IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

NGIRAIKELAU BEOUCH, Appellant, v. ASAKO K. SASAO, NGIRNGESIS MAD, and WATARU ELBELAU Appellees.	CIVIL APPEAL NO. 11-034 Civil Action No. 04-143 **OPINION**

Decided: January 3, 2013

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.**

[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.

PROCEDURAL HISTORY

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*.

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.

"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.
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> 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.

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[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).

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 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 customary law 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").

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

[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.

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]

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]

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[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).

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 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

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

[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] 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

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.").

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)).

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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] 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.

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

DISCUSSION

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

"[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

[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).

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).

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 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.

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

"[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.

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.

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."

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

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[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

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 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 decision of the trial court is **REVERSED**. This case is **REMANDED** for proceedings consistent with this opinion. On remand the Trial Division

[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.

should determine what effect the foregoing conclusions have on the parties' rights to access *Brekong*.[14]

SO ORDERED, this 3rd day of January, 2013.

ARTHUR NGIRAKLSONG
Chief Justice

KATHLEEN M. SALII
Associate Justice

ROSE MARY SKEBONG,
Associate Justice Pro Tem

[14] 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.