


IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

FILED 

TEREKIEU CLAN rep. by BUIK TUCHERUR RICHARD
RECHIREI,
Appellant,
v.
BRENDA NGIRMERIL and AUGUSTA RENGIL,
Appellees.

Cite as: 2019 Palau 37
Civil Appeal No. 18-038
Appeal from Civil Action No. 17-179

Decided: November 11, 2019

Counsel for Appellant Vameline Singeo
Counsel for Appellees C. Quay Polloi

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice
JOHN RECHUCHER, Associate Justice
ALEXANDRO C. CASTRO, Associate Justice

Appeal from the Trial Division, the Honorable Lourdes F. Materne, Associate Justice,
presiding.

OPINION

PER CURIAM:

[¶ 1] At issue in this case is the disposition of funds from the sale and lease of certain properties, and whether the female titleholder of a clan has the right to dispose of the funds “as she wishe[s]” without consulting any other clan members. We hold that, under Palauan customary law, even a titleholder must consult with all of the other senior strong members of the clan prior to any disposition of clan property. Thus, as set forth in more detail below, we **REVERSE** the trial court’s decision and **REMAND** the case for further proceedings consistent with this opinion.

BACKGROUND

[¶ 2] This appeal involves funds generated from the rent of certain lands located at Iyebukel Hamlet in Koror State owned by Terekieu Clan. They are Cadastral Lot Nos. 123 B 07, 123 B 08, 123 B 10, 064 B 04, and 064 B 03. The Clan received \$50,000 for leasing Cadastral Lot Nos. 064 B 03 and 064 B 04. *See* Judgment in CA. No. 16-103. The Clan also received approximately \$5,696 in rent for Lots 123 B 07, 123 B 08 and 123 B 10 and \$158,444 plus \$49,109.00 in interest from the government for the land where Harris Elementary School is located. The parties agree that all but \$28,000 of the initial Harris School payment was appropriately distributed. All of the other funds are the subject of this appeal. The question is: who had the authority to distribute the funds?

[¶ 3] Plaintiff below, and Appellant in this case, is the Terekieu Clan itself, as represented by Buik Tucherur Richard Rihart Rechirei.¹ The highest male titleholder of the clan is known as Tucherur re Terekieu. The title Buik Tucherur means “the messenger of the Tucherur,” and its holder is the next in line to become Tucherur when that title becomes vacant. The Tucherur was Melachelbeluu Wilhelm Rengiil (“Wilhelm”), but he passed away in May of 2017, after the events at issue but before the trial court’s decision in this case. Defendants below,² and Appellees before this Court, are Wilhelm’s sisters and Rechirei’s aunts, Brenda Berenges Ngirmeriil and Augusta Rengiil. Ngirmeriil is undisputedly the female titleholder of the Clan, referred to as Uodelchad ra Terekieu.³ Ngirmeriil and Rengiil have at least two other living sisters, Siang Rengiil⁴ (“Siang”) and Kelebil Shiprit. These two sisters, along

¹ It should be noted, however, that Appellees have consistently maintained that Rechirei has no authority to bring this suit on behalf of the Clan, because he was removed from his title and because he does not hold one of the Clan’s highest titles.

² An individual named Eugene Termeteet was also a named defendant, filed a *pro se* answer to Plaintiff’s complaint, and testified briefly at trial. However, he did not otherwise participate in the case and is not named as a party in this appeal. Eugene Termeteet is married to one of Ngirmeriil’s daughters, Geraldine, and acted as landlord of a house belonging to the Clan, under the authority of Ngirmeriil and Rengiil.

³ While the trial court at one point refers to “Ngirur Ngirmeriil” as Uodelchad, this appears to be an error, as she was purportedly Uodelchad for a short time years ago but gave up the title, and Ngirmeriil’s status was undisputed at trial.

⁴ Siang was also referred to as Siang Yuji in the trial court.

with Appellees and Rechirei's mother, Alberta Rengiil, are the five individuals who signed the document appointing Rechirei to his title. Appellees are undisputedly both ochell members of the Clan, meaning that they can trace their line back to an original female member of the Clan, and senior strong members. The status of Rechirei was disputed, however, as was the issue of who the other senior strong Clan members were, if any.

[¶ 4] Appellant alleged that all of the senior strong members of the Clan should have been part of the decision-making process regarding the Clan funds, and that Appellees improperly used some of the funds for their personal benefit and the benefit of Elilai Clan. Appellant also alleged that Ngirmeriil had a fiduciary duty to the Clan, and requested damages for breach of this duty and unjust enrichment. Appellant requested a declaratory judgment of who the strong senior members of the Terekieu Clan are.

[¶ 5] Appellees countered that, because Ngirmeriil was the highest female titleholder of the clan, and she and her sister Rengiil were the strongest members of the Clan, they had the authority to dispose of the funds without consulting any other members of the Clan, and that the Uodelchad could not be sued over her use of the funds. They also argued that their uses of the funds were not improper under Palauan custom.

[¶ 6] The trial court heard conflicting expert testimony on Palauan custom. Noah Secharraimul was called as an expert witness on behalf of Appellees. The trial court summarized his testimony as "assert[ing] that the most senior members of a clan, notably the title bearers have authority over clan assets such as land and money. He further iterated that female title bearers have authority over all clan assets **to be used for the benefit of the clan.**" (Emphasis added). Secharraimul also testified that clan members cannot sue a titleholder for using the funds for their own personal use, even though doing so is wrong.⁵

[¶ 7] The trial court stated that it accepted Secharraimul's testimony, and held:

⁵ He testified that clan members' remedies are limited to: "go[ing] after the property that was lost and bring[ing] it back pursuant to custom," which would "add to [their] strength within the clan." Otherwise, they must either "forgive" the titleholder or "disregard it."

It is a well accepted practice in Palau that women control the purse. . . . The court accepts Secharraimul's declaration that a female title bearer along with the male title bearer has the authority over clan funds and that mainly the male title bearer administers lands. As such, Ngirmeriil had every right to be in possession of Clan funds and expend them as she wished. Uodelchad alone had the authority over Clan funds as Tucherur was vacant. The Court notes that testimony elicited from Ngirmeriil and Rengiil showed that most of the Clan funds were used for the benefit of the Clan or Clan members. It was also clear that some of the money could not be accounted for. Consequently, the money used by Rengiil were with [*sic*] the consent of Uodelchad and she is not liable to return or payback the money.

The trial court acknowledged "Rechirei as Buik Tucherur," but found that "no evidence was presented to show that Buik Tucherur can administer Clan lands in the absence of Tucherur." Thus, the trial court ruled in favor of Appellees, holding that: "All Clan funds are under the authority of Uodelchad ra Terekieu, Brenda Ngirmeriil as Tucherur is vacant."

STANDARD OF REVIEW

[¶ 8] This Court has previously and succinctly explained the appellate review standards as follows:

A trial judge decides issues that come in three forms, and a decision on each type of issue requires a separate standard of review on appeal: there are conclusions of law, findings of fact, and matters of discretion. Matters of law we decide *de novo*. We review findings of fact for clear error. Exercises of discretion are reviewed for abuse of that discretion.

Kiuluul v. Elilai Clan, 2017 Palau 14 ¶ 4 (internal citations omitted).

While the "clear error" standard is a deferential one:

ROP R. Civ. P. 52(a) requires a trial court to “find the facts specially.” A trial court’s decision must “reveal an understanding analysis of the evidence, a resolution of the material issues of ‘fact’ that penetrate beneath the generality of conclusions, and an application of the law to the facts.” *Fritz v. Blailles*, 6 ROP Intrm. 152, 153 (1997) (quoting 5A James Wm. Moore *et al.*, Moore’s Federal Practice ¶ 52-05[1] (1984)). “Where custom is applied it ‘must be reduced to written form by the record at [trial].’” *Id.* (quoting *Udui v. Dirrecheteet*, 1 ROP Intrm. 114, 117 (1984)).

Eklbai Clan v. Imeong, 11 ROP 15, 17 (2003).

[¶ 9] Customary law is treated like other matters of law in that the lower courts are bound by our decisions – even where expert witness testimony to the contrary is presented, as we elucidated in *Beouch v. Sasao*, 20 ROP 41 (2013), holding: “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).” *Id.* at 48. With respect to changes in custom, however, this Court has noted that it may not “speed th[e] evolution [of custom] along without the help of some form of customary testimony.” *Orak v. Ueki*, 17 ROP 43, 49 (2009). *Beouch* went on to hold that a trial court should use a four-part test to determine whether to take judicial notice of a custom as traditional law – but, again, only “[i]f there is no controlling Appellate Division case law” on point. *Id.* at 49.

[¶ 10] The lower court’s determination that: “Uodelchad [the female title bearer] alone had the authority over Clan funds” and could “expend them as she wished” will be reviewed *de novo* as it is a matter of customary law. *Id.* at 50.

ANALYSIS

I. Under Palauan customary law the senior strong members of a clan must be consulted regarding the distribution of clan assets and distribute them in a way that is fair to all clan members.

[¶ 11] The most basic and fundamental tenet of Palauan custom is that disputes are settled by consensus and, while senior strong members of a clan administer and are responsible for distributing a clan's assets, including money, they must do it in a way that is fair to all clan members. The trial court's failure to follow this customary law, as set forth in our precedents, lead to the error in this case, the finding that Ngirmeriil could expend Clan funds however she wanted. The trial court heard conflicting expert testimony⁶ and held one expert to be more credible. The proper procedure, after *Beouch*, would be for the trial court to first determine whether binding precedent exists and, if it does, limit expert testimony on that point of customary law to the issue of whether the custom has changed.

[¶ 12] One of our early cases explaining the customary law requirements for distributing clan assets was *Sengebau v. Balang*, 1 ROP Intrm. 695, 698 (1989), which involved the distribution of a war claims award. While we held that customary law did not fully address this unusual payment, it was helpful to guide the court in determining how to reach a fair distribution – which is the fundamental goal. *Id.* at 699. We held that: “Customary law throughout Palau requires that assets of a clan or lineage obtained in the normal course be distributed fairly. . . . Often these qualities are assured by the use of consensus of strong, senior members.” *Id.*

[¶ 13] The requirement that the senior strong members be consulted in distributing assets, at least where there was not an affirmative showing of fair distribution by the party who distributed them, has been applied in other cases following *Sengebau*. In *Orak v. Ueki*, 17 ROP 43 (2009), two factions of the same clan disputed who had a right to use clan lands. This Court held that the members of one faction were not strong members (overruling the

⁶ Both experts did, however, agree on several key points. Both agreed that the male titleholder administers lands but could give that authority to the female titleholder; both agreed that a titleholder must act as a “trustee” for the benefit of the clan as a whole.

trial court on this point), and that Orak, a member of the other faction, was a strong member. *Id.* at 49-50. The determination of the strengths of the parties within the clan did not, by itself, resolve the underlying issue of land use. We did not disturb the trial court's finding that the clan should "promptly convene a meeting of the members from both factions [] who should not unreasonably withhold permission to use the disputed land" from Orak, who "ha[d] an equal right to use clan lands." *Id.* at 46. In so doing, this Court held:

As a final consideration in this case, we echo the Trial Division in stating that neither prior case law nor the pleadings in this case dictate that the male chief, or male and female title bearers together, have sole and absolute authority over the use of clan lands. *See* Civ. Act. No. 04-077, Decision at 15 (Tr. Div. June 15, 2007). Rather, "clan land . . . belongs to all clan members, who . . . have a voice in its control and use," *Adelbai v. Ngirchoteot*, 3TTR 619, 629 (App. Div. 1968), and the distribution of clan assets 'should be determined by consensus among the strong, senior members of the clan[,]’ *Remoket v. Omrekongel Clan*, 5 ROP Intrm. 225, 230 (1996)." Indeed, "customary law throughout Palau requires that the assets of a clan . . . be distributed fairly." *Id.* at 16 (*quoting Ngeribongel v. Gulibert*, 8 ROP Intrm. 68, 71 (1999)).

Id. at 52.

[¶ 14] In *Ngeribongel v. Gulibert*, we upheld the trial court's determination that a distribution of clan funds based on services to the clan and clan members' needs could be fair, and cited several cases holding that a clan has "broad discretion" to distribute funds as long as "it gives fair consideration to the welfare of all its members in accordance with accepted Palau custom." *Ngeribongel*, 8 ROP Intrm. at 71 (*quoting Lalou v. Aliang*, 1 TTR 94, 98 (Tr. Div. 1954)). At first blush *Ngeribongel* may appear inconsistent with our holding today because the clan chief justified his distribution in part by testifying that he "sought and obtained the approval of the highest-ranking female titleholder" prior to distributing the funds, rather than claiming that he had consulted all of the senior strong members of the

Clan. *Id.* at 69. In *Ngeribongel*, however, we never explicitly determined who was or was not a “senior strong member” of the Clan. Instead, we noted that the trial court had heard and credited testimony that appellants had provided few services or contributions to the clan. Because senior strong members become so through service to the clan, this Court in effect upheld the trial court’s implicit determination that appellants were not senior strong members and thus would not have needed to be consulted regarding distribution of the funds. In addition, we explicitly upheld the trial court’s finding that the clan chief’s distributions were fair – the most important consideration and the reason the requirement of consulting the senior strong members exists. *Id.* at 72. *See also Sengebau*, 1 ROP Intrm. at 699 (“Traditionally, these fundamental considerations of fairness form the bases of most just decisions under customary law.”).

[¶ 15] A fourth case, *Remoket v. Omrekongel Clan*, involved a dispute over who was a member of the clan and therefore entitled to share in rental proceeds. This Court affirmed the trial court’s determinations regarding membership and strength in the Clan. Because the Clan members could not agree on a distribution even with the benefit of that determination, the trial court was forced to allocate the proceeds for them. In upholding the trial court’s determinations in that regard, we noted that distribution of assets “should be determined by consensus among the strong, senior members of the clan.” *Remoket*, 5 ROP Intrm. at 230 (citing *Sengebau*, 1 ROP Intrm. at 699).

[¶ 16] Because the trial court’s finding in this case is contrary to our past precedents, there would have to be sufficient evidence in the record that Palauan custom had changed in order for us to uphold it. The party asserting such a change, in this case Appellees, would have had to present evidence the custom had changed, and would bear the burden of persuading the trial court to take judicial notice of a new custom as traditional law under the four-element test in *Beouch*. Appellees failed to meet their burden. In fact, the testimony of Appellees’ expert witness, upon whom the trial court relied, supports our holding. Secharraimul explicitly testified that he was not asserting a changed or new custom. On the contrary, he strongly asserted that “custom is custom for all Palauans. . . . it is custom so I cannot change it. . . we preserve it . . . it is important that we be careful with custom and we do

not change it to our liking. . .” The only acknowledgement of change was when he seemed to agree that a consensus requirement had been adopted, which he said was contrary to the Palauan custom that no senior strong member was permitted to disagree with some decisions of a titleholder:

Q: But, [giving clan property to be the personal property of individuals in the clan] requires consent from them, the strong members of the clan?

A: He/she does not get consent from them . . .

Q: And, if there is a strong member of the clan that opposes?

A: Under Palauan custom there is no such thing as that. . . . Today that we [*sic*] are in American (ph) time we use the word consensus. Kebekuul has determined that it will be done this way so we say (ph) so be it. We listen to that statement.

Thus, there was no evidence to support finding a new custom that a titleholder can dispose of clan property as she wishes.

II. We need not address the “vacancy” of the Tucherur title in resolving this case.

[¶ 17] Appellant’s second assignment of error is the trial court’s finding that the position of Tucherur was “vacant.” The trial court asserted in its opinion that; “[a]t the time of trial, the title Tucherur was vacant as Wilhelm Rengiil, the last undisputed title holder had passed away. . . . As for the Clan lands, Tucherur is the rightful administrator. This tile is vacant.” The fact that there was no one holding the title of Tucherur *at the time of trial* is undisputed. However, the trial court also appeared to assert that the position was vacant at the time that the disputed funds were expended, stating that: “Ngirmeriil had every right to be in possession of Clan funds and expend them as she wished. Uodelchad alone had the authority over Clan funds as Tucherur was vacant.” The finding that “Tucherur was vacant” – to the extent that the trial court literally meant that no person held that title while the funds were being expended – is clearly erroneous.

[¶ 18] Appellee’s argument that the trial court’s error was harmless because the Tucherur position was *effectively* vacant due to Wilhelm’s

undisputed incapacity need not be decided by this Court as the issue is not relevant to a decision in this case. It is undisputed that Ngirmeriil had been given the right – whether by Wilhelm or members of the Clan more generally – to receive some of the Clan funds. Thus, whether she was the sole chief titleholder and thus entitled to administer Clan funds for that reason is irrelevant. Rechirei testified that clan members agreed to allow Ngirmeriil to hold the funds from the Harris School because they trusted her. Ngirmeriil herself testified that she “received [funds] on behalf of the Clan.” Thus it was she, not the Tucherur, who was effectively administering these funds. She should have consulted all the strong senior members of the Clan and attempted to reach a consensus regarding the distribution of funds, and she did not – at least assuming there are senior strong members in addition to Appellees.

III. On remand, the trial court should determine who the senior strong Clan members are, as it is better positioned to decide factual disputes.

[¶ 1] Our holding today, standing alone, does not resolve the parties’ dispute. In order to consult the senior strong members⁷ of Terekieu Clan, Appellees must know who those individuals are. The outstanding, disputed issues in this regard should be resolved by the trial court in the first instance. “The trial court is in the best position to hear the evidence and make credibility determinations,” and status and membership in a clan are questions of fact. *Imeong v. Yobech*, 17 ROP 210, 215 (2010) (citation omitted). We leave it to the trial court to determine whether it is preferable to do so on the existing record or whether an additional hearing should be held. In explaining its decision, the trial court should set forth any principles of customary law relied upon and the source of those legal principles, as well as explaining its factual findings and any credibility determinations upon which its decision is based.

⁷ Because our holding is that *all* senior strong members of the Clan must be consulted regarding this disposition of property, the relative strength of each member need not be determined. *Cf. Rdiall v. Adelbai*, 16 ROP 135, 139 (2009) (“The present case, on the other hand, does not deal with relative strength within a lineage. The question is not whether Appellee is stronger than Hiromi. The question is whether Appellee is, in absolute terms, a strong member of the lineage.”).

[¶ 2] The trial court found that the following individuals were undisputed ochell members of the Clan: the parties to this case, Ngirmeriil, Rengiil, and Rechirei, Siang, and Shiprit. The trial court also found that “Rechirei’s sisters and the children of Rechirei’s aunts are all ochell members,” as well as “Ngirur Umang.” These facts were indeed undisputed in the trial court and should not be disturbed on remand.

[¶ 3] The trial court asserted that: “Rechirei as the holder of Buik Tucherur is a senior strong member,” a fact which Appellees had disputed. It also, inconsistently, stated in its “Principles of Customary Law” that: “The clan title bearers are considered senior strong members and have authority over clan matters,” but later on the same page stated that this was true only “in most cases.” No source was cited for these assertions. The trial court failed to explicitly address the factual dispute raised by Appellees, who asserted that Rechirei had been removed from his title.⁸ We express no opinion on the accuracy of the trial court’s determinations regarding Rechirei and request that, on remand, the court clarify its decision.

[¶ 4] The trial court found that it was “undisputed that . . . Siang Rengiil is a senior strong member [of Terekieu Clan].” This finding was clearly erroneous, as Appellees *did* dispute the issue;⁹ the trial court’s finding in this regard is vacated for reexamination. Appellant also alleged that Clara Yuji Gates, Tina Itelbong, Williana Shiprit, Nathan Yuji, and William Shiprit were senior strong members, an issue which the trial court did not reach.

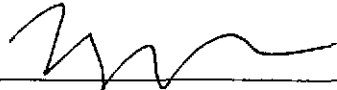
CONCLUSION

[¶ 5] We **REVERSE** the Trial Division’s judgment with respect to Palauan customary law, **VACATE** the finding that Siang Rengiil is a strong senior member of the clan, and **REMAND** for further proceedings consistent with this opinion.

⁸ Appellees argued that Rechirei’s title was unilaterally removed by the two of them, and that their other sisters, Siang and Shiprit, did not need to participate in that removal because they do not have the same status as Appellees – Shiprit because she was adopted out of the Clan and no longer wished to be involved in its affairs, and Siang because she was mentally incapacitated.

⁹ Appellees challenged the lack of evidence regarding her contributions and services to the Clan and claimed that she had become mentally incapacitated.

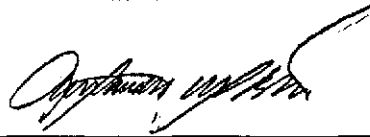
SO ORDERED, this 11th day of November, 2019.



ARTHUR NGIRAKLSONG
Chief Justice



JOHN K. RECHUCHER
Associate Justice



ALEXANDRO C. CASTRO
Associate Justice