED**.

BACKGROUND

In April of 1975 the Fifth Palau Legislature passed Public Law 5-8-10, codified at 35 PNC § 201 et seq., to create a Palau Public Lands Authority (PPLA) and to authorize the creation of state public lands authorities. *ROP v. Ngara-Irrai*, 6 ROP Intrm. 159, 164 n. 10 (1997). Importantly, the law imbued the PPLA with authority "[t]o establish the basic guidelines and procedures for the operation of each Municipal Authority and to provide technical assistance thereto whenever necessary or appropriate." RPPL 5-8-10, § 10(13). Similarly, the law authorized PPLA "[t]o establish rules and regulations, in accordance with applicable law and procedure, for the conduct of its business and programs." PPL 5-8-10, § 10(11). The law also granted to PPLA the power:

> [T]o transfer and convey . . . to its Municipal Public Lands Authority . . . public lands within the geographical boundaries of that municipality . . . and to delegate and assign to the same at the time of said transfer certain or all of its rights, interests, powers, responsibilities, duties and obligations provided for and prescribed in this Act, except those powers reserved to the Authority by Section 12 hereof.

PPL 5-8-10, § 10(12).

On March 11, 1981, John O. Ngiraked, Chairman of the Board of Trustees of the Appellant Palau Public Lands Authority, executed a "QUITCLAIM DEED" in favor of the Ngaptang Municipal Public Lands Authority, the predecessor to Appellee Ngatpang State Public Lands Authority. The deed provided:

> [P]ursuant to the authority and subject to the terms and conditions of Public Law No. 5-8-10, the Palau Public Lands Authority, by these presents, does remise, release, and quitclaim to the Ngatpang Municipal Public Lands Authority, its successors and assigns, all its right, title and interest in and to the following described real property: All public lands . . . situated within the geographic boundaries of the chartered Municipality of Ngatpang . . . .

On April 6, 1999, PPLA adopted a series of rules and regulations relating to the administration of public lands. Part III, § 3(A)(x) ("the Regulation") of such rules provided that:

> If PPLA conveys land to a duly constituted state PLA which subsequently ceases to operate for a period of six months, PPLA shall act as trustee of all such lands until such time as the state PLA begins active operations. PPLA may act after less than six months to the extent that failing to do so may jeopardize the interests of the people of that state.

Palau Pub. Lands Auth., *Regulations Affecting the State Public Lands*, Part III, § 3(A)(x) (Apr. 6, 1999).

On June 28, 2010, PPLA informed NSPLA that NSPLA had failed to file with PPLA certain operational documents. On August 10, 2010, following continued non-

compliance, PPLA notified NSPLA that NSPLA had been deemed non-operational and that PPLA would act as a trustee of NSPLA's lands.

Following the August 10, 2010, correspondence, NSPLA filed an action in the Trial Division challenging PPLA's authority to assume control of NSPLA's lands. Both parties filed motions for summary judgment and on December 31, 2012, the Trial Division granted summary judgment in favor of NSPLA. In its decision, the Trial Division found that "[n]owhere does the statute give Defendant the power to take back the lands it has deeded . . . or to take over the functions of [a State Public Lands Authority] because it has failed to file reports or has become dysfunctional." Thus, the Trial Division concluded that "PPLA . . . conveyed the land to NSPLA. PPLA has no authority to take over the duties of the Board of Trustees of the NSPLA or the public lands of Ngatpang State." PPLA filed a timely appeal.

STANDARD OF REVIEW

On appeal, PPLA contends the Trial Division misinterpreted PPLA's power under its implementing statute and erroneously concluded that the quitclaim deed prohibited PPLA from assuming control over NSPLA's lands. The trial court's interpretation of a statute is reviewed de novo. *Isechal v. Republic of Palau*, 15 ROP 78, 79 (2008); *see also Louis v. Nakamura*, 16 ROP 144, 146 (2009) (appeals of summary judgment are subject to de novo review).

ANALYSIS

This appeal gives rise to two questions: (1) whether the Regulation falls within the scope of PPLA's authority; and (2) if the Regulation is valid, whether PPLA had the power to invoke the regulation to assume control over NSPLA's lands following the execution of the quitclaim deed. Because we conclude the Regulation is contrary to the statute, and is thus invalid, we need not address whether PPLA's invocation of the regulation was proper.

[1, 2] In assessing the validity of regulations, we have recognized that:

> Administrative regulations must be consistent with the constitutional or statutory authority by which they are authorized. Administrative rules may not enlarge, alter or restrict the provisions of the statute being administered. Whatever force and effect a rule or regulation has is derived entirely from the statute under which it is enacted, so administrative regulations that are inconsistent or out of harmony with the statute or that conflict with the statute, for instance by extending or restricting the statute contrary to its meaning, or that modify or amend the statute or enlarge or impair its scope are invalid or void, and courts not only may, but it is their obligation to strike down such regulations.

Becheserrak v. ROP, 5 ROP Intrm. 63, 70 (1995). In this regard, "an agency cannot expand by its regulations the power . . . granted to it." *Strickland v. U.S.*, 423 F.3d 1335, 1338 (Fed. Cir. 2005) (citing *Civil*

Aeronautics Board v. Delta Air Lines, Inc., 367 U.S. 316, 322 (1961)).

[3] Pursuant to 35 PNC § 210(e), PPLA has authority "to sell, lease, exchange, use, dedicate for public purposes, or make other disposition of public lands with the approval of the government of the state within whose geographical boundaries the subject lands are situated." The corollary of this provision is that PPLA lacks the authority to sell, lease, exchange, use, dedicate for public purposes or make other disposition of public lands *without* the approval of the government of the state within whose geographical boundaries the subject lands are situated. *See Carlisle v. United States*, 517 U.S. 416, 431–32 (1996) (providing examples where permissive language creates a restrictive rule).

[4] The transfer of property to the control of a trustee is the very definition of a disposition of property. *See* Black's Law Dictionary (9th ed. 2009), disposition (defining disposition as "[t]he act of transferring something to another's care or possession, esp. by deed or will; the relinquishing of property."); *see also* Restatement (Third) of Trusts § 42 (2003) (trustee obtains legal title to property). Accordingly, PPLA may not transfer property to a trustee without the permission of the relevant state government.

The challenged regulatory provision provides that PPLA will act as a trustee for public lands transferred to a state authority by PPLA when that state authority ceases to operate for six months, or where the state authority's failure to operate may jeopardize the interests of the people of the state. In contravention of section 210(e), the Regulation allows the transfer of the subject lands to take place without approval of the relevant state government. Accordingly, we conclude the Regulation conflicts with the statute and, therefore, must be struck down.[1] *See Becheserrak*, 5 ROP Intrm. at 70.

CONCLUSION

For the reasons set forth above, the Trial Division's grant of summary judgment is **AFFIRMED**.

[1] In reaching this conclusion, we underscore the narrowness of our holding here. We merely hold that the Regulation is invalid insofar as it allows PPLA to effect a transfer of title without obtaining the approval from the proper state authority. This holding in no way prejudices PPLA's authority to assume title to lands through the exercise of eminent domain, or to exercise control of a non-compliant state authority through legal means. *See* 35 PNC § 311(a) (PPLA retains authority to exercise eminent domain); *see also* 35 PNC § 310(k) (granting PPLA the authority to "establish the basic guidelines and procedures for the operation of each state authority and to provide technical assistance thereto whenever necessary or appropriate."); *see also Ortiz-Barraza v. U.S.*, 512 F.2d 1176, 1180 (9th Cir. 1975) ("[T]he power to regulate is only meaningful when combined with the power to enforce.").

UREBAU CLAN,
Appellant,

v.

UCHELIOU CLAN,
Appellee.

CIVIL APPEAL NO. 12-024
LC/N 09-0345
LC/N 09-0397
LC/N 09-0399

Supreme Court, Appellate Division
Republic of Palau

Decided: May 21, 2013

[1] **Evidence:** Site Visits

A trial court may permit a viewing of a location if it is of the opinion that a viewing would be helpful to the trier of the fact in determining some material factual issue in the case. The determination is within the sound discretion of the trial court. In deciding a motion to view the scene the court should consider whether viewing the scene is necessary or important so that the trier of fact may clearly understand the issues and properly apply the evidence.

[2] **Evidence:** Site Visits

Generally, a visit to a site is not necessary or important because photographs or other audio-visual aids could be used, instead of a view of the premises, without any undue inconvenience.

Counsel for Appellant: Oldiais Ngiraikelau
Counsel for Appellee: J. Uduch Sengebau, Senior

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE, Associate Justice.

Appeal from the Land Court, the Honorable SALVADOR INGEREKLII, Associate Judge, presiding.

PER CURIAM:

This is an appeal of a Land Court Determination awarding ownership of land located in Ngetkib Village to Ucheliou Clan, Appellee in this matter. For the following reasons, the decision of the Land Court is **AFFIRMED.**

PROCEDURAL HISTORY

On April 17, 2012, the Land Court commenced a hearing to resolve four competing claims of ownership to three lots located in Ngetkib Village in Airai State. The lots are identified in Bureau of Lands and Surveys Worksheet Number 2005 N 001 as Lot Numbers 05N001-089 (Lot 89), 05N001-087 (Lot 87), and 05N001-97 (Lot 97). At the beginning of the hearing, two of the claimants withdrew, leaving Appellant Urebau Clan and Appellee Ucheliou Clan as the only remaining claimants. Following the withdrawals, the Land Court conducted the hearing based on Appellant and Appellee's competing claims of ownership.

When the hearing began, the representative for Appellant stated:

> [A]ll of [the lots] are inside *Sangelliou*, but several boundaries came into it so it became complicated. There is a claim by Rosania that comes in to include a

> taro paddy. It splits the taro paddy in the middle. So I ask this Court if it has availability, let us go see it before you issue your decision on it.

In support of its claim, Appellant presented evidence that all three lots are part of land known as *Sangelliou*, which was surveyed and monumented in 1976. Appellee, in turn, presented evidence that only Lot 87 was a part of *Sangelliou* and that Lot 89 and Lot 97 were parts of land known as *Ikidel*, which it owns.

Following the hearing, the Land Court issued its Summary of Proceedings, Findings of Fact, Conclusions of Law and Determination. In its Determination, the Land Court found that Lots 89 and 97 were parts of *Ikidel*, and that Lot 87 was a part of *Sangelliou*. Accordingly, the Land Court granted ownership of Lots 89 and 97 to Appellee, and ownership of Lot 87 to Appellant. In its analysis, the Land Court noted that:

> [Appellant] made allegations that Ucheliou Clan have encroached into Urebau lands without providing specific proof of such encroachment, and when Rosania identified the outer boundary of the land *Ikidel* with a green marker, [Appellant] raised no objection . . . . Instead, [it] asked the Court to review the map for proof of such encroachment. The Court declines such invitation. It is the responsibility of each claimant to present his/her claim to the best of his/her ability. And while Rule 2 of the Land Court Rules of Procedure[] requires the Land Court to 'ensure fairness in the conduct of hearings and presentation of claims with or without assistance of legal counsel' this obligation does not include the duty to assist claimants in presenting their best claims. *See, Llecholch v. Lawrence*, 8 ROP Intrm. 24 (1999), and *Arbedul v. Romei Lineage*, 8 ROP Intrm. 30 (1999).

Appellant timely appealed.

STANDARD OF REVIEW

Appellant raises one issue on appeal: that the Land Court's failure to conduct a visit to the claimed property constitutes reversible error. Decisions regarding site visits are reviewed for abuse of discretion. *Auto Owners Insurance Co. v. Bass*, 684 F.2d 764, 769 (11th Cir.1982); *see also Singeo v. Ngaraard State Pub. Lands Auth., et al.*, 14 ROP 102, 103–04 (2007) ("[T]he admission or exclusion of evidence is a matter particularly suited to the broad discretion of the trial judge."). This Court will not find an abuse of discretion unless the trial court's decision was arbitrary, capricious, manifestly unreasonable, or because it stems from an improper motive. *Western Caroline Trading Co. v. Kinney*, 18 ROP 70, 71 (2011).

DISCUSSION

Appellant raises one issue on appeal: that the Land Court's failure to conduct a visit to the claimed property constitutes reversible error. We disagree.

> **[1]** A trial court may permit a viewing of [a location] if it is of the opinion that a viewing would be helpful to the [trier of the fact] in

> determining some material factual issue in the case . . . . The determination . . . is within the sound discretion of the trial court . . . . In deciding a motion to view the scene [t]he court should consider whether viewing the scene is necessary or important so that the [trier of fact] may clearly understand the issues and properly apply the evidence.

State v. Boutilier, 36 A.3d 282, 291 (Conn. App. 2012).[1]

[2] Generally, a visit to a site is not necessary or important because "photographs or other audio-visual aids could be used, instead of a view of the premises, without any undue inconvenience." *E.I. du Pont de Nemours & Co. v. Admiral Ins. Co.*, 577 A.2d 305, 309 (Del. Super., 1989) (internal quotation marks omitted); *see also Thomas v. Home Depot, U.S.A., Inc.*, 131 F.Supp. 2d 934, 940 (E.D. Mich., 2001) (declining to consider possibility of site visit in venue transfer motion because "if . . . . the parties introduce measurements and photographs of the accident scene, that should suffice to make the jury familiar with the site of the accident in this case.").

Here, there is no indication that a site visit was important or necessary for the Land Court to understand the issues or to apply the relevant evidence properly. The sole purpose of the site visit, as stated by Appellant's representative, was to show that the land claimed by Appellee (as evidenced by a cement market) encroached on land Appellant claimed to be its taro paddy. Even assuming that was at all relevant to the resolution of the land dispute, such a fact could have been established through a combination of maps, testimony, and photographic and video evidence. *E.I. du Pont de Nemours & Co.*, 577 A.2d at 309. Accordingly, the Land Court did not act arbitrarily or capriciously when it declined to conduct a site visit of the disputed property. *Id*.

CONCLUSION

For the foregoing reasons, the decision of the Land Court is **AFFIRMED**.

[1] Although *Boutilier* was a criminal matter, we believe the described standard is applicable to civil proceedings as well.

ROMAN OSEKED,
Appellant,

v.

UODELCHAD ANITA NGIRAKED and ERUANG CLAN,
Appellees.

CIVIL APPEAL NO. 12-001
Civil Action No. 11-028

Supreme Court, Appellate Division
Republic of Palau

Decided: May 29, 2013

[1] **Custom:** Judicial Review

Status and membership in a lineage are questions of fact, as is the existence of a purported customary law, and the Appellate Division reviews these findings of fact for clear error.

[2] **Evidence:** Preponderance of the Evidence

The preponderance of the evidence is defined as the greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Counsel for Appellant: Rachel A. Dimitruk
Counsel for Appellees: Moses Uludong

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and LOURDES F. MATERNE, Associate Justice.

Appeal from the Trial Division, the Honorable ALEXANDRA F. FOSTER, Associate Justice, presiding.

PER CURIAM:

This case concerns the parties' disputes over membership in Eruang Clan and the Clan titles of Uodelchad and Ngiracheruang. For the following reasons, the decision of the Trial Division is affirmed.[1]

BACKGROUND

This matter involves two factions that claim ourrot status in the Eruang Clan of Ngchesar State. Each faction claims they descend from ochell members of the Clan and that they have corresponding superior claim to the Clan titles of Uodelchad and Ngiracheruang through an ancestor at least four generations removed from the individuals involved in the current dispute. *See* Plaintiffs' Exhibit 7. Appellees Anita Ngiraked and Eruang Clan claim Ngiraked and her relatives have ochell status through a woman named Ngurd and her children, sisters Melik and Esebar. Appellant Roman Oseked claims ourrot status (for himself and others) through a woman named Ngilas and her son Erbai, who was adopted from Ngurd. Despite the fact that Appellant descends from Erbai, a male member of the Clan, and admits he is ulechell, Appellant

[1] Although Appellant requests oral argument, we determine pursuant to ROP R. App. P. 34(a) that oral argument is unnecessary to resolve this matter.

maintains he and others among his relatives are ourrot because Ngurd was not a member of Eruang Clan and there are not any surviving descendants of an ochell member.

On February 1, 2011, Appellees filed a Verified Complaint for Declaratory Judgment and Damages, wherein they petitioned the court, in part, for a "declaration that the appointment . . . of Defendant (now Appellant) OSEKED to bear the traditional title of Ngiracheruang of ERUANG CLAN violates customs and tradition and was not made by the Ourrot of Eruang Clan and not approved by the Ngaraibeluu pursuant to custom and tradition and is therefore null and void." Appellees also sought a declaration that "under the customs and tradition of Ngchesar and Palau, the Ourrot of ERUANG have the sole authority to appoint a person to bear the title of Ngiracheruang of Eruang Clan and that plaintiff (now Appellee) Uodelchad Anita Ngiraked and those with her who appointed NGOTEL not OSEKED, are Ourrot of Eruang Clan."

Appellant asserted that his Clan status stems from the adoption of his grandfather Erbai by his great-grandmother Ngilas, who was a strong senior member, or ourrot, of Eruang Clan. Appellant further alleged that "only the children and grandchildren of Erbai are members of Eruang Clan and can bear titles in the clan, and have the authority to appoint title bears [sic] in the Eruang Clan." At trial, Appellant asserted: (1) Ngilas was the last ochell of Eruang Clan (and thus only her descendants are ochell members of the Clan), and (2) Ngurd was a member of Ngercheang Clan and not a member of Eruang Clan. Appellant argued Ngurd and her descendants would, therefore, not have the requisite status to hold titles or choose titleholders.

Appellees asserted that Ngurd was an Eruang Clan member and that her descendants through their female children and grandchildren held ochell status in Eruang Clan. Appellees argued the children of Erbai, Ngilas's adopted son and Appellant's ancestor, would instead have ulechell status, which is weaker relative to ochell.

I. Trial Court's Decision.

On December 7, 2011, the trial court issued its Decision. As the trial court noted in its detailed Findings of Fact, "[t]here is little disagreement about who begat whom," and while the list and arrangements of descendants are not in dispute, the clan statuses of certain ancestors are. The Court found that "[t]he issues of membership and status revolve around whether Ngilas and Ngurd were both ourrot of Eruang Clan, or whether solely Ngilas was an ourrot of Eruang . . . the Court adopts the first version." The Court then made three relevant findings: (1) that the descendants of Ngurd are members of Eruang Clan, (2) that Ngurd was an ochell of Eruang Clan, and (3) Anita Ngiraked is Uodelchad of Eruang Clan.

A. Ngurd was a member of Eruang Clan.

Based on testimony at trial, the trial court found it more likely that Ngurd and Ngilas were blood relatives and were both members of Eruang Clan. According to Appellees' expert witness, Floriano Felix, children are normally adopted between the

lineages within a clan in order to strengthen the relationship between those lineages. Tr. (Vol. 1) 179:27 – 180:2. Felix further testified that a person of a high ranking clan would not adopt a "low ranking child" without a clan relationship. Tr. (Vol. 1) 199: 17-21. On this basis, the trial court found it "difficult to accept that Erbai [Ngurd's son] had absolutely no blood connection to Ngilas" and found it unlikely that a mother would give her child "to a complete stranger after – at best – a brief conversation." Accordingly, the trial court found Erbai's adoption by Ngilas made it more likely that Ngurd was a Clan member.

The court found additional support for Ngurd's Eruang membership in the fact that she was buried in the Clan odesongel, or burial ground, noting that burial at a clan odesongel is "an indicia of rank with the clan."

The court also based its conclusion that Ngurd was a member of Eruang Clan on the finding that Ngurd held the Uodelchad title, and she passed that same title down through her female descendants. The trial concluded it was undisputed that some of Ngurd's male descendants, who are Ngiraked's ancestors, held the Ngiracheruang title as appointed by Ngiraked's female ancestors, and that holding these titles was additional evidence that Ngurd's descendants were Eruang Clan members.

Finally, the trial court relied on the fact that Ngurd's descendants have lived on Eruang Clan land as evidence of their Clan membership.

B. Ngiraked is Uodelchad of Eruang Clan.

After concluding that Ngurd was an ochell Eruang Clan member, the court found that Ngurd's descendants were ourrot members of the clan who properly appointed Ngiraked as Uodelchad. As support, the court found: (1) previous Uodelchad titleholders were all within Ngiraked's family line, (2) Ngiraked lives on Eruang Clan land, and (3) Ngiraked has performed years of services for Eruang Clan.

The trial court also concluded that Appellant and his predecessors were ulechell members of Eruang Clan. The trial court found that Elizabeth Oseked (Appellant's sister and Ngiraked's challenger to the Uodelchad title) had been appointed by ulechell of Eruang Clan and supported this finding by taking note of Oseked's lack of knowledge of any predecessors to the title, her lack of testimony regarding Clan services, and her failure to state whether she lived on Clan land. Thus, the court concluded Ngiraked had the stronger claim to the Uodelchad title.

STANDARDS

[1] Status and membership in a lineage are questions of fact, as is the existence of a purported customary law, and the Appellate Division reviews these findings of fact for clear error. *Imeong v. Yobech*, 17 ROP 210, 215 (2010). The appellate court's role on clear error review is not to re-weigh the evidence produced below. *Beches v. Sumor*, 17 ROP 266, 272 (2010). Where admissible evidence supports competing versions of the facts, the trial court's choice between them

is not clear error. *Id*. Credibility determinations are for the trier of fact, and the Appellate Division must give deference to the Trial Division's assessment of the credibility of the witnesses due to the trial court's opportunity to hear the witnesses and observe their demeanor. *Labarda v. Republic of Palau*, 11 ROP 43, 46 (2004). The Court will reverse only if no reasonable trier of fact could have reached the same conclusion based on the evidence in the record. *Id*. Conclusions of law are reviewed de novo. *Estate of Rechucher v. Seid*, 14 ROP 85, 88-89 (2007).

ANALYSIS

Appellant raises several challenges on appeal. First, Appellant contends the trial court erroneously relied on evidence regarding adoptions among clans to conclude that Ngurd was a relative of Ngilas and a member of Eruang Clan. Second, Appellant contends the Trial Division clearly erred in finding the following facts to support the conclusion that Ngurd and her descendants were members of Eruang Clan: (1) that Ngurd and other members of Ngiraked's family were buried at the Eruang Clan odesongel, (2) that it was unlikely that Ngiraked's male ancestors were merely holding the Ngiracheruang title until Appellant's male ancestors came of age, and (3) that Appellant's relatives and ancestors did not protest the fact that Ngiraked's ancestors held the male Clan title "for generations." Third, Appellant argues that the trial court erred in ruling that Ngiraked holds the Uodelchad title when it was not proven by a preponderance of the evidence.

Resolution of most of Appellant's appeal depends on the issue of Ngurd's membership in Eruang Clan, the linchpin of Appellant's theory of his case below. When the trial court's finding that Ngurd was a member of Eruang Clan is sustained, as set out below, Appellant's arguments concerning the make-up of Eruang Clan, the lack of ochell members, and the ourrot status of members of his faction are fatally undermined.

I. The Trial Division did not err in weighing the evidence related to adoption.

Appellant argues the trial court's reliance on a mischaracterization of an expert witness's testimony led to an erroneous finding of fact that necessitates reversal and remand. As explained above, customary expert Floriano Felix testified that (1) adoptions usually occur between lineages within the same clan, and (2) an individual from a high ranking clan would not have adopted from outside the clan. Appellant maintains that "no reasonable trier of fact could conclude that adoptions between non-related individuals are not allowed under Palauan custom." This misstates the trial court's finding. In its Decision, the trial court stated:

> It is difficult to accept that Erbai had absolutely no blood connection to Ngilas. Plaintiffs' customary expert Floriano Felix testified that Palauan adoptions occur between related individuals. He had not heard of someone, even someone from a high ranking clan, adopting a child from a lower ranking clan when these people had no blood relation. This testimony was not rebutted. Such a required connection makes sense.

> Why would a mother give up her baby to a complete stranger after – at best – a brief conversation. Given the expert's testimony, it is more credible that Erbai was adopted by his mother Ngurd's blood relative, Ngilas, and not just taken by a stranger.

First, Appellant appears to seek a legal ruling that unrebutted testimony, such as Felix's expert testimony, is itself not necessarily clear and convincing evidence. We agree that unrebutted testimony must also be both clear and convincing to meet the standard.

Second, the "clear and convincing" standard does not apply under the circumstances because the trial court did not make any ruling as to customary law governing adoptions. Rather, the trial court relied on relevant testimony from a customary witness about common adoption practices of high-ranking officials that was probative of Ngurd's membership in the Clan. The Trial Division's reliance on such testimony is not in error.

Third, the trial court, in fact, did not misstate the expert witness's testimony as it related to the adoption of an unrelated child from a low-ranking clan. The pertinent portion of Felix's testimony is as follows:

> Q : Rubak, now I am going to move to another section. Section of adoption. Rubak, you have testified that most adoptions happen between related people? Have you seen adoptions happen between people who are not related?
>
> A : There is.
>
> Q : Isn't it true that there are situations where people in one village of a high ranking clan, a person of a high ranking clan who doesn't have a child can go and adopt a child from a low ranking child but there's no clan relationship?
>
> A : No.
>
> Q : But you've heard of situations where adoptions happens in a non-related?
>
> A : That is correct.

Tr. (Vol. 1) 199:12 – 199:24. The trial court referred to this portion of the transcript by stating: "[Customary expert Felix] had not heard of someone, even someone from a high ranking clan, adopting a child from a lower ranking clan when these people had no blood relation." We see no error in the trial court's restatement of Felix's testimony that an adoption is unlikely when two conditions are present: (1) when a child is from a lower-ranking clan, and (2) when the child is unrelated to the adopting high-ranking clan member. Appellant's assertion that the trial court misstated the witness's testimony is therefore incorrect, and the trial court's reliance on Felix's testimony in support of its finding that Ngurd was an Eruang Clan member was not error.

II. The Trial Division did not clearly err in its factual findings leading to its conclusion that Ngurd and her descendants were members of Eruang Clan.

Appellant argues the trial court made erroneous findings of fact and mischaracterized evidence in determining that descendants of Ngurd are members of Eruang Clan. Specifically, Appellant argues the trial court clearly erred as to the following findings of fact: (1) that the burial of Ngurd and other members of Ngiraked's family in the Eruang Clan odesongel was indicative of clan membership, (2) that it was unlikely that Ngiraked's male ancestors were merely holding the Ngiracheruang title until Appellant's male ancestors came of age, and (3) that Oseked's ancestors did not protest the fact that Ngiraked's ancestors held the male Clan title "for generations."

A. Evidence of burials at Eruang Clan's Odesongel.

Appellant argues that the trial court gave undue weight to the burial of Ngiraked's ancestors at the stone platform as evidence of Clan membership. Appellant contends: (1) out of five rows of graves, "a significant number of the names on the bottom of the odesongel do not appear in any of the [Eruang genealogy] charts," (2) several of Ngurd's descendants who are buried at the odesongel are there only because they bore the title Ngiracheruang, and (3) Appellant's father Oseked gave permission for two individuals (out of sixty-six people) to be buried at the odesongel.

In establishing Ngurd's membership in Eruang Clan as fact, the court notes her membership "explains why Ngurd and her progeny are buried in the Eruang stone platform. That also explains why Melik and Trang, who (along with Ngurd) pre-deceased Oseked and do not come from Erbai's line, are buried at the Eruang odesongel." As the trial court pointed out, we have recognized that burials in a clan odesongel may reflect clan rank (and by association, clan membership). *Imeong*, 17 ROP at 214, 217–18 . *See also Arbedul v. Diaz*, 9 ROP 218, 223 (Tr. Div. 1989) (same). Crucially, the trial court did not find that burial in a clan odesongel necessarily entails membership in the clan, but merely constitutes evidence suggesting membership.

If the Court were to accept, *arguendo*, the facts Appellant asserts with respect to the Clan membership reflected in the Eruang Clan odesongel, the sum of each of the arguments suggests that, at most, one-third of the individuals buried at the Eruang odesongel might not be Eruang Clan members. Conversely, Appellant, therefore, admits that at least two-thirds of the individuals buried at the odesongel *are* Eruang Clan members. Given this fact, and the fact that Ngurd and her descendants were buried there, it was not clear error for the trial court to find that Ngurd's burial at the Eruang odesongel was one among several indicia of her Clan membership.

B. Evidence of "regency" for the title of Ngiracheruang.

Appellant argues that it was clear error for the court to find it implausible that Ngiraked's male predecessors were entrusted with the title of Ngiracheruang as regents for young male relatives of Appellant. In particular, Appellant points to expert witness testimony that it is possible for someone to hold a title in safekeeping for another. Tr. (Vol. 1) 203:28–204:8. The court, however, did not conclude that it was impossible for a person to hold a title for the

benefit of another, but instead made its finding after weighing the available evidence and finding little support for the existence of such an arrangement under these circumstances. Specifically, the trial court explained why it found Appellant's argument untenable:

> Defendants gave no satisfactory answer to the question of why such an egregious power grab by Plaintiffs' ancestors [who did not give back the Ngiracheruang title] went unanswered for generations. [Appellees'] ancestors appointed their male relatives over and over again to the Ngiracheruang title, and [Appellant's] ancestors did nothing to stop them. According to [Appellant], [his] ancestors were too young or too busy or too pacifist. Such assertions ring hollow when one reviews the list of available men on Ngilas' and Obechou's family trees. In addition, if Techemang pre-deceased Oseked, why not take the title back at that point and appoint someone truly from Eruang Clan? Roman said Oseked was physically weak but mentally capable. Surely Oseked understood that if he allowed Ngotel to take the title, Oseked may not get it back for his clan. Such acquiescence to others' will sits in stark contrast with the powerful and controlling character of Oseked otherwise painted by [Appellant].

Appellant may have established that such a practice exists in Palau, but he failed to provide sufficient evidence to convince us that the trial court clearly erred when it found that the predecessors of Appellant and Ngiraked did not enter into an arrangement under which Ngiraked's ancestors merely held the Ngiracheruang title in favor of Appellant's young male ancestors.[2]

C. Evidence of objections to appointment of Ngiraked's ancestors to Eruang Clan titles.

Appellant argues that it was error for the trial court to state that Appellant's ancestors had failed to challenge the "usurpation" of the Eruang titles by descendants of Ngurd. Again, the trial court stated in its Decision: "[Appellant] gave no satisfactory answer to the question of why such an egregious power grab by [Ngiraked's] ancestors went unanswered for generations," and that the explanations offered by Appellant "ring hollow." In support of his argument, Appellant cites to testimony describing why one of his great-granduncles was unable to protest the title being held by a descendant of Ngurd. Appellant then cites testimony alluding to vague, unsuccessful attempts to retrieve titles and properties then held by Ngurd's descendants, as well as various other reasons why his ancestors were unable to object to the situation. The trial court's decision not to credit this testimony on the basis of its credibility determination is not clear error and will not be disturbed on appeal. *See Labarda*, 11 ROP at 46.

Further, whether Appellant's ancestors' efforts amounted to an actual protest was not central to the question of

[2] Although Appellant notes that his witnesses' testimony was unrebutted, a trial court "is not required to accept uncontradicted testimony as true." *Idid Clan v. Olngebang Lineage*, 12 ROP 111, 124 (2005).

whether Ngurd was a member of Eruang Clan. The trial court merely mentioned this fact to support its determination that Ngiraked's ancestors held titles in Eruang Clan, for whatever reason, which made it more likely that they were, in fact, members of the Clan.

Accordingly, this Court concludes that the trial court did not clearly err with respect to the above findings made in support of the trial court's conclusion that Ngurd and her descendants are Eruang Clan members.

III. The trial court did not clearly err in finding that Ngiraked is Uodelchad.

Appellant makes five separate arguments alleging factual error in the trial court's determination that Ngiraked was properly appointed as and now holds the title of Uodelchad of Eruang Clan. The Court notes that each of the following assertions of error presumes that Ngurd and her descendants are not members of Eruang Clan. Appellant merely recasts the testimony of his trial witnesses in the record in a light that favors his claim, emphasizing, despite the contrary testimony and explicit findings by the trial court, the statements that support his position that Ngurd and her descendants are not members of Eruang Clan. As set out above, these issues are well settled in Appellees' favor, and we are not inclined to revisit them here. We, nevertheless, address each of Appellant's specific contentions briefly.

First, Appellant argues that there was "absolutely no evidence presented to the trial court about whether the women who appointed [Ngiraked] were actually ourrot of Eruang Clan." However, Appellant cites directly to Ngiraked's testimony in which she specifically attests that she was appointed by the ourrot of Eruang Clan and names the ochell women who appointed her to the position. Tr. (Vol. 1) 66:27 – 67:15. Thus, as Appellant's argument makes plain, there is admissible evidence in the record upon which a reasonable trier of fact could reach the same conclusion as the trial court, and the trial court's choice between two competing version of the facts is not error. *See Beches*, 17 ROP at 272.

Second, Appellant argues that the court erred in taking into account the "years of services" that Ngiraked performed for Eruang Clan because such acts were "self-serving," in that they benefitted Ngiraked and her family. This argument concedes Ngiraked performed services, but questions to whom those services were directed. Again, once the trial court ruled that Ngiraked and her faction are, in fact, members of Eruang Clan, any such services that Ngiraked performed for her family were, in fact, services for the Clan. Likewise, Appellant's contention—that one's service to the clan is somehow discounted if the services also benefit that person—seems inapposite and is certainly not supported. Appellant merely presents his view of the evidence and challenges the credibility of Ngiraked's testimony, but he does not demonstrate clear error on the part of the Trial Division.

Third, Appellant argues that the question of "who is and who is not ochell of Eruang Clan had not been established by a preponderance of the evidence." Appellant reiterates that he and his sister Elizabeth are members of Eruang Clan through Erbai,

who was adopted by Ngilas. Of note, Appellant's sister admitted in her testimony that "although she and her brother . . . are members through their male ancestors and would therefore be ulechell, there are no remaining ancestors from the female line so they became strong senior members." Thus, Appellant's argument rests on the conclusion that Ngurd and her descendants were not members of Eruang Clan. Once again, because the trial court found to the contrary, Ngurd's descendants through the female line are considered ochell of Eruang. As noted, we do not find any clear error of fact in the trial court's findings relating to the ochell status of the descendants of Ngurd.

Fourth, Appellant argues that the trial court mischaracterized evidence when it stated that Elizabeth Oseked could not name any of her predecessors to the Uodelchad title. Appellant maintains, contrary to the trial court's factual finding and Ngiraked's credited testimony, that no one was appointed to the Uodelchad title for "the last 40 or 50 years." The trial court concluded Elizabeth Okseked's testimony was "unconvincing," determining it was not credible that "Eruang Clan was maintained by just one man, first by Erbai and then by Oseked, with no female counterparts for generations." The trial court's choice between the competing testimony by Ngiraked and Oseked is not clear error.

Finally, Appellant argues that the trial court misstated Elizabeth Oseked's testimony when it noted that she "could not describe an Eruang Clan function that she had participated in." Appellant points to testimony by Elizabeth Oseked that she attended functions relating to Hitler Demei's appointment to the Ngiracheruang title. Both Elizabeth Oseked and Ngiraked attested to the performance of Clan services. With the trial court finding that Ngurd was a member of Eruang Clan, which granted her descendants through the female line ochell status, the resulting conclusion is that Elizabeth Oseked was not ourrot and the functions she attended to appoint a Ngiracheruang title bearer were not for someone who had been properly appointed. The trial court found Ngiraked's testimony more credible concerning the performance of Clan services, and we do not find any error in its resolution of this competing testimony.

[2] These findings, as well as the others that Appellant contends are in error, have been established by a preponderance of the evidence, which is defined as:

> [t]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Black's Law Dictionary 1220 (8th ed. 2004). The trial court weighed all of the evidence and concluded that a greater weight of the evidence favored Appellees' claims that Ngurd was a true member of Eruang Clan; her descendants through the female line are true ochell, among whom are a number of ourrot of the Clan; and Ngiraked is the current and properly appointed Uodelchad

of the Clan. Because we do not find any error in those factual findings, we affirm the trial court.

CONCLUSION

Based on the foregoing, we **AFFIRM** the Trial Division's decision.

VICTOR M. YANO,
Appellant,

v.

JENNIFER SUGIYAMA YANO,
Appellee.

CIVIL APPEAL NO. 11-011
(Civil Action No. 09-287)

Supreme Court, Appellate Division
Republic of Palau

Decided: June 10, 2013

[1] **Appeal and Error**: Standard of Review; **Family Law:** Standard of Review

Decisions concerning child custody, child support, and property division are reviewed for abuse of discretion.

[2] **Divorce and Separation:** Grounds for Divorce

While divorce may be granted to both parties in a divorce proceeding, it is axiomatic that statutory grounds must exist entitling each party to such relief. Thus, in identifying the appropriate statutory grounds, if any, for divorce, a court must make findings of fact to support its conclusion that such grounds exist.

[3] **Courts:** Stipulations

Private agreements between litigants cannot relieve the Court of performance of its judicial function.

[4] **Courts:** Stipulations

While parties may enter into stipulations of fact that are binding upon them, parties may not stipulate to the legal conclusions to be reached by the court

[5] **Divorce and Separation:** Adultery

Adultery is the act of entering into a personal, intimate sexual relationship with any other person, irrespective of the specific sexual acts performed, or the gender of the third party.

[6] **Divorce and Separation:** Adultery

Where circumstantial evidence is used to prove adultery, the evidence must be sufficiently strong to lead the guarded discretion of a reasonable and just mind to the conclusion of adultery as a necessary inference.

[7] **Divorce and Separation:** Equitable Distribution

The doctrine of equitable distribution is based on the general rule that in a divorce proceeding the division of property must be equitable, but not necessarily equal.

[8] **Divorce and Separation:** Equitable Distribution

21 PNC § 302's reference to justice and the "best interests of all concerned" requires that property be distributed equitably.

[9] **Divorce and Separation:** Equitable Distribution

Equitable distribution during a divorce involves three steps: first, identifying the property as marital or separate; second, valuing the property; and third, allocating it between spouses according to equitable factors.

[10] **Divorce and Separation:** Equitable Distribution

Generally, all property acquired during the marriage is marital property while property owned by the parties prior to marriage, or acquired during the marriage by gift or inheritance, is separate property and thus not subject to division, as is property acquired in exchange for any separate property.

[11] **Divorce and Separation:** Equitable Distribution

To effect an equitable distribution of marital property, a court must place a value on all non-nominal marital assets. An item is considered nominal when its value is insignificant compared to the total value of the marital estate.

[12] **Divorce and Separation:** Equitable Distribution

Under the equitable distribution system, the marriage is viewed as a partnership with both spouses contributing to the marital estate in the manner which they have chosen.

[13] **Divorce and Separation:** Equitable Distribution

Pursuant to 21 PNC § 203, a court should consider the following factors when seeking to create an equitable distribution of property: (1) substantial contribution to the accumulation of the property; (2) the degree to which each spouse has expended,

withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise; (3) The market value and the emotional value of the assets subject to distribution; (4) the value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance or inter vivos gift by or to an individual spouse; (5) tax and other economic consequences, and contractual or legal consequences to third parties, of the proposed distribution; (6) the extent to which property division may, with equity to both parties, be utilized to eliminate periodic payments and other potential sources of future friction between the parties; (7) the needs of the parties for financial security with due regard to the combination of assets, income and earning capacity; and (8) any other factor which in equity should be considered.

[14] **Divorce and Separation:** Equitable Distribution

A party's infidelity is relevant to the distribution insofar as it relates to the contribution to the stability of the marriage and (in some cases) to the dissipation of assets.

[15] **Family Law:** Custody

Under 21 PNC § 302, the primary consideration for custody orders should be the best interests of the children.

[16] **Family Law:** Custody

Normally the best-interest inquiry is based on statutorily prescribed factors. In the absence of such direction, there are policies designed not to bind the courts, but to guide them in determining the best interests of the child. In this regard, primary among the circumstances to be considered is the quality of the home environment and the parental guidance the custodial parent provides for the child in particular the financial status and the ability of each parent to provide for the child and the ability of each parent to provide for the child's emotional and intellectual development. Because the ultimate determination is based on the totality of the circumstances, the existence or absence of any one factor cannot be determinative on appellate review.

[17] **Family Law:** Custody

Adultery (and other marital fault) is relevant to awards of custody only so far as the adultery can be shown to impact the best interests of the children.

[18] **Family Law:** Custody

It is in the best interest of the children that they have a meaningful relationship with both parents.

[19] **Family Law:** Custody

The best interests of the child are paramount in making custody and support decisions.

[20] **Divorce and Separation:** Child Support

Subsections (a) and (b) of 21 PNC § 335 operate to create two types of child support obligations: (1) an obligation of a party to a marriage who causes a marriage to terminate either on his own initiative or for any

enumerated reason to provide support for children of the marriage; (2) an obligation of a person to provide support for all biological children who have not been adopted pursuant to law or custom.

[21] **Divorce and Separation:** Child Support

Within the meaning of 21 PNC § 335, a person causes a marriage to terminate on his own initiative when he knowingly and voluntarily causes the marriage to terminate.

[22] **Divorce and Separation:** Child Support

The ultimate objective in setting awards for child support is to secure support commensurate with the needs of the children and the ability of the obligor to meet those needs.

[23] **Divorce and Separation:** Child Support

At common law, with regard to a parent's ability to pay support, the net income after reasonable and justifiable business expenses should be the primary consideration.

[24] **Divorce and Separation:** Child Support

Child support awards often create a benefit for the custodial parent

Counsel for Appellants: John K. Rechucher, Jeffrey L. Beattie, Steven R. Marks
Counsel for Appellee: Siegfried Nakamura, Clara Kalscheur

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and KATHERINE A. MARAMAN, Part-Time Associate Justice.

Appeal from the Supreme Court, Trial Division, the Honorable ALEXANDRA F. FOSTER, Associate Justice, presiding.

PER CURIAM:

This appeal stems from the separation and divorce of Dr. Victor Yano ("Yano") and Jennifer Sugiyama Yano ("Sugiyama"). Yano appeals several aspects of the Trial Division's order granting the parties a divorce and setting terms of custody, property division and child support. Oral argument in this matter was held on April 8, 2013. We **AFFIRM** in part, but we **REVERSE** with respect to the Trial Division's child support award and distribution of property.

BACKGROUND[1]

Sugiyama and Yano's relationship began in the early nineties, and they began living together in 1997. At that time, Yano ended his first marriage through Palauan custom. He and Sugiyama were married according to Palauan custom on March 15, 2003, and a civil marriage in Hawaii on July 30, 2003. The couple have three children, J.Y. (born in 1999), N.Y. (born in 2003), and Y.Y. (born in 2004, adopted from Yano's extended family).

[1] We recite the facts predominantly as the Trial Division found them. Those facts that remain subject to some dispute are discussed in more detail in the Analysis section of our Opinion.

I. Relationship and Accumulation of Property

Yano is the head of Belau Medical Clinic ("BMC"), an entity he began with help from close family in 1981. In 1996 or 1997, while Yano was Minister of State, Sugiyama began keeping the books for and managing the business of BMC. By all accounts, she was a poor bookkeeper, and there was testimony that she caused the business to decline in value. Additionally, Sugiyama oversaw various cosmetic and substantive changes to the business, such as paving the parking lot and purchasing medical equipment. However, it remains unclear how much BMC was worth before, during, and after the marriage. Although BMC was started as a corporation, it failed to file annual reports with the proper authorities and has been dissolved by the Attorney General. Yano draws on BMC's accounts for personal expenses, and Sugiyama did so during the marriage.

In addition to BMC, Yano possessed several other properties prior to marrying Sugiyama. First, he held a land use right to a home on his grandmother's property called *Ngesekes*. Using money from the BMC bank account and their joint personal bank account, the parties renovated the home at *Ngesekes*. Sugiyama claimed to have overseen many of the improvements. She also maintained the home and garden. Yano, Sugiyama, and Sugiyama's children from a previous marriage stayed in the home during their relationship. By the time of the trial in this matter, one of Yano's employees was living on the premises.

Yano's grandmother also owned Sils, a commercial building, which she transferred to him in 1985. Together, Yano and Sugiyama renovated this space. Sugiyama collected rent from the commercial tenant and acted as a property manager. Today, Yano collects about $2,250 per month in rent from leases on the property.

In 1998, Sugiyama and Yano began to lease property in Steba from Koror State Public Lands Authority. Sugiyama negotiated the terms of the commercial and residential leases and secured permits to build on the land. She acquired gravel and dirt and hired laborers to fill in the boggy land on the premises. The couple ran an aquaculture business (Belau Aquaculture) and built barracks and a summer house which are still standing. Beginning in 2004 or 2005, they began construction on a house. Sugiyama oversaw the construction with some input from Yano. In 2006, the whole family moved into the home. The commercial and residential property at Steba is worth about $350,000.

The couple also acquired land in Ngaraard and Ngeremlengui. The parcel in Ngaeremlengui was used as collateral for a $10,000 personal loan that Sugiyama disbursed to a borrower from the BMC account. When the borrower could not repay the loan, he gave Sugiyama the land. The land in Ngaraard similarly was acquired as collateral on a defaulted $10,000 loan given by Yano. Yano indicated at trial that he was not interested in possessing these properties.

In addition to their land investments, Sugiyama and Yano had several bank accounts. They had two joint accounts, one at Bank of Hawaii and one at the now-

defunct Pacific Savings Bank. J.Y. and N.Y. also had savings accounts. Sugiyama emptied those accounts after the action for divorce was commenced; she testified that Yano told her to take the money out of the savings accounts and to place it in a BMC account.

The couple also had a number of vehicles. Among the vehicles were a white flatbed truck (purchased by the parties), a BMW sports car (a gift from Yano to Sugiyama), a white Mitsubishi Pajero (driven by Yano), two Nissan Marches (driven by BMC employees), another Nissan March, three boats, and a motorcycle. Finally, the couple had several pieces of Palauan money, some earned by Sugiyama and some purchased by the couple, and a piece of Balinese money, purchased by Sugiyama. Sugiyama and Yano disputed the precise number of Palauan money beads.

II. The End of the Marriage

Sometime near the end of their marriage, Sugiyama began having an affair with Isley Singichi. Employees from the Carolines Resort testified to seeing Sugiyama and Singichi at the resort together. Evidence was also presented that Sugiyama cooked and cleaned for Singichi. Yano began to suspect the affair, and he confronted Sugiyama about it.

On October 17, 2009, Yano and one of his senior family members met with John Sugiyama, Jennifer Sugiyama's father, in order to affect a customary divorce. Jennifer Sugiyama was not invited to the meeting. Although there is conflicting testimony as to whether a customary divorce was finalized during the meeting, in the fall of 2009 Yano stopped buying food for Sugiyama and the children, and he expected them to move out of the Steba house.

In November of 2009, Sugiyama took a trip with the children to the United States. When she returned she discovered that Yano had padlocked the Steba house. Yano testified that he expected Sugiyama to leave the home pursuant to the customary divorce. However, the Trial Division found that explanation untenable because when Yano padlocked the house, the children's clothing and personal items remained in the home.

III. Divorce Proceedings

Sugiyama filed a petition for divorce in the Trial Division and sought a temporary restraining order on December 22, 2009. In her petition, Sugiyama alleged that she was entitled to a divorce on the grounds of neglect. Yano counterclaimed for a divorce on the grounds of cruelty and neglect and adultery.

After denying a motion for partial summary judgment filed by Yano, the Trial Division set a trial date for July 2010. On the eve of trial, the parties entered into a stipulation, which stated:

> 1. There are grounds, pursuant to 21 PNC Section 331(b) [cruelty and neglect], to award a divorce to the parties. The Court may issue a judgment awarding a divorce to the parties pursuant to 21 PNC Section 331(b).

> 2. At any trial in this matter, to the extent relevant to the issue of property division, child custody, or child support, either party may present evidence as to the cause(s) of the breakdown of the marriage of the parties.

The parties further represented to the court that they wished to litigate solely the issue of ownership of *Ngerikiil*, a farm located in Airai State. The parties informed the court that they would be able to resolve outstanding issues following a decision on *Ngerikiil*.

Relying on the parties' representation, the Trial Division conducted a limited hearing from July 19-21, 2010. Approximately three weeks after the close of the hearing, the Trial Division entered an order finding *Ngerikiil* to be the separate property of Yano. In reaching this conclusion, the Trial Division recited the contents of the parties' stipulation, and noted that "[a]ccordingly, on the first day of the hearing, the Court found grounds for divorce under 21 PNC § 331(b)." Although the lower court did not specify specific grounds for this finding, it noted that "[s]uch grounds are true for both parties."

Notwithstanding the previous representation to the court, the parties were unable to resolve *any* outstanding issues and the case proceeded to a second trial to determine the distribution of property, the custody of the children, and child and spousal support. At the outset of the second trial, the trial judge explained her understanding that the grounds for divorce had already been established and that the trial would address "how things get subdivided." In turn, counsel for Yano expressed his belief that for

> the hearing regarding the status of the Ngerikiil farm, the Court would not issue a judgment regarding its status unless there is a divorce. So for that case, the Court reached the . . . decision based on the stipulation that there is a cause for divorce, but it doesn't prevent at a later time, any party who would present any evidence to show that one party was causes [sic] the termination of the marriage and therefore should not be entitled to this properties or she should be responsible for providing child support.

The trial judge responded that was not her understanding and then explained:

> on the eve of the [first] hearing the parties filed a stipulation that there are grounds [for divorce] pursuant to 21 section 331b [and] accordingly on the first day of the hearing the Court found grounds for divorce under 21, 331b . . . It seems to me [that] is res judicata . . . . So . . . to the extent that . . . you believe other grounds for divorce [exist] you get to get into [that] under the Palauan custom branch . . . . But . . . as for grounds for divorce . . . that's been decided.

Counsel for Yano concurred with the trial judge's description of the matter's procedural posture.

The Trial Division proceeded to take nine days of testimony to resolve the issues of property division, custody, and child

support. Evidence presented included the cause of the divorce; the existence of customary laws governing divorce, custody and property distribution; and the value of some of the parties' properties. Testimony ended on January 17, 2011, and on February 25, 2011, the Trial Division issued its Judgment and Decision in this matter.

The court first considered whether Palauan custom required that Sugiyama, as an adulterer, leave the marriage with nothing. The court rejected this custom because the relevant expert testimony conflicted as to whether the custom could be applied where the adultery could only be proved through circumstantial evidence. The court also rejected adultery as a grounds for the parties' divorce because it had granted a divorce on the basis of the stipulated neglect and cruelty grounds.

Next, the court turned to custody of the children. It noted that, although Sugiyama was employed, Yano worked extremely long hours and was "too busy to properly care for his children full time, and . . . made no concessions to lighten his workload if awarded full custody." Relying on the best interests of the child standard, as well as the Palauan customary norm that children remain with their mother, the court awarded full custody of all three children to Sugiyama.

The court awarded child support in the amount of $2,100 per month to be paid by Yano. It reasoned that, after expenses, Yano had about $3,000 a month in disposable income.

With respect to the division of property, the court applied the doctrine of equitable distribution and found BMC, Sils, and *Ngesekes* to be Yano's separate property. The land in Ngaremlengui and Ngaraard was determined to be marital property and was awarded to Sugiyama because she brokered the loans and "maintain[ed] an interest in the properties."

The court then considered the Steba house. It noted that the "most lucrative properties—BMC, Sils, and *Ngesekes*—[were] awarded to" Yano. Although the court acknowledged that it had no authority to give the separate property to Sugiyama, it considered the high value of the separate property, which was improved in part by marital funds. Based on the high value of the separate property, and in light of the fact that the children saw the Steba house as their home, the court awarded the Steba house to Sugiyama.

Finally, the court divided the personal property. As to the bead money, the court determined that Sugiyama could retain the Palauan money that she and her family earned by performing custom and the Palauan and Balinese money that she purchased herself. The remaining money stayed with Yano. The BMW, one Nissan March, the motorcycle, and one of the boats were awarded to Sugiyama. The court awarded the remaining personal property to Yano.

Yano timely appealed.

STANDARDS OF REVIEW

Factual findings, including the existence and content of a customary practice, are reviewed for clear error. *Ngoriakl v. Gulibert*, 16 ROP 105, 106

(2008). We review legal conclusions de novo. *Id.* at 107.

[1] Decisions concerning child custody, child support, and property division are reviewed for abuse of discretion. *Ngoriakl*, 16 ROP at 107. The Trial Division's broad discretion in such matters is based on 21 PNC § 302, which provides in relevant part:

> In granting or denying an annulment or a divorce, the court may make such orders for custody of minor children for their support, for support of either party, and for the disposition of either or both parties' interest in any property in which both have interests, as it deems just and the best interests of all concerned may require.

Under the abuse of discretion standard, "a trial court's decision will not be overturned on appeal unless the decision was arbitrary, capricious, or manifestly unreasonable, or because it stemmed from an improper motive." *Ngoriakl*, 16 ROP at 107 (quotation omitted). Similarly, although the divorce statute limits the grounds on which a divorce may be granted, *see* 21 PNC § 331, a trial court has "broad discretion to determine the proper grounds for a divorce," 24 Am. Jur. *Divorce & Separation* § 19 (2008).

ANALYSIS

Yano contends that the Trial Division: (1) failed to make factual findings which would support a granting of divorce on the grounds of neglect and cruelty; (2) abused its discretion by refusing to grant a divorce to Yano on the grounds of adultery; (3) committed error by failing to apply Palauan custom regarding property distribution following adultery; (4) committed error in determining that adultery was irrelevant to property division, child custody, and child support; (5) abused its discretion in its division of the property; (6) abused its discretion by awarding custody of the children to Sugiyama; and (7) erred in its award of child support.

I. The Trial Division's Finding of Grounds for Divorce

Yano argues the Trial Division "erred in granting a divorce [for cruelty or neglect] based solely on the Stipulation and without even finding which party was at fault."

Palau's current divorce statute was adopted almost verbatim from the Trust Territory Code. *Compare* 21 PNC § 331 *with* 39 TTC § 201 (1970). The divorce statute strictly limits the grounds on which a divorce may be issued in the Republic, enumerating nine possible bases for the dissolution of marriage. It provides:

> **§ 331. Grounds.** Divorce from marriage may be granted under this chapter for the following causes and no other:
>
> (a) adultery.
>
> (b) the guilt of either party toward the other of such cruel treatment, neglect, or personal indignities, whether or not amounting to physical cruelty, as to render the life of the other burdensome and intolerable and their further living together unsupportable.

(c) willful desertion continued for a period of not less than one year.

(d) habitual intemperance in the use of intoxicating liquor or drugs continued for a period of not less than one year.

(e) the sentencing of either party to imprisonment for life or for three years or more. After divorce for such cause, no pardon granted to the party so sentenced shall affect such divorce.

(f) the insanity of either party where the same has existed for three years or more.

(g) the contracting by either party of leprosy.

(h) the separation of the parties for two consecutive years without cohabitation, whether or not by mutual consent.

(i) willful neglect by the husband to provide suitable support for his wife when able to do so or when failure to do so is because of his idleness, profligacy or dissipation.

[2] While divorce *may* be granted to both parties in a divorce proceeding, it is axiomatic that statutory grounds must exist entitling each party to such relief. *See* 21 PNC § 331 ("divorces . . . may be granted . . . for the following causes *and no other*." (emphasis added)). "[A] trial court decision must contain sufficient findings supporting its conclusions to allow for appellate review." *Ngirutang v. Ngirutang*, 11 ROP 208, 211 (2004). Thus, in identifying the appropriate statutory grounds, if any, for divorce, a court must make findings of fact to support its conclusion that such grounds exist. *See Leary v. Leary*, 627 A.2d 30, 34 (Md. App. 1992) (Court erred in allowing agreement of the parties to control absent fact-finding to support grounds for divorce.).

At the outset of the first trial, the Trial Division granted divorce in favor of both parties on the grounds of cruelty or neglect. In the order memorializing the granting of divorce, the Trial Division cited only to the parties' stipulation that grounds for divorce existed under section 331(b).

[3, 4] "[P]rivate agreements between litigants . . . cannot relieve this Court of performance of its judicial function." *Garcia v. United States*, 469 U.S. 70, 79 (1985). Thus, "[w]hile parties may enter into stipulations of fact that are binding upon them . . . parties may not stipulate to the legal conclusions to be reached by the court." *Weston v. Washington Metropolitan Area Transit Authority*, 78 F.3d 682, 685 (D.C. Cir. 1996).

The Trial Division had a duty to find specific facts supporting its conclusion that both parties were entitled to divorce under section 331(b). By relying solely on a non-factual stipulation, the lower court failed to perform its fact finding duty. Thus, the finding that both sides were entitled to divorce under section 331(b) may not be sustained.

II. Adultery as Grounds for Divorce

Although the Trial Division found that there was "most damning" and "powerful circumstantial evidence" that Sugiyama was engaged in an affair, it declined to grant divorce on the grounds of adultery because it had "already granted a divorce on the grounds of cruelty, and finding any additional causes of divorce would have no effect on the Court's decision on the issues of property division, child custody or child support." As explained above, we conclude the Trial Division erred by relying on the stipulation to find grounds for divorce based on cruelty or neglect. It follows that the Trial Division also erred when it used its erroneous finding as a basis for declining to consider adultery as a grounds for divorce. Having found error, the question becomes whether Yano is entitled to the additional relief he seeks—a judgment that he is entitled to divorce on the grounds of adultery.

[5, 6] Adultery is the act of "entering into a personal, intimate sexual relationship with any other person, irrespective of the specific sexual acts performed, or the gender of the third party." 24 Am. Jur. 2d *Divorce and Separation* § 56. Where circumstantial evidence is used to prove adultery, the evidence "must be sufficiently strong to lead the guarded discretion of a reasonable and just mind to the conclusion of adultery as a necessary inference." *Fowler v. Fowler*, 636 So. 2d 433, 435 (Ala. Ct. App. 1994).

Although Sugiyama denies the affair, we conclude that the litany of circumstantial evidence cited by the Trial Division requires a finding that a reasonable person would view adultery as a necessary inference. Accordingly, we conclude Yano should be granted a divorce on the basis of adultery. *See Imeong v. Yobech*, 17 ROP 210, 219 (2010) (Appellate Division may make findings where "the evidence . . . require[s the specific] finding.").

III. Division of Marital Estate

Yano raises three objections to the Trial Division's apportionment of the marital estate: (1) the quantity of the apportionment was inequitable; (2) the Trial Division failed to consider relevant factors when apportioning the property; and (3) the Trial Division failed to make specific findings as to the value of the apportioned property.

The relevant statutory provision[2] provides that "[i]n granting or denying an annulment or a divorce, the court may make such orders . . . for the disposition of either or both parties' interest in any property in which both have interests, as it deems justice and the best interests of all concerned may require."[3] 21 PNC § 302. The Trial Division and the litigants both proceeded under the assumption that section 302 requires "equitable distribution" of the

[2] In cases filed before January 3, 2013, a party relying on custom must prove: (1) the existence of a purported custom; (2) the present viability of that custom; and (3) if the claimed custom is on a subject matter governed by an existing statute, that (a) there is no conflict between the custom and the statute or, (b) if there is a conflict, that the purported custom prevails over the statute pursuant to Article V, section 2 of the Palau Constitution. *Beouch v. Sasao*, Civ. App. 11-034, slip op. at 10-14 (Jan. 3, 2013).

[3] The same provision appears in the statutory framework of three of our neighbors. See 6 Micr. Code § 1622; 8 N. Mar. I. Code § 1311; 26 Marsh. Is. Revised Code § 110.

property in which both parties have interests.

[7, 8] The doctrine of equitable distribution is based on the general rule that in a divorce proceeding "the division of property must be equitable, but not necessarily equal." 24 Am. Jur. 2d *Divorce and Separation* § 530. Although we have never adopted expressly the use of equitable distribution in divorce proceedings, we note that American courts have applied the doctrine to statutes which like section 302 require division based on the concept of justice. *Skibinski v. Skibinski*, 964 A.2d 641, 643–44 (Me. 2009) (statute mandating "just" distribution requires "the division must be fair and just considering all of the circumstances of the parties." (internal quotation marks omitted)); *see also In re Marriage of Walker*, 899 N.E.2d 1097, 1104 (Ill. App. 2008) (invoking equitable distribution where statute required "just proportions considering all relevant factors"). We believe section 302's reference to justice and the "best interests of all concerned" requires that property be distributed equitably. *Id*.

[9] "Equitable distribution during a divorce involves three steps: first, identifying the property as marital or separate; second, valuing the property; and third, allocating it between spouses according to equitable factors." *Gottstein v. Kraft*, 274 P.3d 469, 476 n.26 (Alaska 2012).

A. Marital Property

[10] "Generally, all property acquired during the marriage is marital property . . . while property owned by the parties prior to marriage, or acquired during the marriage by gift or inheritance, is separate property and thus not subject to division, as is property acquired in exchange for any separate property." 24 Am. Jur. 2d *Divorce and Separation* § 477. In its decision, the Trial Division found the following property to be marital property: (1) the lands in Ngaraard and Ngeremlengui; (2) the Steba home; (3) Palauan and Balinese money beads; (3) five boats; (4) nine cars/motorcycles; (5) fishing equipment located in a warehouse; and (6) rental chairs, tables and a tent located in a separate warehouse. Sils, *Ngesekes* and BMC were determined to be the separate property of Yano.

Appellant does not challenge the foregoing designations, and we affirm the Trial Division in this regard.

B. Valuation of Property

[11] To effect an equitable distribution of marital property, a court must place a value on all non-nominal marital assets. *Guindon v. Guindon*, 256 N.W.2d 894, 897 (S.D. 1977) (court must place value on all assets); *see also In re Marriage of Patus*, 372 N.E. 2d 493, 496 (Ind. Ct. App. 1978) (nominal items need not be valued). An item is considered nominal when its value is insignificant compared to the total value of the marital estate. *Id.*

Here, with the exception of the Steba estate, the Trial Division failed to make any factual findings as to the value of marital property, including the boats and land vehicles. Absent such findings, it is impossible to determine to what extent, if any, the ultimate distribution was equitable. Thus, this matter must be remanded to allow the Trial Division an opportunity to assess

the value of the marital property to be divided. *See Morrison v. Morrison*, 296 N.W.2d 919, 920 (S.D. 1980) (remanding for valuation of marital property).

C. Equitable Distribution

Yano submits that the ultimate distribution of the property was inequitable insofar as the Trial Division: (1) failed to account for Sugiyama's adultery; (2) considered Yano's separate property in distributing the marital property; and (3) ultimately awarded a disproportionate share of the estate to Sugiyama. Because we conclude this matter must be remanded for a proper valuation of the marital estate, there is no need to consider whether the Trial Division's distribution was equitable. However, given the dearth of Palauan authority on equitable distribution, we deem it prudent to provide the lower court guidance on the application of equitable distribution in Palau.

[12, 13] "Under the equitable distribution system, the marriage is viewed as a partnership with both spouses contributing to the marital estate in the manner which they have chosen." *Ferguson v. Ferguson*, 639 So.2d 921, 927 n. 4 (Miss. 1994). Common law factors for insuring an equitable distribution of property include:

1. Substantial contribution to the accumulation of the property. Factors to be considered in determining contribution are as follows:

   a. Direct or indirect economic contribution to the acquisition of the property;

   b. Contribution to the stability and harmony of the marital and family relationships as measured by quality, quantity of time spent on family duties and duration of the marriage; and

   c. Contribution to the education, training or other accomplishment bearing on the earning power of the spouse accumulating the assets;

2. The degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise;

3. The market value and the emotional value of the assets subject to distribution;

4. The value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance or inter vivos gift by or to an individual spouse;

5. Tax and other economic consequences, and contractual or legal consequences to third parties, of the proposed distribution;

6. The extent to which property division may, with equity to both parties,
be utilized to eliminate periodic payments and other potential sources of future friction between the parties;

> 7. The needs of the parties for financial security with due regard to the combination of assets, income and earning capacity; and
>
> 8. Any other factor which in equity should be considered.

Ferguson, 639 So.2d at 928.

[14] We find these factors to be consistent with section 302's statutory mandate and adopt them here. Of import to this matter, a party's infidelity is relevant to the distribution insofar as it relates to the contribution to the stability of the marriage and (in some cases) to the dissipation of assets. *See Bond v. Bond*, 69 So.3d 771, 773 (Miss. 2011) (discussing adultery in context of *Ferguson* factors). Likewise, separate property may be considered in reaching a fair and equitable distribution. *Ferguson*, 639 So.2d at 928 (factor four).

On remand, the Trial Division should apply the foregoing standards to the distribution of the parties' marital property.

IV. Custody

In its decision the Trial Division awarded custody of the three marital children to Sugiyama based on the finding that the custody award was "in the best interest of all concerned, especially the children." The lower court reached this conclusion based on: (1) Yano's busy schedule, (2) the fact that Sugiyama had been caring for the children full time since the separation, and (3) Yano's failure to attempt to spend time with the children in the previous year.

Yano asserts three enumerations of error with regard to the custody determination. First, he contends that Palau's child support statute, 21 PNC § 335, controls custody determinations. Second, Yano contends that the Trial Division abused its discretion in awarding Sugiyama custody based on Yano's lack of contact with the children after the separation and based on his long working hours. Third, he claims the Trial Division erred in failing to consider Sugiyama's adultery as a factor in the custody analysis.

A. The Custody Statute

21 PNC § 335 provides that a person "who causes [a] marriage to be terminated, either on his own initiative or for any of the reasons enumerated in section 331, subsections (a), (b), (c), (d) or (i) of this title shall provide support for each child of that marriage." 21 PNC § 335. Yano submits the statute requires that the party who "causes" the demise of the marriage on one of the enumerated grounds, including adultery, must not have custody of the children because one cannot pay child support to oneself. We decline to follow this reading.

The only Trust Territory court to consider the issue held that relevant language did not preclude an award of custody. *C.f. Ngiraroro v. Martin*, 7 TTR 310, 313 (Tr. Div. 1970) ("Any interpretation of the section which results in the simple declaration that a spouse causing the termination of the marriage on one of the enumerated grounds is not entitled to child support, is erroneous."). Furthermore, Section 335(e) provides explicitly that "[n]othing in this section shall . . . contradict

the provisions of section 302 of this title." Section 302, in turn, requires that orders for custody be based on consideration of "justice and [what] the best interests of all concerned may require." 21 PNC § 302. Thus, to the extent Yano contends section 331 creates a bright line rule for the awarding of custody in divorces, such position must be rejected.[4]

B. Sugiyama's Adultery, Yano's Busy Schedule and Absence During the Separation

Yano argues that in awarding custody it was error for the Trial Division to: (1) consider his failure to reach out to the children during the period of separation because his absence was a direct result of a restraining order issued against him which forbade him from contacting Sugiyama and limited his access to the family home; (2) weigh his expected reliance on a caretaker against his custody claim; and (3) ignore Sugiyama's adultery.

1. Yano's Future Schedule and Absence From the Children's Lives

As explained above, custody decisions are reviewed for abuse of discretion. *Ngoriakl*, 16 ROP at 107. "An abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered, when an irrelevant or improper factor is considered and given significant weight, or when all proper and no improper factors are considered, but the court in weighing those factors commits a clear error of judgment." *Ngeremlengui State Pub. Lands Auth. v. Telungalk Ra Melilt*, 18 ROP 80, 83 (2011). Accordingly, resolution of Yano's enumeration of error depends on the proper factors for resolving questions of custody. *Id.*

[15] As with the division of property, orders of custody must be made "as . . . justice and the best interests of all concerned may require." 21 PNC § 302. Trust Territory courts interpreting a provision with identical language to section 302 held that custody should be determined "primarily by the best interests of the children." *Yamada v. Yamada*, 2 TTR 66, 70–71 (Tr. Div. 1959) (interpreting Section 704 of the Trust Territory Code). This approach is consistent with the general rule in American jurisdictions and with the approach of least one Trial Division decision. *See Kumangai v. Decherong*, 13 ROP 275, 279 (Tr. Div. 2006) (rejecting joint custody where it was "not in the best interest of the children."); *see also* 24A Am. Jur. 2d *Divorce and Separation* § 849 ("In divorce proceedings, the 'best interests' of the child is a proper and feasible criterion for making a decision as to which of the two parents will be accorded custody of the child."). We agree with the foregoing authority and hold that under section 302, the primary consideration for custody orders should be the best

[4] Even in the absence of the limiting provision of section 335(e), we would reject Yano's contention that a child support obligation created under section 335 precludes an award of custody to the obligee. Section 335(b) provides that "[a]ny biological parent of a child under 18 years of age shall provide support for that child unless the child is adopted legally or in accordance with established custom." Under Yano's reading of the statute, no biological parent could obtain custody of their children. Clearly this is not the case. *See Lin v. ROP*, 13 ROP 55, 58 (2006) (court may discard even a plain reading of a statute to avoid an absurd result).

interests of the children. *Yamada*, 2 TTR at 70–71.

[16] Normally the best-interest inquiry is based on statutorily prescribed factors. In the absence of such direction, "there are policies designed not to bind the courts, but to guide them in determining the best interests of the child." *Eschbach v. Eschbach*, 436 N.E.2d 1260, 1262 (N.Y. 1982). In this regard, "[p]rimary among the circumstances to be considered is the quality of the home environment and the parental guidance the custodial parent provides for the child [in particular] the financial status and the ability of each parent to provide for the child [and] the ability of each parent to provide for the child's emotional and intellectual development." *Eschbach*, 436 N.E.2d at 1263 (internal punctuation omitted). Because the ultimate determination is based on the totality of the circumstances, "the existence or absence of any one factor cannot be determinative on appellate review." *Id.* at 1264.

Here, the Trial Division determined that Yano's recent absence from the children's lives and his likely reliance on a caretaker weighed against granting him custody. We conclude both these facts relate to the "primary" considerations of home environment and parental guidance and thus hold that the Trial Division did not err in its custodial inquiry when it found that both facts weighed against Yano's claim of custody. *See Thompson v. Thompson*, 974 S.W.2d 494, 496–97 (Ark. Ct. App. 1998) ("Here, there was evidence that appellee was better positioned to be the child's primary caretaker at present than was the appellant: appellee testified that she had quit her job so as to be able to care for the child during the day, while appellant worked daytime hours and was not able to do so.").

2. Adultery as a Factor in Awarding Custody

Modern jurisdictions have largely abandoned consideration of marital misconduct in awarding custody of children. *See Roberts v. Roberts*, 835 P.2d 193, 197 (Utah 1993) ("[T]he concept of fault, unrelated to the children's best interests, is irrelevant to the custody decision."); *see also Price v. Price*, 541 A.2d 79, 81 (1987) (custody decisions must be made on basis of children's best interest and not on the fault of parties). Nevertheless, Yano submits that it was error for the Trial Division to fail to consider Sugiyama's adultery in the course of determining custody. In support of this assertion, he cites to three cases, all of which were decided prior to 1977, for the proposition that adultery is an important factor in the best interest inquiry. While acknowledging the antiquity of his authority, Yano argues "[t]he Palau divorce statute (which . . . was the Trust Territory statute) is based upon divorce statutes which then prevailed in the United States." Thus, Yano urges us to look to interpretations of "statutes in the U.S. in the 1950's or earlier, before the advent of no-fault divorce."

[17] "In earlier decisions, custodial law was used to punish and penalize spouses guilty of marital fault. The development of exceptions to the general rule evidenced a changing attitude. Generally, courts now consider the best interest rule, not marital fault, as the primary guide in custody determinations." *Carr v. Carr*, 480 So.2d 1120, 1122 (Miss. 1985). From its inception, the language of section 302 has

been interpreted as requiring a best interest analysis. *Yamada*, 2 TTR at 70–71. Given this focus, we conclude adultery (and other marital fault) is relevant to awards of custody only so far as the adultery can be shown to impact the best interests of the children. *Carr*, 480 So.2d at 1122–23. In this regard, courts have held that acts of adultery are not per se relevant to a parent's ability to care for a child. *See In re Marriage of Slayton*, 103 Cal. Rptr. 2d 545, 552 (Cal. Ct. App. 2001) (Where "[m]other made no offer of proof that Father's alleged adulterous relationship would adversely affect the home environment he would provide for [child, the] court reasonably could conclude the evidence of adultery was not relevant to the custody determination."); *see also Cooper v. Cooper*, 579 So.2d 1159, 1163 (La. Ct. App. 1991) ("Acts of adultery with the same person do not, per se, render a parent morally unfit who is otherwise suited for custody.").

At the trial level, Yano failed to explain how or why Sugiyama's adultery rendered her an unfit parent. Because adultery alone is not a per se indication of unfitness, we conclude the Trial Division did not err when it declined to consider Sugiyama's adultery in its custody determination.[5]

3. Failure to provide scheduled visitation.

[18] Yano raised the issue of his ability to have custody of his children and although we did not find error in the Trial Division's order of sole custody we are mindful that Yano has a right to have regular contact with his children in order to maintain the parent child relationship. It is of grave concern to this Court that he went a lengthy time without being with his children. It is in the best interest of the children that they have a meaningful relationship with both parents. The Trial Division erred in not providing for regular visitation between Yano and his children. The issue of visitation is remanded with direction that the Trial Division order regular, meaningful visitation between Yano and his children.

V. Child Support

Yano raises two challenges to the Trial Division's award of child support: (1) he was not required to provide support for the children of the marriage (J.Y., N.Y., and Y.Y.); and (2) the Trial Division erred in calculating the support.

A. Child Support Obligation

[19] Palau has two statutes concerning child support. Title 21, § 335 of the National Code states that one "who causes [a] marriage to terminate, either on his own initiative or for any of the reasons enumerated in section 331, subsections (a), (b), (c), (d) or (i) of this title shall provide support for each child of that marriage." Section 302 grants the Trial Division wide discretion to "make such orders for custody of minor children [and] for their support . . . as [the court] deems justice and the best interests of all concerned may require." The best interests of the child are paramount in

[5] Yano asserts in his opening brief that Singichi has a criminal record and is thus a negative influence on the children. Based on our review of the pleadings and argument by Yano, this does not appear to be a fact raised and considered below and, therefore, we may not consider it here. *See Rechucher*, 12 ROP at 54. However, Yano can always petition the trial court to amend its decision. *See* 21 PNC § 302.

making such custody and support decisions. *See Kumangai*, 13 ROP at 279; 24A Am. Jur. *Divorce & Separation* § 916 (2008).

On appeal, Yano contends:

> [T]he two statutes, when read together, provide that a court *must* order that child support be paid by a party who causes a divorce under any of the subsections of § 331 that are enumerated in § 335. Where a party causes a divorce under a different subsection, say insanity under subsection (f), the court is not obligated to order the party to pay child support, but it *may* do so under § 302 if justice and the best interests of concerned so require. Under this construction, the child support order here would be error because there is no finding –and no evidence that would support one—that Dr. Yano caused the marriage to terminate; but there is powerful evidence that Petitioner caused the termination of the marriage under § 331(a).

(emphasis in original)

[20] Subsections (a) and (b) of section 335 operate to create two types of child support obligations: (1) an obligation of a party to a marriage who causes a marriage to terminate either on his own initiative or for any enumerated reason to provide support for children of the marriage; (2) an obligation of a person to provide support for all biological children who have not been adopted pursuant to law or custom.

We have never had occasion to consider how a person causes a marriage to terminate "on his own initiative." As a general matter, statutes are controlled by the plain meaning of their words. *ROP v. Palau Museum*, 6 ROP Intrm. 277, 278–79 (1995). Plain meaning, in turn, is derived by recourse to both general and legal dictionaries. *Ngerul v. ROP*, 8 ROP Intrm. 295, 297 (2001).

[21] In common usage, "one's own initiative" is defined to mean "at one's own discretion: independently of outside influence or control." Merriam-Webster's Online Dictionary, http://www.merriam-webster.com/dictionary/initiative (last accessed April 23, 2013). The phrase is undefined in Black's Legal Dictionary. We adopt the common meaning of the phrase and hold that a person causes a marriage to terminate on his own initiative when he knowingly and voluntarily causes the marriage to terminate.

Here, it is undisputed that in October of 2009, before the instant divorce petition was filed, Yano attempted to affect a customary divorce. Later, in response to Sugiyama's petition, he filed a counter-claim for divorce on the grounds of adultery. As explained above, the counterclaim proved to be meritorious and ultimately ended the marriage. Applying the foregoing standard to the instant facts, we conclude that Yano caused the marriage to terminate at his own discretion.

Because Yano caused the marriage to terminate on his own initiative, he is obligated to pay child support, and his contention to the contrary is without merit.[6]

[6] To the extent Yano contends Sugiyama's adultery precludes an award of child support in her favor, this argument has already been rejected.

B. Child Support Award

[22] Unlike some jurisdictions, Palau has no formula for deriving the proper amount of child support due. Rather, section 302 provides that, where support is granted in a divorce action, such support should be determined based on the now-familiar considerations of justice and the best interests of those concerned. This direction is consistent with the general rule that "[t]he ultimate objective in setting awards for child support is to secure support commensurate with the needs of the children and the ability of the obligor to meet those needs." 24A Am. Jur. 2d *Divorce and Separation* § 942.

The Trial Division properly identified the two of the most important variables as the children's needs and Yano's ability to pay. However, Yano submits the court erred in calculating the actual amounts of both.

1. Yano's Ability to Pay

On the issue of Yano's ability to pay, he submits the court counted as income the rent he is paid at the Sils property but neglected to acknowledge the costs of leasing out and maintaining the property. Yano also contends that the trial court erred by failing to consider his five-hundred dollar per month child support obligation to another child and his $350 per month payment of salary to an employee at Belau Aquaculture.

[23] At common law, "with regard to a parent's ability to pay support, the net income after reasonable and justifiable business expenses should be the primary consideration." *In re Marriage of Crowley*, 663 P.2d 267, 268 (Colo. Ct. App. 1983). Net income necessarily excludes legal obligations and "necessary expense[s] of living." *See Klise v. Klise*, 678 S.W.2d 545, 546 (Tex. Ct. App. 1984) ("In testing a spouse's ability to pay the amount of child support ordered, the financial capability of the spouse is examined in light of all other liabilities the spouse has . . . ." (internal punctuation omitted)); *see also Sohocki v. Sohocki*, 730 S.W.2d 30, 32 (Tex Ct. App. 1987) ("The amount a parent is required to pay should be commensurate with his or her ability to pay, but should not be great enough to deny that party the necessary expenses of living.").

We conclude the rental upkeep and payment of the salary of the Belau Aquaculture employee both were reasonable and justifiable business expenses that should have been considered in Yano's ability to pay child support. *In re Marriage of Crowley*, 663 P.2d at 268. Likewise, we conclude the child support obligation from a previous marriage should have been considered as a liability in the ability to pay inquiry. *Klise*, 678 S.W.2d at 546. However, such error was harmless.

In calculating Yano's ability to pay, the Trial Division took his gross income (approximately $5,283 per month) and subtracted the following monthly expenses: (1) $1,000 in loan servicing;[7] (2) $500 for food; (3) $200 for gas; (4) $200 for car repairs; (5) $500 for "entertainment," defined as "renting films, listening to music [and] going out;" and (6) $80 for laundry. The Trial Division found that after the foregoing expenses, Yano had slightly more

[7] Yano testified the loan would be paid off in January of 2013. It is unclear whether this has occurred.

than three thousand dollars to pay the $2,100 of child support.

In reviewing the Trial Division's findings, we begin by noting that renting films, listening to music and going out are not necessary living expenses. Furthermore, we observe the Trial Division failed to include in its calculation of gross income the approximately hundred dollars of income produced by Belau Aquaculture. These omissions account for a $600 error in Yano's favor. In contrast, the missed deductions advanced by Yano total $850 ($500 in child support, $350 in salary and $0 in rental upkeep).[8] With the proper deductions, Yano would have approximately $2,750 of disposable income to pay child support, still in excess of the $2,100 awarded amount. Thus, we conclude a proper calculation of his ability to pay would not have altered the ultimate amount awarded and that, therefore, any error in this regard was harmless. *See Ngiraiwet v. Telungalek Ra Emadaob*, 16 ROP 163, 165–66 (2009) ("Harmless errors are those that do not prejudice a particular party's case.").

2. Needs of the Children

As to the needs of the children, Yano argues that it was improper for the court to award costs of utilities and amenities, such as internet and cable, in child support costs because such costs benefit Sugiyama. Yano also contends that the total amount awarded exceeded the needs of the children, as found by the Trial Division.

[24] As an initial matter, we note that child support awards often create a benefit for the custodial parent. Such a result is not error, but is a logical consequence of child support payments. *See generally Schabauer v. Schabauer*, 673 N.W.2d 274, 282 n. 2 (S.D. 2003) (Sabers, J., dissenting) (noting that "a child support award will always indirectly affect the custodial parent's standard of living . . . .").

Yano next contends that the Trial Division erred in setting the child support amount ($2,100 per month) at a number in excess of the amount it calculated to be the combined needs of the children of the marriage ($1,916.67 per month) without justification for the increase. Both parties agree that the $1,916.67 monthly expenses found by the lower court is an accurate estimate of the needs of the children. Because child support awards are based on the needs of the children, we conclude that it was error for the Trial Division to exceed the agreed needs of the children without justification. *See Reid v. Reid*, 998 So.2d 1032, 1039 (Miss. Ct. App. 2008) ("[C]hild support awards, even if comporting with the statutory guidelines, cannot exceed the needs of the children.").

In the absence of dispute as to the actual needs of the children, we find the needs of the children to be $1,916.67 per month until the court awards the marital property. The Trial Division may determine in dividing the marital property that it is appropriate to sell the family home or that the children should continue to reside in the family home with their mother until their majority. If the mother is not awarded the family home or is allowed to reside there

[8] Yano presented no evidence of the expenses associated with Sils. "[I]t is not the Court's job to develop the record or act as the claimant's advocate." *Arbedul v. Rengelekel A Kloulubak*, 8 ROP Intrm. 97, 98 (1999).

with the children until they are of majority age the needs of the children may change.

The Trial Division failed to consider the mother's obligation to support her children. Some consideration should be given to each parent's financial obligation and ability to provide for the children. Evidence was received that the mother was previously employed and has the ability to provide support.

For the period of the pendency of the litigation until the marital property is divided child support is reduced to $1,916.67 per month. The issue of child support is remanded to the Trial Division to consider the needs of the children taking into consideration the division of marital assets and the mother's ability to provide financial support. However, in no event shall the amount of child support be greater than the needs of the children.

CONCLUSION

For the foregoing reasons, we **AFFIRM** in part. We **REVERSE** the Trial Division's order regarding the division of property and child support. We **REMAND** for proceedings consistent with this decision.

KOROR STATE PUBLIC LANDS AUTHORITY,
Appellant,

v.

BELECHEL NGIRNGEBEDANGEL and TECHEBOET LINEAGE,
Appellees.

CIVIL APPEAL NO. 12-042
LC/B 01-0527
LC/B 01-0528
LC/B 01-0529
LC/B 01-0530

Supreme Court, Appellate Division
Republic of Palau

Decided: June 26, 2013

[1] **Property:** Adverse Possession

To acquire title by adverse possession, the claimant must show that the possession is actual, continuous, open, visible, notorious, hostile or adverse, and under a claim of title or right for twenty years. Possession also must be exclusive.

[2] **Property:** Adverse Possession

The burden of proof as to each element rests on the party asserting adverse possession.

[3] **Appeal and Error:** Standard of Review

Whether a party transferred ownership of land is a question of fact.

[4] **Land Commission/LCHO/Land Court:** Determinations of Ownership

A Determination of Ownership issued by the Land Court must be based on findings of fact. While this rule requires specific findings, if, from the facts found, other facts may be inferred that will support the judgment, the court of appeals will deem such inferences to have been drawn by the trial court.

[5] **Land Commission/LCHO/Land Court:** Determinations of Ownership

An uninterrupted chain of title is unnecessary to prove ownership of property, so long as the ownership is supported by other adequate evidence.

Counsel for Koror State Public Lands Authority: J. Uduch Sengebau Senior
Counsel for Belechel Ngirngebedangel: Pro Se
Counsel for Techeboet Lineage: Salvador Remoket

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and R. ASHBY PATE, Associate Justice.

Appeal from the Land Court, the Honorable SALVADOR INGEREKLII, Associate Judge, presiding.

PER CURIAM:

This is an appeal of a Land Court Determination awarding ownership of six parcels of land to Appellee Belechel Ngirngebedangel and ownership of one parcel of land to Appellee Techebeot Lineage. For the following reasons, the determination of the Land Court is **AFFIRMED.**

BACKGROUND

On October 31, 2008, the Land Court issued Determinations of Ownership regarding twenty-five parcels of land. Of relevance here, the Land Court awarded six lots to Ngirngebedangel[1] (the Ngirngebedangel Lots) and one lot to Techeboet Lineage[2] (the Lineage Lot). *Id.* Appellant KSPLA claimed the foregoing seven lots.

The Land Court awarded the Ngirngebedangel Lots to Ngirngebedangel on the ground that KSPLA's claims were barred twenty-year statute of limitations on property actions. The Land Court granted the Lineage Lot to Techeboet Lineage because Bilung Gloria Salii, one of the Lineage's representatives, was the only claimant with a familial connection to Kisaol, a deceased ancestor of Salii whom the Land Court determined to be the true owner of the claimed parcel. KSPLA appealed these determinations, arguing, among other things, that it had acted as a lessor of the disputed lands for more than twenty years and had, therefore, acquired the properties by adverse possession.

On appeal, we rejected KSPLA's adverse possession claims on the ground that it could not show actual or hostile possession of the claimed properties. *KSPLA v. Idong Lineage*, 17 ROP 82, 84 (2010). In doing so, we concluded that the

[1] Lot Nos. 181-034H, 181-191A, 181-191B, 181-191C, 181-191E, and 181-191P.
[2] Lot No. 181-191H.

evidence relied upon by KSPLA (lease documents and testimony that certain claimants were aware of the leases) was insufficient to show hostile possession. *Id.* Although we rejected KSPLA's adverse possession claims, we also held that the Land Court erred in awarding the Ngirngebedangel Lots based on adverse possession. *Id.* at 85–86. As to the Lineage Lot, we held that the Land Court erred in awarding the land to the Lineage on the basis of Bilung Gloria Salii's relationship to Kisaol because the Lineage's claim "was not made through a relationship with Kisaol," but on the ground that "Kisaol lived on the land with permission of Techeboet Lineage." *KSPLA I*, at 87–88. Having found that the Land Court erred in its determinations, we remanded the matter for further proceedings. *Id.* at 88.

On remand, the Land Court took testimony from Salii and Ngirngebedangel. Salii testified in Palauan that, if the Lineage Lot was individual property of Kisaol prior to moving to Japan, Kisaol "a ulterkokl a kloklel"[3] to three women of Idid Clan.[4] Salii further clarified that she was claiming the Lineage Lot based on this transfer. Ngirngebedangel testified that he purchased his claimed properties from Iked Etipison. KSPLA did not present additional evidence.

On September 21, 2012, the Land Court issued a second set of Determinations. In the Second Determinations, the Land Court found that Kisaol "a ulterkokl a kloklel" to three members of Idid Clan and, in doing so, "conveyed ownership of her properties . . . ." The Land Court further found that Ngirngebedangel purchased the Ngirngebedangel Lots from Iked Etpison in 1976, and that, "[s]ince purchasing the[] lots [he] has maintained completed control of, and operated his business upon, the land." Accordingly, the Land Court once again awarded the Ngirngebedangel Lots to Ngirngebedangel and the Lineage Lots to the Lineage.

KSPLA appealed.

STANDARD OF REVIEW

We review the Land Court's legal conclusions de novo and its factual findings for clear error. *Kotaro v. Ngotel*, 16 ROP 120, 121–22 (2009).

DISCUSSION

Appellant contends that the Land Court erred by awarding the Ngirngebedangel Lots to Ngirngebedangel because "KSPLA owns the lands . . . under the theory of adverse possession." Appellant further submits that the Land Court erred in awarding the Lineage Lots because "Appellee Bilung Gloria Salii failed to establish that Kisaol own[ed] the land."

I. Adverse Possession of the Ngirngebedangel Lots

[1, 2] "To acquire title by adverse possession, the claimant must show that the possession is actual, continuous, open, visible, notorious, hostile or adverse, and under a claim of title or right for twenty years." *Petrus v. Suzuky*, 19 ROP 37, 39 (2011). Possession also must be exclusive. *Id.* at 42; *see also Arbedul v. Rengelekel A Kloulubak*, 8 ROP Intrm. 97, 98 (1999)

[3] This translates roughly to "entrusted her property."

[4] Techeboet is a lineage of Idid Clan.

(plaintiff failed to show adverse possession because he failed to show exclusive possession). The burden of proof as to each element rests on the party asserting adverse possession. *Id.*

In *KSPLA I* we held unequivocally that KSPLA could not establish adverse possession merely by pointing to the existence of leases made by KSPLA and by establishing knowledge of the leases by the adverse claimant. *KSPLA I*, at 84–85. Inexplicably, on appeal, KSPLA now contends that it proved adverse possession by relying on various lease documents and on testimony that Ngirngebedangel was aware of at least one of the leases. As we already have held, this evidence remains insufficient under the circumstances to establish adverse possession.

II. Kisaol's Ownership and Conveyance of the Lineage Lots

As we recently observed,

> litigants in a Land Court proceeding may advance two types of claims: (1) a superior ownership claim under which the litigant pursues ownership based on the strength of his title; and (2) a return of public lands claim under which a private party "admits that title to the land is held by a public entity, but seeks its return." *See Koror State Pub. Lands Auth. v. Wong*, Civ. App. 12-006, slip op. at 4–5 (Oct. 31, 2012) (emphasis omitted). Where . . . parties assert competing claims of superior ownership, the Land Court must award ownership to the claimant advancing the strongest claim. *See Ngirumerang v. Tmakeung*, 8 ROP Intrm. 230, 231 (2000) ("The Land Court can, and must, choose among the claimants who appear before it and cannot choose someone who did not, even though his or her claim might be theoretically more sound.").

Ngirametuker v. Oikull Village, Civ. App. 12-030, slip op. at 6–7 (May 21, 2013).

Here, the Lineage advanced a superior title claim. Accordingly, the Land Court was required to award ownership to the claimant advancing the strongest claim. *Id.*

On remand, the Land Court found that Kisaol owned the land and that, prior to her death, she conveyed ownership to three members of Idid Clan. In reaching the latter conclusion, the Land Court rejected KSPLA's contention that "a ulterkokl a kloklel," the phrase Salii used to describe the transfer, was not evidence that ownership was transferred. Specifically, the Land Court found that KSPLA's argument was belied by the fact that, following the transfer, but before Kisaol's death, a transferee disposed of one of Kisaol's former properties. Based on these conclusions, the Land Court awarded the land to the Lineage because the Lineage claimants "through their position as heads of Idid [C]lan and its Lineages, and people who are closely related to Kisaol and have the authority to dispose of her properties have decided that this land would be registered as property of Techebeot Lineage of Idid [C]lan." Now, KSPLA contends that "Bilung provided absolutely no evidence as to how Kisaol came to own the land or how Kisaol transferred ownership of her land to

Idid Clan. Bilung used the word 'ulterkokl' which does not necessarily mean conveyance or transfer of land ownership."

A. The Purported Conveyance

[3] Whether Kisaol transferred ownership of her land prior to moving to Japan is a question of fact. *See Gold'n Plump Poultry, Inc. v. Simmons Engineering Co.*, 805 F.2d 1312, 1318 (8th Cir. 1986) ("Whether or not a sale occurred is a question of fact for the trial court."). Accordingly, we review the Land Court's determination in this regard for clear error. *Kikuo v. Ucheliou Clan*, 15 ROP 69, 73 (2008).

The uncontradicted testimony was that, prior to leaving for Japan, Kisaol "entrusted"[5] her lands to three women of Idid Clan. Evidence showed that after Kisaol moved to Japan, but before her death, one of the three women sold one of the entrusted properties. KSPLA does not cite to any evidence which would tend to show that ownership of Kisaol's lands was *not* transferred prior to her death. Absent such evidence, we cannot conclude that the Land Court committed clear error when it found that Kisaol conveyed ownership of her lands to the women of Idid Clan. *See Kikuo*, 15 ROP at 73–74.

B. Kisaol's Ownership

KSPLA further contends that the Land Court erred by granting ownership to the Lineage on the basis of Kisaol's ownership because there was no evidence regarding how Kisaol acquired ownership and because "the Land Court never made a specific finding of fact that Kisaol owns the land . . . ." As to the latter point, we assume KSPLA intended to challenge the lack of a finding that Kisaol *owned* the land.[6]

[4] A Determination of Ownership issued by the Land Court must be "based on findings of fact." L.C. Reg. 20. While this rule requires specific findings, "[i]f, from the facts found, other facts may be inferred that will support the judgment, the court of appeals will deem such inferences to have been drawn by the [trial] court." 9C Fed. Prac. & Proc. Civ. § 2579 n. 17 (3d ed.). Here, the Land Court found that "Kisaol left her properties, including the lot before the Court, to [the Idid women]." We believe that the foregoing language constitutes an explicit finding that Kisaol owned the Lineage Lot. Furthermore, even if the finding was not explicit, Kisaol's ownership of the property may be inferred from the Land Court's conclusion. Accordingly, we reject KSPLA's contention that the Land Court failed to find that Kisaol owned the Lineage Lot.

[5] Finally, an uninterrupted chain of title is unnecessary to prove ownership of property, so long as the ownership is supported by other adequate evidence. *See Omenged v. UMDA*, 8 ROP Intrm. 232, 234 (2000) (affirming quiet title judgment based on reputation evidence where claimant failed to show chain of title). The Land

[5] KSPLA makes much of the fact that Salii testified that Kisaol "a ulterkokl a kloklel" and that no evidence was presented regarding this phrase's customary meaning. However, there is no indication that Salii, who was testifying in Palauan, claimed the transfer was customary.

[6] To the extent KSPLA intends to challenge the lack of a finding that Kisaol *owns* the land, we see no error insofar as the Land Court found that Kisaol conveyed ownership of her lands.

Court found that Kisaol owned the property based on evidence that she maintained uninterrupted use and possession of the land and that she raised ducks on the property. Although Salii testified originally that Kisaol did not own the land, we cannot say the Land Court's conclusion to the contrary was clear error. *See Mesubed v. Iramek*, 7 ROP Intrm. 137, 138 (1999) ("While mere occupation of land is not determinative of ownership, this Court has previously relied on evidence regarding *the use and possession* of land in a dispute between family members over the ownership of land." (emphasis added)). We thus affirm the Land Court's factual determination that Kisaol owned the Lineage Lot.

CONCLUSION

For the foregoing reasons, the determination of the Land Court is **AFFIRMED**.

FRANCISCO SUNGINO,
Appellant,

v.

FUANA BENHART, MARK RUBASCH, SUZETTE NGIRASOB, and RUTH GIBBONS,
Appellants.

CIVIL APPEAL NO. 12-041
Civil Action No. 11-225

Supreme Court, Appellate Division
Republic of Palau

Decided: July 3, 2013

[1] **Custom:** Burden of Proof

A party claiming to be a strong senior member of a clan has the burden of proving such status by a preponderance of the evidence.

[2] **Custom:** Appellate Review

Status and membership in a lineage are questions of fact, as is the existence of a purported customary law, and the Appellate Division reviews these findings of fact for clear error. The Court will reverse only if no reasonable trier of fact could have reached the same conclusion based on the evidence in the record.

[3] **Appeal and Error:** Credibility Determinations

The Appellate Division will only overturn credibility determinations of a trial court in extraordinary circumstances.

Counsel for Appellant: Brien Sers Nicholas
Counsel for Appellees: Salvador Remoket

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and R. ASHBY PATE, Associate Justice.

Appeal from the Trial Division, the Honorable LOURDES F. MATERNE, Associate Justice, presiding.

PER CURIAM:

This appeal arises from the Trial Division's Judgment concluding that Appellees are senior strong members and Appellant is not Kloulubak of the Kermong Clan. For the following reasons, the decision of the Trial Division is **AFFIRMED**.[1]

BACKGROUND

The underlying dispute in this appeal stems from a disagreement concerning the identities of the strong members of the Kermong Clan of Ngkeklau Hamlet, Ngaraard State. Appellees filed for declaratory relief before the Trial Division, seeking a determination that they are the senior strong members of the Clan with the power to appoint the title-holders and to manage and control Clan affairs. Appellees also disputed Appellant's counterclaim that he holds the title of Kloulubak (male chief) of the Clan.

Before the Trial Division, both parties called multiple witnesses to testify concerning their claimed statuses within the Clan. Appellees—Fuana Behart, Mark Rubasch, Suzette Ngirasob, and Ruth Gibbons—testified that their ochell (strong female line) status extends back seven generations to a woman named Sulkal, whom they claim was a member of the Clan.[2]

Appellant disputed Appellees' senior strong status, arguing that the line from Sulkal was broken when Ubad, a female ancestor of Appellees, refused to take part in an omengol[3] to Melekeok. Accordingly, Appellant asserted that Appellees are now mechut el iars, a label reserved for those who return to a clan after being separated from it. As such, Appellant argued that Appellees' statuses are weaker than his own.

Appellant called witnesses to testify that he was presented before the Ngkeklau Klobak by senior strong members of the Clan and was confirmed as Kloulubak of the Clan. These testimonies also suggested that Appellant was connected to the Clan through Appellant's ancestor who became a part of the Clan when she agreed to lead the omengol that Ubad allegedly refused to perform.

In the Findings of Fact and Decision of the Trial Division issued on September 19, 2012, the court stated that Appellee

[1] Although Appellant requests oral argument, we determine pursuant to ROP R. App. P. 34(a) that oral argument is unnecessary to resolve this matter.

[2] Testimony established that Sulkal had three sons—Oyaol, Ngiraidelbong, and Meresebang. Generationally, Ngiraidelbong was the father of Torch, who was the mother of Ubad, who was the mother of Ilong, who was the mother of Ileberang, who was the mother of Belbult, who was the mother of Appellees Fuana and Gibbons.

[3] An omengol occurs when females from one clan go to another village to perform services for money on behalf of their clan.

Fuana is a strong senior member of the Clan. The court rejected Appellant's contention that Appellees are mechut el iars, finding that, regardless of what might have happened with Ubad, other members of the lineage stayed with the Clan and maintained their status. The court accepted expert testimony supporting the notion that, even if one member moves away, if other members of her lineage stay behind and remain active in clan matters, the other members of that lineage maintain their status.

The court also accepted expert customary testimony explaining that, in order for someone to become Kloulubak, all senior strong members must approve the appointment. The court concluded that, because Fuana is a senior strong member and did not approve Appellant's appointment, Appellant did not present sufficiently convincing evidence that he is Kloulubak of the Clan.

Appellant appealed these findings.

STANDARD OF REVIEW

[1] Appellant argues that the trial court erred in finding that Appellant does not hold the chiefly title of Kloulubak for the Clan because he was not endorsed by all of the senior strong members. Appellant asserts that Appellees failed to prove that they are senior strong members with "evidence so clear, un-contradictory and distinct as to leave no doubt as to the validity of their argument." First, we note that this is *not* the standard Appellees bore before the trial court. Rather, Appellees, as plaintiffs at the trial level, were required to prove their case by a preponderance of the evidence and to prove the existence of any customs upon which they rely by clear and convincing evidence. *See Remoket v. Omrekongel Clan*, 5 ROP Intrm. 225, 227 (1996); *Ngiramechelbang v. Katosang*, 8 ROP Intrm. 333, 333 (1999).[4]

[2] The trial court's conclusions concerning whether Appellees met this burden are findings of fact, as is the existence of a purported customary law, which we review for clear error. *Imeong v. Yobech*, 17 ROP 210, 215 (2010). Accordingly, on appeal we will not reweigh evidence, nor will we consider a decision clear error where admissible evidence supports competing versions of the facts. *Beches v. Sumor*, 17 ROP 266, 272 (2010). Thus, we will reverse only if no reasonable trier of fact could have reached the same conclusion based on the evidence in the record. *Labarda v. ROP*, 11 ROP 43, 46 (2004).

DISCUSSION

Both of Appellant's arguments on appeal turn on whether Appellees are senior strong members of the Clan. The burden of proof in these matters belongs to the individual or group seeking to establish their status within the clan. *In re Estate of Baulechong Adelbeluu*, 3 ROP Intrm. 58, 59 (1991). The burden of proving senior strong status is the preponderance of the evidence standard and, "[t]o the extent that [a party] relies upon custom to prove [their] case, [they] must prove the existence of the

[4] This standard was revised in *Beouch v. Sasao*, Civ. App. 11-034, slip op. at 10-14 (Jan. 3, 2013). However, because the *Beouch* decision has been given purely prospective effect, it does not apply to cases, such as the one at bar, filed before January 3, 2013. *Id.* at 17.

custom by clear and convincing evidence." *Ngiramechelbang*, 8 ROP Intrm. at 333. Faced with this burden, Appellees presented evidence tracing their ancestry through several generations of female members of the Clan. The Trial Division found this evidence sufficient to meet Appellees' burden. Appellant, however, argues that, because one of Appellees' ancestors, Ubad, left the Clan, Appellees' attempts to establish strong membership in the Clan now makes them mechut el iars. As such, Appellant contends, they are not senior strong members of the Clan.

I. The Trial Division did not err in concluding that Appellees are not mechut el iars of the Clan.

The Trial Division took testimony concerning Appellant's claims that Appellees are mechut el iars. Specifically, the Trial Division heard from an expert witness, who explained that customary law dictates that, when one person leaves a clan, that person's descendants do not lose their clan membership so long as other members of their lineage maintain their strong ties to the clan. The court noted that Appellees have maintained ties to the Clan by staying active in Clan matters. Further, Appellant presented no evidence to rebut Appellees' evidence establishing their Clan status.

Because Appellees' ties to the Clan are questions of fact, in order to disturb that finding we must conclude that no reasonable trier of fact could have come to the same conclusion as the Trial Division. *Labarda*, 11 ROP at 46. Appellant has given us no reason to conclude as much. Appellees have clearly demonstrated their strong ties to the Clan and that their roots in the Clan run deep. Appellees presented substantial testimony to establish their ochell status and as such they have convincingly demonstrated their senior strong status within the Clan.

[3] Appellant attacks the credibility of Appellee Fuana by arguing that some of her testimony was contradictory. It is well-settled that "[t]he Appellate Division will only overturn credibility determinations of a trial court in extraordinary circumstances." *Kotaro v. Ngotel*, 16 ROP 120, 123 (2009). Thus, we disagree that Fuana's alleged contradictions—that she has made claims to membership in a different lineage in the past—are sufficiently egregious to warrant reversal. Assuming for the sake of argument that Fuana's statements are contradictory, we do not agree that the Trial Division was unreasonable in concluding that Appellees have maintained their Clan ties. Appellees were able to explain their ancestry and how they have remained active in the Clan. Appellant did not contradict this evidence.

II. The Trial Division did not err in concluding that Appellant is not Kloulubak of the Clan.

Next, Appellant asserts that the Trial Division erred in determining that Appellant is not Kloulubak of the Clan. Appellant argues that he presented substantial testimony from strong members of the Clan establishing his connection to the Clan and proving that Appellant was presented to Ngkeklau Klobak, where he was confirmed Kloulubak.

Problematic for Appellant, however, was expert testimony that established that, in order for a man to become Kloulubak of a

clan, all senior strong members of the clan must confirm him. As noted, the Trial Division did not err in concluding that Appellees are senior strong members. The Trial Division also accepted that Appellee Fuana did not confirm Appellant as Kloulubak. Because we hold that the court did not err in its Decision concerning Appellees' status, then the only aspect left for review on this point is whether the court erred in its Decision with respect to the expert testimony that all senior strong members must confirm a Kloulubak.

Appellees met their burden of proving with clear and convincing evidence that all senior strong members must confirm a Kloulubak. *See Omrekongel Clan*, 5 ROP Intrm. at 227. They did so by providing uncontradicted and convincing expert testimony that all senior strong members must confirm a Kloulubak, as well as other uncontradicted testimony that Fuana, a senior strong member, did not confirm Appellant. Based on this evidence, we cannot agree that no reasonable finder of fact could have come to the same conclusion as the Trial Division. *See Labarda*, 11 ROP at 46. Because fewer than all senior strong members confirmed Appellant as Kloulubak, the Trial Division did not err in concluding that he does not hold this title.

CONCLUSION

Because we hold that the Trial Division did not err in its factual findings, we **AFFIRM** its decision on all accounts.

REPUBLIC OF PALAU,
Plaintiff,

v.

ANDY MESUBED aka YEN-AN LAI aka ANDY LAI,
Defendant.

CRIMINAL CASE NO. 13-002

Supreme Court, Trial Division
Republic of Palau

Decided: July 19, 2013

[1] **Criminal Law:** Rights of Defendant

Civil rights of a criminal defendant in Palau come from three sources: statute, the Constitution and the *Miranda* prophylactic rule.

[2] **Criminal Law:** Suppression of Evidence

Where the government violates one of the statutorily enumerated rights, no evidence obtained as a result of such violation shall be admissible against the accused.

[3] **Criminal Law:** Advice of Rights

Pursuant to 18 PNC § 218, a person under arrest must be advised of his right to an attorney and his right to remain silent. Additionally, it is unlawful for those having custody of one arrested, before questioning him about his participation in any crime, to fail to inform him of his rights and their

obligations under subsections (a)(1) - (3) of 18 PNC § 218.

[4] **Criminal Law:** Arrest

"Arrest," is defined under the statute as any form of legal detention by legal authority. 18 PNC § 101(a). Within the context of advice of rights, "arrest" includes detentions "for examination" based on probable cause that a crime has been committed.

[5] **Criminal Law:** Arrest

When considering the existence of arrest or custody several factors guide the inquiry: the location of the interview; the length and manner of questioning; whether the individual possessed unrestrained freedom of movement during the interview; and whether the individual was told she need not answer the questions.

[6] **Criminal Law:** Suppression of Evidence

In order to suppress evidence obtained in violation of 18 PNC § 218, defendant must at the very least assert a causal link between the failure of investigators [and the discovery of the evidence]. Consequence will not be presumed where it is not alleged.

[7] **Criminal Law:** Right to Counsel

Pursuant to section 218, the Government may not deny an arrestee the right to see at reasonable intervals, and for a reasonable time at the place of his detention, counsel, or members of his family, or his employer, or a representative of his employer.

[8] **Constitutional Law:** Suppression of Evidence

There are three types of constitutional bars to admission of evidence in a criminal proceeding. First, the Constitution may speak directly to admissibility. Second, under the prudential exclusionary rule, evidence obtained in violation of a constitutional right will be deemed inadmissible in court. Relatedly, where a constitutional right has been violated, evidence must be suppressed when recovery of the evidence has come by exploitation of that illegality.

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[10] **Constitutional Law:** Right Against Self-Incrimination

The right against self-incrimination protects against two separate acts. First, the core protection afforded by the Self–Incrimination Clause is a prohibition on compelling a criminal defendant to testify against himself at trial. Second, the right privileges a person not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.

[11] **Criminal Law:** Right Against Self-Incrimination

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[12] **Criminal Law:** Voluntary Statements

To determine whether a statement was voluntary rather than compelled a court must consider the totality of the circumstances to determine whether the will of the suspect was overborne by government coercion. The test for the voluntariness of a confession is whether the confession was extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of any improper influence.

[13] **Criminal Law:** Right to Counsel

Like the right against self-incrimination, the right to counsel attaches at the time a defendant has been implicated in a crime.

[14] **Criminal Law:** Right to Counsel

The right to counsel renders inadmissible in the prosecution's case in chief statements deliberately elicited from a defendant without an express waiver of the right to counsel.

The Honorable ARTHUR NGIRAKLSONG, Chief Justice:

This matter is before the Court on Defendant Andy Mesubed's motion to suppress statements and evidence collected on January 25, 2012. An evidentiary hearing on Defendant's Motion was held on July 10-11, 2013. For the reasons set forth below, the motion is **GRANTED**.

BACKGROUND

On May 1, 2013, Defendant filed a motion to suppress statements and evidence based on violations of his constitutional and statutory rights. In support of his motion, Defendant submitted an affidavit which made the following allegations:

> That the police came to his house in Ngerchemai on January 24, 2012 around lunch time and ordered that he go with them to the police station;
>
> That after arriving at the police station the police interrogated him without first advising him of his rights. Only after he gave a statement was he read his rights;
>
> That he asked the police if needed a lawyer since they were going to ask him questions and the police told him he did not need one because was not arrested;
>
> That the police told him he was not free to leave and that if he did not talk to them he would be put in the dark room;
>
> That he was deprived of sleep and food and when he did not wish to talk to the police he was given some type of drug which he took;

> That the drug had an effect on him, it made him feel happy, at ease but slightly dizzy, and comfortable to talk to the police;
>
> That after the police obtained his statement and recovered [evidence] he was released.

[Affidaivt, ¶¶ 3-9].

Based on these allegations, an evidentiary hearing was convened. Testimony from the hearing showed the following:

At approximately noon on January 24, 2012, approximately three police officers, including Officer Harline Stark, traveled to Defendant's home in Koror. Upon arriving at the residence, the officers asked Defendant to accompany them to the police station to discuss a robbery of the Long Rainbow Tour Office. Defendant requested time to get ready to leave and was given approximately twenty minutes to shower and change. Defendant was driven to the police station in a BPS vehicle.

Defendant was taken to the offices of the BPS Narcotics Division. From approximately 12:30 until 6:00 p.m., Defendant sat with Officer Felix Francisco and Officer Stark answering questions about the robbery. At the commencement of questioning, Defendant asked whether he needed an attorney. Francisco responded that Defendant did not need an attorney because he was not under arrest. However, at Defendant's request, Francisco contacted Defendant's family members and requested that they come to the police station. Emory Mesubed appeared first, and spoke with Defendant for approximately fifteen minutes. Shortly after, Elmis Mesubed came to the station and spoke with Defendant for approximately twenty minutes.

Defendant claims that at some point during his conversation with Stark and Francisco, Officer Francisco waved a knife in his face and threatened to put Defendant in a "dark room" with an unknown person who would hurt him. At some point during the conversation, Francisco offered Defendant a piece of an apple which fell on the floor; Defendant declined the offer. Defendant testified that he asked to end the interview but that Francisco told him he could not leave.

At approximately 4:00 p.m. on January 24, 2012, Defendant informed the officers he needed to use the restroom. Defendant was escorted to a restroom outdoors and locked in the facility. When he was ready to get out, he was forced to knock on the door and inform the officers he wanted to leave.

At approximately 6:00 p.m. Defendant stated that he had a headache. In response to Defendant's complaint, the officers gave him two white pills which they claimed to be Tylenol. Defendant testified that, after taking the pills, he felt light-headed and "easier to talk."

Defendant was not advised of his rights during the initial five-and-a-half hours of questioning.

A second round of questioning began at 7:00 p.m. Defendant claims that at an unspecified time, Francisco promised Defendant that there would be no gun related charges if he cooperated and led the

police to the gun used in the robbery. Following this promise, Defendant agreed to take police officers to a location in Malakal where the gun allegedly used in the robbery was hidden. Defendant testified that, following his agreement he was taken three times to Malakal on searches for the gun. The first two searches, which began at 12:00 and 3:00 a.m., and lasted approximately an hour each, were unsuccessful. A third search, which began at approximately 6:30 a.m. on January 25, 2012, uncovered the handgun. Between the searches, Defendant was allowed to sleep in an unlocked office with a small couch.

When Defendant returned after the third search, he was taken to the BPS CID building where, at approximately 9:00 a.m., he was questioned by Officer Sherry Sisior and CID Chief Aloysius Alonz. Officer Sisior testified that she was directed to take a statement regarding the discovered gun. The questioning was conducted in Chief Alonz's office, an approximately 6-foot-by-8-foot room with four windows and good lighting.

At the outset of the questioning, Defendant was presented a "Bureau of Public Safety Advice of Rights" form, which provided:

> 1) You have the right to remain silent. You do not have to talk to me un less you want to do so.
>
> 2) If you do talk to me, anytihing [sic] you say may be used against you as evidence in a court of law.
>
> 3) You have the right to consult with a lawyer and to have a lawyer present while you are being questioned. You may stop talking to me at any time and demand a lawyer.
>
> 4) If you want a lawyer but are unable to pay for one, a lawyer will be appointed to represent you free of any cost to you. If you want a lawyer to consult with [sic] before or during questioning, we will try to get a lawyer here to talk to you.
>
> 5) The service of the Public Defender or his representative are [sic] available to you without charge.
>
> 6) You may ask to see your lawyer, members of your family, or your employer or a representative of your employer, and will be permitted to see them at reasonable intervals and for reasonable amounts of time if you so request.
>
> 7) You may ask that a message be sent to your lawyer, or to members of your family, or to your employer or to a representative of your employer, provided that the message can be sent without expense to the Government or you repay such expense.

8) Public Safety will release you or charge you with a criminal offense within a reasonable amount of time; you will not be held more than 24 hours without being charged.

[ROP Exhibit B].

Chief Alonz testified that he went over the Advice of Rights form with Defendant and that Defendant initialed and signed the form. Defendant testified that he only signed the form and that he only did so after Alonz told him that he could leave once he signed.

On the form, which was admitted into evidence, the initials "Y-L" are handwritten next to each of the numbered rights. Below the rights, the words "yes Y-L" are written next to the phrase "Do you understand these rights I have read and explained to you?" Below the acknowledgement of rights, the words "yes Y-L" are written next to the phrase "Knowing these rights, do you want to talk to me without having lawyer [sic] present?" The form is signed by Defendant and dated January 25, 2012, "0919 hrs."

Chief Alonz testified that he believed Defendant was under arrest but that Defendant was very cooperative. Alonz denied making threats or promises to Defendant.

Officer Sisior confirmed that Defendant was advised of his rights and that he signed the waiver form. Sisior testified that although Defendant spoke and understood English, he appeared very "sleepy," and was slow to comprehend questions. However, Defendant never asked to stop the interview. Three or four times during the interview, Defendant was allowed to leave the room to make tea.

Defendant spoke with Sisior and Alonz for approximately two hours. At the conclusion of the interview, he signed and initialed a written statement. Notably, the statement is initialed "Y-A." [ROP Exhibit C].

Defendant was released from custody sometime in the afternoon of January 25, 2012.

On January 15, 2013, Defendant was charged in a multi-count information with: (1) two counts of robbery; (2) two counts of grand larceny; (3) conspiracy to commit robbery; (4) conspiracy to commit grand larceny; (5) conspiracy to commit aggravated assault; (6) two counts of unlawful possession of a firearm; and (7) two counts of unlawful possession of ammunition.

DISCUSSION

In his motion, Defendant seeks to suppress all evidence obtained as a result of his detention (including the gun) and also the statements made to Sisior and Alonz.[1]

[1] Civil rights of a criminal defendant in Palau come from three sources: statute, the Constitution and the *Miranda* prophylactic rule. *See* 18 PNC §§ 218, 210; ROP Const. Art. IV, § 7; *Wong v. ROP*, 11 ROP 178, 182 (2004) (setting forth *Miranda*

[1] The Government does not intend to introduce Defendant's statements made prior to the Sisior interview.

rule). This decision will address suppression under each of the relevant rules.

I. Section 220

18 PNC § 218 provides:

> (a) In any case of arrest, or arrest for examination, as provided in subsection (d), section 211 of this chapter, it shall be unlawful:
>
> (1) to deny to the person so arrested the right to see at reasonable intervals, and for a reasonable time at the place of his detention, counsel, or members of his family, or his employer, or a representative of his employer; or
>
> (2) to refuse or fail to make a reasonable effort to send a message by telephone, cable, wireless, messenger or other expeditious means, to any person mentioned in subsection (a)(1) of this section, provided the arrested person so requests and such message can be sent without expense to the government or the arrested person prepays any expense there may be to the government; or
>
> (3) to fail either to release or charge such arrested person with a criminal offense within a reasonable time, which under no circumstances shall exceed 24 hours;
>
> (4) for those having custody of one arrested, before questioning him about his participation in any crime, to fail to inform him of his rights and their obligations under subsections (a)(1) - (3) of this section.
>
> (b) In addition, any person arrested shall be advised as follows:
>
> (1) that the individual has a right to remain silent;
>
> (2) that the police will, if the individual so requests, endeavor to call counsel to the place of detention and allow the individual to confer with counsel there before he is questioned further, and allow him to have counsel present while he is questioned by the police if he so desires; and
>
> (3) that the services of the public defender, when in the vicinity of his local representative, are available for these purposes without charge.
>
> 18 PNC § 218.

[2] Where the government violates one of the statutorily enumerated rights, "no evidence obtained as a result of such violation shall be admissible against the accused." 18 PNC § 220. Insofar as section 220 bars the admission of evidence "obtained as a result" of a violation of Title 18, a challenge to admissibility brought under the statute requires two inquiries: (1) whether there was a violation of Title 18; and (2) whether the evidence sought to be suppressed was "obtained as a result" of the

relevant violation. At the hearing, Defendant identified two potential violations—a failure to advise him of his rights and a denial of his right to counsel.

A. Advice of Rights

[3] Pursuant to 18 PNC § 218, a person under arrest must be advised of his right to an attorney and his right to remain silent. 18 PNC § 218(b). Additionally, "it is unlawful for those having custody of one arrested, before questioning him about his participation in any crime, to fail to inform him of his rights and their obligations under subsections (a)(1) - (3) of [18 PNC § 218]." 18 PNC § 218(a)(4). There is no question that Defendant was not advised of his rights until approximately 9:00 a.m. on January 25, well after he led the police to the gun used in the robbery. Accordingly, the Government violated section 218(b) if Defendant was "under arrest," at any time prior the January 25 advice of rights. Likewise, the Government violated section 218(a)(4) if Defendant was under arrest and those in custody of him questioned him about his participation in any crime without advising him of his rights set forth in 18 PNC § 218 (a)(1) - (3).

[4] "Arrest," is defined under the statute as "any form of legal detention by legal authority." 18 PNC § 101(a). Within the context of advice of rights, "arrest" includes detentions "for examination" based on probable cause that a crime has been committed. *See* 18 PNC §§ 211(d), 218(a). The statutory touchstone of legal detention tracks the *Miranda* requirement that warnings be issued to a person when he has been formally arrested or when he is in custody and subject to "restraint on freedom of movement of the degree associated with a formal arrest." *Stansbury v. California*, 511 U.S. 318, 322 (1994). Such similarity comports with the Appellate Division's direction that, insofar as section 218 codifies the *Miranda* warning, relevant United States case law may be used to interpret the statute's provision. *See Wong v. ROP*, 11 ROP 178, 182 n.2 (2004).

[5] When considering the existence of arrest (or custody) "[s]everal factors guide the inquiry: the location of the interview; the length and manner of questioning; whether the individual possessed unrestrained freedom of movement during the interview; and whether the individual was told she need not answer the questions." *U.S. v. Panak*, 552 F.3d 462, 465 (6th Cir. 2009).

Here all three of the relevant factors suggest a finding of "arrest" while Defendant was at the police station. The interview was conducted at the police station. Defendant was escorted by police when he left the station and was locked inside a bathroom. There is no indication (until the January 25 interview) that Defendant was told he did not need to answer questions. Finally, Defendant was kept at the police station for more than twenty-four hours. Accordingly, the Court concludes that Defendant was arrested, within the meaning of section 218, during his time at the police station. *See Panak*, 552 F.3d at 465.

Having found that Defendant was under arrest within the meaning of the statute, it is clear that the Government's failure to inform him of his rights under section 218 was a violation of the statute

requiring suppression of all evidence obtained "as a result" of such violation.

[6] "The phrase 'as a result of' necessarily means that the violation must be the proximate cause of the improperly obtained evidence. Thus, in order to suppress evidence obtained in violation of 18 PNC § 218, defendant must at the very least assert a causal link between the failure of investigators [and the discovery of the evidence]. Consequence will not be presumed where it is not alleged." *In re Temol*, 6 ROP Intrm. 326, 329 (Tr. Div. 1996). Defendant has not asserted a causal link between the violation and either the recovery of the gun or his statements. In the absence of such link, suppression pursuant to section 218 must be denied.

B. Statutory Right to Counsel

[7] Pursuant to section 218, the Government may not "deny" an arrestee "the right to see at reasonable intervals, and for a reasonable time at the place of his detention, counsel, or members of his family, or his employer, or a representative of his employer." 18 PNC § 218(a)(1). This provision mirrors a similar statute in Hawaii. *See* Haw. Rev. State § 803-9 ("It shall be unlawful in any case of arrest for examination [to] deny to the person so arrested the right of seeing, at reasonable intervals and for a reasonable time at the place of the person's detention, counsel or a member of the arrested person's family.").

In evaluating the scope of a defendant's right pursuant to this provision, the Court once again turns to *Miranda* case law. *Wong*, 11 ROP at 182 n.2. In this regard, the *Miranda* right to counsel must be invoked unambigously to be effective. *See Davis v. U.S.*, 512 U.S. 452, 458 (1984) (*Miranda* right to counsel must be invoked to be effective). Accordingly, the Court concludes that the right to counsel arising from section 218 also must be invoked unambiguously in order to be violated.

There is no dispute that Defendant's right to see family members was not violated. As to the right to see counsel, the evidence supports a conclusion that Defendant asked if he "needed" a lawyer and was told that he "did not need one because he was not arrested." Inquiries regarding the necessity of a lawyer are not unambiguous invocations of the right to counsel arising from *Miranda*. *See Diaz v. Senkowski*, 76 F.3d 61, 63 (2d Cir. 1996) ("Do you think I need a lawyer?" was not a clear statement invoking *Miranda* rights). Accordingly, the Court concludes that Defendant did not invoke his right to counsel under 18 PNC, and that, therefore, such right could not have been denied.

II. Constitution

[8, 9] There are three types of constitutional bars to admission of evidence in a criminal proceeding. First, the Constitution may speak directly to admissibility. *See e.g.*, ROP Const. art. IV, § 7 ("Coerced or forced confessions shall not be admitted into evidence."). Second, under the prudential "exclusionary rule," evidence obtained in violation of a constitutional right will be deemed inadmissible in court. *See Herring v. United States*, 555 U.S. 135, 139 (2009) (The exclusionary rule, "when applicable, forbids the use of improperly obtained evidence at trial."). Relatedly, where a constitutional

right has been violated, evidence must be suppressed when recovery of the evidence has "come . . . by exploitation of that illegality." *United States v. Delancy*, 502 F.3d 1297, 1309 (11th Cir. 2007) (quoting *Wong Sun v. United States*, 371 U.S. 471, 488 (1963)).

Here, Defendant contends that the events of January 24 and January 25 violated his constitutional right to counsel and his constitutional right against self-incrimination.

A. Self-Incrimination

Like the United States Constitution, our Constitution protects an individual against compelled self-incrimination. ROP Const. art. IV, § 7. However, while the U.S. Constitution extends this protection to all "persons," the ROP right applies only to persons "accused of a criminal offense." *Compare* U.S. Const. amend. V, *with* ROP Const. art. IV, § 7. Accordingly, as an initial matter, the Court must first address when a person is "accused" within the meaning of Article IV, section 7.

In ascertaining the meaning of the constitutional provision, the Court begins with the general rule that "the courts are required to give effect to the intent of the framers as expressed in the plain meaning of the language used in the constitution." *Ngeremlengui Chiefs v. Ngeremlengui Gov't, 8 ROP Intrm.*, 178, 181 (2000). In this regard, a person is considered "accused" of a crime when he is "implicated" in the crime. Black's Law Dictionary (9th ed. 2009), accused. A person is "implicated" when it is "show[n he is] involved in . . . a crime." Black's Law Dictionary (9th ed. 2009), implicate (internal punctuation omitted).

[10, 11]The right against self-incrimination protects against two separate acts. First, "the core protection afforded by the Self–Incrimination Clause is a prohibition on compelling a criminal defendant to testify against himself at trial." *United States v. Patane*, 542 U.S. 630, 637 (2004) (plurality op.) Second, the right "privileges [a person] not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). The latter of these rights prohibits the compelling from the accused of self-incriminating statements. *See ROP v. Recheluul*, 10 ROP 205 (Tr. Div. 2002).

[12] To determine whether a statement was voluntary (rather than compelled) a court must consider "the totality of the circumstances to determine whether the will of the suspect was overborne by government coercion." *Wong*, 11 ROP at 183. "The test for the voluntariness of a confession is whether the confession was extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of any improper influence." *Id*. at 183–84 (quoting *Hutto v. Ross*, 429 U.S. 28, 30 (1976) (internal quotation marks omitted)). Additionally, a statement may be involuntary if the accused is incapable of voluntarily waiving their right to silence. *Recheluul*, 10 ROP at 207. In evaluating a capacity to waive, a court should consider the accused's age, intelligence, health, and impairment due to drugs or alcohol. *Id*.

Of relevance here, "the Self–Incrimination Clause contains its own exclusionary rule . . . . [Specifically,] those subjected to coercive police interrogations have an *automatic* protection from the use of their involuntary statements (or evidence derived from their statements) in any subsequent criminal trial." *Patane*, 542 U.S. at 640.

1. The Relevant Facts

Here, there are two relevant incriminating statements: (1) the signed confession made during the January 25 interview; and (2) the statements made the evening of January 24, leading the police to the gun. Defendant contends that these statements were involuntary because: (1) Francisco waved a knife in Defendant's direction while yelling; (2) Francisco threatened to put Defendant in a "dark room" with someone who would hurt him; (3) Defendant was deprived of food and sleep; (4) Francisco promised Defendant that if he led him to the gun he would not be charged for the gun; (5) Defendant was on some type of drug (which had been given to him by the police); and (6) Alonz told him that if he signed the waiver form, he would be able to go home. Defendant alleges that that he was deprived of food (with the exception of an apple slice) and sleep during the more than twenty-four hours of detention.

Officer Stark, who was with Francisco and Defendant for much of the afternoon and evening, denied witnessing any of the threats or promises described by Defendant. Chief Alonz testified that he did not threaten or make any promises to Defendant. Testimony established that Defendant was allowed to sleep on a small couch in an unlocked room.

As to the drug allegation, Defendant alleged in his affidavit that, following his consumption of two pills he was told were Tylenol, he felt "happy, at ease but slightly dizzy, and comfortable to talk to the police." [Affidavit, at ¶ 8]. Defendant did not testify how long this feeling lasted, or what role, if any, it had in his making the statements leading police to the gun or the statements on January 25.

In evaluating these allegations, the Court notes that "the trial court is not required to accept uncontradicted testimony as true . . . . Although a finder of fact may not arbitrarily disregard testimony, [he] is not bound to accept even uncontradicted testimony." *Ngetelkou Lineage v. Orakiblai Clan*, 17 ROP 88, 92 (2010).

Having considered the credibility of the witnesses, the Court concludes that Defendant was provided an opportunity to sleep on a small couch and that he was offered at least some food. Likewise, Chief Alonz did not make any promises or threats to secure Defendant's statement during the January 25 interrogation.

The allegations regarding Officer Francisco's actions, however, are more concerning. The uncontradicted testimony was that Officer Francisco made a series of threats to Defendant and then promised that there would be no gun charges if Defendant led the police to the gun used in the robbery. Following the alleged promise, Defendant made statements leading the police to the gun. Although these allegations were not included in Defendant's initial affidavit,

they stand un-rebutted by Francisco himself (who for reasons unknown was not called to testify)[2] or any of the officers who appeared at the hearing. Notably, there is no testimony explaining *why* Defendant (a criminal suspect) made statements directly leading police to evidence of his crime. In the absence of such testimony, the Court credits Defendant's allegations that Francisco promised that Defendant would not be charged for the gun if led police to the weapon. However, the Court finds the allegations regarding the threats to be exaggerated and uncredible.

2. The Law Applied

The affidavit of probable cause filed in this matter shows that on January 23, 2013, Defendant was identified as one of the perpetrators of the robbery. Thus, there can be no doubt that Defendant was implicated in a crime at the time he was brought to the police station. Accordingly, at all relevant times, Defendant was an "accused" entitled to a protection against self-incrimination under the Constitution. *See* Article IV, section 7.

Having found that Francisco promised Defendant that he would not be charged for the gun if he led the police to the gun, the question becomes whether such conduct (in conjunction with the other circumstances of the detention, such as sleep deprivation) resulted in an overbearing of Defendant's will. *Wong*, 11 ROP at 183.

A promise of non-prosecution is sufficient to overbear the will of a suspect. *See Wong*, 11 ROP at 184 ("The test for the voluntariness of a confession is whether the confession was extracted by any sort of threats or violence, *or obtained by any direct or implied promises, however slight*, or by the exertion of any improper influence." (emphasis added)); *see also U.S. v. Menesses*, 962 F.2d 420, 428 (5th Cir. 1992) ("[A] confession made induced by an assurance that there will be no prosecution is not voluntary."). Here, the totality of the circumstances—the promise made to Defendant regarding the retrieval of the gun, the sleep deprivation and the overall tenor of the detention—operated to overbear Defendant's will. Accordingly, Defendant's statements regarding the gun were involuntary and subject to suppression. *Id*. Likewise, all evidence derived from such statements must be suppressed. *Patane*, 542 U.S. at 640.

It is clear that the discovery of the gun (and all evidence discovered with the gun) was derived from Defendant's statements leading the police to the gun. Likewise, insofar as Officer Stark testified that she was directed to take Defendant's statement regarding the gun, it is equally clear that Defendant's statements to Officer Stark were derived from the previous unlawful coercion. Accordingly, the gun and Defendant's January 25 statements must be suppressed. *Patane*, 542 U.S. at 640.

B. Right to Counsel

[13] Like the right against self-incrimination, the right to counsel attaches at the time a defendant has been implicated in a crime. Article IV, section 7. In this

[2] Although the Government could not have known the allegations that would be levied against Francisco, it is clear that he was the officer in charge of Defendant's interrogation. Accordingly, it is inconceivable that he would not have been called to testify.

regard, the right differs from the express constitutional right to counsel derived from the United States Constitution, which attaches at the time formal charges are filed. *Texas v. Cobb*, 532 U.S. 162, 167–68 (2001) (Sixth Amendment right to counsel attaches when "a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."). Such difference is seen in the prefatory clauses of the two sections. *Compare* Article IV, section 7 ("At all times the accused shall have the right to counsel.") with U.S. Const. amendment 6. ("In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."). Despite the difference in texts, the Appellate Division has looked to the United States in interpreting the scope of Palau's right to counsel. *See Sanders v. ROP*, 8 ROP Intrm. 90, 91 n.1 (1999).

[14] Once attached, the right to counsel secures for the accused "the right to rely on counsel as a 'medium' between him and the State." *Michigan v. Jackson*, 475 U.S. 625, 632 (1986) (internal quotation marks omitted). In this regard, the accused has the right "to be free of uncounseled interrogation." *Kansas v. Ventris*, 556 U.S. 586, 592 (2009). An interrogation, in turn, is a question "deliberately designed to elicit incriminating remarks." *Bey v. Morton*, 124 F.3d 524, 531 (3rd Cir. 1997). Thus, the right to counsel "renders inadmissible in the prosecution's case in chief statements deliberately elicited from a defendant without an express waiver of the right to counsel." *Michigan v. Harvey*, 494 U.S. 344, 348 (1990) (internal quotation marks omitted). The exclusionary rule and fruit of the poisonous tree doctrines apply to violations of the constitutional right to counsel. *Nix v. Williams*, 467 U.S. 431, 442 (1984).

Here, as explained above, Defendant was accused of the crime of robbery when he was taken to the police station and placed in custody. Accordingly, Defendant was entitled to the advice of counsel during a police interrogation. *Ventris*, 556 U.S. at 592. It is beyond dispute that Defendant was subjected to interrogation without counsel throughout the afternoon and evening of January 24. During the course of the interrogation, Defendant led police to the gun. The following morning, Defendant was questioned specifically about the discovered gun and, in response to such questions, gave an incriminating statement. Under these circumstances, suppression of the gun and the January 25 statements is necessary. *Nix*, 467 U.S. at 442.

III. *Miranda* Warnings

Having found that the Constitution requires suppression of the challenged, the Court declines to address whether suppression is warranted due to a violation of Defendant's *Miranda* rights.

CONCLUSION

For the reasons set forth above, Defendant's Motion to Suppress is **GRANTED.** The gun and the statements issued on January 25, 2012, are hereby **SUPPRESSED**.

ELIA KUAL,
Appellant,

v.

NGARCHELONG STATE PUBLIC LANDS AUTHORITY,
Appellee.

CIVIL APPEAL NO. 12-047
(LC/N 09-0402)

Supreme Court, Appellate Division
Republic of Palau

Decided: August 8, 2013

[1] **Appeal and Error:** Standard of Review

The Appellate Division reviews the Land Court's findings of fact for clear error and its conclusions of law de novo.

[2] **Land Commission/LCHO/Land Court:** Claims

Litigants in a Land Court proceeding may advance two types of claims: (1) a superior ownership claim under which the litigant pursues ownership based on the strength of his title; and (2) a return of public lands claim under which a private party "admits that title to the land is held by a public entity, but seeks its return.

[3] **Property:** Islands

As a rule of law, the title to islands is ordinarily vested in the owner of the bed of the waters out of which they arise provided there has been no separation of such ownership by grant, reservation, or otherwise.

Counsel for Appellants: Yukiwo Dengokl
Counsel for Appellees: William Ripdath

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and LOURDES F. MATERNE. Associate Justice.

Appeal from the Land Court, the Honorable C. QUAY POLLOI, Senior Judge, presiding.

PER CURIAM:

This is an appeal of a Land Court Decision awarding ownership of a rock island to Ngarchelong State Public Lands Authority (NSPLA). For the reasons set forth below, the Land Court's Determination is **AFFIRMED**.

BACKGROUND

This case concerns the claims of Appellant Elia Kual, Mengellakl Municipality, and the NSPLA to a rock island known as *Ngerulleuang* (the Island).[1] An evidentiary hearing on the competing claims was held on October 23, 2012.

At the hearing, Kual presented evidence that a deity known as Ngirngarchelong gave *Ngerulleuang* to Ureked Clan. Kual testified that he received title to the island from a Ureked Clan title bearer named Swei. Uong er Etei Victor Joseph, a chief of Ngarchelong and Mangellang Municpality, testified that the

[1] The Municipality has not appealed the Land Court's Determination.

island was used for *teliakl*, a place where a person would go for a "designated number of days" prior to installation as a chief. NSPLA, which claimed the title "for Ngarchelong State," only presented evidence rebutting Kual's claim.

Following the hearing, the Land Court issued a Decision concluding that ownership to the island rested with NSPLA. In reaching this conclusion, the Land Court rejected Kual's claim because there was "insufficient proof of Ureked Clan's initial ownership [and] Mr. Guak's claim in reliance of that earlier ownership cannot prevail." The court rejected the Mengellang Hamlet claim because Joseph's testimony "would support a claim for the clan where Uong er Etei comes from more so than for Mengellang village."

Turning to NSPLA's claim, the Land Court wrote:

> It can readily be inferred [the] island is within 12 nautical miles seaward from land. Pursuant to Article I, Section 2 of the Palau Constitution, 'Each state shall have exclusive ownership of all living and non-living resources . . . from the land to twelve (12) nautical miles seaward from the traditional baselines.' By legal operation on the foregoing facts, [the] Island is hereby determined to be owned by [NSPLA].

Kual appealed.

STANDARD OF REVIEW

[1] We review the Land Court's legal conclusions de novo and its factual findings for clear error. *Children of Dirrabang v. Children of Ngirailild*, 10 ROP 150, 151 (2003).

DISCUSSION

On appeal, Kual contends that the Land Court erred when it concluded that Article I, § 2, of the Constitution governs ownership of islands, and that even if the Land Court's constitutional interpretation was proper, Ngarchelong State (as opposed to NSPLA) was the proper party to receive title to the island.

I. The Distinction Between Ngarchelong State and NSPLA

As amended, Article I, § 2, of the Constitution provides "each state shall have exclusive ownership of all living and non-living resources, except highly migratory fish, within the twelve (12) nautical mile territorial sea, provided, however, that traditional fishing rights and practices shall not be impaired." ROP Const. amend. XXVI, § 2. Kual first argues that the Land Court erred when it relied on this provision to grant ownership of the Island to NSPLA because Article I, § 2, references states, not state public land authorities. We disagree.

[2] As we recently observed,

> litigants in a Land Court proceeding may advance two types of claims: (1) a superior ownership claim under which the litigant pursues ownership based on the strength of his title; and (2) a return of public lands claim under which a private party "admits

> that title to the land is held by a public entity, but seeks its return." *See Koror State Pub. Lands Auth. v. Wong*, Civ. App. 12-006, slip op. at 4–5 (Oct. 31, 2012) (emphasis omitted). *Where . . . parties assert competing claims of superior ownership, the Land Court must award ownership to the claimant advancing the strongest claim. See Ngirumerang v. Tmakeung*, 8 ROP Intrm. 230, 231 (2000) ("The Land Court can, and must, choose among the claimants who appear before it and cannot choose someone who did not, even though his or her claim might be theoretically more sound.").

Ngirametuker v. Oikull Village, Civ. App. 12-030, slip op. at 6–7 (May 21, 2013) (emphasis added).

Here, Kual advanced a superior title claim. Accordingly, the Land Court was required to award ownership to the claimant advancing the strongest claim. *Id.* In this regard, the Land Court concluded that the true owner of the property was Ngarchelong State and that, since the state itself was not a party, the strongest claimant was NSPLA. Accordingly, if Ngarchelong State is the true owner of the property, the Land Court did not err in determining title in favor of NSPLA.

II. Ownership of the Property

The Land Court concluded that § 2 operates to grant states title to all lands within twelve nautical miles of its shores. Kual contends this was error. We believe that the Land Court's decision may be affirmed on other grounds and thus decline to consider the Constitutional question. *See Ngetelkou Lineage v. Orakiblai Clan*, 17 ROP 88, 93 (2010) ("An appellate court may affirm or reverse a decision of a trial court even though the reasoning differs."); *see also Blanco v. ROP*, 16 ROP 205, 208 (2009) ("[C]ourts should avoid unnecessarily addressing and deciding constitutional issues." (internal punctuation omitted)).

[3] As a rule of law, "[t]he title to islands is ordinarily vested in the owner of the bed of the waters out of which they arise provided there has been no separation of such ownership by grant, reservation, or otherwise." 78 Am. Jur. 2d *Waters* § 353 (citing *City of St. Louis v. Rutz*, 138 U.S. 226, (1891)). Here, there is no dispute that the area below the high water mark (including the seabed) is government land. 35 PNC § 102 ("[A]ll marine areas below the ordinary high watermark belong to the government."). There is also no dispute that the areas below the high water mark are owned by the states. *House of Traditional Leaders v. Koror State Gov't*, 17 ROP 101, 107 (2010) (citing section 2 for the proposition that "[t]he Republic of Palau transferred authority to lands below the high water mark to the state governments."). Because the states own title to the seabed, they own title to the islands arising from the seabed, unless ownership to the island has been separated from ownership of the seabed by sale or other legal means. 78 Am Jur. 2d *Waters* § 353; *see also Ngirametuker*, slip op. at 7–8 (Absent proof that an eligible claimant acquired title, rock islands in Airai State are public land).

Here, the Land Court found, and we agree, that Kual failed to prove that the title

to the Island was separated from title to the seabed. In the absence of such evidence, the Land Court did not err when it found that Ngarchelong State (the owner of the relevant seabed) is the owner of the Island. *See id.*

CONCLUSION

For the foregoing reasons, the determination of the Land Court is **AFFIRMED**.

ESTATE OF TONY NGIRAILILD and DWELYNE NGIRAILILD, co-administrator,
Appellants,

v.

NGARCHELONG PUBLIC LANDS AUTHORITY,
Appellee.

CIVIL APPEAL NO. 12-018
Civil Action No. 01-220

Supreme Court, Appellate Division
Republic of Palau

Decided: August 8, 2013

[1] **Property:** Homesteads

The previously-controlling Trust Territory Homestead Act sets out the following process to perfect a homestead claim and earn title to the government land: (1) the claimant must complete and file an application with the District Land Office; (2) the District Land Office would review the application and submit a recommendation to the District Land Administrator; (3) the District Land Administrator would file the determination with the Clerk of Courts and, if approved, issue an "entry permit" to the claimant to enter the land and to begin improving it based on the conditions set out in the permit; (4) after three years, the District Land Office would inspect the land to determine whether the conditions of the permit had been satisfied and, if so, issue a certification of compliance; and (5) the homestead claimant would be entitled to a deed of conveyance within two years

conveying all of the Trust Territory government's interests in the land.

[2] **Appeal and Error:** Standard of Review

The lower court's factual findings are reviewed using the clearly erroneous standard.

[3] **Appeal and Error:** Standard of Review

The lower court's conclusions of law are reviewed de novo.

Counsel for Appellant: Yukiwo P. Dengokl
Counsel for Appellee: William L. Ridpath

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and R. ASHBY PATE, Associate Justice.

Appeal from the Trial Division, the Honorable LOURDES F. MATERNE, Associate Justice, presiding.

PER CURIAM:

This case concerns an appeal from the Trial Division's denial of a claim to land pursuant to the Trust Territory Homestead Act, 67 TTC §§ 201–13. For the following reasons the decision of the Trial Division is affirmed.[1]

BACKGROUND

The salient facts in this matter are not in dispute. In the late 1940s or early 1950s, Appellant Dwelyne Ngirailild's grandfather, Ngirailild Yaichi ("Ngirailild"), leased from the Trust Territory government an island off the coast of Ngarchelong known as *Ngerkeklau*, which is identified as Cadastral Lot No. F-7-1 and Tochi Daicho Lot No. 1464. Pursuant to that lease, Ngirailild made a home on the island; improved the land; farmed coconuts; and raised animals such as pigs, chickens, and goats.

[1] In early 1962, Ngirailild filed an application for a homestead on *Ngerkeklau*, which was received, filed, and reviewed by the Trust Territory District Land Office. The then-controlling Trust Territory Homestead Act sets out the following process to perfect a homestead claim and earn title to the government land: (1) the claimant must complete and file an application with the District Land Office; (2) the District Land Office would review the application and submit a recommendation to the District Land Administrator; (3) the District Land Administrator would file the determination with the Clerk of Courts and, if approved, issue an "entry permit" to the claimant to enter the land and to begin improving it based on the conditions set out in the permit; (4) after three years, the District Land Office would inspect the land to determine whether the conditions of the permit had been satisfied and, if so, issue a certification of compliance; and (5) the homestead claimant would be entitled to a deed of conveyance within two years conveying all of the Trust Territory government's interests in the land. *See* 67 TTC §§ 201–08.

[1] Although Appellants request oral argument, we determine pursuant to ROP R. App. P. 34(a) that oral argument is unnecessary to resolve this matter.

On consideration of Ngirailild's application, the District Land Advisory Board issued its recommendation that his application be accepted "subject to certain minor restrictions." Beyond evidence of that recommendation, there is not any documentary evidence relating to Ngirailild's homestead claim showing that the District Land Administrator accepted the Board's recommendation, issued an entry permit, inspected Ngirailild's progress and compliance with any conditions of his permit, certified Ngirailild's compliance, surveyed the homesteaded land, or issued any deed of conveyance.

Ngirailild continued to live on *Ngerkeklau* until his death in 1975.

In August 2001, Tony Ngirailild, heir to Ngirailild, filed a quiet title action in the Trial Division seeking title to *Ngerkeklau*, title to which was maintained by Ngarchelong State. Tony Ngirailild died during the pendency of the underlying matter, and his Estate was thereafter substituted as a plaintiff along with its co-administrator, Dwelyne Ngirailild. The Trial Division held a trial on November 7, 8, and 16, 2011, to resolve whether Ngirailild was entitled to a deed of conveyance for *Ngerkeklau*. The Trial Division concluded: (1) *Ngerkeklau* was not conveyed orally to Ngirailild; (2) Ngirailild's homestead application was not approved by the Land District Officer; (3) Ngirailild was not issued an entry permit for *Ngerkeklau*; and (4) Ngirailild did not meet the requirements for a homestead under the Trust Territory Homestead Act and, accordingly, did not acquire fee simple title to the island.

This appeal followed.

STANDARD OF REVIEW

[2] Appellants challenge the trial court's finding that Appellants failed to establish that Ngirailild met the statutory requirements for a homestead. The lower court's factual findings are reviewed using the clearly erroneous standard. *Nebre v. Uludong*, 15 ROP 15, 21 (2008) (citing *Dilubech Clan v. Ngeremlengui State Pub. Lands Auth.*, 9 ROP 162, 164 (2002)). The appellate court's role on clear error review is not to re-weigh the evidence produced below. *Beches v. Sumor*, 17 ROP 266, 272 (2010). Where admissible evidence supports competing versions of the facts, the trial court's choice between them is not clear error. *Id*.

[3] Appellants also contend the trial court improperly applied the law with respect to the necessary proof required to establish entitlement to a homestead. The lower court's conclusions of law are reviewed de novo. *See Wong v. Obichang*, 16 ROP 209, 212 (2009); *Roman Tmetuchl Family Trust v. Whipps*, 8 ROP Intrm. 317, 318 (2001).

ANALYSIS

Appellants' challenges on appeal reduce to two arguments: (1) the trial court clearly erred when it concluded Ngirailild's "homestead application for Ngerkeklau Island was not approved and therefore no entry permit was issued," and (2) the trial court erred as a matter of law when it concluded Ngirailild did not meet the requirements for a homestead and was not entitled to a deed of conveyance for *Ngerkeklau*.

I. Appellants' Challenge to the Trial Division's Factual Findings

Appellants contend it was clear error for the trial court to conclude on this record that Ngirailild's homestead application was not approved and that he was not issued an entry permit.

As noted, there was not any documentary evidence in the record that clearly showed Ngirailild's application was approved or that he was issued an entry permit. The trial court based its conclusions on substantial evidence in the record, which reflects the following: (1) Ngirailild's homestead file did not contain an entry permit for *Ngerkeklau*; (2) Appellants did not provide a record of inspection of Ngirailild's improvements, any conditions of his permit, or a certification of compliance; (3) Ngirailild's name did not appear on the homestead map for Ngarchelong State; (4) the eight homestead owners shown on the Ngarchelong homestead map each were issued entry permits; and (5) *Ngerkeklau* was not included in the surveys of the Ngarchelong homesteads. Accordingly, the Trial Division concluded he did not satisfy the requirements of the Homestead Act and was not entitled to a deed of conveyance for *Ngerkeklau*.

Because they lacked direct evidence, Appellants relied on testimony by Elia Kual, a former Palau Public Lands Authority employee who was involved with review of homestead matters for roughly ten years beginning in 2000. Kual offered possible explanations for the lack of proper documentation, suggesting, for example, that the entry permit had been lost over the years and that the Land Officers may not have performed their duties as required. In reaching its contrary conclusion, the Trial Division determined, in light of the record as a whole, that the testimony of Taro Ngiraingas, a retired surveyor who worked for the Trust Territory government on the official Ngarchelong homestead map, was more credible than the testimony by Kual. In particular, Ngiraingas attested he was instructed to survey each homestead in Ngarchelong, but he was never sent to survey *Ngerkeklau*. Thus, the Trial Division found it "more logical" that Ngirailild's application was not approved and concluded:

> all credible evidence presented show[s] that plaintiff has failed to prove that Yaichi's application was approved and that he met all of the requirements under the Homestead Act. Consequently, there is no basis for this Court to make a determination that he acquired a fee simple title to Ngerkeklau Island.

Of note, the trial court found it particularly difficult to reach a conclusion that Ngirailild had satisfied the conditions of his entry permit because there was not any evidence in the record as to the specific conditions on Ngirailild's homestead.

Appellants also quibble with the Trial Court's determination that Ngirailild's lease of *Ngerkeklau* for several years prior to filing his homestead application was a more likely explanation for the facts that Ngirailild developed the island and was the person who granted permission to visitors of the island. The trial court concluded that the documentary evidence gave stronger support

for its interpretation, because the record contained an actual lease document but not any documentary evidence of the grant of a homestead. Appellants argue this is impermissible speculation on the part of the Trial Division and, ironically, urge this Court to speculate as to the opposite inference—that Ngirailild maintained and developed *Ngerkeklau* pursuant to a homestead that has scant evidentiary support in this record.[2]

Although Appellants go to great lengths in their briefs to paint the facts in the light most favorable to their claim, the Trial Division weighed the relevant evidence and chose between two possible interpretations: the lack of an existing entry permit might mean that one had never been issued; or it might mean that one was issued, was not properly documented by government officials, and was subsequently lost. The Trial Division's choice between these permissible views of the evidence is not clear error, nor does the Court see any basis on this record for disturbing the Trial Division's credibility determination. Accordingly, we affirm the Trial Division's factual findings.

II. Appellants' Challenge to the Trial Division's Legal Conclusions

Appellants also contend that the Trial Division improperly applied the case law interpreting the Trust Territory Homestead Act. Appellants concede the trial court correctly set out the requirements of the statute, but they maintain that subsequent case law clarifies that a homestead claimant need not produce particular documentary evidence to prove his homestead claim. Thus, Appellants argue that the Trial Division erred in its reliance on the fact that there was not any documentary evidence of an entry permit, a certificate of compliance, or a deed of conveyance.

Appellants rely on two cases to support their contention, neither of which controls the outcome of this case nor demonstrates error on the part of the trial court. First, Appellants cite *Tmetuchl v. Siksei* in which this Court determined that a certificate of compliance under the Trust Territory Homestead Act is "not a *sine qua non* of finding ownership." 7 ROP Intrm. 102, 105 (1998). In *Tmetuchl*, we held that a claimant under the Homestead Act could prove through testimony or other means that he had met the homestead requirements and was entitled to the property as a result, even if he did not have a certificate of compliance as required by the statute. *Id.* Under the circumstances of that case, we held the trial court did not err when it concluded the claimant met the homestead requirements despite the lack of certification. *Id.* at 104–05. The Court did not, however, establish any controlling rule of law that would dictate the outcome of this matter. Although the Trial Division could have, as a matter of law, concluded that Ngirailild met the requirements of his entry permit and was therefore entitled to *Ngerkeklau* despite the lack of a certificate of compliance, *Temetuchl* does not require that outcome

[2] Indeed, the Court finds it strange that Appellants make such a strong assertion of factual error on this record based on the testimony of Kual, who admitted he saw Ngirailild's file for the first time in the 1990s, 30 years after the relevant period, and that he did not have any personal knowledge about the issuance, loss, or failure to properly follow up with Ngirailild's entry permit or certificate of compliance.

because it is based on the circumstantial evidence of the particular case. Furthermore, there are crucial factual distinctions between *Tmetuchl* and this matter. In *Tmetuchl*, the claimant had been issued an entry permit, the trial court was able to determine the conditions of that permit, and there was unrebutted evidence in the record from the surveyor of that homestead that the conditions of the permit had been satisfied. *Id.* at 102–03. Factually, the two matters bear little resemblance. In any event, here the trial court did not hold that the lack of a certificate of compliance was fatal to Appellants' claim. Instead, the trial court considered the relevant evidence and determined it was insufficient to satisfy Appellants' burden that an entry permit was ever issued to Ngirailild.[3] Accordingly, we cannot say that our holding in *Tmetuchl* demonstrates any legal error on the part of the Trial Division.

Appellants also cite *Cruz v. Johnston*, a Trust Territory case in which the trial division of the High Court concluded that the High Commissioner could not refuse to issue a deed of conveyance to several homesteaders who had met the conditions of their entry permits. 6 TTR 354, 356–59 (1973). Once again, however, the case does not present any controlling rule of law for this matter. Notably, each of the plaintiffs in *Cruz* were determined to have met the conditions of their entry permits and were issued certificates of compliance. *Id.* at 356–57. The *Cruz* court merely ruled that the High Commissioner must comply with the statutory directive in the Homestead Act to issue a deed of conveyance under those circumstances. *Id.* at 359–61. Here, although the Trial Division heard testimony that Ngirailild met the conditions of his permit, it concluded that no entry permit was ever issued. As set out above, we do not see any error in that finding, and, accordingly, we conclude the holding of *Cruz* is inapplicable to this matter.

CONCLUSION

For the foregoing reasons, the decision of the Trial Division is **AFFIRMED**.

[3] While Appellants correctly contend the lack of a certificate of compliance or even an entry permit is not necessarily fatal to their claim, certainly the fact that those documents cannot be located is relevant to and probative of the trial court's finding that neither was ever issued. The lesson of *Tmetuchl* is merely that such facts alone do not preclude a finding that a homesteader satisfied the statutory requirements.

HEIRS OF ADACHI and KATEY GIRAKED,
Appellants,

v.

KOROR STATE PUBLIC LANDS AUTHORITY,
Appellee;

KOROR STATE PUBLIC LANDS AUTHORITY,
Appellant,

v.

MARIANO TELLEI and MEROL NGIRMERIIL,
Appellees.

CIVIL APPEAL NOS. 12-022 & 12-023
(Consolidated)
LC/B Nos. 04-0119, 04-0134, 04-0135, & 04-0136

Supreme Court, Appellate Division
Republic of Palau

Decided: August 12, 2013

[1] **Appeal and Error:** Standard of Review

We review the Land Court's factual determinations for clear error and will reverse its findings of fact only if the findings so lack evidentiary support in the record that no reasonable trier of fact could have reached the same conclusion.

[2] **Appeal and Error:** Frivolous Appeal

Empirically, appeals challenging the factual determinations of the Land Court are extraordinarily unsuccessful. Given the standard of review, an appeal that merely re-states the facts in the light most favorable to the appellant and contends that the Land Court weighed the evidence incorrectly borders on frivolous.

[3] **Appeal and Error:** Standard of Review

Legal issues will be reviewed de novo.

[4] **Land Commission/LCHO/Land Court:** Burden of Proof

To prevail on return-of-public-lands claim under section 1304(b), a claimant must prove: (1) he or she is a citizen who has filed a timely claim; (2) he or she is either the original owner of the land, or one of the original owner's 'proper heirs;' and (3) the claimed property is public land which attained that status by a government taking that involved force or fraud, or was not supported by either just compensation or adequate consideration.

[5] **Land Commission/LCHO/Land Court:** Burden of Proof

In return-of-public-lands claims, it is well established that: (1) the burden is at all times on the claimant to prove each of the elements of their claim, including that the claimed land became public land; and (2) government ownership of the claimed land is conceded in return-of-public-lands claims.

[6] **Land Commission/LCHO/Land Court:** Burden of Proof

A mere statement that a person is unaware of how the claimed land was acquired by the government and that she had not been told that the land was purchased may be insufficient to support a contention that the claimed lands were wrongfully taken.

[7] **Civil Procedure:** Preservation of Issues

Having found no record of KSPLA's preservation of this issue, the Court deems it waived.

Counsel for Heirs of Adachi: J. Roman Bedor
Counsel for Katey Giraked: Ernestine K. Rengiil
Counsel for KSPLA: Debra B. Lefing
Counsel for Mariano Tellei and Merol Ngirmeriil: Oldiais Ngiraikelau

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and KATHERINE A. MARAMAN, Part-Time Associate Justice.

Appeal from the Land Court, the Honorable RONALD RDECHOR, Associate Judge, presiding.

PER CURIAM:

This case concerns three appeals from the same consolidated Land Court Findings of Fact, Conclusions of Law, and Determination issued on May 7, 2012. For the following reasons, the decision of the Land Court is **AFFIRMED**.[1]

BACKGROUND

The appeals by the Heirs of Adachi, Katey Giraked, and Koror State Public Lands Authority concern six parcels of land in Ngerkesoaol Hamlet, Koror, each of which KSPLA claimed as public lands. The Land Court matter from which Appellants now appeal consolidated the claims of numerous parties to the six parcels in dispute.

In resolving the competing claims before it, the Land Court held hearings on October 10, 2011; January 23-26, 2012, and February 24, 2012. The Land Court issued its Findings of Fact, Conclusions of Law, and Determination on May 7, 2012.

The Land Court determined, among other things, that (1) Appellant Heirs of Adachi failed to meet their burden to show wrongful taking of Worksheet Lots 181-12062, 181-12063, 181-12072, and PK-26, (formerly a part of Tochi Daicho lot 239) and, therefore, failed to prove their return of public lands claims as to those lots; (2) Appellant Giraked failed to meet her burden of proof to show wrongful taking of Worksheet Lots 181-062 and 181-12072 (also formerly a part of Tochi Daicho Lot 239), and, therefore failed to prove her return of public lands claim as to those lots; (3) Appellee Mariano Tellei met his burden to prove his return of public lands claim with respect to Worksheet Lots 181-12056 and 181-12061 and, therefore, was granted ownership of those lots; and (4) Appellee Merol Ngirmeriil met his burden to prove his return of public lands claim with respect

[1] Although Appellant Koror State Public Lands Authority requests oral argument, we determined pursuant to ROP R. App. P. 34(a) that oral argument is unnecessary to resolve this matter.

to Worksheet Lot 181-12063 and, therefore, was granted ownership of that lot.

Heirs of Adachi and Giraked each appeal, asserting the Land Court erred in awarding the claimed lands to KSPLA. KSPLA also appeals the Land Court's award of lands to Tellei and Ngirmeriil.

STANDARD OF REVIEW

Appellants each assert factual challenges to the Land Court's Findings of Fact, Conclusions of Law, and Determination.

[1] We review the Land Court's factual determinations for clear error and will reverse its findings of fact "only if the findings so lack evidentiary support in the record that no reasonable trier of fact could have reached the same conclusion." *Ngirakesau v. Ongelakel Lineage*, Civ. App. Nos. 10-037, slip op. at 5-6 (Nov. 11, 2011) (citing *Palau Pub. Lands Auth. v. Tab Lineage*, 11 ROP 161, 165 (2004)). We will not substitute our view of the evidence for the Land Court's, nor are we obligated to reweigh the evidence or reassess the credibility of witnesses. *See Rengchol v. Uchelkeiukl Clan*, Civ. App. Nos. 10-018 & 10-024, slip op. at 9 (Oct. 7, 2011) (citing *Ebilklou Lineage v. Blesoch*, 11 ROP 142, 144 (2004). *See also Ngarngedchibel v. Koror State Pub. Lands Auth.*, Civ. App. Nos. 10-047 & 11-002, slip op. at 5 (Feb 23, 2012). "Where there are two permissible views of the evidence, the court's choice between them cannot be clearly erroneous." *Rengchol*, slip op. at 6 (citing *Ngirmang v. Oderiong*, 14 ROP 152, 153 (2007)).

[2] With respect to appeals that challenge a court's factual findings, this Court recently held:

> Empirically, 'appeals challenging the factual determinations of the Land Court . . . are extraordinarily unsuccessful.' *Kawang Lineage v. Meketii Clan*, 14 ROP 145, 146 (2007). Given the standard of review, an appeal that merely re-states the facts in the light most favorable to the appellant and contends that the Land Court weighed the evidence incorrectly borders on frivolous.

Koror State Pub. Lands Auth. v. Tmetbab Clan, Civ. App. No. 11-014, slip op. at 6 (July 2, 2012). *See also Estate of Dingilius v. Peleliu State Pub. Lands Auth.*, Civ. App. No. 11-005, slip op. at 5 (June 5, 2012) (citing *Kawang Lineage v. Meketii Clan*, 14 ROP 145, 146 (2007)).

[3] In addition, Heirs of Adachi raise a single legal issue on appeal, which we review de novo. *Rengchol v. Uchelkeiukl Clan*, Civ. App. Nos, 10-018 & 10-024, slip op. at 6 (Oct. 7, 2011) (citing *Sechedui Lineage v. Estate of Johnny Reklai*, 14 ROP 169, 170 (2007)).

ANALYSIS

Heirs of Adachi contend the Land Court erred by failing to hold KSPLA to the burden to prove the land at issue is public land and by concluding that Heirs of Adachi failed to meet their burden to prove a wrongful taking of their land as a part of their return-of-public-lands claims to Lots 181-12062, 181-12063, 181-12072, and

portions of PK-26. Giraked argues the Land Court erred when it concluded she failed to meet her burden to prove a wrongful taking as a part of her return-of-public-lands claims to Lots 181-12062 and 181-12072.[2] Finally, KSPLA appeals the Land Court's award of lands to Appellees Tellei and Ngirmeriil and contends the Land Court erred on the grounds that (1) Tellei failed to meet his burden to prove he filed timely claims for Lots 181-12056 and 181-12061, and (2) Ngirmeriil failed to meet his burden to prove a wrongful taking of Lot 181-12063 as a part of his return-of-public-lands claim.

[4] To prevail on return-of-public-lands claim under section 1304(b), a claimant must prove:

> (1) he or she is a citizen who has filed a timely claim; (2) he or she is either the original owner of the land, or one of the original owner's 'proper heirs;' and (3) the claimed property is public land which attained that status by a government taking that involved force or fraud, or was not supported by either just compensation or adequate consideration.

Palau Pub. Lands Auth. v. Ngiratrang, 13 ROP 90, 94 (2006).

I. Heirs of Adachi Appeal

[5] Attendant to their factual challenge on appeal, Heirs of Adachi initially argue that KSPLA failed to prove that Lots 181-12062, 181-12063, 181-12072 are, in fact, public lands. The Court need not elaborate on this basic point of law any more than to repeat two well-established legal principles relating to return-of-public-lands claims: (1) the burden is at all times on the claimant to prove each of the elements of their claim, including that the claimed land became public land, *see Salii v. Koror State Pub. Lands Auth.*, 17 ROP 157, 160 (2010); and (2) government ownership of the claimed land is conceded in return-of-public-lands claims, *Airai State Pub. Lands Auth. v. Seventh Day Adventist Mission*, 12 ROP 38, 41 (2004). Accordingly, the Land Court did not err in failing to require KSPLA to prove the claimed lands are public lands.

Heirs of Adachi also contend the Land Court erred when it concluded that Heirs of Adachi did not meet their burden to prove that the claimed lots were wrongfully taken. As an initial matter, Heirs of Adachi appear to contend that the mere fact that KSPLA claims it owns the lots at issue is itself, ipso facto, evidence of a wrongful taking from the Heirs of Adachi. That is plainly not the case. As noted, Heirs of Adachi bear the burden to prove the lands they claim were taken by force or fraud or were obtained without just compensation or adequate consideration. *Ngiratrang*, 13 ROP at 94. The fact that the lands were acquired by a previous occupying power does not itself prove anything wrongful occurred.

Heirs of Adachi also argue they provided sufficient evidence to meet their burden to demonstrate their claimed lands were wrongfully taken. The transcript, however, is largely bereft of any testimony by Heirs of Adachi as to the circumstances

[2] Although Giraked included Lot PK-26 in her Notice of Appeal as a part of her challenge to the Land Court's Decision, she withdraws that portion of her appeal in her Opening Brief.

under which their claimed lands were publicly acquired, wrongful or otherwise. The only testimony Heirs of Adachi identifies in the record is the statement by Satoru Adachi that it is his "understanding" the lands at issue were "not bought." Even if such testimony was unrebutted and credited by the Land Court, it is not necessarily sufficient to establish a wrongful taking, because the property may have been acquired by lawful means other than a purchase. In any event, without any details about the nature of the public acquisition of the claimed lands, we cannot say that the Land Court clearly erred in finding that Heirs of Adachi did not provide sufficient evidence to meet their burden to show the claimed lands were wrongfully taken. *See, e.g., Estate of Ngiramechelbang v. Ngardmau State Pub. Lands Auth.*, 12 ROP 148, 150-51 (2005) ("[W]e find that there was sufficient evidence to support the Land Court's finding that Rimat did not establish a wrongful taking. Rimat provided the court with no details about who took the land or how the land was taken, other than to state that the land was taken without compensation. . . . Rimat's suggestion that the Land Court could not discount her testimony because it was undisputed ignores the clearly established precedent that a judge may choose to disbelieve even uncontroverted evidence."). Accordingly, we affirm the Land Court's conclusion that Heirs of Adachi did not prove their claimed lands were wrongfully taken.

II. Giraked Appeal.

Giraked raises a similar factual challenge to the Land Court's determination, arguing the Land Court clearly erred in reaching the conclusion that she failed to meet her burden to prove a wrongful taking as a part of her return-of-public-lands claims to Lots 181-12062 and 181-12072. Specifically, Giraked contends the Land Court erred in its finding that Giraked "denied the land was ever taken by the government" and that she "provided no evidence to establish the land . . . was wrongfully taken."

Giraked's testimony regarding the wrongful taking aspect of her return-of-public-lands claim is extremely thin. Her relevant testimony on this aspect of her claim, for which she carries the burden of proof, was: (1) despite limited use by the Japanese during the war, she continued to use the property even after the war had ended and after her father, Ngiraked, had died; (2) her father never told her that the Japanese purchased the property, and (3) she never found out how the land was acquired but only "hear[d] that it is a government property." In her Opening Brief, Giraked contends this testimony shows she "did not know that the Japanese or TT government bought the lots she is claiming."

[6] The analysis here is no different than for the Heirs of Adachi, above, based on the Court's holding in *Ngiramechelbang*. A mere statement that a person is unaware of how the claimed land was acquired by the government and that she had not been told that the land was purchased, at least under these circumstances, can barely be construed as supporting the contention that the claimed lands were wrongfully taken. Indeed, as with the Heirs of Adachi, on this record it is unclear as to how, when, or by whom the claimed lots were taken. To the extent Giraked requests this Court to reweigh the evidence or to reevaluate the credibility of

her testimony in order to find in her favor, we decline to do so. *See Rengchol*, slip op. at 9. A reasonable trier of fact could have reached the same conclusion as the Land Court in finding that Giraked's evidence was insufficient to carry her burden to prove her claimed lands were wrongfully taken. Accordingly, we affirm the Land Court's decision.

III. KSPLA's Appeal.

KSPLA raises two arguments on appeal. First, KSPLA contends the Land Court clearly erred as a matter of fact when it found that Appellee Tellei filed a timely claim to Lots 181-12056 and 181-12061. Second, KSPLA maintains the Land Court committed clear error when it found that Appellee Ngermeriil proved a wrongful taking of Lot 181-12063.

A. Tellei's Claims.

During the underlying proceedings on September 20, 2011, Tellei filed a Notice of Additional Claim in which he sought to include Lots 181-12056 and 181-12061 in his initial claim for Lot 181-12063, and the Land Court took testimony concerning the scope of Tellei's claims. KSPLA contends that it was error for the Land Court to conclude that those additional claims were timely because they were not filed as a part of Tellei's original claim before the January 1, 1989, deadline for return-of-public-lands claims. In other words, KSPLA maintains on appeal that Tellei's claims to Lots 181-12056 and 181-12061 were untimely, and it was error to conclude otherwise.

Before addressing the merits of KSPLA's argument, Tellei notes that KSPLA did not raise this argument during the underlying proceedings, and, therefore, the Land Court did not have an opportunity to rule on any such objection. As Tellei points out, the Court postponed the hearings in this matter to resolve KSPLA's objection to Tellei's claim based on the concern that the claims had not properly been registered and noticed and that there might be additional claimants to the lots. On Order of the Land Court, the proceedings were postponed, and Chamberlain Ngiralmau, Land Registration Officer with the Bureau of Land and Surveys, investigated the claims to those lots. Based on his investigation, Ngiralmau testified the claimed lots were properly registered, noticed, and monumented and that there were not any new claims to those lots beyond those before the Land Court at the time of his testimony. Tellei testified at length that his timely-filed original claim was associated initially with the pre-Tochi Daicho designation "Lot 167" and encompassed both Lots 181-12056 and 181-12061, which became associated with Tochi Daicho Lot 239. According to Ngiralmau and as evidenced by the record, the claims by Tellei were apparently sufficient for BLS to register the land, provide public notice, monument the lots, and map them on a Worksheet Map. After Ngiralmau's testimony, the Land Court proceeded with Tellei's claims to Lots 181-12056 and 181-12061 without any objection by KSPLA as to the timeliness of those claims. In its written closing arguments, KSPLA continued to maintain those lots were not properly registered and that Tellei's claim to Lot 181-12063 was outside of his original claim because it corresponded to Tochi Daicho Lot 240. Both of those arguments have been abandoned on appeal in favor of the argument that the claims for

Lots 181-12056 and 181-12061 were not timely filed.

[7] It is important to clarify that KSPLA's argument is presented solely as a clear error review of the Land Court's factual finding that Tellei presented a timely claim, rather than as a legal challenge to the conclusion that Tellei's "additional claims" were properly considered as a part of Tellei's original claim. The Court notes KSPLA elected not to file a reply to Tellei's argument and, therefore, did not take the opportunity to point to any portion of the trial record showing that it preserved this issue for appeal, nor does KSPLA state any evidentiary basis on which to base its present argument. As set out above, the Court has reviewed the relevant portions of the record, which do not reflect that KSPLA raised this argument for the Land Court's consideration either during the hearing or in its written closing. Having found no record of KSPLA's preservation of this issue, the Court deems it waived. *See Kotaro v. Ngirchechol*, 11 ROP 235, 237 (2004) ("No axiom of law is better settled than that a party who raises an issue for the first time on appeal will be deemed to have forfeited that issue, even if it concerns a matter of constitutional law.").

B. Ngirmeriil's Claim.

KSPLA also challenges the Land Court's award of Lot 181-12063 to Ngirmeriil on the ground that the Land Court committed clear error when it found Ngirmeriil proved a wrongful taking. Specifically, KSPLA argues Ngirmeriil's testimony was too vague and general to be sufficient to carry his burden.

In contrast to the claims by Heirs of Adachi and Giraked already discussed, the Land Court noted Ngirmeriil's testimony that his grandfather, Yaoch Ngirametuker, sold some of the surrounding lots but maintained ownership of and continued farming on the claimed lot until the Japanese told Ngirametuker they were going to farm pineapples on his property, that he could no longer use the land, and that he would not receive compensation. Ngirmeriil's testimony at the hearing echoes the Land Court's findings, explaining that the Japanese told Youch he could no longer farm the land near a Japanese shrine that was in the area and that they used Yaoch's land to farm pineapples. Tr. 42-43, 64.

KSPLA cites *Ngiramechelbang* for the general proposition that a statement that land was taken without compensation is insufficient to carry a claimant's burden of proof as to a wrongful taking. 12 ROP at 150-51. We did not, however, make such a general statement of law in *Ngiramechelbang*. Instead, we held that we could not say the Land Court erred in finding that the testimony of the claimant lacked credibility because it was so lacking in detail as to the nature of the alleged wrongful taking. *Id.* We did not preclude the possibility of finding such limited testimony both credible and sufficient under other circumstances. Nevertheless, we note the crucial distinctions between the testimony of Giraked and Heirs of Adachi discussed above and Ngirmeriil's testimony. In contrast to the testimony in *Ngiramechelbang*, Ngirmeriil was able to identify: who gave him the information about how the land was taken (his mother and maternal uncle, Olkeriil), who took the land (the Japanese), for what purpose the

land was taken (to farm pineapples and to make a buffer around a nearby shrine), that there was an order given to abandon the land, to whom the Japanese issued their instruction to abandon the land (Yaoch Ngirametuker), and that no compensation was paid. This testimony is more detailed than that discussed in *Ngiramechelbang* and is far from KSPLA's description as "vague" and "general." KSPLA does not identify any contrary testimony in the record but merely maintains this testimony is insufficient. We disagree and conclude that a reasonable trier of fact could have reached the same conclusion as the Land Court in finding the claimed lot was wrongfully taken.

CONCLUSION

For the foregoing reasons, the decision of the Land Court is **AFFIRMED**.

KOROR STATE PUBLIC LANDS AUTHORITY,
Appellant,

v.

KATEY GIRAKED,
Appellee.

CIVIL APPEAL NO. 12-035
LC/B No. 08-0297

Supreme Court, Appellate Division
Republic of Palau

Decided: August 13, 2013

[1] **Appeal and Error:** Standard of Review

We review the Land Court's factual determinations for clear error and will reverse its findings of fact only if the findings so lack evidentiary support in the record that no reasonable trier of fact could have reached the same conclusion.

[2] **Appeal and Error:** Frivolous Appeal

Empirically, appeals challenging the factual determinations of the Land Court are extraordinarily unsuccessful. Given the standard of review, an appeal that merely re-states the facts in the light most favorable to the appellant and contends that the Land Court weighed the evidence incorrectly borders on frivolous.

[3] **Return of Public Lands:** Burden of Proof

To prevail on a return-of-public-lands claim under section 1304(b), a claimant must

prove: (1) he or she is a citizen who has filed a timely claim; (2) [he or] she is either the original owner of the land, or one of the original owner's 'proper heirs;' and (3) the claimed property is public land which attained that status by a government taking that involved force or fraud, or was not supported by either just compensation or adequate consideration.

Counsel for Appellant: J. Uduch Sengebau Senior
Counsel for Appellee: Yukiwo P. Dengokl

BEFORE: KATHLEEN M. SALII, Associate Justice; R. ASHBY PATE, Associate Justice; and KATHERINE A. MARAMAN, Part-Time Associate Justice.

Appeal from the Land Court, the Honorable SALVADOR INGEREKLII, Associate Justice, presiding.

PER CURIAM:

This appeal arises from the Land Court's award of part of the land in Ngerchemai Hamlet, Koror, known as *Isngull*,[1] to Appellee Katey Giraked (Appellee) pursuant to her return-of-public-lands claim under Article XIII, § 10 of the Constitution and 35 PNC § 1304. For the following reasons the decision of the Land Court is affirmed.[2]

BACKGROUND

In its Findings of Fact, Conclusions of Law, and Determination issued on August 14, 2012, the Land Court made the following findings as to Appellee's claim for return of public land:

1. Lot 247 is listed in the Tochi Daicho as owned by the Tropical Industrial Research Bureau of the South Seas Islands Government Agency.

2. Presently, Lot 247 is classified as public land administered by KSPLA. KSPLA has leased lots within Lot 247.

3. Ngiraked owned a large tract of land known as *Isngull* which he conveyed to [his] child Katey Ochob Giraked.

4. The land *Isngull* consists of several Tochi Daicho Lots several of which have been adjudicated and title issued to Katey Giraked.

5. Lot 247, inclusive of the lots before the Court, is part of a larger tract of land *Isngull*.

6. Ngiraked aka Giraked is the father of claimant Katey Ochob Giraked.

7. The land *Isngull* was formerly owned by Ngiraked and wrongfully taken by the Japanese without compensation, and registered as owned by a Japanese Governmental Agency.

[1] The lots at issue are identified as Cadastral Lot Nos. 021 B 04 and 021 B 05, formerly Tochi Daicho Lot 247.

[2] Although Appellant requests oral argument, we determine pursuant to ROP R. App. P. 34(a) that oral argument is unnecessary to resolve this matter.

8. While still maintaining ownership and control over Lot 247 and prior to its wrongful taking by the Japanese, Ngiraked leased part of Lot 247 to a Japanese national who owned and operated a store on the land.

With respect to Appellee's status as the proper heir to Ngiraked's property, the Land Court concluded based on testimony in the record that Ngiraked declared his intent to have his daughter, Appellee, inherit all of his properties, including *Isngull*.

Based on these factual findings, the Land Court determined that Appellee had met the burden of proof as to her claim for return of public land by a preponderance of the evidence. The Land Court awarded the lots at issue to Appellee.

This appeal followed.

STANDARD OF REVIEW

Appellant Koror State Public Lands Authority challenges only the Land Court's finding that Appellee is the "proper heir" to the original owner of the claimed land.

[1] We review the Land Court's factual determinations for clear error and will reverse its findings of fact "only if the findings so lack evidentiary support in the record that no reasonable trier of fact could have reached the same conclusion." *Ngirakesau v. Ongelakel Lineage*, Civ. App. Nos. 10-037, slip op. at 5–6 (Nov. 11, 2011) (citing *Palau Pub. Lands Auth. v. Tab Lineage*, 11 ROP 161, 165 (2004)). We will not substitute our view of the evidence for the Land Court's, nor are we obligated to reweigh the evidence or reassess the credibility of witnesses. *See Rengchol v. Uchelkeiukl Clan*, Civ. App. Nos. 10-018 & 10-024, slip op. at 9 (Oct. 7, 2011) (citing *Ebilklou Lineage v. Blesoch*, 11 ROP 142, 144 (2004)). *See also Ngarngedchibel v. Koror State Pub. Lands Auth.*, Civ. App. Nos. 10-047 & 11-002, slip op. at 5 (Feb. 23, 2012). "Where there are two permissible views of the evidence, the court's choice between them cannot be clearly erroneous." *Rengchol*, slip op. at 6 (citing *Ngirmang v. Oderiong*, 14 ROP 152, 153 (2007)).

[2] With respect to appeals that challenge a court's factual findings, this Court recently held:

> Empirically, 'appeals challenging the factual determinations of the Land Court . . . are extraordinarily unsuccessful.' *Kawang Lineage v. Meketii Clan*, 14 ROP 145, 146 (2007). Given the standard of review, an appeal that merely re-states the facts in the light most favorable to the appellant and contends that the Land Court weighed the evidence incorrectly borders on frivolous.

Koror State Pub. Lands Auth. v. Tmetbab Clan, Civ. App. No. 11-014, slip op. at 6 (July 2, 2012). *See also Kawang Lineage v. Meketii Clan*, 14 ROP 145, 146 (2007)).

ANALYSIS

[3] To prevail on a return-of-public-lands claim under section 1304(b), a claimant must prove:

> (1) he or she is a citizen who has filed a timely claim; (2) [he or] she is either the original owner of the land, or one of the original owner's 'proper heirs;' and (3) the claimed property is public land which attained that status by a government taking that involved force or fraud, or was not supported by either just compensation or adequate consideration.

Palau Pub. Lands Auth. v. Ngiratrang, 13 ROP 90, 94 (2006).

Appellant challenges only the second element of Appellee's claim and concedes the balance of the Land Court's factual findings set out above. According to Appellant, the Land Court clearly erred when it found that Appellee is the proper heir to Ngiraked's ownership interest in the portion of *Isngull* at issue in Appellee's claim, a finding the Land Court concluded was "beyond dispute." Specifically, and without any legal support, Appellant contends that Appellee is not the proper heir under 35 PNC § 1304(b) because "[w]hen Ngiraked gave the land Isngull to Katey" in advance of his death in 1940, "Ngiraked did not own Tochi Daicho Lot 247." In other words, Appellant contends that because Ngiraked's land was wrongfully taken by the Japanese government, Ngiraked did not own the land and his attempt to devise the land to his daughter was, therefore, ineffective. In support of its argument, Appellant points to the Land Court's factual finding that Tochi Daicho Lot 247 was still owned by an agency of the Japanese Government as of 1960 and, thus, "[t]he Land Court cannot award Tochi Daicho Lot 247 to Katey Giraked based on what her father told her before his death in 1940!"

One might generously characterize this argument as novel. Appellant certainly does not point to any legal authority to support its assertion of error, and we are not aware of any of our decisions that lend even slight credence to the argument. It is self-evident that a person whose land has been taken by force or without just compensation is no longer in possession of the property such that the owner may affect an actual transfer of the property. The purpose of Article XIII, § 10 and the statutory return-of-public-lands process is, quite obviously, to correct such injustices. The question for the trial court under these circumstances, when it is conceded that the land has been wrongfully taken, is to whom the land should be returned.

In *Markub v. Koror State Public Lands Authority*, we explained the appropriate inquiry relating to the Land Court's determination of a "proper heir":

> Article XIII, Section 10, is a command to the national government to act swiftly to undo past injustice. Where land was wrongfully taken by a foreign power, the government has the duty to find the "original owners or their heirs" and give it back. . . . There is no reason to believe that the framers of the Constitution, faced with the choice of returning the land to "the most closely related persons who filed a timely claim" and doing nothing, would have chosen the latter.

* * *

> Looking at §1304(b), the language of the statute does not compel us to put aside other indicators of legislative intent and public policy and enforce the statute as written. While it is possible to read the words "proper heirs" to mean only the exact persons dictated by the intestacy statute, it is not the lone interpretation. The addition of the word "proper" could have been meant simply to ensure that a claimant show a true relationship to the original landowner, or, as between competing claimants, to ensure that the Court choose the one with the strongest claim. As the *Masang* opinion recognized, in all other land matters, we have directed the Land Court to "choose among the claimants who appear before it" even if, as sometimes happens, there is another person whose claim "might be theoretically more sound" but who failed to file a claim. *Ngirumerang v. Tellames*, 8 ROP Intrm. 230, 231 (2000); *see Masang*, 9 ROP at 128 n.3. There is thus nothing extraordinary in finding that "the most closely related persons failed to file claim" are "proper heirs" within the meaning of §1304(b).

14 ROP 45, 48–49 (2007) (footnote omitted). Thus, the lesson of *Markub* is that the phrase "proper heir" is defined broadly in light of its constitutional and statutory context and the injustice that return-of-public-lands claims are designed to remedy. Here, the Land Court found the land at issue was taken by force and without compensation by the Japanese government. The Court also found the original owner, Ngiraked, is Appellee's father and that he declared his wish in advance of his death that his properties should go to Appellee. Those findings are not challenged. The Land Court concluded: "By a preponderance of the evidence Katey has established that she is the proper heir of her father, Ngiraked, entitled to inherit *his ownership interest* to Lot 247." Emphasis added. Accordingly, Appellee is an heir of the original owner, and, considering *Markub*, we have no difficulty upholding the Land Court's determination on this record that Appellee is also the proper heir to Ngiraked's interest as the rightful owner of the portion of *Isngull* at issue here.[3] It is *presumed* in the context of a return-of-public-lands claim that Ngiraked did not own the land at issue at the time of his declaration that his properties should go to his daughter. Appellant's insistence that Appellee must somehow prove that Ngiraked effectively transferred actual ownership of and title to Lot 247 to Appellee in order to succeed on her return-of-public-lands claim is nonsense. If that had occurred, Appellee would not have needed to file a legal claim seeking an award of ownership of the land from the government.

Appellant's argument contains two poorly developed challenges to the Land Court's findings that Lot 247 was part of the land known as *Isngull* and that Ngiraked

[3] Although the evidence adduced at trial here renders it unnecessary to take judicial notice of our previous ruling, the Court feels obliged to note that we have already upheld the finding that Appellee is the proper heir of Ngiraked in another matter involving Appellee's claims to lots that are part of *Isngull* based on Ngiraked's customary declaration of his wish to bequeath his lands to Appellee. *See Rechucher v. Ngiraked*, 10 ROP 20, 26–27 (2002).

distributed his properties to Appellee in accordance with custom. Despite expert testimony that Ngiraked's statement of his intent to transfer his lands to Appellee was effective to eliminate the need for an ebedel a kesol to discuss and then to distribute those lands at an cheldecheduch, Appellant argues without reference to any supporting testimony that the lack of an cheldecheduch undermines Appellee's status as the proper heir. The Court has reviewed the record with respect to both findings and concludes there is substantial testimony in the record to support both, such that a rational trier of fact could reach the same conclusions. *See* Tr. 8–12, 23–26, 31, 36–41. Appellant does not cite to any contrary testimony in the record that would convince us that the Land Court committed clear error in either respect, and further discussion is not warranted.

This appeal was, at best, unnecessary and, at worst, frivolous. Ultimately, this appeal reduces to Appellant's perceived tension between the Land Court's finding that another entity owned the land that Ngiraked purported to devise to his daughter and the finding that she is, in fact, the proper heir to that land. No such tension exists, and we emphatically put that argument to rest now.

CONCLUSION

For the foregoing reasons, the decision of the Land Court is **AFFIRMED**.

KLAI CLAN,
Appellant,

v.

AIRAI STATE PUBLIC LANDS AUTHORITY,
Appellee.

CIVIL APPEAL NO. 12-051
LC/N 08-825

Supreme Court, Appellate Division
Republic of Palau

Decided: August 22, 2013

[1] **Land Commission/LCHO/Land Court**: Claims

A Land Court claimant may raise one of two types of claims: (1) a superior title claim, in which the claimant asserts he holds the strongest title to the land claimed; and (2) a return of public lands claim, in which the claimant concedes that a public entity holds superior title to the land, but argues that the title was acquired wrongly from the claimant or his predecessors.

[2] **Land Commission/LCHO/Land Court**: Claims

Although return and superior title claims may be raised in the alternative, a claimant desiring to pursue both types of claims must present and preserve the separate claims individually.

[3] **Land Commission/LCHO/Land Court**: Claims

If a claim has not been preserved properly, it may not be considered.

[4] **Land Commission/LCHO/Land Court**: Rules and Regulations

The Rules of Civil Procedure do not govern proceedings in the Land Court.

[5] **Land Commission/LCHO/Land Court**: Rules and Regulations

The Land Court's authority flows from the Land Claims Reorganization Act, the Rules and Regulations promulgated pursuant to the LCRA, and from the Land Court's inherent powers.

[6] **Statutes**: Land Claims Reorganization Act

The Land Claims Reorganization Act does not provide the authority for the Land court to transform an untimely land claim into a timely one simply by trying it with the parties' consent.

[7] **Courts:** Inherent Powers

A court's inherent authority is limited to those powers necessary to carrying out its functions as a court.

[8] **Courts:** Inherent Powers; **Land Commission/LCHO/Land Court**: Rules and Regulations

The power to amend a pleading by trying an issue by consent is unnecessary for the Land Court to carry out its function.

Counsel for Appellant: Moses Uludong
Counsel for Appellee: Mariano Carlos

BEFORE: KATHLEEN M. SALII, Associate Justice; LOURDES F. MATERNE. Associate Justice; and R. ASHBY PATE, Associate Justice.

Appeal from the Land Court, the Honorable RONALD RDECHOR, Associate Judge, presiding.

PER CURIAM:

This appeal arises from a Land Court decision awarding Appellee Airai State Public Lands Authority (ASPLA) ownership of a parcel of land identified as Lot 002-N06 on Cadastral Plat No. 002 N 00 (the Land). For the following reasons, we **AFFIRM** the decision of the Land Court**.**

BACKGROUND

On December 31, 1988, Ebilraklai Ngetwai Ngirarchereang, acting on behalf of Appellant Klai Clan, filed a "Claim[] for Public Lands (Pursuant to 35 PNC § 1104)" for the Land. In its claim, the Clan alleged that the Japanese administration took and used the Land without paying compensation. The claim asserted an interest of "[f]ee simple absolute ownership in Klai Clan," and alleged that the Land "has been Clan property as far back as can be remembered." Elsewhere, the Clan alleged "[t]his property has always been Klai Clan property." Approximately ten years later, on April 27, 1999, Tungelel Lineage filed a "Claim of Land Ownership" for the Land.

On August 20, 2012, the Land Court convened a hearing to resolve the outstanding claims. At the commencement of the hearing, the Land Court noted that ASPLA had been served with notice of the hearing, but that it failed to appear.

Following this observation, Klai Clan presented witness testimony purporting to show that it held title to the Land and that title never passed to the Japanese administration.

At the beginning of the second day of trial, the Land Court admonished Klai Clan's counsel: "Before we begin . . . when I look at [your claim], it's claiming for the return of public lands. I don't know if you have changed . . . and now you're claiming that this is not public land . . ." Counsel for Klai Clan responded: "We are claiming for return of public land and as original owner. [B]ut our claim says original owner . . . . we never lost ownership of the land . . . . [If] it turns out to be a public land then we're taking it through both." The Land Court then allowed Klai Clan to continue presenting its case.

Following two additional days of testimony, the Land Court issued its Decision. In its Decision, the Land Court wrote:

> During the hearing, the Court counseled Klai Clan that its claim was for return of public lands and admonished counsel to present evidence relevant to such a claim. Counsel for Klai Clan, however, ignored this advice and continued to make arguments consistent with a superior ownership claim. Klai Clan's refusal to make arguments consistent with its pleadings does not alter the pleadings it made. Consequently, this Court will address the claim as one of return of public lands.

(internal citation omitted).

The Land Court held that Klai Clan failed to meet its burden under the return of public lands standard and, having also rejected Tungelel Lineage's claim, awarded ownership of the Land to ASPLA.

Klai Clan appealed.

STANDARD OF REVIEW

We review the Land Court's legal conclusions de novo and its factual findings for clear error. *Kotaro v. Ngotel*, 16 ROP 120, 121–22 (2009).

DISCUSSION

[1-3] As we have explained many times before, a Land Court claimant may raise one of two types of claims: (1) a superior title claim, in which the claimant asserts he holds the strongest title to the land claimed; and (2) a return of public lands claim, in which the claimant concedes that a public entity holds superior title to the land, but argues that the title was acquired wrongly from the claimant or his predecessors. *See Koror State Pub. Lands Auth., v. Wong*, Civ. App. 12-006, slip op. at 4–5 (Oct. 31, 2012) (describing two types of claims). Although return and superior title claims may be raised in the alternative, *Kerradel v. Ngaraard State Pub. Lands Auth.*, 9 ROP 185, 185–86 (2002), a claimant desiring to pursue both types of claims must present and preserve the separate claims individually. *See Idid Clan v. Koror State Public Lands Auth.*, 9 ROP 12, 14 n.3 (2001) (alternative claims must be "presented and preserved as if they were presented by different persons."). If a claim

has not been preserved properly, it may not be considered. L.C. Reg. 12 ("Any claim which is not timely filed shall be forfeited."); *Ngarameketii v. Koror State Pub. Lands Auth.*, 16 ROP 229, 231 (2009) (return of public lands claim may not be considered as superior title claim in order to avoid statutory deadline).

The Land Court's Regulations provide explicitly that "[a]ll claims to private lands must be filed with the Land Court no later than 60 days prior to the date set for hearing of the land claimed [and that t]he deadline for claims to public land was January 1, 1989." L.C. Reg. 11.

Here, the Land Court found, and Klai Clan does not dispute, that the only filed claim was for a return of public lands. On appeal, the Clan quotes Rule 15 of our Rules of Civil Procedure, which provides "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised by the pleadings." The Clan argues that, by trying the superior title claim with the parties' consent, the Land Court amended the Clan's return of public lands claim to include a superior title claim, and that, therefore, the Land Court's refusal to consider such claim was in error. Because we believe such amendment falls outside the Land Court's authority, Klai Clan's argument fails.

[4, 5] Importantly, the Rules of Civil Procedure do not govern proceedings in the Land Court. *Sadang v. Ongesii*, 10 ROP 100, 101–02 (2003). Rather, the Land Court's authority flows from the Land Claims Reorganization Act (35 PNC §§ 1301, et seq.), the Rules and Regulations promulgated pursuant to the LCRA, and from the Land Court's inherent powers. *See id.* (where power to reconsider decision is not set forth in Land Court's statute, "if the Land Court may afford a party relief from a determination of ownership, it must be through some inherent Land Court authority."). Thus, if the Land Court has the authority to transform an untimely superior title claim into a timely one simply by trying the claim with the parties' consent, such power must come from one of three sources—the LCRA, the Land Court's Rules and Regulations, or the Land Court's inherent powers. *Id.*

I. The Land Claims Reorganization Act and the Land Court's Rules and Regulations

[6] The Land Claims Reorganization Act does not provide the authority for the Land court to transform an untimely land claim into a timely one simply by trying it with the parties' consent. It does, however, grant the Supreme Court authority to "promulgate special procedural and evidentiary rules designed to allow claimants to represent themselves without the aid of legal counsel." 35 PNC § 1310(a).

Acting pursuant to that statutory direction, the Supreme Court established Rules of Procedure and Rules and Regulations for the Land Court. *See* L.C. Reg. 1–32; *see also* L.C. R. Proc. 1–20. Similar to the LCRA, neither the Rules of Procedure nor the Rules and Regulations provide the power to amend by consent to the Land Court. To the contrary, the Rules and Regulations set forth specific deadlines for filing claims and provide that untimely claims shall be forfeited. L.C. Reg. 11–12.

Accordingly, for the power to exist, it must reside in the Land Court's inherent authority. *Sadang*, 10 ROP at 101–02.

II. The Land Court's Inherent Authority

[7] A court's inherent authority is limited to those "powers necessary to . . . carrying out [its] functions as [a] court[]." *Cushnie v. Oiterong*, 4 ROP Intrm. 216, 218 (1994). In light of the fact that, "[t]he primary function of courts is to make decisions with regard to matters properly brought before them," 20 Am. Jur. 2d *Courts* § 34, we have held that a court has the inherent authority to reconsider its decisions, *Shmull v. Ngirirs Clan*, 11 ROP 198, 202–03 (2004); enforce its judgments, *Bechab v. Anastacio*, Civ. App. 12-007, slip op. at 12 (Jan. 11, 2013); and issue penalties for contempt, *Cushnie*, 4 ROP at 218–19.

[8] Unlike the three inherent powers articulated above, the power advanced by Klai Clan—amending a pleading by trying the issue by consent—is unnecessary for the Land Court to carry out its function to the extent that it would permit the Land Court to render a decision on a claim not property before it—that is, a claim filed less than sixty days before a hearing. *See* L.C. Reg. 11–12 (untimely claims are forfeited).

CONCLUSION

For the reasons set forth above, we reject Klai Clan's sole enumeration of error—that its claim was amended when the Land Court tried the superior title issue. Accordingly, we **AFFIRM** the Land Court's Decision.

DEBORAH RENGIIL, MARGO LLECHOLCH, and SHERRY TADAO,
Appellants,

v.

REPUBLIC OF PALAU,
Appellee.

CRIM. APPEAL NO. 12-001
Crim. Case No. 10-038
Supreme Court, Appellate Division
Republic of Palau

Decided: August 28, 2013

[1] **Review and Error:** Reconsideration of Appellate Opinions

Petitions for rehearing should be granted exceedingly sparingly, and only in those cases where this Court's original decision obviously and demonstrably contains an error of fact or law that draws into question the result of the appeal.

Counsel for Petitioner, Deborah Rengiil:
Mariano Carlos
Counsel for Respondent, Republic of Palau:
Brentley S. Foster

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; LOURDES F. MATERNE, Associate Justice; and KATHERINE A. MARAMAN, Part-Time Associate Justice.

PER CURIAM:

This matter concerns Defendant Deborah Rengiil's convictions of numerous charges of money laundering and grand larceny. The facts of these charges and trial are detailed in the Opinion issued in this

matter affirming the Trial Division's determinations. *See Rengiil v. ROP*, Civ. App. No. 12-013, slip op (April 30, 2013). We will not list those details again here.

After the Opinion was issued, counsel for Rengiil filed a timely Petition for Rehearing on May 13, 2013. Below, we briefly explain why, after careful consideration, this petition is **DENIED**.

[1] Petitions for rehearing must be filed within fourteen days after an appellate opinion has been issued and it must "state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended." ROP R. App. P. 40(a). We grant "[p]etitions for rehearing . . . exceedingly sparingly, and only in those cases where this Court's original decision obviously and demonstrably contains an error of fact or law that draws into question the result of the appeal." *Western Caroline Trading Co. v. Philip*, 13 ROP 89, 89 (2006) (citation and internal quotation marks omitted).

Rengiil's lengthy argument detailed in her petition is hardly more than a complicated version of the same argument that was rejected by the Trial Division and then again by the Appellate Division. According to Rengiil, from its inception the subsidiary ledger reflected loans to her in the amount of hundreds of thousands of dollars. Rengiil contends, however, that despite these ledger entries, she did not receive all of these funds that the bank loaned to her and that, instead, she was entitled to write checks to herself from the bank against that amount and without making a record of the checks on the subsidiary ledger. Incredibly, Rengiil was making payments against the loans she alleges she did not receive, including interest payments. Further, Rengiil goes to great length, again, to argue that because the subsidiary ledger reflected the full loan amount (that she had not yet borrowed) from the inception of the bank's use of the ledger, if Rengiil *had* recorded the checks she subsequently wrote, she would have been responsible for paying back *double* the amount she was borrowing.

Perhaps as one extra twist, Rengiil attempts to argue that her loan was somehow different than the construction loans offered by the bank in that it did not require recording in the subsidiary ledger. Rengiil has pointed to no evidence of record to substantiate these claims.[1]

We agree with the Republic that the argument that Rengiil was paying interest and principal on a loan for which she had not even had money disbursed is absurd. Evidence regarding the bank procedures and Rengiil's loan sufficiently established that Rengiil's loan was like every other loan one can find at a bank—a loan where the borrower is responsible to pay back the amount they borrowed, plus interest. And the only way for the bank to keep track of its loans is to require the proper recording of loan disbursements, which occurred when Rengiil drew checks on her loan, and not some time before. We have no doubt that the bank was guilty of some sloppy recordkeeping. But quite simply, the Trial Division found that Rengiil attempted to get

[1] Rengiil testified at trial that her loan was simply a "housing" or "construction" loan. *See Trial Transcript, Testimony of Deborah Rengiil*, p. 1020, Ins. 12–17.

away with writing substantial checks without proper recording.

The Trial Division heard testimony and accepted that Rengiil was required to record her loan disbursements in the subsidiary ledger when she wrote out checks. Because she did not do this, the checks were unaccounted for, making Rengiil guilty of her charges. On appeal, we were presented no reason to doubt these factual findings by the trial court. And again, on review of the appellate Opinion, Rengiil has given us no reason to question our ruling.

Rengiil further complains that two witnesses, John DeVivo and Tim Taunton, could have substantiated her theories concerning the bank procedures for her loan, but that the Republic failed to call these individuals as witnesses. Rengiil explains, "John Devivo should have been brought by the government to testify. He would have explained away the whole case against the defendants . . . ." This argument is absurd. Surely counsel is aware of his ability to call witnesses at trial. If counsel believed there were witnesses who could support a theory of Rengiil's defense, then it was defense counsel's responsibility to call those witnesses. And in any event, we will not grant a petition for rehearing simply because the defense claims that there is testimony out there that was not presented at trial and that might be helpful to Rengiil's case.

We remain un-swayed by the defense's arguments, which have now failed for a third time before the courts. For this reason, we **DENY** Rengiil's petition for rehearing.

ABEL SUZUKY,
Appellant/Cross-Appellee,

v.

MODESTO PETRUS,
Appellee/Cross-Appellant.

CIVIL APPEAL NO. 12-043
Civil Action No. 09-050

Supreme Court, Appellate Division
Republic of Palau

Decided: August 28, 2013

[1] **Property:** Adverse Possession

Unless an adverse possessor enters under color of title, his actual possession is determinative of the boundaries of the land acquired.

[2] **Property:** Adverse Possession

There is no fixed rule by which the actual possession of real property by an adverse claimant may be determined in all cases, because the determination of what constitutes possession of property for purposes of adverse possession depends on the facts in each case, and to a large extent on the character of the premises. Generally, the standard to be applied to any particular tract of land is whether the possession comports with the ordinary management of similar lands by their owners. However, something more than mere occasional use of the land is needed to establish adverse possession, even if the disputed land is wild.

[3] **Property:** Adverse Possession

There cannot be a concurrent possession of land under conflicting claims of right. If two or more persons are in possession of real estate, ordinarily none has the exclusive possession necessary to establish adverse possession.

Counsel for Appellant: Pro Se
Counsel for Appellee: Mariano Carlos

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice;

HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem; and KATHERINE A. MARAMAN, Part-Time Associate Justice.

Appeal from the Trial Division, the Honorable KATHLEEN M. SALII, Associate Justice, presiding.

PER CURIAM:

This is the third time this quiet title action has been before us. The first two times we considered whether Abel Suzuky acquired title to a portion of Modesto Petrus's land via adverse possession. On the second appeal we concluded that Suzuky acquired title and remanded the matter to the Trial Division for a determination of the size of the parcel acquired. This is an appeal of the Trial Division's determination regarding the size of the adversely possessed land.[1] For the reasons set forth below, we **AFFIRM in Part and REVERSE in Part**.

BACKGROUND

Appellant Modesto Petrus is the registered owner of Cadastral Lot 028 A 10 ("the Lot"). In 1985 Appellee Abel Suzuky began working on a portion of the Lot with the understanding that the land in question was unclaimed. Over the ensuing two decades, Suzuky planted mangos, coconuts, lemon or lime trees, and betel nut trees. He planted various crops on much of the property and maintained a pig pen on a portion of the property until 1990.

On March 9, 2009, Petrus filed the instant action to quiet title in the property. Following a long and winding procedural history, including an initial trial-level ruling in favor of Petrus, we held that Suzuky adversely possessed a portion of the Lot and remanded the matter for a determination on the size of the parcel actually acquired. On remand, the Trial Division conducted a hearing on the scope of Suzuky's adversely acquired land. At the hearing, Suzuky testified that he planted and farmed virtually the entire Lot. Petrus testified that he and his agents made use of much of the southern portion of the Lot through farming and an auto repair business. Figure 1 below shows the relative locations of the activities claimed.[2]

[1] A more detailed procedural history is set forth in our Order Denying Motion to Remand. *See Suzuky v. Petrus*, Civ. App. 12-043, slip op. at 1–3 (Apr. 25, 2013).

[2] Figure 1 was prepared by the Bureau of Lands and Surveys at the request of Petrus. The printed shapes were placed on the map by BLS. The drawings were added by Petrus and Suzuky during their testimonies at the remand hearing.

* = Petrus farming location
X = Petrus auto repair storage location
O = Plants and trees planted by Suzuky

As shown in Figure 1, the Lot (encased by a black border) is shaped like a lower case "d." Suzuky testified that he did not use the area of the property on which car parts were stored and that he only began using the portion of the property south of the road approximately six years ago. Petrus, in contrast, claimed he started storing car parts on the property around 1980. He further testified that he gave permission to Suzuky to build his driveway and to a group of Palauan women to farm the southern portion of the land. Suzuky denied receiving permission from Petrus to build the driveway and testified that the women mentioned by Petrus never farmed the Lot.

Following the close of the remand hearing, the Trial Division issued an order granting Suzuky the following property:

> Starting on the northern portion of the Lot, closest to Lot 028 A 08, beginning with the triangular point, nearest to what was marked at the hearing as Tank 1, or the northern-most tank on the Lot, marks one boundary of [Suzuky]'s property. [Suzuky]'s property includes all that area running from that point in a southerly direction and inclusive of the area indicating locations of a platform, the banana, bread fruit and mango tree, down to the section of the Lot bounded by the road. [Suzuky]'s property further includes that portion of the Lot indicating the location of Water Tank 2 and the smaller house located to the left of Water Tank 2, and all that area up to the border of lot 028 A 09 as delineated by a straight black line.
>
> [Suzuky]'s property does not include the area inclusive of Water Tank 3 and the house located to the immediate right of Water Tank 3, and does not [include] that portion of the Lot on the other side of the road [in] the area.

Petrus and Suzuky appealed.[3]

STANDARD OF REVIEW

"Common law adverse possession presents a mixed question of law and fact." *Seventh Day Adventist Mission of Palau, Inc. v. Elsau Clan*, 11 ROP 191, 193 (2004). We review mixed conclusions de novo. *Ngiralmau v. ROP*, 16 ROP 167, 169 (2009).

DISCUSSION

"To acquire title by adverse possession, the claimant must show that the possession is actual, continuous, open,

[3] Although Suzuky appealed, he never filed an opening brief. We thus dismiss his appeal for lack of prosecution. *See* R. of App. Proc. 3(a).

visible, notorious, hostile or adverse, and under a claim of title or right for twenty years." *Petrus v. Suzuky*, 19 ROP 37, 39 (2011) (*Petrus II*). Possession also must be exclusive. *Id*. at 42; *see also Arbedul v. Rengelekel A Kloulubak*, 8 ROP Intrm. 97, 98 (1999) (plaintiff failed to show adverse possession when he failed to show exclusive possession). The burden of proof as to each element rests on the party asserting adverse possession. *Id.*

On appeal, Petrus argues that the Trial Division erred by giving "Suzuky parts of the land that he is not occupying, the part of the land that Modesto Petrus gave Suzuky permission to use as his drive way and parts of the land Modesto Petrus and his licenees occupied from the past to the present time." Petrus also appears to raise an issue as to the visibility of Suzuky's activities in the northern portion of the Lot. We have previously addressed and rejected Petrus's arguments concerning the visibility of Suzuky's activities and the purported permission to build the driveway. *Petrus II*, slip op. at 6–8. Our opinions have not changed. We thus turn to Petrus's arguments concerning actual and exclusive possession.

I. Actual Possession

[1, 2] Unless an adverse possessor enters under color of title,[4] his actual possession is determinative of the boundaries of the land acquired. 3 Am. Jur. 2d *Adverse Possession* § 256. "There is no fixed rule by which the actual possession of real property by an adverse claimant may be determined in all cases, because the determination of what constitutes possession of property for purposes of adverse possession depends on the facts in each case, and to a large extent on the character of the premises." *Id.* § 18. Generally, "[t]he standard to be applied to any particular tract of land is whether the possession comports with the ordinary management of similar lands by their owners." *Id*. § 22. "However, something more than mere occasional use of the land is needed to establish adverse possession, even if the disputed land is wild . . . ." *Id*. § 21. Petrus contends that Suzuky never was in actual possession of the northernmost portion of the Lot and the portion of the Lot on which the car parts were stored.

As to the northern triangle, Suzuky testified that, absent the areas used for car part storage, he planted trees and plants (including crops) on the Lot as a whole. When asked to identify the portions of the Lot he cultivated, Suzuky diagrammed an area which included the northern part of the Lot. Given that the surrounding area is used as farm land, we conclude that the planting of trees and crops comports with the ordinary management of similar lands and that, therefore, Suzuky actually possessed the northern triangle. *See* 3 Am. Jur. *Adverse Possession* § 22.

Turning to the southern portion of the Lot, Suzuky testified that he did nothing with the areas used for car-part storage. Because actual possession of property requires some level of activity, we conclude that Suzuky was not in actual possession of

[4] Color of title "is that which gives the semblance or appearance of title, but which is not title in fact—that which, on its face, professes to pass title, but fails to do so because of a want of title in the person from whom it comes or the employment of an ineffective means of conveyance." 3 Am. Jur. 2d *Adverse Possession* § 123.

the car storage area. *See* 3 Am. Jur. *Adverse Possession* § 21.

II. Exclusive Possession

"There cannot be a concurrent possession of land under conflicting claims of right. . . . If two or more persons are in possession of real estate, ordinarily none has the exclusive possession necessary to establish adverse possession." 3 Am. Jur. 2d *Adverse Possession* § 71. Petrus submits that Suzuky failed to show exclusive possession of the areas of the Lot used for car storage and of the areas allegedly used by farmers with the permission of Petrus.

First, insofar as we have concluded that Suzuky did not have actual possession of the portion of the property used for car storage, we need not consider whether he had exclusive possession of such land. As to the portion of the Lot allegedly farmed by people other than Suzuky, there is no evidence that anyone (other than Suzuky) used the Lot for farming during the adverse possession period. Indeed, Suzuky testified to the contrary. Thus, we conclude that the Trial Division did not err in its conclusion that Suzuky had exclusive possession of the portions of the Lot purportedly used for farming by Petrus's designees.

CONCLUSION

For the foregoing reasons, the decision of the Trial Division is **AFFIRMED in Part and REVERSED in Part**. The portion of the Lot acquired by Suzuky shall encompass the area of the Lot running south from the triangle north of Tank 1 to the beginning of the portion of the Lot used for the storage of Petrus's car parts, as delineated by the solid red line on the map found in Appendix A.

CHILDREN OF IDIP NGIRATIOU,
Appellants,

v.

DESCENDANTS OF NGIRATIOU,
Rep. by FRANCIS KIB,
Appellees.

CIVIL APPEAL NOs. 11-030 & 12-025
(Case No. SP/E 11-001 and SP/E 11-002)

Supreme Court, Appellate Division
Republic of Palau

Decided: August 29, 2013

[1] **Courts:** Jurisdiction

A court has the power and duty to examine and determine whether it has jurisdiction over the matter presented to it. That power includes the authority to resolve factual and legal disputes that bear on the question of jurisdiction.

[2] **Courts:** Land Court

Although the Land Court's own rules and regulations do not contain any provision allowing it to reconsider its determinations of ownership, we have held that, in certain circumstances, the Land Court has the inherent authority to correct its own decision.

[3] **Judgments:** Void Judgments

The Land Court has the authority cancel or set aside void determinations of ownership and certificates of title.

[4] **Judgments:** Interpretation

The determinative factor in interpreting a judgment is the intention of the court, as gathered, not from an isolated part thereof but from all parts of the judgment itself. If a judgment is issued "pursuant" to something else, it follows any ambiguity as to the meaning of the judgment must be resolved by reference to the underlying factor that motivated its issuance.

Counsel for Appellants: J. Uduch Sengebau Senior
Counsel for Appellees: John K. Rechucher

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and LOURDES F. MATERNE, Associate Justice.

Appeal from the Land Court, the Honorable ROSE MARY SKEBONG, Associate Judge, presiding.

PER CURIAM:

This case concerns the Land Court's Decision to cancel certificates of title and have them reissued due to a clerical error. For the following reasons, the decision of the Land Court is **AFFIRMED.**[1]

BACKGROUND

The parties in this dispute include Descendants of Ngiratiou, who successfully persuaded the Land Court that the Land Claims Hearing Office erred in issuing them

[1] Although Appellant requests oral argument, we determine pursuant to ROP R. App. P. 34(a) that oral argument is unnecessary to resolve this matter.

Tochi Daicho Lot 498 instead of Lot 489,[2] and the Children of Idip Ngiratiou (hereinafter Children of Idip), who opposed Descendants of Ngiratiou's attempts to have this purported error corrected and who now appeal the Land Court's Decision.

Descendants of Ngiratiou argue that the Tochi Daicho Lots 489 and 498 were distributed to the incorrect parties through a clerical error in a Determination of Ownership and Certificate of Title. The reasons for this error extend back over more than two decades during which multiple mistakes were made in the distribution of the property of the deceased Ngiratiou to his children.

In the 1980s two of the children of Ngiratiou appeared before the Land Commission to claim lands that the Tochi Daicho listed as belonging to their father. The Land Commission issued Determinations of Ownership in favor of the two children individually. Of relevance here, Tochi Daicho Lot 489 was granted to Idip Ngiratiou. Following these Determinations, other family members filed a civil suit to undo the Land Commission's decision. In 1989, the parties settled, purportedly agreeing that these properties, including Tochi Daicho Lot 489, would be issued to Descendants of Ngiratiou, rather than to Idip individually. Citing this settlement agreement, the Trial Division issued a Judgment, awarding Descendants of Ngiratiou several pieces of land, including Tochi Daicho Lot 489. The Trial Division made no mention of Tochi Daicho Lot 498, which had been purchased and was owned individually by Idip and was irrelevant to that proceeding.

When the Trial Division issued its Judgment in 1989, finding that Descendants of Ngiratiou owned Tochi Daicho Lot 489, it mistakenly listed this Tochi Daicho Lot's corresponding Cadastral Lot as number 021 E 04. Importantly, that Cadastral Lot number actually corresponded with Tochi Daicho Lot 498, the lot that was indisputably owned by Idip, individually.

When the Land Claims Hearing Office issued Determinations of Ownership and Certificates of Title pursuant to the Trial Division's Judgment ten years later, it changed the listed Tochi Daicho number from 489 to 498 rather than adjusting the listed Cadastral Lot number to match the Tochi Daicho. In so doing, it failed to undo the granting of Tochi Daicho Lot 489 to Idip as an individual, which action Descendants of Ngiratiou contend the 1989 Judgment sought to accomplish, and essentially reiterated Idip's ownership of that lot.

Over the course of the two decades after the initial Trial Division judgment, this error went undiscovered by the parties. Descendants of Ngiratiou were unaware of the mistake, explaining before the Land Court prior to this appeal that the 1989 Judgment was served to Descendants of Ngiratiou through Rikel Temarsel, who could not read or understand English. When she passed away in 2010, the family became aware of the mistake for the first time.

Upon discovering the error, Descendants of Ngiratiou filed a Petition to

[2] During the course of the proceedings in this case, Tochi Daicho Lots 489, 491, and 499 were combined and considered together. For purposes of this Opinion, we refer to the relevant property simply as "Tochi Daicho Lot 489."

Correct Clerical Error in the Land Court, which sought to have the issuing of Tochi Daicho Lots 489 and 498 to Children of Idip and Descendants of Ngiratiou, respectively, reversed. Judge Polloi denied the Petition, finding that the Land Court lacked jurisdiction to correct a decision by the Trial Division, and noting that Descendants of Ngiratiou appeared to be seeking the Cadastral Lot that was, in fact, already granted to them. In his Determination, Judge Polloi did not appear to understand that Descendants of Ngiratiou were seeking ownership of Tochi Daicho Lot 489.

Descendants of Ngiratiou filed a motion for reconsideration of the Land Court's decision to deny the motion to correct the clerical error. Judge Polloi recused himself and assigned the case to Judge Skebong. Judge Skebong granted the motion for reconsideration, accepting Descendants of Ngiratiou's reasons for waiting so long to seek a correction of the error. The Land Court then set aside its own order granting the motion in order to allow Children of Idip the opportunity to be heard. It had taken evidence concerning the purpose of the settlement agreement that prompted the 1989 Judgment, which it referenced in its Decision. After concluding that it had jurisdiction to correct a clerical error, the Land Court determined that the original purpose of the settlement agreement and corresponding Trial Division Judgment in 1989 was to undo the improper granting of Tochi Daicho Lot 489 to Idip.

Further, the Land Court concluded that the Land Claims Hearing Office committed a clerical error by issuing a Determination of Ownership to Descendants of Ngiratiou of Tochi Daicho Lot 498, which was *not* listed in the Trial Division's Judgment. The Land Court determined that the Land Claims Hearing Office further failed to reissue a Determination of Ownership of Tochi Daicho Lot 489 to Descendants of Ngiratiou, as it was directed to do in the 1989 Judgment. The Land Court, therefore, ordered that the prior Determinations of Ownership and Certificates of Title for Tochi Daicho Lots 489 and 498, which were incorrectly issued due to this clerical error, be cancelled and reissued according to the corrected information. Children of Ngiratiou appeal this ruling.

STANDARD OF REVIEW

Children of Idip argue that the Land Court does not have jurisdiction to correct a clerical error made by the Trial Division and that its actions constituted a correction of the Trial Division's Judgment. Questions of jurisdiction are questions of law, which we review de novo. *Skebong v. EQPB*, 8 ROP Intrm. 80, 82 (1999).

Children of Idip also contend that that the Land Claims Hearing Office correctly interpreted the 1989 Judgment and did not commit error in issuing a Certificate of Title to them for Tochi Daicho Lot 489. Accordingly, Children of Idip assert that the Land Court erred in concluding otherwise and canceling the Certificate of Title. The Land Court's determination regarding the intention of the 1989 Judgment and the preceding settlement agreement is a mixed question of law and fact. *See Mikel v. Saito*, Civ. App. No. 12-032, slip op. at *8 (2013). We review questions of law de novo, giving no deference to the Land Court. *Singeo v. Secharmidal*, 14 ROP 99, 100 (2007). We

review the Land Court's factual findings for correctness, only setting them aside if no reasonable trier of fact could have come to the same conclusion. *Rechirikl v. Descendants of Telbadel*, 13 ROP 167, 168 (2006).

ANALYSIS

Some of Children of Idip's arguments on appeal essentially amount to challenges to the Land Court's jurisdiction to correct what it determined to be a clerical error. Children of Idip also contend that no error occurred with respect to the Certificates of Title and that the Trial Division intended to allow Idip to retain ownership of Tochi Daicho Lot 489. We consider these arguments in turn below.

I. The Land Court has authority to correct a void Determination of Ownership and corresponding Certificate of Title.

[1] A Court has the power and duty to determine whether it has jurisdiction over the matter before it, including the power to resolve factual and legal disputes that bear on the question of jurisdiction. *Roman Tmetuchl Family Trust v. Ordomel Hamlet*, 11 ROP 158, 160 (2004).

[2] We note that the decision that is challenged on appeal is the Land Court's grant of a Motion for Reconsideration of the Land Court's earlier decision to deny a motion to correct a clerical error. We have previously held that the Land Court has inherent authority to reconsider its own decisions when there has been an intervening change in the law, a discovery of new evidence that was previously unavailable, or a need to correct clear error or prevent manifest injustice due to the court's misapprehension of the facts, a party's position, or the controlling law. *Senior v. Masami*, 16 ROP 196, 198 (2009). While the Land Court clearly has the inherent authority to reconsider its own decision, what complicates matters here is Children of Idip's contention that the Land Court has corrected clerical errors made by bodies separate from the Land Court, including either the Land Claims Hearing Office or the Trial Division or both. Before we can determine whether or not the Land Court has the authority to correct such an error, we must establish whose error it attempted to correct.

Mistakes were made all along the way in this case by the parties, by their attorneys, by the Land Claims Hearing Office, by the Trial Division, and by the Land Court. This has resulted in over two decades of failed attempts to correct errors that have complicated what should have never been a complicated case.[3] The greatest amount of confusion in this particular dispute may be traced back to the Trial Division's 1989 Judgment, which acknowledged the settlement agreement by the parties and, accordingly, ordered that the Land Claims Hearing Office issue

[3] While it is disconcerting that so much time has passed without the parties bringing the error to the Land Court's attention, we are satisfied that Judge Skebong considered this and was reasonable in accepting Descendants of Ngiratiou's explanation for the delay, that the Certificate of Title was delivered to and sat with someone who could not read English and that the parties had no reason to believe that they needed to check for an error. Further, where a piece of property was issued in error, we have a strong interest in correcting this error, particularly when it has gone innocently unnoticed.

Determinations of Ownership and Certificates of Title to Descendants of Ngiratiou for certain properties. Listed in these properties was Tochi Daicho Lot 489, called *Ngermedong*, and labeled as Cadastral Lot number 021 E 04. It is undisputed that this was an error, because Cadastral Lot number 021 E 04 actually corresponded with Tochi Daicho Lot 498, which was indisputably owned by Idip, individually.

Faced with this obvious discrepancy, the Land Claims Hearing Office then made the decision to base its Determination of Ownership and Certificate of Title, which it was ordered to issue, on the Cadastral Lot number, rather than the Tochi Daicho number, and it issued Tochi Daicho Lot 498 to Descendants of Ngiratiou. As explained in Section II of this Opinion, it was an error for the Land Claims Hearing Office to do so. Thus, both the Trial Division *and* the Land Claims Hearing Office committed clerical errors.

When the Land Court was asked by Descendants of Ngiratiou to correct a clerical error in the issuance of the Certificates of Title, contrary to Children of Idip's contention, it was *not* faced with the task of correcting the error of the Trial Division. Rather, it was asked to correct the error of the Land Claims Hearing Office, which made its error in part due to the confusion that the Trial Division caused. The Land Court did not order that the 1989 Judgment be corrected. It ordered that the incorrect Determinations of Ownership and Certificates of Title be canceled and be reissued according to a more accurate interpretation of the Trial Division's Judgment. Thus, we are not required to determine whether the Land Court has jurisdiction to correct a clerical error made by the Trial Division of the Supreme Court, but whether it has jurisdiction to correct clerical errors in determinations of ownership and certificates of title issued by the Land Claims Hearing Office.

[3] We have already determined that the Land Court has such authority, so long as the determination of ownership and subsequent certificate of title are void due to some mistake in their issuance. *In re Idelui*, 17 ROP 300, 303–04 (2010). When a determination of ownership and certificate of title are issued contrary to a court order, their issuance constitutes a clerical error and they are void. *See id.* (explaining that judgments are void that lack jurisdiction or constitute a violation of due process). This is precisely what happened here. The Trial Division determined in 1989 that Tochi Daicho Lot 489 belonged to Descendants of Ngiratiou. The Land Claims Hearing Office issued the Certificate of Title contrary to the Trial Division's order. The Land Court discovered this error that made the Certificates of Title void because they were not made pursuant to a valid judgment. And the Land Court has the authority to set such invalid issuances aside in the interest of justice. *Id.* The Land Court did its job in setting aside the Certificates of Title after so many years of mistakes.[4]

II. The 1989 Trial Division Judgment ordered that Tochi Daicho Lot 489 be issued to Descendants of Ngiratiou.

[4] We note that typically certificates of title are final and there are rules governing collateral attacks of those certificates. However, here the procedural history of this case shows the Certificates of Title to be void.

There is great disagreement in the briefing over the initial intentions of the Trial Division's 1989 Judgment, due to the discrepancy between the listed Tochi Daicho Lot number 489 and what the Judgment falsely listed as its corresponding Cadastral Lot number. In order to determine the true effect of the Judgment, Judge Skebong reviewed the complaints and Certificates of Title and received sworn affidavits by those involved in the 1989 proceeding.

[4] We recently discussed the process by which a court interprets a judgment. We held that judgments should be construed like any other written agreement and that "[t]he determinative factor in interpreting a judgment is the intention of the court, as gathered, not from an isolated part thereof but from all parts of the judgment itself." *Mikel*, Civ. App. No. 12-032, at *8 (citation and internal quotation marks omitted). We also determined that if a judgment is issued "pursuant" to something else, "it follows any ambiguity as to the meaning of [the judgment] must be resolved by reference to the underlying" factor that motivated its issuance. *Id.* at *7.

The 1989 Judgment provides good insight to its intention, explaining that its declaration was being made "[p]ursuant to a settlement agreement" by the parties. Accordingly, Judge Skebong properly took evidence concerning the intent of the settlement agreement with respect to ownership of Tochi Daicho Lots 489 and 498.

The evidence showed that the parties' settlement agreement attempted to grant ownership of Tochi Daicho Lot 489 to Descendants of Ngiratiou. Such evidence included a sworn affidavit by Roman Bedor, who acted as counsel for Descendants of Ngiratiou in 1989 and who was a part of the settlement negotiations. Bedor's account regarding the settlement conversations about Tochi Daicho Lot 489 was detailed and clear and it asserted that the parties agreed that the Lot should have gone to Descendants of Ngiratiou. This testimony was consistent with the Trial Division's statement in its Judgment that Tochi Daicho Lot 489 would go to Descendants of Ngiratiou in accordance with the settlement. Accordingly, the Land Court concluded that there was convincing evidence that the purpose of the proceedings in 1989 was to return Tochi Daicho Lot 489 to Descendants of Ngiratiou. This was a factual determination, which we will not disturb because "the findings are supported by evidence such that a reasonable trier of fact could have reached the same conclusion." *Rechirikl v. Descendants of Telbadel*, 13 ROP 167, 168 (2006).

Children of Idip contend that the Certificates of Title were issued appropriately and that it was the intention of the Trial Division all along to issue Tochi Daicho Lot 489 to Idip and Tochi Daicho Lot 498 to Descendants of Ngiratiou. The reasoning behind Children of Idip's argument is nonsensical to us, primarily because it is undisputed that Idip purchased Tochi Daicho Lot 498 individually, and we cannot understand why any court would have determined that this lot belonged to Descendants of Ngiratiou. For the Land Claims Hearing Office to later issue a Determination of Ownership and Certificate of Title for Tochi Daicho Lots 489 and 498 to Children of Idip and to Descendants of Ngiratiou, respectively, was obviously an

error and was inconsistent with the intention of the 1989 Judgment. It was an error that benefited Children of Idip, who essentially exchanged their interest in Tochi Daicho Lot 498 for interest in the much larger Tochi Daicho Lot 489.

We are satisfied after a careful reading of the record and of Judge Skebong's Order Granting Motion for Reconsideration that there was no clear error in the Land Court's conclusion that the initial intention of the 1989 Trial Division Judgment and settlement agreement that prompted the Judgment was to correct a previous error that improperly granted Tochi Daicho Lot 489 to Idip, individually. Accordingly, we dismiss Children of Idip's suggestion that the Trial Division intended to allow them to retain Lot 489.

CONCLUSION

For the foregoing reasons, we conclude that the Land Claims Hearing Office committed a clerical error when it failed to issue a certificate of title to Descendants of Ngiratiou for Tochi Daicho Lot 489 and instead issued one to them for Tochi Daicho Lot 498. The Land Court was correct to fix this error. Accordingly, its decision is **AFFIRMED**.

IDID CLAN,
Appellant,

v.

KOROR STATE PUBLIC LANDS AUTHORITY,
Appellee.

CIVIL APPEAL NO. 12-036
Case Nos. LC/B 08-139 & 08-140

Supreme Court, Appellate Division
Republic of Palau

Decided: September 4, 2013

[1] **Land Commission/LCHO/Land Court:** Claims

Return of public lands and superior title claims are fundamentally different, with different burdens of proof and different defenses applicable to each. Unlike a return of public lands case, a claimant asserting superior title claims the land on the theory that it never became public land in the first place. Such a claimant stands on equal footing with the governmental entity claiming the land, but the claimant must confront the availability of affirmative defenses not available to the government in Article XIII claims.

[2] **Appeal and Error:** Standard of Review

The Land Court's factual findings are reviewed for clear error. Under this standard, we will not set aside the findings so long as they are supported by evidence such that any reasonable trier of fact could have reached the same conclusion, unless

we are left with a definite and firm conviction that an error has been made.

[3] **Land Commission/LCHO/Land Court:** Claims

The Land Court must limit its review to only claims actually before it.

[4] **Land Commission/LCHO/Land Court:** Claims

The Land Court does not have the authority to amend a claim by trying the claim with consent of the parties.

[5] **Appeal and Error:** Harmless Error

The Appellate Division will not reverse a lower court decision due to an error where that error is harmless.

[6] **Appeal and Error:** Briefs

Rule 28(a) requires a party to support asserted facts, including proper citations to the record below. The rule is clear and unambiguous, and failure to comply permits the Court to disregard any factual arguments unsupported by cites to the record.

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Counsel for Appellee: J. Uduch Sengebau Senior

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and R. ASHBY PATE, Associate Justice.

Appeal from the Land Court, the Honorable C. QUAY POLLOI, Senior Judge, presiding.

PER CURIAM:

This appeal arises from a Land Court Decision awarding land in Dngeronger Hamlet, Koror State, in the area commonly referred to as *Butilei*, to Koror State Public Lands Authority (KSPLA). For the following reasons, we **AFFIRM** the Land Court's Decision. As we explain in greater detail below, the Land Court committed error by remodeling Idid Clan's return of public lands claim into a superior title claim; however, its erroneous attempt to address a claim not properly before it ultimately had no effect on the proper outcome of the Decision or of this Appeal. *See Ngiraiwet v. Telungalek ra Emadaob*, 16 ROP 163, 166 (2009) (explaining that even if the Land Court erred, the Appellate Division will not reverse the Land Court's determination of ownership where the error had no bearing on why the appellant's claim was denied).

BACKGROUND

The area in Dngeronger Hamlet commonly referred to as *Butilei* is comprised of two lots—Worksheet Lots B06-116 (formerly Tochi Daicho Lot 986) and Worksheet Lot B06-119 (formerly Tochi Daicho Lot 987). Both of the Tochi Daicho lots were registered under the name of Hisakichi Tokunanga.

Prior to 1989, Idid Clan filed a return of public lands claim for *Butilei* and the Land Court convened a hearing on May 8–9, 2012.[1] In pursuing the claim to *Butilei* as a

[1] There is no indication of the precise date Idid Clan filed its claim to the land; however, the record contains a document in which the Land Court expressly recognized that Idid Clan had filed a claim

return of public lands claim, Idid Clan bore the burden under 35 PNC §1304(b)(1) to show that the property became public land "through force, coercion, fraud, or without just compensation or adequate consideration" and under 35 PNC §1304(b)(2) to prove that Idid Clan was a proper heir to the land by establishing control or ownership prior to the wrongful taking. 35 PNC § 1304(b)(1)-(2).

At the hearing and in its written closing arguments, Idid Clan stressed that both of the Tochi Daicho lots at issue had previously been registered under what appeared to be a Japanese name—Hisakichi Tokunanga. The Land Court found that Idid Clan relied on this fact alone to establish that the land became public land through a wrongful taking. Although it acknowledged that Article XIII, § 10 of the Constitution provides that "nationals" of previous occupying powers forfeited land ownership rights to the national government, the Land Court determined that no evidence apart from Tokunanga's name was submitted to establish his nationality. Accordingly, the Land Court rejected Idid Clan's argument that Tokunanga's Japanese-sounding name proved that the land had been wrongfully taken by the Japanese occupying forces.

Further, the Land Court explained that it was unclear what happened with the land both prior to, and following, Tokunanga's ownership. Thus, the Land Court determined that the evidence of Idid Clan's status as a proper heir to the land was less than convincing. As explained in more detail below, this should have ended the Land Court's inquiry.

However, in determining there was insufficient evidence to establish that *Butilei* became public land through force, coercion, fraud, or without just compensation or adequate consideration, the Land Court went one step further and stated that there was insufficient evidence that *Butilei* was ever public land. It did so apparently because KSPLA based its claim that *Butilei* was public land on the same basis of Tokunanga's Japanese-sounding name. Thus, the Land Court determined, sua sponte, that Idid Clan should have filed a claim for superior title. Remodeling the claim into a superior title claim, the Land Court concluded that Idid Clan shared the burden of proof with KSPLA to prove ownership through a preponderance of the evidence. Examining the evidence in this light, the Land Court then found that KSPLA had a "more meritorious claim" to the land because it showed that it has exercised greater dominion and control over it and Idid Clan gave very little evidence of use of the property.

Idid Clan appealed.

STANDARDS OF REVIEW

We review the Land Court's legal conclusions de novo and its factual findings for clear error. *Kotaro v. Ngotel*, 16 ROP 120, 121–22 (2009). We do not review legal issues that the parties have not developed through proper briefing. *Ngirmeriil v. Estate of Rechucher*, 13 ROP 42, 50 (2006).

for *Butilei*, accompanied by a note by the Land Court that Idid Clan's claim is "a public land claim." There is no indication that any party challenged the timeliness of the claim.

DISCUSSION

A Land Court claimant may assert one of two types of claims: (1) a superior title claim, in which the claimant asserts he holds the strongest title to the land claimed; and (2) a return of public lands claim, in which the claimant concedes that a public entity holds superior title to the land, but argues that the title was acquired wrongly from the claimant or his predecessors. *See Koror State Pub. Lands Auth. v. Wong*, Civ. App. 12-006, slip op. at 4–5 (Oct. 31, 2012) (describing two types of claims).

[1] The burdens and elements needed to prove ownership are different for the two types of claims. *See Ngarameketii v. Koror State Pub. Lands Auth.*, 18 ROP 59, 63–64 (2011) ("It is important to bear in mind that the two types of claims are fundamentally different, with different burdens of proof and different defenses applicable to each." (citation, brackets, and internal quotation marks omitted)).

In a return of public lands case, the claimant must show that a piece of property became public land "through force, coercion, fraud, or without just compensation or adequate consideration" in addition to showing a proper connection to the land. 35 PNC § 1304(b)(1)-(2). "At all times, the burden of proof remains on the claimants, not the governmental land authority, to establish by a preponderance of the evidence, that they satisfy all requirements of the [Land Registration Act]." *Palau Pub. Lands Auth. v. Ngiratrang*, 13 ROP 90, 93 (2006).

In contrast, in superior title claims, the burden is shared. It is in the claimant's interest to establish control and use of the property, and "the claimant must confront . . . the availability of affirmative defenses not available to the government in Article XIII claims." *Kerradel v. Ngaraard State Pub. Lands Auth.*, 9 ROP 185, 185 (2002) (citation and internal quotation marks omitted). None of these elements exist or are relevant in return of public lands actions. *Id.*

Although return of public lands and superior title claims may be raised in the alternative, *Kerradel v. Ngaraard State Pub. Lands Auth.*, 9 ROP 185, 185–86 (2002), a claimant desiring to pursue both types of claims must present and must preserve the claims individually. *See Idid Clan v. Koror State Public Lands Auth.*, 9 ROP 12, 14 n.3 (2001) (holding that alternative claims must be "presented and preserved as if they were presented by different persons.").

Further, if a claim has not been preserved properly, it may not be considered. L.C. Reg. 12 ("Any claim which is not timely filed shall be forfeited."); *see also Ngarameketii v. Koror State Pub. Lands Auth.*, 16 ROP 229, 231 (2009) (return of public lands claim may not be considered as superior title claim in order to avoid statutory deadline). The Land Court's Regulations provide explicitly that "[a]ll claims to private lands [read: superior title claims] must be filed with the Land Court no later than 60 days prior to the date set for hearing of the land claimed [and that t]he deadline for claims to public land [read: return of public lands claims] was January 1, 1989." L.C. Reg. 11.

For both types of claims, under 35 PNC § 1312, "[w]ithin twenty (20) business

days following the conclusion of a hearing, the Land Court shall issue a determination of ownership or shall issue a written statement explaining why the determination cannot be made within such time." This is in keeping with the Land Court's overriding purpose, that is, to see that all lands in the Republic are properly registered in an efficient and just manner. *See* 35 PNC § 1302.

With the above in mind, we address Idid Clan's two arguments on appeal.

I. The Land Court did not err in concluding that Idid Clan presented insufficient evidence to establish that *Butilei* became public land through a wrongful taking; however, it erred in addressing a superior title claim that was never filed by the parties.

Idid Clan's first argument on appeal is in two parts. It argues that the Land Court erred in holding Idid Clan failed to prove that *Butilei* became public land through a wrongful taking and, as a corollary to that, that the Land Court erred by remodeling Idid Clan's claim into one for superior title. We address each in turn.

A. The Land Court's Finding that *Butilei* is not Public Land

First, the Land Court found that Idid Clan presented insufficient evidence to prove that *Butilei* was ever public land, or at least, that it ever became public land "through force, coercion, fraud, or without just compensation or adequate consideration," as required by 35 PNC §1304(b)(1). It explained that the only evidence Idid Clan offered to prove that *Butilei* became public land through a wrongful taking was a Tochi Daicho record that listed Hisakichi Tokunanga as the pre-World War II owner of the lot. The Land Court also noted that the chain of ownership for the property went from the house of Butilei in about 1910 straight to Hisakichi Tokunanga just before World War II. As such, the Land Court expressly found that Idid Clan failed to present convincing evidence that the land ever belonged to the Clan, a necessary requirement for succeeding on a return of public lands claim under 35 PNC §1304(b)(2).

[2] Idid Clan challenges this ruling on appeal, stating that it also presented evidence that the Trust Territory Government, as well as KSPLA, leased *Butilei* to third parties for years and that this fact also helps establish that the lands are public lands. This misses the whole point of 35 PNC §1304(b)(1). Although we have consistently held that "some maintenance of the land by the government will be probative of government ownership," it is not dispositive of it. *Koror State Pub. Lands Auth. v. Ngermellong Clan*, Civ. App. No. 11-042, slip op. at 7 (2013). More importantly, this does not explain whether the land was acquired through a wrongful taking. On appeal, Idid Clan once again fails to point to a single piece of evidence of a wrongful taking besides the name of Hisakichi Tokunanga. Whether the land became public land through a wrongful taking is a factual determination, and considering that no evidence apart from a name of a past owner and record of some government leasing of the property was submitted to the court, we cannot conclude that the Land Court was unreasonable in its determination. *See Ngirausui v. Koror State*

Pub. Lands Auth., 18 ROP 200, 202 (2011) ("We will not set aside the Land Court's factual findings so long as they are supported by evidence such that any reasonable trier of fact could have reached the same conclusion, unless we are left with a definite and firm conviction that an error has been made."). Therefore, we will not overturn the Land Court's decision that Idid Clan failed to prove that the land at issue became public land as outlined in 35 PNC §1304(b)(1).

B. The Land Court's Treatment of Idid Clan's Claim as a Claim for Superior Title

While we do not find error in the Land Court's determination that Idid Clan failed to prove that *Butilei* became public land as a result of a wrongful taking, we agree with Idid Clan that the Land Court erred in attempting to remodel Idid Clan's return of public lands claim into to a claim for superior title. This brings us to the second part of Idid Clan's first argument on appeal.

[3] Put simply, the Land Court must limit its review of claims to those claims actually before it. *See* 46 Am. Jur. 2d Judgments § 2 (2006) ("A judgment must be supported by pleadings that allege applicable legal theories" and thus "a judgment based on an issue not pleaded is a nullity." (footnotes omitted)). When a party files a return of public lands claim, the Land Court may not simply treat that claim as one for superior title without the parties having preserved that claim properly, and if a claim has not been preserved properly, it may not be considered. L.C. Reg. 12 ("Any claim which is not timely filed shall be forfeited."); *see also Ngarameketii v. Koror State Pub. Lands Auth.*, 16 ROP 229, 231 (2009) (return of public lands claim may not be considered as superior title claim in order to avoid statutory deadline). The Land Court's Regulations provide explicitly that "[a]ll claims to private lands [read: superior title claims] must be filed with the Land Court no later than 60 days prior to the date set for hearing of the land claimed [and that t]he deadline for claims to public land [read: return of public lands claims] was January 1, 1989." L.C. Reg. 11.

[4] Although there appears to be some confusion concerning what type of claim Idid Clan was attempting to argue at various points of the case, the Land Court clearly accepted that Idid Clan made a timely claim for a return of public lands. Moreover, at the hearing, both parties proceeded as though Idid Clan's claim was a return of public lands claim, and Idid Clan also relied largely on a return of public lands approach in its written closing argument. There is no indication on the record that Idid Clan preserved a superior title claim or filed anything that could be construed as a superior title claim earlier than 60 days prior to the hearing date. Further, even if Idid Clan began arguing a superior title claim after filing a claim for return of public lands, the Land Court does not have the authority to amend a claim by trying the claim with consent of the parties. *See Klai Clan v. Airai State Pub. Lands Auth.*, Civ. App. No. 12-051, slip op. at 5 (Aug. 22, 2013) (holding that the Land Court does not possess the inherent authority to amend a pleading by trying an issue by consent). Accordingly, it was error for the Land Court to address Idid Clan's claim as one for superior title.

[5] Despite this error, the Appellate Division will not reverse the Land Court's determination of ownership where the error had no bearing on why the appellant's claim was denied. *See Ngiraiwet v. Telungalek ra Emadaob*, 16 ROP 163, 166 (2009). Although the Land Court ultimately resolved the dispute using a superior title analysis, it did so only after making a merits determination that Idid Clan failed to carry its return of public lands burden under both 35 PNC §1304(b)(1) and (2). That is, first, the Land Court held that Idid Clan failed to show that the property became public land "through force, coercion, fraud, or without just compensation or adequate consideration" by basing its claim solely on the appearance of a Japanese-sounding name.[2] And second, it held that Idid Clan failed to show it was proper heir to the land.

Under the statutory mandate for return of public lands claims, Idid Clan's failure to carry its burden under 35 PNC § 1304(b)(1)-(2) should have ended the inquiry and the Land Court should have issued a Determination of Ownership to KSPLA. *See Palau Pub. Lands Auth. v. Ngiratrang*, 13 ROP 90, 93 (2006) ("At all times, the burden of proof remains on the claimants, not the governmental land authority, to establish by a preponderance of the evidence, that they satisfy all requirements of the [Land Registration Act]."); *see also Masang v. Ngirmang*, 9 ROP 125, 129 (2002) ("If no claimant proves the[] necessary elements [of a return of public lands claim], title cannot be transferred pursuant to section 1304(b), and the property remains public land."). To the extent the Land Court held that KSPLA, as a public entity in a return of public lands claim, was required to prove anything at all, such holding was a misinterpretation of the burden articulated in *Ngiratrang*. However, the Land Court's continued analysis under a superior title rubric does not constitute grounds for reversal because (a) the Land Court had already made a merits determination of Idid Clan's return of public lands claim and (b) it ultimately issued (albeit for different reasons) a Determination of Ownership to the public lands entity.

II. We decline to address Idid Clan's next contention on appeal as it is inadequately briefed.

[6] Based on a comparison of the land illustrated in the Worksheet Lots and the land in the Tochi Daicho Lots, the Land Court determined that the marine areas near the shoreline contained in Tochi Daicho Lot 987 had been filled and expanded in size over the years. Idid Clan appeals this finding, but the extent of its argument spans less than one-third of a page and cites no legal authority whatsoever. It amounts to little more than a conclusory statement that there was "no evidence" to support the finding. We will not address this claim here as it is inadequately briefed. *See Idid Clan v. Demei*, 17 ROP 221, 229 fn. 4 (2010) ("It is not the Court's duty to interpret this sort of broad, sweeping argument, to conduct legal research for the parties, or to scour the record for any facts to which the argument might apply. As we have previously noted, '[a]ppellate courts generally should not address legal issues that the parties have not developed through proper briefing.'

[2] The court's statement to this effect was that "[i]n light of the foregoing, this Court is not convinced enough to find that the lands here belonged to a Japanese national and thus became part of public lands after World War II."

Ngirmeriil v. Estate of Rechucher, 13 ROP 42, 50 (2006) (quotations omitted)."). In any event, because Idid Clan failed to carry its burden under 35 PNC § 1304(b)(1)-(2), the Land Court's determination here is of no moment, as such was made as part of its superior title analysis.

CONCLUSION

We **AFFIRM** the Land Court's conclusion that *Butilei* did not become public land through a wrongful taking and that Idid Clan failed to establish its return of public lands claim. We hold that any discussion concerning a superior title claim, which was not before the Land Court, was outside of the Land Court's authority and therefore is of no effect.

KABITEI KIMO KEE and ELENA TELLEI,
Appellants,

v.

TERRY E. NGIRAINGAS,
Appellee.

CIVIL APPEAL NO. 12-031
Civil Action No. 11-231

Supreme Court, Appellate Division
Republic of Palau

Decided: September 5, 2013

[1] Appeal and Error: Standard of Review

Challenges related to the sufficiency of the evidence are questions of fact, which we review for clear error, only reversing the trial court's decision if its findings are not supported by such relevant evidence that a reasonable trier of fact could have reached the same conclusion.

[2] Appeal and Error: Abuse of Discretion

An abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered; when an irrelevant or improper factor is considered and given significant weight; or when all proper and no improper factors are considered, but the court in weighing those factors commits a clear error of judgment in weighing those factors.

[3] Descent and Distribution: Determination of Heirs

While the trial court is not duty-bound to list the names of specific beneficiaries in an intestate proceeding, it does have some duty to issue a determination concerning who the heirs of the relevant property are. The administrator or administratrix must then distribute the property according to this determination.

Counsel for Appellant: Raynold B. Oilouch
Counsel for Appellee: Moses Uludong

BEFORE: R. ASHBY PATE, Associate Justice; KATHERINE A. MARAMAN, Part-Time Associate Justice; and RICHARD H. BENSON, Part-Time Associate Justice.

Appeal from the Trial Division, the Honorable ALEXANDRA F. FOSTER, Associate Justice, presiding.

PER CURIAM:

This appeal arises from the Trial Division's Decision and Judgment regarding the disposition of property known as *Cheuang*, which was the only property listed by Petitioner Ngiraingas ("Ngiraingas") as an asset in Akiko Wong's estate. For the following reasons, the Decision of the Trial Division is **AFFIRMED** in part and **REVERSED** in part.[1]

BACKGROUND

Two sisters, Akiko Wong ("Wong") and Huyuko Eledui ("Eledui"), owned a piece of property together called *Cheuang*.[2] Wong had four children: Kinsiana Bechtel ("Bechtel"), Erica Elechuus ("Elechuus"), Mariana Wong ("Mariana"), and Kabitei Kimo Kee ("Kee")—the Appellant here.[3]

In 1996, Wong's sister Eledui transferred her interest in the property to Wong's son, Kee. A Certificate of Title soon issued showing that Wong and Kee jointly owned *Cheuang*. Wong died one year later, in 1997. For the next several years, Kee treated *Cheuang* as his property, living on it, improving it, renting it, and ultimately selling it. No one sought to intercede or affect these decisions in any way.

In 2003, Kee sold his interest in the property to Adalbert Eledui ("Adalbert"), who was married to Elena Tellei ("Tellei"). An updated Certificate of Title was issued listing Wong and Adalbert as joint owners of *Cheuang*. Aldalbert treated the property as his own, also without objection by anyone.

In 2011, Ngiraingas petitioned to settle Wong's estate, after having been granted a power of attorney both by Wong's daughter, Bechtel, as well as Wong's granddaughter, Kaia Sasao ("Sasao"), who is the only daughter of Wong's deceased daughter, Mariana.

In a November 17, 2011 Order, the Trial Division appointed Ngiraingas as Temporary Administratrix of the estate and directed her to give general notice to the public of her intention to probate the *Cheuang* property. Such notice was posted at the Koror Post Office and the Supreme

[1] Although Appellant requests oral argument, under ROP R. App. P. 34(a), it is unnecessary to resolve this matter.

[2] The property is located in Ikelau Hamlet, Koror. It is labeled as Cadastral Lot No. 045 B 20.

[3] Hereinafter, for clarity, we refer to Akiko Wong as "Wong" and Mariana Wong as "Mariana."

Court, published once in the local newspaper, broadcast on the T8AA radio station for two weeks, and served upon all close relatives of the decedent, including Bechtel, Sasao, Elechuus, Kee, and others. Ngiraingas then filed an inventory of assets and liabilities, which listed *Cheuang* as the sole asset of the estate.

Shortly thereafter, Kee filed a timely Notice of Claim. However, rather than making a traditional claim against the estate, Kee argued that *Cheuang* was not an asset of the estate at all. The Court subsequently held a four-day hearing on the matter.

At the hearing, Kee advanced two primary arguments. First, he claimed that Wong orally transferred her interest in *Cheuang* to him before she died. As a result, Kee argued, he became the sole owner of the property, and at the time he sold it to Adalbert, Adalbert then became the sole owner of the property. When Adalbert died, his wife, Tellei, became the sole owner. Thus, Kee argued, Ngiraingas improperly listed *Cheuang* as an asset of the estate.

Alternatively, Kee argued that if Wong's oral transfer of ownership was ineffective, then Kee obtained sole ownership—and subsequently had the power to transfer sole ownership—in another way. Kee argued that, after Wong's death, the property would have normally passed to her four children; however, only Kee and Elechuus's interests in the property survived to the time of trial because (a) Bechtel had become a United States citizen, by virtue of which she had forfeited her right to own property in Palau, and (b) Mariana had passed away in 2010. Thus, when Elechuus's children transferred their mother's interest in the property in 2011 to Tellei, Tellei would have finally obtained full ownership of the property in that way.

Ngiraingas, on the other hand, argued that Wong's one-half interest in *Cheuang* remained with the estate. Thus, she argued that the property should be awarded to Wong's children under 25 PNC § 301(b).

Even a cursory review of the controlling law reveals that the Trial Division was faced with a Hobson's choice. If the Court accepted Kee's argument that Tellei was the sole owner of the property, it would have been forced to ignore either the Republic's well-settled Statue of Frauds or the applicable inheritance statutes. If the Court accepted Ngiraingas's arguments that the property should go to all of Wong's children, the decision would entail a similar rejection of the inheritance statutes. The choice was made even more difficult by the fact that neither party presented adequate customary testimony to support their positions.

Ultimately, the Trial Division determined that it had an insufficient basis to choose either of the options it faced. Instead, it held that the property was jointly owned by Tellei and Wong's estate because the oral transfer of the property from Wong to Kee ran afoul of the Statute of Frauds. Regarding Kee's argument in the alternative, the Trial Division expressed skepticism about Elechuus's children's purported transfer of the property and determined that it likewise failed. The Trial Division instead determined that Wong's interest in the property was never effectively transferred

from her possession and remained part of her estate. In many ways, this validated Ngiraingas's primary position at trial, but the Court nonetheless rejected Ngiraingas's argument that the property should be distributed to Wong's children, stating that Ngiraingas had presented no basis in law or Palauan custom to justify an award to the children.

In the end, the Trial Division only determined that *Cheuang* was part of Wong's estate. It appointed Ngiraingas as Permanent Administratrix, rejected Kee's objection to her appointment as untimely, and directed her to administer *Cheuang* for Wong's beneficiaries, who to this day remain unidentified.[4]

STANDARDS OF REVIEW

[1] Kee and Tellei argue that the Trial Division erred in failing consider evidence that that Wong's other children—Bechtel, Elechuus, and Mariana—have no ownership interest in *Cheuang*. An attack on the sufficiency of the evidence is an attack on the Trial Division's factual findings, which are reviewed for clear error and will not be overturned unless a reasonable trier of fact could not have come to the same conclusion. *Ongidobel v. ROP*, 9 ROP 63, 65 (2002).

[2] Kee and Tellei also assert that the Trial Division abused its discretion in appointing Ngiraingas as Adminstratrix and ordering her to administer the estate. We will not disturb this ruling in the absence of clear error. *See Ngeremlengui State Pub. Lands Auth. v. Tenungalk Ra Melilt*, 18 ROP 80, 83 (2011) ("An abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered, when an irrelevant or improper factor is considered and given significant weight, or when all proper and no improper factors are considered, but the court in weighing those factors commits a clear error of judgment. . . . Under this standard, a trial court's decision will not be overturned unless that decision was clearly wrong." (citations and internal quotation marks omitted)).

DISCUSSION

I. The Trial Division did not err in rejecting Kee and Tellei's argument that Wong's other children have no interest in *Cheuang*.

Kee and Tellei assert that the Trial Division erred by rejecting their argument that Wong's other children had no interest in the property. In order to overturn the decision of the Trial Division on this issue, we must determine that a reasonable fact finder *must* have concluded that neither Mariana, Elechuus, nor Bechtel had any interest in the property. *See Ongidobel*, 9 ROP at 65. We consider these individuals in turn and hold that there was no clear error on this point.

First, Kee and Tellei argue that Mariana died in 2010 and, thus, could not have any interest in the property. However, the Trial Division noted that Kee and Tellei

[4] The parties stipulated during the hearing that Wong's interest in one additional, uncontested property should go to her four children: Bechtel, Elechuus, Mariana, and Kee. Although the Court was imprecise in its final direction, we speculate that its direction to administer *Cheuang* for Wong's "beneficiaries" was meant as a direction to administer it for her children's benefit.

cited no law to support the contention that Mariana's death extinguished her interest. On appeal, Kee and Tellei still cite to no law to support this contention. Moreover, their position regarding Mariana's interest contradicts their position regarding Elechuus's interest. That is, Kee and Tellei argue that Elechuus's children transferred whatever interest Elechuus had in the property to Tellei. Importantly, the property was never sold to Elechuus and there was never any explicit transfer to her. Thus, Kee and Tellei's argument assumes that Elechuus's interest in the property must have been transferred to her by mere nature of her relation to her mother.

Mariana was alive at the time of her mother's death, just as Elechuus was. Thus, if this Court were to accept Kee and Tellei's argument that Elechuus's children transferred their mother's interest in the property to Tellei, this Court would have to accept that Mariana's estate had the same interest in the property. And this interest would not have been extinguished and passed to Tellei at Mariana's death. We can see no reason simply to assume that Mariana's interest in the property extinguished or automatically vested with Tellei when she died. Indeed, the descent laws of Palau suggest otherwise. *See* 25 PNC § 301 (providing for inheritance of fee simple interests). Thus, the Trial Division did not commit clear error in dismissing Kee and Tellei's argument that Mariana's estate has no interest in the property as an heir to Wong's interest.

Next, the Trial Division considered Kee and Tellei's argument that Elechuus's incapacity extinguished her interest in the property or somehow caused it to pass to her children, and, as a result, her children were able to transfer or "release" their mother's interest to Tellei. The Trial Division did not accept this, explaining that it was not satisfied that Elechuus was unable to "think, reason and reach a decision concerning her interest in *Cheuang*."

The Trial Division noted that Kee approached Elechuus's children and did not approach Elechuus herself with the request to transfer her interest to Tellei. Because Elechuus apparently was able to communicate with her husband, the Trial Division concluded that there was insufficient proof that Elechuus's incapacity extinguished her interests. Because of this, the Trial Division refused to take the additional leap in accepting that Elechuus's potential interest in the property could be transferred or "released" without her knowledge or approval. This was a reasonable factual determination and we have no reason to conclude that it was made in clear error.

Finally, Kee and Tellei assert that, because Bechtel was not a citizen of Palau at the time of Wong's death, she has no interest in the property. The Trial Division did not consider this argument because it decided that Elechuus and Mariana's rights to the property had not extinguished, and thus Kee's argument would fail irrespective of Bechtel's interest. We do not have reason to overturn this decision. Furthermore, there is insufficient evidence (and a lack of anything resembling a sufficient legal argument) in the record regarding Bechtel's forfeiture of citizenship and her right to own property in the Republic. Accordingly, the Trial Division did not err when it rejected

Kee and Tellei's arguments that Tellei had acquired full ownership of the property.

II. The Trial Division abused its discretion in refusing to consider Kee's objection to Ngiraingas as Adminstratrix.

Kee and Tellei also appeal the Trial Division's determination that Kee failed to timely object to Ngiraingas's appointment as Adminstratrix. In its November 17, 2011 Order, the Trial Division explained, "[i]n the event that there is a timely objection to the appointment of Terry Eledui Ngiraingas as Administratrix, the Court will set a hearing. In the absence of such an objection, she shall become permanent Administratrix." In the very next sentence, it added, "[t]hose individuals who have already filed claims need not file an additional claim."

Kee and Tellei argue that Kee preserved his objection to Ngiraingas's appointment and that his objection was ignored by the Trial Division. In his Notice of Claim, filed just three days prior to the Order, he stated, "Ngiraingas has no rights in Decedent's estate and Claimant objects to her actions herein." Kee contends that this statement constituted his objection and that he was unaware that the Trial Division expected him to file an objection to her appointment again, particularly considering its note that anyone "who ha[s] already filed claims need not file an additional claim."

While we are cautious not to suggest that an objection, especially one that predates an order calling for objections, is somehow preserved into perpetuity, in these circumstances, the Trial Division expressly preserved prior claims.[5] Kee, a pro se litigant, very clearly objected to Ngiraingas's appointment and did so within a few days of her appointment.[6] Accordingly, we find that the Trial Division failed to consider Kee's objections to Ngiraingas's appointment and, as a result, abused its discretion. We instruct the Trial Division on remand to consider Kee's objections regarding Ngiraingas's appointment as Administratrix.

III. The Trial Court erred in failing to identify the proper heirs of the property and should not have closed the estate without more specific direction.

[3] Finally, Kee makes a broader argument concerning the role of the Trial Division in probate proceedings, specifically its duties in closing and adequately supervising an estate. Kee and Tellei assert that the Trial Division erred by failing to determine to whom the property should pass. This, they argue, left the case unsettled, as it failed to resolve the very dispute for which the parties sought resolution.

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[5] To be fair, the Trial Division only specifically preserved prior claims, as opposed to prior objections. From a purely technical standpoint, claims are made against the estate and objections are made to the appointment of the administrator. In practice, however, given the number of pro se litigants involved in estate matters and the way in which the two terms are used interchangeably in pro forma notices, this distinction is honored more in the breach.

[6] The courts of the Republic have been instructed to employ a heightened duty to liberally construe pro se litigants' pleadings. *See Whipps v. Nabeyama*, 17 ROP 9, 12 (2009).

We are not prepared to state that it is the duty of the Trial Division to list the specific names of each beneficiary for whose benefit the administrator must distribute the assets of the estate. However, under these circumstances, we are concerned about the practical implications of the Court directing the Adminstratrix to administer the estate for the benefit of beneficiaries, whom the Court itself was unable to identify. Closing an estate with so little direction invites future litigation.

The precise duty of the Trial Division in closing and supervising probate matters is largely undefined by the decisional law in the Republic. However, 35 PNC §1317 (b) and (c) specifically address the transfer of land in probate matters. Subsection (c) reads, "[t]he Trial Division of the Supreme Court shall make a determination of the devisee(s) or heir(s), and the interest or respective interests to which each is entitled." 35 PNC §1317 (b)–(c). Although the statute does not state explicitly that the Trial Division is required to list individual devisees or heirs in order to close an estate, it mandates that the Trial Division make *some* "determination" of the heirs and their interests.

Of relevance here, we are satisfied that a trial court fulfills its duties under §1317 when it determines that a certain class of heirs shall receive some designated portion of an estate (i.e., the children of decedent shall receive a particular parcel of land). Once the specific property and a class of heirs has been identified, the administrator, acting in a fiduciary capacity, is charged with distributing the estate in accordance with the Trial Division's determinations.

To aid the Trial Division in determining the heirs in an intestate proceeding concerning land held in fee simple, the Trial Division should be guided by 25 PNC §301(a)–(b) and *Marsil v. Telungalk ra Iterkerkill*, 15 ROP 33 (2008). The relevant provisions of 25 PNC §301(a)–(b) read:

> (a) In the absence of instruments and statements provided for in [39 PNCA § 403(b)], lands held in fee simple, which were acquired by the owner as a bona fide purchaser for value, shall, upon the death of the owner, be inherited by the owner's oldest legitimate living male child of sound mind, natural or adopted, or if male heirs are lacking the oldest legitimate living female child of sound mind, natural or adopted, of the marriage during which such lands were acquired; in the absence of any issue such lands shall be disposed of in accordance with subsection [(b)] hereof.
>
> (b) If the owner of fee simple land dies without issue and no will has been made in accordance with this section [or 39 PNCA § 403] or the laws of the Republic or if such lands were acquired by means other than as a bona fide purchaser for value, then the land in question shall be disposed of in accordance with the desires of the immediate maternal or paternal lineage to whom the deceased was related by birth or adoption and which was actively and primarily responsible for the deceased prior to his death. Such desires of the immediate maternal or

> paternal lineage with respect to the disposition of the land in question shall be registered with the Clerk of Courts pursuant to [39 PNCA § 403(a)].

See 25 PNC §301.

To summarize, subsections (a) and (b) govern different scenarios for the disposition of the property in an estate depending, in part, on whether the decedent died with issue and was a bona fide purchaser of the land. Subsection (a) applies if the decedent died with children *and* the decedent purchased the land as a bona fide purchaser for value. If these requirements are met, then the land will be inherited by the owner's oldest child. *See* 25 PNC §301(a).

Subsection (b), which this Court has previously noted "is not the model of clarity," has been interpreted to apply only when the decedent dies without children, without a will, *and* the land owned was not purchased for value.[7] *Marsil*, 15 ROP at 36. In the event subsection (b) is implicated, the land passes in accordance with the wishes of the decedent's immediate maternal or paternal lineage. *See Koror State Pub. Lands Auth. v. Ngirmang*, 14 ROP 29, 33 (2006) (holding that a lineage meeting the statutory requirements must exist and come forward). If neither §301(a) nor (b) applies—for example, if a decedent died with issue and was not a bona fide purchaser for value—then a court should award property based on custom. *See id.* at 33; *see also Omelau v. Saito*, Civ. App. 11-040, slip op. at 3–4 (Sep. 18, 2012).

Put simply, in order for the Trial Division to execute its charge under 35 PNC §1317 to "make a determination of the . . . heir(s)," it must be able to identify whether the decedent was a bona fide purchaser, or, in the alternative, it must consider evidence of Palauan custom. *See Marsil*, 15 ROP at 26 (holding that, absent an applicable descent and distribution statute, customary law applies).

Here, the Trial Division correctly determined that §301(b) should not apply because the decedent died with issue. However, admitting there was no evidence on the record, either way, as to whether decedent was a bona fide purchaser, the Court failed to determine whether §301(a) controls. To be sure, the Court's reluctance to reach a decision on the applicability of subsection (a) was caused by a failure of the parties to present probative evidence on the issue. Nonetheless, this determination was crucial to determining whether to award the property either to Wong's eldest living child under §301(a) or whether to award the property based on custom.[8] *Marsil*, 15 ROP at 26.

In sum, Kee and Tellei argued unconvincingly that various beneficiaries of Wong's estate lost their interest in the property and failed to cite controlling

[7] The main confusion with the interpretation of §301(b) is that the introductory clause, which is clearly in the disjunctive, has been interpreted by this Court actually to be read in the conjunctive. That is, "in order for 25 PNC § 301(b) to apply, the decedent must die without issue, without a will, and must have acquired his lands other than as a bona fide purchaser for value. In effect, the 'or' becomes an 'and.'" *Marsil*, 15 ROP at 36.

[8] The record is essentially devoid of any expert customary testimony.

decisional law supporting this position. Ngiraingas, on the other hand, argued that Wong was not a bona fide purchaser and thus the property should go to Wong's children. Ngiraingas came closest to hitting the mark by citing 25 PNC §301, but failed to present evidence suggesting that Wong was in fact not a bona fide purchaser, failed to present evidence of Palauan custom, and ultimately misunderstood 25 PNC §301's entire rubric—that is, if §301(b) applied, the property would not necessarily pass to Wong's children; instead it would be determined by reference to the "desires of the immediate maternal or paternal lineage to whom the deceased was related." 25 PNC §301(b). The Court also failed to inquire more deeply into the bona fide purchaser issue, stating only that there was no evidence supporting either conclusion, and failed to insist on the development of a customary record in the alternative.

In the end, the concomitant failure resulted in leaving an estate matter unresolved and in derogation of 35 PNC §1317. Because of the failure to execute the charge in 35 PNC §1317, which was not entirely the fault of the Trial Division, it was nonetheless an error for it to close the estate without seeking to determine more conclusively and develop the record more robustly to identify, at the very least, a class of proper heirs and their respective interests.

CONCLUSION

The Trial Division did not err in dismissing Kee and Tellei's arguments that none of the other children of Wong have an interest in the *Cheuang* property. The Trial Division, however, did abuse its discretion in naming Ngiraingas as Permanent Adminstratrix without considering Kee's objections to her appointment. The Trial Division also erred in prematurely closing the estate without determining the heirs and providing more specific direction to the Administratrix.

Accordingly, the Decision of the Trial Division is **AFFIRMED** in part and **REVERSED** regarding Ngiraingas's appointment and the premature closing of the estate. We **REMAND** this case to the Trial Division and direct it to proceed in accordance with this Opinion.

In re: Determination of ownership of land called *Olang* identified as Worksheet Lots 181-12073 and 181-12074, located in Ngerkesoaol Hamlet, Koror State.

SANTOS IKLUK,

v.

KOROR STATE PUBLIC LANDS AUTHORITY,
Claimants.

LC/B 04-0137
LC/B 04-0138

Land Court
Republic of Palau

Decided: September 9, 2013
***Appeal of this Decision is pending**

[1]**Land Commission/LCHO/Land Court:** Superior Title

Under the superior title standard, a claimant claims that, *ab initio*, the land never became public land.

[2]**Land Commission/LCHO/Land Court:** Burden of Proof

Although ordinarily both the government and the private claimant stand on equal footing, if there is an adverse Tochi Daicho listing for the land, the claimant has the "added burden of establishing by clear and convincing evidence that [it is] incorrect."

[3] **Property:** Proof of Ownership

Finally, ownership can be inferred from long, uninterrupted use of land that is consistent with ownership and without objection from adverse claimants.

Counsel for KSPLA: Debra Lefing, Esq.
Counsel for Santos Ikluk: Mariano Carlos, Esq.

The Honorable, C. QUAY POLLOI, Senior Judge:

PROCEDURAL BACKGROUND

These two consolidated cases were initially before Associate Judge Ronald Rdechor. He heard the matters starting in October 2011 and then in January and February of 2012. On May 7, 2012, Associate Judge Rdechor issued his "Findings of Fact, Conclusions of Law, and Determination." On May 21, 2012, claimant Santos Ikluk filed an appeal. On March 28, 2013, the Appellate Division issued its Opinion reversing and remanding the matter for the Land Court to "re-evaluate Ikluk's claim under the superior title standard." *Ikluk v. KSPLA* Civ. App. No. 12-020, slip. op. at 7. The Appellate Division decided to remand the case because "superior title and return of public lands claims may be asserted individually or together."[1] *Id.* at 4

[1]The case of *Carlos v. Ngarchelong SPLA*, 8 ROP Intrm. 270 (2001) was the impetus for the holding that the theories of wrongful taking and/or superior title may be raised in the alternative by a single claimant. That case was soon followed by *Kerradel v. Ngaraard State Pub. Lands Auth.*, 9 ROP 185 (2002). In *Kerradel*, the Land Court dismissed appellant's return of public land claim because it was untimely filed. The Appellate Division remanded the case back to the Land Court for the reason that a superior title action preexists and predates Article XIII claims so, "Appellant . . . was entitled to, and did, claim the land on the theory that it never became public land in the first place." *Id.* at 185. For over a decade now, the Land Court has routinely heard

citing *Kerradel v. Ngaraard State Pub. Lands Auth.*, 9 ROP 185, 185-186 (2002). By the time the case was remanded to the Land Court, Associate Judge Rdechor had resigned. The matter was then assigned to the undersigned judge.

A status conference was held on June 7, 2013 and a hearing was then scheduled for July 17, 2013. Because of technical issues, the hearing was held the following day, July 18, 2013. After the hearing, the parties submitted their written closing arguments. KSPLA submitted its closing on the deadline date of August 30, 2013. Santos Ikluk submitted his closing on September 3, 2013, or four days after the deadline date.[2] The parties were permitted to make replies by Friday, September 6, 2013 but none were filed. The Court then took the matter under advisement.

Having considered the evidence adduced at the July 18, 2013 hearing and the arguments raised in the written closing arguments, this Court now issues this "Decision After Remand." For the reasons stated below, the worksheet lots at issue are determined to be owned by Koror State Public Lands Authority.

STANDARD OF REVIEW

[1, 2] The Appellate Division has instructed the Land Court to "re-evaluate Ikluk's claim under the superior title standard." *Ikluk v. KSPLA* Civ. App. No. 12-020, slip op. at 7. Under the superior title standard, a claimant claims that, *ab initio*, "the land never became public land." *See, Wasisang v. Palau Pub. Lands Auth.* 16 ROP 83, 84 (2008). Under this theory, both the claimant and the public lands authority stand on equal footing albeit affirmative defenses are available for the government that are otherwise unavailable in Article XIII claims. These affirmative defenses include laches, estoppel, waiver, stale demand, and the statute of limitations. *See generally,*

claimants raise these two alternative theories for claiming public land. Recently, however, on August 22, 2013, the Appellate Division in *Klai Clan v. Airai State Pub. Lands Auth.*, Civ. App. No. 12-051 (2013) changed the standard by holding that the Appellant could not raise a superior title claim because the Appellant's, "only filed claim was for a return of public lands." *Id.* at pg. 4. Then, on September 4, 2013, the Appellate Division emphasized this new requirement by stating that, "even if Idid Clan began arguing a superior title claim after filing a claim for return of public lands, the Land Court does not have the authority to amend a claim by consent of the parties." *Idid Clan v. KSPLA*, Civ. App. 12-036, Slip. Op. at 10 (2013). Under *Klai Clan* and *Idid Clan*, a claimant who filed using a form for claiming public lands can no longer raise a superior title argument. The only time that a claimant can raise both theories is if the claimant preserved both by filing two separate claims, one for a return of public lands (and doing so before the 1989 deadline) and another on a form for claiming private lands (and doing so by the 60-day deadline which the Appellate Division points out as stemming from Land Court Regulation 11 but that has been superseded by statute, namely, 35 PNC §1307). Because it has been the practice of the Bureau of Lands & Surveys to issue notices for filing claims based on the Tochi Daicho for most states and because public lands are usually identified by Tochi Daicho lot numbers, the chances of a claimant filing a public land claim as well as a private land claim for the same public land is virtually nonexistent. Under *Klai Clan* and *Idid Clan*, a superior title action filed in the Trial Division is now the only recourse for a claimant whose superior title claim for a public land is dismissed by the Land Court because the claimant only filed using a "Claim for Public Land" form.

[2] Counsel for Mr. Ikluk is reminded that making submissions after the deadline date can have negative repercussions including sanctions or the Court not considering the submission.

Espong Lineage v. Airai State Pub. Lands Auth., 12 ROP 1, 5, (2004). Although ordinarily both the government and the private claimant stand on equal footing, if there is an adverse Tochi Daicho listing for the land, the claimant has the "added burden of establishing by clear and convincing evidence that [it is] incorrect." *Wasisang*, 16 ROP at 85.

DISCUSSION

I. Santos Ikluk's Claim

Before evaluating Ikluk's claim under the superior title standard, the basis of his claim is first discussed. Claimant Santos Ikluk testified that he is retired and resides at Ngerkebesang Hamlet where he bears the title *Espangel*. The land he claims is called *Olang* and it is located Ngerielb in Ngermid. He testified that *Olang* is supposed to be one lot but on the map it has been split into two parcels. On Ikluk Exhibit A, the lots that he claims are highlighted in yellow and are numbered 181-12073 and 181-12074.

Mr. Ikluk went on to testify that the land *Olang* encompasses an area beyond the lots he claims. The entirety of *Olang* was originally owned by Ollaol during the Japanese Era. A Japanese man wanted to plant lemon trees on the land and asked to purchase the land from Ollaol. The Japanese man could not make a full payment, so he made partial payments. Eventually, the Japanese Government came and told Ollaol and the Japanese man and others that *Olang* and the area of Ngerieilb would be used for a Japanese shrine so they had to move. Eventually World War II came and went. Afterwards the lands became Trust Territory lands.

Early in the Trust Territory period, a man named Armaluuk claimed various lands including *Olang*. He claimed that the land belongs to Ngerketiit Lineage and not the government. In 1958, a determination of ownership was issued by the Trust Territory. It was admitted into evidence as Ikluk Exhibit B. It is dated July 8, 1958 and is entitled Determination of Ownership and Release No. 162 wherein *Olang* and other named lands are awarded to Ngerketiit Lineage.

Mr. Ikluk also testified that part of *Olang* was given by Adelbai Ollaol to George Ngirarsaol. The person named Adelbai Ollaol is a male son of Ollaol, the owner of *Olang* during the Japanese Era. On Ikluk Exhibit A-1, the part of *Olang* that was given by Adelbai to George Ngirarsaol is numbered 016 B 23. It is just south of one of the lots that Ikluk claims, namely, 181-12073. Mr. Ikluk testified that the reason why he is familiar with George Ngirarsaol's lot is because Adelbai Ollaol brought him to the area and told him that the part of *Olang* that is adjacent to George Ngirarsaol's land would belong to him, Santos Ikluk.

Mr. Ikluk explained why Adelbai gave him this part of *Olang*. He testified that Adelbai is his maternal uncle and gave him *Olang* as payment for services rendered. Specifically, in the late 1970's or early 1980's, Adelbai's sister Aot was to be wedded and the customary food called *ngader* had to be prepared. Adelbai asked Mr. Ikluk to prepare the *ngader* which Mr. Ikluk did prepare. Adelbai received the *bus* payment for the *ngader* but used up the funds. Accordingly, he asked Mr. Ikluk to visit him on the weekend which Mr. Ikluk did. Adelbai then took Mr. Ikluk to the land

Olang and then showed him George Ngirarsaol's portion of *Olang* and the other portion that he, Adelbai, then gave to Mr. Ikluk. Adelbai told Mr. Ikluk that when paperwork regarding ownership had to be completed then Mr. Ikluk could bring such matters to him so that he can assist with processing them.

Eventually, Mr. Ikluk noticed a "Private Property" sign on the land. He inquired about the matter which led to his filing a claim for ownership. Mr. Ikluk explained that he filed his claim not for the return of public lands because the land belonged to Adelbai and now it is his land. This is so because ownership was previously determined in 1958 as shown by Ikluk Exhibit B, the Trust Territory determination awarding ownership to Ngerketiit Lineage. When questioned by counsel for KSPLA, Mr. Ikluk explained that the 1958 determination of ownership is itself proof that the Tochi Daicho listing naming the government as owner was incorrect. Instead, the land is private land at least since 1958 and that is why he filed a regular claim for a private land, instead of a public lands claim.

Having summarized Mr. Ikluk's evidence, the Court now turns to the merits of the claim under the applicable legal standard. As a superior title action, Mr. Ikluk must prove that the land at issue never became public land in the first place. If it is listed in the Tochi Daicho as owned by the government, Mr. Ikluk must prove by clear and convincing evidence that the listing is erroneous. *See generally, Wasisang v. Palau Pub. Lands Auth.* 16 ROP 83 (2008); *Espong Lineage v. Airai State Pub. Lands Auth.*, 12 ROP 1, 5, (2004).

Instead of proving that *Olang* never became public land in the first place, Mr. Ikluk sought to prove that there was a wrongful taking by the Japanese. This is highlighted by this testimony at the hearing that the Japanese Government came and told Ollaol and the Japanese man and others that *Olang* and the area of *Ngerieilb* would be used for a Japanese shrine so they had to move. This position was reiterated in Mr. Ikluk's written closing argument whereby his counsel states that, "Santos Ikluk testified that the part of Olang that he is claiming was taken by Nanyo Shinto Shrine Society during the Japanese time and became part of Tochi Daicho 218." Ikluk *Closing Argument* at 1.

For the wrongful-taking argument to apply, Mr. Ikluk must have filed a claim for public lands by the statutory deadline of January 1989. He did not do this. Instead, he filed his claim on July 20, 2000 and did so using a Land Court "Claim of Land Ownership" form.[3] Consequently, he can only raise and prove a superior title claim. *See generally*, *Klai Clan v. Airai State Pub. Lands Auth.*, Civ. App. No. 12-051 (2013); *Idid Clan v. KSPLA*, Civ. App. 12-036, slip. op. at 10 (2013) (both cases standing for the proposition that a claimant who only filed a claim for public lands cannot raise a superior title claim if he did not also file a separate claim for private lands). By focusing on a wrongful taking theory, Mr. Ikluk failed to prove his superior title claim.

[3] This type of private claim has been labeled a superior title claim by the Appellate Division. *See, Idid Clan v. KSPLA*, Civ. App. 12-036, slip op. at 9 (2013).

II. KSPLA's Claim

KSPLA submitted 7 exhibits that were, to an extent, voluminous. Some of these exhibits were more so self-explanatory. Others, however, were far from being clear as to their relevance to the land at issue. KSPLA did little in terms of authenticating, laying a foundation, and then presenting sufficient testimony so that the Court could better appreciate the importance of each document and how they relate to each other. Although the Rules of Evidence do not apply at the Land Court, the parties are reminded that this Court will not go out of its way to make sense of extensive documents if they are not adequately explained at a hearing.

KSPLA's witnesses did provide other useful testimony. The first witness was 51-year-old Pasquana Blesam. Ms. Blesam testified that she is a Realty Manager at KSPLA, having been working in that capacity for about 16 years. She testified that she manages and maintains all of the KSPLA lease files. Because of her work, she knows what leases pertain to what lands. She then referred to KSPLA Exhibit 5, which are two residential leases between KSPLA and Suko Ngiraului. She explained that the leases concern the area that is now worksheet lot 181-12074.

The next witness was 58-year-old Mr. Roman Remoket. He testified that he is currently a surveyor for KSPLA. He previously worked for the Bureau of Lands and Surveys from 1975 to about 1980 during the Trust Territory administration. As to Ikluk's Exhibit A, he testified that the lands claimed by Mr. Ikluk are government lands. The basis of his knowledge is that in about 1975 to 1976, during the Land Commission of the Trust Territory period, he accompanied elder men such as Blacheos Kemaitelong. With maps on hand, they walked the land to confirm the boundary between public and private lands. The markers were already in existence, and they went to the area to relocate the markers. This confirmation activity was done before the aerial photo survey program started. The purpose of the aerial survey was to identify and survey government lands. Although he did not hear and retain the name of the land they traversed, he did hear the men mention a boundary shared between the government and Armaluuk.

Mr. Remoket then testified that lot numbers181-12072 and 181-12073 are within an area of government lands. This is based on what the elder men, mainly from Koror, indicated. As to Armaluuk's land, the elder men said that they would go to Armaluuk's land and then go down to relocate the markers between the private and public lands. The land that was referred to as Armaluuk's land is where Ilang-Ilang is presently located. [4]

Having summarized KSPLA's claim, the Court now turns to its merits. For three reasons, the Court concludes that KSPLA's claim prevails. First, adverse claimant Santos Ikluk conceded that the part of Olang that he is claiming "became part of Tochi Daicho Lot 218" which is listed under Nanyo Shinto Shrine Society. Ikluk *Closing Argument* at 1. It is then listed as public land although there is no monumentation record or other documents on file that show

[4]The Court takes judicial notice that this is the area that is referred to as George Ngirarsaol's land.

that Tochi Daicho 218 was ever monumented and surveyed. Be that as it may, KSPLA claims that the lot at issue is Tochi Daicho 218, a point which Mr. Ikluk did not refute but conceded.

Second, the Court credits surveyor Roman Remoket's testimony that, based on his personal experiences with elders walking the boundaries in the 1970's, the boundary between private and public lands in the vicinity ran generally between Armaluuk's lot, which is now George Ngirarsaol's land, and the lands to the north of that lot. That area to the north (*i.e.*, the public land area) includes the lands now claimed by Mr. Ikluk.

[3] Finally, ownership can be inferred from long, uninterrupted use of land that is consistent with ownership and without objection from adverse claimants. *See generally*, *Obak v. Joseph*, 11 ROP 124 (2004). For several years now, KSPLA has leased out at least one of the two lots. There was no evidence submitted to show that Mr. Ikluk objected to this usage by KSPLA. For this third reason, ownership is awarded to KSPLA.

CONCLUSION

For the foregoing reasons, the lots at issue are hereby determined to be owned by Koror State Public Lands Authority. Appropriate determinations of ownership shall issue forthwith.

DOMINICA NGORIAKL,
Appellant,

v.

GEORGE RECHUCHER,
Appellee.

CIVIL APPEAL NO. 12-038
Civil Action No. 09-058

Supreme Court, Appellate Division
Republic of Palau

Decided: September 19, 2013

[1] **Appeal and Error:** Harmless Error

Errors made by a lower court do not require reversal where the error is unrelated to the matter's ultimate determination, rendering it harmless.

[2] **Courts:** Judgments

As a general rule, judgments are to be construed like other written instruments, and the legal effect of a judgment must be declared in light of the literal meaning of the language used.

[3] **Contracts:** Reformation

A court "reforms" a document when it employs its equitable powers to construe a legal document "to express or conform to the real intention of the parties when some error or mistake has been committed.

[4] **Contracts:** Severability

Invalid or unenforceable provisions may be severed from an otherwise valid contract for

purposes of rescission if circumstances so require to yield a just result.

[5] **Contracts:** Severability

The question whether a contract can be properly considered severable is considered in light of the language employed by the parties and the circumstances existing at the time of the contracting. The primary criterion for determining the question is the intention of the parties as determined by a fair construction of the terms and provisions of the contract itself, by the subject matter to which it has reference and by the circumstances of the particular transaction giving rise to the question.

[6] **Property:** Deeds

Deeds typically will be enforced, notwithstanding the existence of unenforceable provisions.

Counsel for Appellant: William Ripdath
Counsel for Appellee: Kevin Kirk

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; R. ASHBY PATE, Associate Justice; and HONORA E. REMENGESAU RUDIMCH, Associate Justice Pro Tem.

Appeal from the Trial Division, the Honorable KATHLEEN M. SALII, Associate Justice, presiding.

PER CURIAM:

This is an appeal of a Trial Division judgment granting Appellee George Rechucher a use right for land owned by Tmetab Clan. For the reasons set forth below, the Trial Division's decision is **AFFIRMED**.

BACKGROUND

On August 20, 2007, Adelbai re Kesoaol Jones Ngoriakl (Adelbai Jones), the highest ranking chief of Tmetab Clan, executed a "Land-Use Right Agreement" (the Agreement) on behalf of Tmetab Clan in favor of Appellant George Rechucher. The agreement identified a portion of Cadastral Lot No. 023 B 01 (the Land) and provided that:

> User shall have the right to possess, occupy, and use for whatever purposes the above-described portion of the Land and is free to conduct any construction, renovation, and/or improvement thereon as he himself deems necessary or appropriate. Furthermore, [he] shall have the right to transfer, assign, lease or sublease any of his interests in the above-described portion of the Land without consent of the Owner, provided, however, that any interest so transferred, assigned, leased or subleased shall not exceed User's own interests. Finally, Owner agrees, promises and covenants that it shall not void or attempt to void this Use-Right upon grounds that the boundaries of the portion of the Land subject herein are uncertain or for any other reason(s).

Approximately three weeks later, on September 10, 2007, Adelbai Jones, once again purporting to act on behalf of Tmetab Clan, executed an Amended Land-Use Right Agreement (the Amended Agreement) "to

honor the August 20, 2007 Land-Use Right Agreement [and] to further extend the use-right in said portion of the Land to include User's children, heirs and/or successors." Specifically, the Amended Agreement provided that:

> [Rechucher], his children, heirs, and/or successors shall have the right to possess, occupy, and use for whatever purposes the same portion of Land described in the August 20, 2007 Land-Use Right Agreement and are free to conduct any construction, renovation, and or improvement thereon as they deem necessary or appropriate. Furthermore, User, his children, heirs and/or successors shall have the right to transfer, assign, lease or sublease any of their interests in the said portion of the Land without consent of the Owner.

On March 19, 2009, Appellant Dominica Ngoriakl filed a complaint in the Trial Division seeking an injunction preventing Rechucher from exercising the rights granted by the August 20, 2007, Agreement.[1] She also sought a declaratory judgment that the August 20, 2007, Agreement is invalid. Ngoriakl alleged that the Agreement was invalid because: (1) Rechucher was not a member of Tmetab Clan; (2) the Agreement was not supported by adequate consideration; (3) Adelbai Jones executed the agreement "without the prior, concurrent, or subsequent assent of plaintiff or any other strong or senior members of Tmetab Clan as is required by law, and such instrument is therefore voidable by plaintiff." The case proceeded to trial at which three expert witnesses presented different opinions on a chief's authority to transfer interests in clan lands.

Demei Otobed, Rechucher's expert witness, testified that a chief may convey interest in clan property without the consent of the kldorolel[2] or other strong senior members of the clan. Kazumoto Rengulbai testified that the consent of the clan's ourrot generally is required to convey interest in land but that the chief possesses unilateral authority to grant a use right. Florencio Gibbons, Ngoriakl's expert, testified that before clan property can be conveyed (either in fee simple or as a use right) the male title holder must call a meeting with his kldorolel and other members and then reach a consensus on conveyance. All three witnesses testified that where a chief gives a use right, the right may be rescinded if the clan has a need for the property, or if the right is abused.

The Trial Division issued a Decision and Judgment concluding that a chief of a clan may unilaterally convey a right to a clan member to use clan land but that, prior to conveying a fee simple interest in such land, he must obtain approval from the ourrot. The Trial Division further found that the Amended Agreement was an agreement to convey a fee simple interest in the described land and was, therefore, invalid. However, rather than invalidate the entire Amended Agreement, the Trial Division severed the fee simple transfer from the Amended Agreement and upheld the portions granting Rechucher a use right.

[1] The complaint did not reference the Amended Agreement.

[2] A chief's female counterpart.

Elsewhere in the decision, the Trial Division found that Rechucher was an ochell member of the clan.

Ngoriakl appealed.

STANDARD OF REVIEW

Ngoriakl raises two issues on appeal: (1) the Trial Division erred in severing the contract (rather than invalidating it); and (2) the Trial Division erred in its finding of Rechucher's clan status. Because a person's status in a clan is a matter of custom which, for cases filed before January 3, 2013, was a determination of fact, we review the Trial Division's customary finding for clear error. *See Beouch v. Sasao*, Civ. App. No. 11-034, slip op. at 5, 17 (Jan. 3, 2013). Determinations of law, including a court's interpretation of a contract, are reviewed de novo. *Isechal v. Umerang Clan*, 18 ROP 136, 142 (2011).

DISCUSSION

I. Clan Membership

In its decision, the Trial Division found that "[t]he preponderance of the evidence established at trial is that Defendant is an ochell member of Tmetbab Clan through his mother's matrilineal line. His mother, Martha, may be adopted, but she is nevertheless an ochell member of the clan . . . ." Ngoriakl contends that this conclusion was error because "the two expert witnesses who opined at trial on clan membership [testified] this is impossible under Palau customary principles."

Ngoriakl submits that the Trial Division erred in finding that Rechucher holds ochell status and that such error requires reversal because:

> [i]t appears, in the Court's reasoning, to fundamentally undergird and lead to the Court's next conclusion that Adelbai Jones had the authority to convey a use right to Mr. Rechucher without the consent of any other clan members. Otherwise, the finding of Mr. Rechucher's ochell status, as opposed to some lesser or general status in the clan . . . would have no importance and be purely gratuitous.

We need not consider this argument because, even if the Trial Division erred in concluding that Rechucher held ochell status, such error was harmless.

Errors made by a lower court do not require reversal where the error is unrelated to the matter's ultimate determination, rendering it harmless. See *Rengiil v. Debkar Clan*, 16 ROP 185, 191 (2009) ("Because that misstatement does not undermine the reasoning or validity of the Land Court's [conclusion], it is harmless and does not justify remand.").

[1] In its decision, the Trial Division concluded that "because [Rechucher] is a member of Tmetbab Clan, Adelbai had the authority to grant him a use-right without first consulting with or getting approval from the ourrot of the Clan." Ngoriakl would have us read the foregoing sentence as beginning with the clause "because Defendant is *an ochell* member of Tmetbab Clan." We see no reason to do so.

[2] "As a general rule, judgments are to be construed like other written instruments, and the legal effect of a judgment must be

declared in light of the literal meaning of the language used." *Mikel v. Saito*, Civ. App. No. 12-032, slip op. at 8 (Feb. 28, 2013) (internal punctuation omitted). Here, the plain reading of the decision is that the Trial Division based its decision that Adelbai Jones could convey a use right on the fact that Rechucher was a clan member. There is no indication that the finding of Rechucher's specific clan status played any role in the ultimate conclusion that Adelbai Jones had the unilateral authority to grant Rechucher a use right to clan land. Indeed, of the two expert witnesses who testified that the male title holder of a clan could unilaterally grant a use right to a clan member, neither testified that the grant of a use right was conditional on the grantee's ochell status.[3] Accordingly, we conclude that Rechucher's ochell status was immaterial to the lower court's decision and that, therefore, any error in this regard was harmless.

II. Enforcement of the Contract

The Amended Agreement granted Rechucher a use right to the property and the ability to transfer and devise his right at will. The Trial Division found that the purported transfer was invalid insofar as it was an attempt to effectuate a fee simple transfer without the approval of the ourrot. However, noting that "contracts . . . can be severed for purposes of rescission if circumstances so require to yield a just result," the Trial Division elected to treat the grant of the use right to Rechucher as severable from the purported grant of transferability of the use right. Ngoriakl contends that the Trial Division improperly reformed the Agreement. We disagree and hold that the Trial Division properly severed (rather than reformed) the parties' agreement.

A. Severance and Reformation

[3, 4] It is important to distinguish between the judicial doctrines of severance and reformation. A court "reforms" a document when it employs its equitable powers to construe a legal document "to express or conform to the real intention of the parties when some error or mistake has been committed." 66 Am. Jur. 2d *Reformation of Instruments* § 1. Relatedly, invalid or unenforceable provisions may "be severed [from an otherwise valid contract] for purposes of rescission if circumstances so require to yield a just result." *Dalton v. Borja*, 12 ROP 65, 72 (2005).

The Trial Division, citing to *Borja*, stated explicitly that it was severing the portions of the Agreement it found to be unenforceable—those provisions granting Rechucher the right to transfer and devise his use right. This was not a reformation of the contract, and Appellant's contention that the Trial Division misapplied the reformation doctrine is without merit.

B. The Trial Division's Decision to Sever the Unenforceable Terms

[5] "The question whether a contract can be properly considered severable is considered in light of the language employed by the parties and the circumstances existing at the time of the contracting." *Palau Marine Indus. Corp. v.*

[3] Otobed testified that he was aware of a person who received a use right *because* he was an ochell member. This is not testimony that a person *must* be an ochell member to receive a use right.

Pac. Call Invs., Ltd., 9 ROP 67, 71 (2002). "The primary criterion for determining the question is the intention of the parties as determined by a fair construction of the terms and provisions of the contract itself, by the subject matter to which it has reference and by the circumstances of the particular transaction giving rise to the question." 17A Am. Jur. 2d *Contracts* § 406.

In answering this question, we first address the interplay between the Agreement and the Amended Agreement. The Trial Division found, and neither party disputes, that the Amended Agreement constituted an attempt to transfer a fee simple interest in the property and that Adelbai Jones lacked authority to affect such a transfer. Because Adelbai Jones lacked authority to execute the Amended Agreement, the document is without legal effect. *See* Restatement (Third) of Agency § 1.01 *cmt.* c (2005) ("Only interactions that are within the scope of an agency relationship affect the principal's legal position."). Accordingly, the only question before us is whether the Agreement (as it existed before the Amended Agreement) may be enforced.

The Agreement provided that:

> [Rechucher] shall have the right to possess, occupy, and use for whatever purposes the above-described portion of the Land and is free to conduct any construction, renovation, and/or improvement thereon as he himself deems necessary or appropriate. Furthermore, [he] shall have the right to transfer, assign, lease or sublease any of his interests in the above-described portion of the Land without consent of the Owner, provided, however, that any interest so transferred, assigned, leased or subleased shall not exceed User's own interests.

[6] With regard to conveyances of property, "[p]ractically all courts agree that a deed will be given an interpretation which will cause it to be effective in preference to one which would render it inoperative." 23 Am. Jur. 2d *Deeds* § 199. Accordingly, deeds typically will be enforced, notwithstanding the existence of unenforceable provisions. *See, e.g., Corner v. Mills*, 650 N.E.2d 712, 715 (Ind. Ct. App. 1995) ("[I]llegal covenants [in deeds] may be removed if to do so will not affect the intent or symmetry of the remaining covenants."); *Connolley v. Harrison*, 327 A.2d 787, 789 (Md. Ct. App. 1974) ("[Unenforceable provision] can be severed from the instrument without destroying the instrument's overall validity or the validity of any other provisions if it is not so interwoven as to be logically inseparable from the rest."); *Hawthorne v. Realty Syndicate, Inc.*, 268 S.E.2d 494, 500 (N.C. 1980) ("Defendants' contention that the residential restriction must fail because of its conjunction with an unenforceable racial restriction is meritless. Although expressed as part of the same covenant, the two clauses are so clearly independent that one need not infect the other.").

Here, the Agreement split the rights of use and transferability into separate clauses. Based on this separation of the rights, and the presumption of intent for the validity of deeds, we conclude that the Trial

Division did not err in severing the unenforceable portions of the Agreement from the enforceable use right.

CONCLUSION

For the foregoing reasons, we conclude that Rechucher possesses a non-transferrable use right to the Land described in the Agreement. The decision of the Trial Division is **AFFIRMED**.