IN THE SUPREME COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

EMILA ZEDHKEIA, on behalf of Emile Aini,

Plaintiff/Appellant,

vs.

LISEN LEIT and KENNETH KEDI,

Defendants/Appellees.

Supreme Court Case No. 2019-001
(High Court Case No. 2014-229)

OPINION

BEFORE: CADRA, Chief Justice; SEABRIGHT, Associate Justice;[1] and SEEBORG, Associate Justice[2]
CADRA, Chief Justice, with whom SEABRIGHT and SEEBORG, Associate Justices, concur:

I. INTRODUCTION

Plaintiff/Appellant Emila Zedhkeia, on behalf of Emile Aini (the real party in interest), appeals a final judgment of the High Court declaring (1) that as between Emile Aini and Defendant/Appellee Lisen Leit, Lisen Leit holds the title of *alap* and *senior dri jerbal* on Monloklap weto, Ajeltake, Majuro Atoll; (2) that a lease with Defendant/Appellee Kenneth Kedi for a portion of Monloklap weto is signed by the appropriate parties and is therefore valid; and

[1] The Honorable J. Michael Seabright, Chief United States District Judge, District of Hawaii, sitting by designation of the Cabinet.
[2] The Honorable Richard Seeborg, Chief United States District Judge, Northern District of California, sitting by designation of the Cabinet.

also appeals (3) an order by the High Court denying a motion for imposition of costs or sanctions upon the High Court's granting of a continuance of the hearing date to Defendants/Appellants.

In reaching its judgment the High Court adopted the opinion of the Traditional Rights Court (TRC). The TRC found that Emile Aini should be *alap* and *senior dri jerbal* on Monloklap weto under custom but that the previous *alap* and *senior dri jerbal,* Litiria, made a will or *kalimur* transferring Monloklap weto to Lisen Leit (Leit). The TRC concluded that Leit is the proper person to hold those rights and titles to Monloklap pursuant to the "applicable customary law and traditional practice" of "*Imon Aje* and will by an *alap*, from *alap* Litiria to Lisen Leit."

Having found Leit is the proper person to hold the title of *alap* and *senior dri jerbal* on Monloklap pursuant to custom and because the only issue regarding the validity of a ground lease of a portion of Monloklap weto with Kenneth Kedi (Kedi) was the identity of the proper *alap* and *senior dri jerbal,* the High Court declared that the ground lease between Leit and Kedi was signed by the appropriate parties and was therefore valid.

Emile Zedhkeia (Zedhkeia) timely appealed. On appeal, Zedhkeia broadly contends the High Court erred "when it confirmed a decision of the TRC that was obviously contrary to the facts and established law on custom which require consent by the *iroij* and the *bwij* members before any transfer of land rights is deemed valid."

Specifically, Zedhkeia contends the TRC and High Court erred in relying on a March 2000 division of wetos purportedly signed by Emile Aini and her sisters transferring Monloklap weto to Leit. Zedhkeia argues that division of wetos is invalid because it did not have the consent of the *iroij* and all *bwij* members as required by custom. She (correctly) points out that the High Court erred in its finding that the parties' common ancestor and former *alap* on Monloklap, Litiria, had authored that document because it is undisputed that Litiria had died prior to the time

that document was created. Further, Emile Aini testified she did not sign that document and that the document is a forgery.

Zedhkeia also claims the TRC erred in relying on wills or *kalimurs* purportedly made by Litiria in 1975 and 1980 because those documents, like the 2000 division of wetos, lacked the consent of the *iroij* and/or all *bwij* members as required under custom. She further contends that the 1975 and 1980 wills or *kalimurs* are invalid as a "matter of law" because they did not have *droulul* or 20/20 approval as required by the former Japanese and Trust Territory Administration's law which existed at the time those wills or *kalimurs* were made or executed. The High Court found this issue was waived because it was an issue of custom not raised before the TRC. Zedhkeia challenges that finding. We agree with Zedhkeia that the High Court erred in finding the issue was waived but, as discussed below, do not believe a remand is warranted because the issue is one of law which we review *de novo*.

Additionally, Zedhkeia claims the High Court and TRC's decision is "clearly erroneous" because it is unsupportable or contrary to the evidence introduced at trial. A plethora of factual issues are raised in that regard. Significantly, in addition to claims of forgery, Zedhkeia points out that the 1975 will or *kalimur* is not signed by Litiria, and claims that the proper *iroij* did not sign that document introducing yet another title issue into this contentious dispute. Zedhkeia also introduced and relies on a 2008 affidavit by Leit wherein Leit claimed that Emile Aini is the *alap* on Monloklap weto. No explanation has been offered for the inconsistency in Leit's prior sworn statement and her testimony in this case. These factual issues, among others, were not specifically addressed by either the TRC or High Court.

Although we may have decided this case differently, we find the TRC's and High Court's factual findings regarding the custom and ultimate judgment that Leit holds the title of *alap* and

senior dri jerbal to Monloklap weto are supported by credible evidence and are, therefore, not "clearly erroneous." Because those findings are not "clearly erroneous" we are required by the Constitution and our case law to defer to those findings even though we may (and perhaps probably would) have reached a different conclusion on the evidence presented. We therefore AFFIRM the TRC's finding and High Court's judgment that Leit is *alap* and *senior dri jerbal* on Monloklap weto.

Because we affirm the High Court's and TRC's finding that Leit is the proper *alap* and *senior dri jerbal,* and because there is no challenge to the authority of the *iroij* who signed the ground lease of a portion of Monloklap weto with Kedi, we also AFFIRM the High Court's conclusion that the lease with Kedi is signed by the appropriate parties as required by the Constitution and is therefore valid.

Finally, while we recognize the potential for abusive litigation practices by last minute requests for continuances of scheduled trial dates or hearings, we do not find that the High Court's order denying sanctions or costs to Zedhkeia was "clearly erroneous." We therefore also AFFIRM that order.

II. FACTUAL BACKGROUND AND PROCEEDINGS BELOW

This case is a customary title dispute between two sisters, Emile Aini and Lisen Leit. The dispute arises out of an April 4, 2013, ground lease between lessors, *iroijlaplap* and *iroijedrik* Alden Nemna, and Lisen Leit acting as *alap* and *senior dri jerbal*, with lessee Kenneth Kedi for a portion of Monloklap weto, Ajeltake Island, Majuro Atoll.[3] Having obtained the ground lease Kedi proceeded with construction of a house on Monloklap weto.

[3] Defendants' Exhibit 2H.

On April 20, 2013, Emila Zedhkeia (Zedhkeia) sent a letter to Kedi stating that she (Zedhkeia) was the eldest daughter of *alap* Emile Aini and was responsible for managing her lands including Monloklap weto. Zedhkeia asserted that Kedi did not have a valid lease or the *alap's* permission to build on Monloklap. Zedhkeia stated her intent to have Kedi ejected if he did not sign a lease with the proper *alap* (Emile Aini) within 14 days.[4] Kedi did not enter into a ground lease with either Zedhkeia or Emile Aini. Zedhkeia then commenced the instant civil action.

The High Court referred two broad questions to the TRC: (1) Who as between Emile Aini and Lisen Leit is the proper person to hold and exercise the *alap* right? and (2) Who, as between Emile Aini and Lisen Leit is the proper person to hold and exercise the *senior dri jerbal* right (on Monloklap weto)?[5]

A trial spanning 12 days was held before the TRC over June 5, 2018, through July 20, 2018. Simply stated, Zedhkeia's theory of the case was that her mother Emile Aini is the eldest surviving member of the *bwij*. As the eldest member of the *bwij* Emile Aini is the proper person to presently hold the *alap* and *senior dri jerbal* rights to Monloklap weto pursuant to Marshallese custom.[6] Because the ground lease with Kedi did not have the approval of Emile Aini (or Zedhkeia acting as Aini's agent under a power of attorney) as required by the Constitution the ground lease is invalid.[7]

Leit's theory of the case was that *alap* Litiria had set apart and bequeathed to her, and her children, the *alap* and *senior dri jerbal* rights on Monloklap weto.[8] Leit relied on a series of

[4] Plaintiff's Exhibit "I."
[5] *See* TRC "Opinion & Answer," p. 1, "The Question(s) Referred to the TRC Panel for Answers."
[6] *Id.,* p.1, "The Parties' Contentions."
[7] This issue regarding validity of the ground lease was not addressed as a matter of customary law by the TRC but was addressed by the High Court in its Rule 9 Decision & Judgment..
[8] TRC "Opinion & Answer," p. 1.

wills or *kalimurs* purportedly from Litiria devising the rights to Monloklap weto to Leit. Leit also relied on a document dividing Litiria's wetos amongst the then surviving members of the *bwij*.

The validity of the wills or *kalimurs* relied upon by Leit were contested by Zedhkeia as being contrary to custom, not having approval of the *bwij* and/or proper *iroij*, not complying with the law which existed when those wills or *kalimurs* were made, and/or being outright forgeries. Zedhkeia also introduced an affidavit of Leit wherein Leit acknowledged Emile Aini as the *alap* on Monloklap weto.

The TRC issued its "Opinion & Answer" on August 29, 2018. The TRC found that Emile Aini should have held and exercised the *alap* and *senior dri jerbal* rights on Monloklap weto pursuant to Marshallese custom but that *alap* Litiria had willed Monloklap weto to Lisen Leit and her children. Because Monloklap weto had been willed to Leit, the TRC concluded that Lisen Leit is the proper person to hold both the *alap* and *senior dri jerbal* rights on Monloklap weto.

The TRC explained its factual findings and conclusions referencing the testimony and exhibits as follows:

> Testimonial evidence by the defendants made it clear to the TRC panel that Lisen Leit is the proper person to hold the *alap* and *senior dri jerbal* rights on Monloklap weto, Ajeltake, …As stated by *Leroij* Arleen Jacob in her testimony, she recognized that Emile Aini should have held and exercised the *alap* and *senior dri jerbal* rights on Monloklap weto. She also stated that if there were any prior agreements or wills made by the previous *alaps* to Lisen Leit, she will also recognize her as it is the custom. (Defendant Exhibit P).
>
> *Iroij* Kelai Namna in his testimony also recognized Emile as the *alap* in accordance with custom because she is older and still living today. However, after understanding that Monloklap weto in Ajeltake was bequeathed in a will by *alap* Litiria to Lisen and her children, and the previous *iroijs* agreed to it, he, in truth, said he does not have the power or authority today to revoke or change this pursuant to custom. *Iroij* Telnan Lanki and *Iroij* Alden Nemna did not oppose any of the arrangements made by *Alap* Litiria with respect to the transfer (of) Monloklap to her daughter, Lisen Leit, and her children. Based on these facts, he stated that he will therefore recognize Lisen Leit as the *Alap* and *Senior*

> *Dri jerbal* on Monloklap weto in Ajeltake. (Defendant Exhibit 2S), (Defendant Exhibit 2P), (Defendant Exhibit 2J), (Defendant Exhibit 2Q), (Defendant Exhibit 2B).
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> According to Lutrik Smart's testimony, she stated that all the wills concerning Monloklap weto has her younger sister, Lisen, as beneficiary, and that she was fully aware and understood this to be the case.
>
> Frank Beinkotkot testified that he lived on the neighboring weto adjacent to the weto Lisen resides on (Monloklap weto),and saw Lisen living on the weto from 1945 to date (2018). This confirms that Monloklap weto in Ajeltake belongs to or is owned by Lisen.[9]

The TRC found, without discussion or explanation, that the custom applicable to the facts of this case was "*imon aje* and will by an *alap,* from *alap* Litiria to Lisen Leit."[10] Regarding the custom, however, there was testimony from Alfred Capelle regarding the concept of "*ajej*" or separation/division of land. Capelle testified that if the *iroij* and members of the *bwij* agree to a division of land, such as Monloklap weto, then that is permissible under custom.[11]

The TRC found there was both *bwij* and *iroij* consent to the transfer of Monloklap from Litiria to Lisen Leit. The TRC found that, based on the evidence, "it was clear that *alap* Litiria held and exercised the *alap* right title on many lands. However, with respect to Monloklap weto, Ajeltake, Majuro, it was set aside from the rest and transferred to Lisen Leit and her children. This is a clear indication that Lisen Leit is the *alap* and *senior dri-jerbal* for Monloklap weto pursuant to the agreement by the *bwij* and the *iroijs* of Monloklap weto."[12]

Although not necessary to its decision, the TRC believed it should be mentioned that "according to expert witness Alfred Capelle,…a power of attorney is a western concept and that

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[9] TRC "Opinion &Answer," p. 2.
[10] *Id.,* p. 2 "Applicable Customary Law and Traditional Practice."
[11] Transcript of proceedings before the TRC, pp. 395-6.
Kedi: Meaning if Monloklap was separated for Lisen and her descendant, the rights are with Lisen. Is that right?
Capelle: As I have said, if that was the agreement in the division of land and the members of the *bwij* had agreed to it and the *iroij* had agreed to it then.
Kedi: Meaning if they agreed to it. So, it's proper?
Capelle: If the *iroij* during that time, and the members of the *bwij* had agreed to the agreement, that's how it will be.
[12] *Id.*, p. 3 "Analysis."

it cannot be used to give away or change the order or line of succession on land, but can be used for other matters and personal property."[13] Capelle further testified that under custom when an *alap* is absent from the land then the next in line takes the position of *alap*.[14] This testimony is potentially significant because there was evidence that Emile Aini had left Monloklap weto, was living off-island in the State of Washington for years,[15] and had delegated her *alap* and *senior dri jerbal* rights to Emila Zedhkeia by a power of attorney,[16] which would be arguably contrary to custom. The concern being that the traditional order of title passing from the eldest to the youngest member of the *bwij* could be bypassed and given to the younger generation or *bwij* by use of a power of attorney. There were, however, no findings by the TRC or the High Court regarding this power of attorney issue or whether the *alap* or *senior dri jerbal* rights should have gone to the next eldest member of the *bwij* when Emile Aini left island for an extended period of time. Because neither lower court made findings on this issue and because that issue played no

[13] TRC "Opinion & Answer," p. 5, "Other Matters The Panel Believes Should Be Mentioned."

[14] Transcript of proceedings before TRC, pp. 397-8.
Capelle: If it is a *bwij* land, nobody can use power of attorney for it. Everybody lives on the land. Not just one person.
Kedi: If the alap was to depart from the island, the current alap, if she should depart from the island for any medical reason for over years, who would be the most proper person to exercise her rights in her absence?
Capelle: I would say one more time that if it was *bwij* land, it would go from the eldest to those that are younger.
Kedi: Meaning that it should have gone to her younger sister and not her descendant. The power of attorney?
Capelle: If it is *bwij* land, then yes.

[15] Deposition of Emile Aini, 11/12/15?), p. 3.
Q: (Chickamoto): Were you ever living in the United States?
A: (Aini): Yes, in 2008.
Q: Was it just for the year 2008 or was it from the year 2008 til today?
A: From 2008 till now.
Q: So from 2008 you moved from Majuro is that correct you left Majuro?
A: Yes.
Q: And where did you move to?
A: Spokane.
Q: Spokane, Washington?
A: Yes.

[16] *See, e.g.,* Plaintiff's Exhibit G "General Power of Attorney" dated 2/18/14; Exhibit F "General Power of Attorney" dated 12/9/2008.

role in the TRC's ultimate conclusion that Leit is *alap* and *senior dri jerbal* on Monloklap, we do not address this significant and potentially dispositive issue.

The TRC also mentioned that Lutrik had adopted Kenneth Kedi but there were no findings as to how that adoption might affect Kedi's rights to be on Monloklap. Because neither court made findings on these issues and because we do not make factual findings on appeal, we express no opinion as to resolution of that issue. We do believe, as did the TRC, that these unresolved issues are worthy of mention.

On September 26, 2018, a Rule 9 Hearing was held before the High Court (Judge Winchester). In her "Rule 9 Statement," Zedhkeia argued that the wills or *kalimurs* from Litiria to Leit were invalid as a matter of law because they did not have *droulul* or 20/20 approval as required by the law as it then existed during the Trust Territory Administration. Zedhkeia's argument is concisely set forth in her Rule 9 Statement:

> The point is that the alleged *kalimurs* or wills supposedly executed by Litiria, mother of Plaintiff Emile Aini and Defendant Lisen Leit, that the TRC Panel relied upon in basing their decision, were executed during the time that the *droulul* and the *20/20* were collectively functioning as the equivalent of an *Iroijlaplap* on lands formerly controlled by *Iroijlaplap* Lukotwerak on Majuro Atoll. As such, in order for the *kalimurs* or wills that were submitted by Defendant supporting her claims, to be considered valid, they had to be approved by all the *Iroij edriks* on Jebdrik's side (collectively), the *droulul* and *20/20*, in accordance Marshallese custom acknowledged under case law from the early days of the Trust Territory. Those approvals were lacking as their signatures were absent on the *kalimurs* in question, and no proof of approvals was put on by Defendants explaining that absence. Since all the *kalimurs* relied upon by the TRC justifying their decision in favor of Defendant Lisen Leit, pre-date the Customary Law (Restoration) Act 1986, and therefore required the necessary approval of the *droulul* and *20/20* in order to be valid transfers of land rights and titles, the essence upon which the opinion of the TRC panel was based, was patently defective, and were in violation of established law and custom that has been recognized by the Courts since the Trust Territory time. These *kalimurs* were invalid under custom and should have been recognized as such by the TRC Panel. Therefore, the TRC's reliance upon the alleged wills of Litiria was gross legal error and an abuse of discretion by the TRC in finding that those wills were valid transfers of the titles originally held by Litiria – their validity simply violated Marshallese

> custom and tradition as a matter of law. The TRC Panel never addressed this critical customary and legal fact in arriving at their decision.[17]

Zedhkeia devoted a substantial portion of her oral argument to the issue of *droulul* and 20/20 consent at the Rule 9 Hearing, again summarizing her argument and casting it as an "issue of law":

> Chickamoto: But what is critical to understand what I've been trying to develop in my submissions to the court is during this critical period of time between 1975 and 1980 what this …all of these documents had to be signed by the *Iroijlaplap* who was not in existence and therefore had to be signed by the representative of the *droulul* and *20/20* which don't exist and that is why we question how could the court of custom who is supposed to understand land laws throughout the Marshall Islands can miss such a critical point under Marshallese custom and did not apply that in rejecting the very wills that depended upon in arriving at their decision.
> Court: Mr. Chickamoto, did you raise that to them at the time?
> Chickamoto: No, the reason why your honor is that if you go through the cases, you'll understand that the reason why that this came up was first of all when Jebdrik died in 1919 and there was no one to succeed him. The successor of administration at that time, the Japanese, under the trusteeship that was given them by the League of Nation came up with this solution with that problem, understanding that an *Iroijlaplap* has to sign. So really as a matter of law, that's what they came up with and it has been followed by the Trustee …the Trust Territory court decisions and should have been applied all the way up through 1986 but that customary law was passed by the Nitijela abolishing this *droulul* as well as the *20/20* as having to sign documents on behalf of the *Iroijlaplap*. So, as a matter of law, which is what we are talking about now, they deal with matters of custom but they should have understood that the *Iroijlaplap* had to sign these wills in order to have it validated.[18]

The High Court issued its "Rule 9 Decision and Judgment" on November 2, 2018. The High Court noted "[t]he most significant argument made by Emile during the Rule 9 hearing was that the March 2000 transfer is invalid because it was not approved by the *droulul* and all members of the *bwij*. Emile admittedly did not raise those issues during the TRC proceedings. When I asked why, Mr. Chickamoto responded that those are matters of law for the High Court,

[17] Plaintiff's Rule 9 Statement, p. 8.
[18] Transcript, pp. 6-7.

and not matters of custom for the TRC."[19] The High Court stated "those issues are, first and foremost, issues of custom to be considered by the TRC, followed by High Court review."[20] The High Court consequently found the issue of *droulul* or 20/20 approval was waived because the issue had not been raised before the TRC.[21] The High Court adopted the opinion of the TRC finding that decision was not clearly erroneous or contrary to law.[22]

The High Court in its "Rule 9 Decision and Judgment" also denied Zedhkeia's motion for sanctions and costs incurred by a last minute motion for continuance of the hearing date for two reasons: "First, there have been numerous delays in this matter, some even occasioned by Mr. Chickamoto. When it comes to delay, there is blame sufficient for all to share. Second, although these particular delays were occasioned by Mr. Kun and/or Keti, I do not find evidence to support the intentional misrepresentations or improper purposes alleged by Mr. Chickamoto."[23]

Zedhkeia filed a motion for reconsideration which could not be addressed because the High Court trial judge, Judge Winchester, had left the Republic and the remaining High Court judges were disqualified due to conflicts of interest.

Zedhkeia timely filed her Notice of Appeal on January 7, 2019.

III. APPELLANTS' CONTENTIONS ON APPEAL

Appellants' briefing raises two very broad questions on appeal:

1. Did the High Court commit error when it confirmed a decision of the TRC that was contrary to the facts and established law on custom which require consent by the *Iroij* and the *bwij* members before any transfer of land rights is deemed valid? And

[19] "Rule 9 Decision & Judgment," p. 2.
[20] *Id.*
[21] *Id.,* pp. 3-4.
[22] *Id.*
[23] *Id.,* p. 5.

2. Did the High Court commit error in failing to award attorney's fees and costs to a delay which (when viewed by a disinterested party) could only be interpreted as an intentional delay on the part of Appellees?[24]

IV. STANDARD OF REVIEW

Matters of law are reviewed *de novo*. *Lobo v. Jejo*, 1 MILR (Rev.) 224, at 225. Findings of fact are reviewed under the "clearly erroneous" standard. *Dribo v. Bondrik, et al,* 3 MILR 127, 131 (2010); *Abner v. Jibke, et al,* 1 MILR 3, 5 (1984). Mixed questions of law and fact are reviewed under the *de novo* standard. *Samson, et al v. Rongelap Atoll LDA*, 1 MILR (Rev.) 280, 284 (1992).

A finding of fact is "clearly erroneous" when review of the entire record produces a definite and firm conviction that the court below made a mistake. *Lobo v. Jejo, supra*, at 225-6 (1991). The "clearly erroneous" standard does not entitle a reviewing court to reverse the findings of the trier of fact simply because it is convinced that it would have decided the case differently, the reviewing court's function is not to decide the factual issues *de novo*. *Bulele v. Morelik*, 3 MILR 96,100 (2009). We will not interfere with a finding of fact if it is supported by credible evidence, must refrain from reweighing the evidence and must make every reasonable assumption in favor of the trial court's decision. *Kramer & PII v. Are & Are*, 3 MILR 56, 61 (2008). We are required to defer to the factual findings of the court(s) below even if we would have decided the case differently and even if the evidence would make another conclusion more plausible. *Kabua v. Malolo*, Supreme Court Case No. 2018-008, Slip. Op. 12/10/21; *see also Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985).

[24] Opening Brief, p. 4.

In cases involving customary issues decided by the Traditional Rights Court, the Constitution requires that the High Court (and, therefore, this Court on review of such decision) give "substantial weight" to the Traditional Rights Court's decision. Constitution, art. VI, sec. 4(5). "The High Court's duty is to review the decision of the Traditional Rights Court and to adopt that decision unless it is clearly erroneous or contrary to law." *Abija v. Bwijmaron*, 2 MILR 6, 15 (1994).

Determinations of custom by the Traditional Rights Court are ordinarily factual issues entitled to deference on review unless the custom has attained the status of law through enactment by statute or a final Supreme Court decision. "Every inquiry into custom involves two factual determinations. The first is: is there a custom with respect to the subject matter of the inquiry? If so, the second is: what is it? Only when the ascertained custom is incorporated in a statute or has formed the basis of a final court decision does it become law in the modern sense." *Lebo v. Jajo*, 1 MILR (Rev.) 224, 226 (1991); *Zaion v. Peter*, 1 MILR (Rev.) 228, 231 (1991); *Kabua v. Malolo*, Supreme Court Case No. 2018-008, Slip Op. 12/10/21.

Expressions of custom by the courts of the prior Trust Territory Administration, while instructive, are not binding. *See, e.g., Langijota v. Alex*, 1 MILR (Rev.) 216, 218. Similarly, treatises on Marshallese custom, while instructive, are not binding because those treatises have not been adopted as authoritative by statute or Supreme Court decision. *Kabua v. Malolo, supra.*

V. THE ANALYTICAL FRAMEWORK

It is uncontested that Litiria was the former *alap* for Monloklap weto and that her children, from eldest to youngest, are Berta (deceased), Jumos (deceased), Emile, Lutrik, Lisen, and Romme (also spelled Ronny, deceased). It is undisputed that the surviving children of Litiria, namely Emile, Lutrik and Lisen, constitute the current *bwij*. As a general rule of

customary law and traditional practice it is not disputed that the title of *alap* goes from the eldest to the youngest *bwij* member. Therefore, Emile Aini should be *alap* and *senior dri jerbal* on Monloklap as she is the eldest surviving member of the *bwij* absent some exception under custom.

The exception to the custom or dispute in this case centers around the wills or *kalimurs* allegedly transferring the *alap* and *senior dri jerbal* rights to Monloklap from Litiria to Leit. It is uncontested that Monloklap weto is on "Jebdrik's side." It is also uncontested that the Trust Territory Administration law in effect when the wills or *kalimurs* made prior to 1986 required *droulul* or 20/20 consent for lands on Jebdrik's side. It is uncontested that the 1975 and 1980 wills or *kalimurs* relied upon by Leit lack *droulul* or 20/20 approval. Zedhkeia argues those wills or *kalimurs* are therefore invalid because they did not comply with the then existing Trust Territory law. Because the wills or *kalimurs* relied upon by Leit are invalid, it follows that Emile Aini is the proper person to hold the titles of *alap* and *senior dri jerbal* under custom according to Zedhkeia.

The logical starting point in deciding this case is whether the wills or *kalimurs* at issue are invalid "as a matter of law." If those wills or *kalimurs* are invalid as a matter of law the inquiry ceases and Emile Aini must be declared the proper *alap* and *senior dri jerbal* under custom. The hurdle to reaching this logical starting point is whether Zedhkeia waived her argument that the wills or *kalimurs* are invalid for lack of *droulul* or 20/20 consent because she did not raise the argument before the TRC as held by the High Court.

If the will(s) or *kalimur(s)* are not invalid as a matter of law the next logical step in the analysis is whether they are valid (or invalid) under custom. Under this step, we are required to accept the factual findings of the TRC and High Court unless those findings are "clearly

erroneous." Findings regarding the custom, credibility of witnesses or the weight to be afforded documentary evidence are factual findings to which we defer if those findings are supported by evidence in the record. We will not reverse simply because we would have found the facts and decided the case differently (which we may have).

Finally, the validity of Kedi's lease is determined by whether the TRC's and High Court's conclusion that Lisen Leit is the proper *alap* and *senior dri jerbal* for Monloklap weto is affirmed. The parties do not challenge the authority of Alden Nemna to have signed the ground lease as *iroij* and *iroij edrik*.

VI. DISCUSSION

A. Zedhkeia Did Not Waive The Issue Of *Droulul* Approval By Failing To Raise It Before The TRC.

The High Court avoided addressing the issue of *droulul* or 20/20 approval finding it was one of "custom" which was never raised before the TRC and was, therefore, waived.[25] Appellees also claim the issue was never raised before the TRC and should not be considered by this Court on appeal.[26] Consequently, Appellees did not brief or otherwise address this issue.

We have reviewed the record and find the issue was repeatedly raised by Zedhkeia before the TRC.

Zedhkeia raised the issue in her written Closing Statement to the TRC:

> And any transfer of an *Alap's* title must be consented to by the *Iroijlaplap* and in the case of land on Jebdrik's side of Majuro, the *droulul* comprised of the *Iroij erik*, and in the instant case, the *senior Dri Jerbal* (see *Nashion v. Litiria*, 8 TTR 357 (A.D. 1983).[27]

Zedhkeia also raised the issue in her oral argument to the TRC:

> Chickamoto: "And the only documents that really go to the heart of the case were documents that were incomplete and not signed by all the proper parties that should have

[25] Rule 9 Decision and Judgment, pp. 2-3.
[26] Appellees' Joint Answering Brief, p. 10.
[27] Plaintiff's Closing Statement, pp. 2-3.

approved whatever document that was submitted. In particular, whenever there's a termination of the *alap* rights it's just a drastic action that there [h]as to be approval by the *iroij edrik* in this case because its Jebdrik's land…" Transcript of Proceedings before the TRC, 7/20/18, p. 2. (Emphasis by underlining added).

Chickamoto: "Under Marshallese custom nothing short of a very serious infraction under custom will result in the termination of the title of *alap*. And I refer the court to the TT case of *Linedrik v. Maine*, 5 TTR 561. Any transfer of an *alap's* title must be consented to by the *iroijlaplap* and in this case because its Jebdrik's lands it must be consented to by the *droulul*." Transcript of Proceedings before the TRC, p. 4. (Emphasis by underlining added).

The record further reveals Appellees referenced the issue in their argument to the TRC:

Kun: "Lisen argues that the *alap* does not have the authority to cut off interest in land by himself or herself as shown in *Jabwe v. Enos*, 5 TTR 458. Because for the *alap* to do that, cut off the interest in a land, he or she must have the approval of the *droulul* or the group that is exercising the *iroij* rights and this is shown in *Makroro v. Benjamin*, 5 TTR 519. (Emphasis by underlining added).

The High Court's and Appellees' assertion that the issue of *droulul* or *20/20* approval was not raised before the TRC is contradicted by the record. The High Court therefore erred in finding the issue had been waived.

Further, even if the issue had not been raised before the TRC the High Court should have addressed it at the Rule 9 hearing. The issue of *droulul* or 20/20 consent is not one of "custom" but, rather, is one of "law."

It is clear that the *droulul* or 20/20 and the requirement of its consent to transfer of land on Jebdrik's side was a creation of the Japanese Administration which was carried over to the Trust Territory Administration and presents an issue of law not arising under custom.

The appellant claims that this special arrangement was contrary to Marshallese custom. We agree that it was a departure from Marshallese custom, but hold that that is not a valid objection to it. This arrangement, clearly determined upon the authority then administering the Marshall Islands, changed the law and created a new way of exercising the *iroij lablab* powers in that part or 'side' of Majuro Atoll, by giving them to the government, the *iroij erik* on that 'side', and the group (*'droulul'* in Marshallese) consisting of those holding property rights there." (Emphasis by underlining added).

Jatios v. Levi, 1 TTR 578, 584 (Appellate Division 1954).

> *Droulul* approval is the pivotal legal requirement under Marshallese custom for the creation or transfer of rights in a weto on Jebdrik's side.

Nashion v. Litiria, 5 TTR 357, 363 (App. Div. 1983).

The TRC is tasked with determining questions relating to titles or land rights depending wholly or partly on customary law and traditional practice. Constitution, Art. VI, Sec. 4(3). Because the issue of *droulul* or 20/20 consent does not arise under custom, it is an issue properly to be addressed by the High Court. It is the exclusive function of the trial judge to find and interpret the applicable law. *See, e.g., Charles Reinhart Co. v. Winiemko*, 513 N.W.2d 773, 78 (Mich. 1994).

As an issue of law, not custom, we find the High Court erred in not addressing this issue which was clearly and repeatedly raised in both the briefing and oral argument before the TRC and the High Court. This error, however, does not require a remand because the applicable standard of review is *de novo*. The next step in the analysis thus becomes whether the 1975 and 1980 wills or *kalimurs* are invalid as a matter of law because they did not have *droulul* or 20/20 approval.

B. The 1975 and 1980 Wills or *Kalimurs* Are Not Invalid Because They Lacked *Droulul* Approval.

While the law in effect at the time the 1975 and 1980 wills or *kalimurs* relied upon by Liet were made required *droulul* or 20/20 approval, the "Customary Law (Restoration) Act 1986" eliminated that requirement.

The "Customary Law (Restoration) Act 1986," 39 MIRC, Chpt. 2, Sec. 202 provides:

> (1) The decision of the High Court of the Trust Territory of the Pacific Islands in the case of *L. Levi, et al v. Kumtak, et al*, specified as Combined Civil Action No. 1, is hereby declared null and void, and any rights, titles or interest deriving therefrom are of no force or avail in law unless the same be in conformity with the rules of customary law

> applicable thereto, any changes made by the Japanese Administration to the contrary notwithstanding.
> (2) No person or body of persons recognized in pursuance of the said decision shall after the date of commencement of this Chapter assert or exercise any title, right or power of *Iroijlaplap* with respect to the subject matter thereof which may be asserted or exercised by only such person as shall be entitled thereto according to the rules of customary law.

The legislative intent of the "Customary Law (Restoration) Act 1986," (the "Act") as the title implies, was to restore the customary law as the rule of decision in cases involving "rights, titles or interest" by abolishing the Japanese Administration's changes to the customary law. One of the changes to the customary law by the Japanese Administration was the requirement of *droulul* or 20/20 approval of transfers of land rights or titles on Jebdrik's side. The "person or body of persons recognized in pursuance of the said decision (in *Levi v. Kumtak*)" referenced in subsection 2 of the "Act" is a reference to the *droulul* or 20/20 which was set up by the Japanese Administration to exercise the powers of the *iroijlaplap* on Jebdrik's side. The clear legislative intent of subsection 2 was to abolish the *droulul* or 20/20 as of the effective date of that statute which was March 6, 1986.

Subsection 1 of the "Act" voided the High Court of the Trust Territory's decision in the case of *Levi, et al v. Kumtak, et* al, Combined Civil Action No. 1, declaring that any rights, titles or interests derived under that case were invalid unless in conformity with the rules of customary law. The question arises whether the Nitijela intended the "Act" to only apply to the litigants in *Levi v. Kumtak* or to apply more broadly to all similarly situated persons. If applicable to all similarly situated persons, the inquiry in the instant case ultimately becomes whether the 1975 and 1980 wills or *kalimurs* comply with custom, not whether they comply with the former Administration's requirement of *droulul* or 20/20 approval.

Whether the Nitijela intended the "Act" to apply only to the litigants in the *Levi v. Kumtak* case or whether it intended the "Act" to apply more broadly is not ascertainable from the language of that statute. If the plain language does not conclusively determine a statute's meaning, it is presumed that the legislature both intended to and did act constitutionally in enacting the statute and the court should indulge in any reasonable construction that can save the statute from invalidity. *See, e.g., Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990); *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 925 (9th Cir. 2004). "If an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, *citation omitted*, we are obligated to construe the statute to avoid such problems, *citation omitted*." *I.N.S. v. St. Cyr.*, 533 U.S. 289, 300 (2001).

The Republic of the Marshall Islands (RMI) Constitution, Art. II, Sec. 12 (1) provides "[a]ll persons are equal under the law and are entitled to the equal protection of the laws." The Equal Protection clause directs that "all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). Generally, "special legislation" conferring a benefit, liability or right upon an individual or class to the exclusion of others similarly situated is a violation of the equal protection clause. "Legislation which confers benefits on one class and denies same to another may be attacked both as special legislation and as a denial of equal protection, but under either ground for challenge it is the duty of courts to decide whether classifications are unreasonable." *Chicago Nat. League Ball Club, Inc. v. Thompson*, 483 N.E.2d 1245, 1250 (Ill. 1985). "Unless legislation operates to the disadvantage of a suspect classification or infringes upon a fundamental right, the legislation, to be upheld as constitutional, must bear a rational relationship to a legitimate governmental interest." *Id., citing*

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973); *Dandridge v. Williams,* 397 U.S. 471 (1970).

If the "Customary Law (Restoration) Act 1986" is construed as applying only to those litigants involved in *Levi v. Kumtak*, to the exclusion of others similarly situated then the Act would be violative of the Constitutional guarantee of equal protection under the law.[28] We can posit no reasonable or rational relationship to a legitimate government interest by applying the Act only to those litigants involved in *Levi v. Kumtak* to the exclusion of everyone else in the Republic whose rights, titles or interests might have been affected by the changes to custom made by the Japanese Administration.

A reasonable construction of the Act which comports with the Constitutional guarantee of equal protection is that the Nitijela intended to restore the custom as determinative of every person's rights, titles or interests on Jebdrik's side notwithstanding the changes made to the custom by the Japanese Administration.

We conclude that the "Act" eliminates the issue of *droulul* or 20/20 approval for transfers of land on Jebdrik's side from consideration in determining the validity of the wills or *kalimurs* in this case. Accordingly, the inquiry becomes whether those wills or *kalimurs* comply with custom. That inquiry is a factual one to which we are required to defer to the TRC's findings unless those findings are "clearly erroneous."

[28] There is no specific constitutional prohibition against special legislation in the RMI. However, the rationale behind the prohibition against special legislation would apply equally to an equal protection analysis. "The purpose behind the prohibition on special legislation rests on the notion that 'over the course of time, …the propensities of legislatures to indulge in favoritism through special legislation developed into a major abuse of governmental power …[C]onstitutional prohibitions were enacted to limit the practice of enacting special legislation and to achieve greater universality and uniformity in the operation of statute law in respect to all persons." *Vreeland v. Byrne*, 72 N.J. 292, 298, 370 A.2d 825 quoting 2 Sutherland Statutory Construction, 4th Ed., Sec. 40.01.

C. The TRC's Conclusion That Lisen Leit Is The Proper *Alap* and *Senior Dri Jerbal* On Monloklap Is Not "Clearly Erroneous."

One of the difficulties in applying the "clearly erroneous" standard of review to the TRC's and High Court's findings in this particular case is that the findings are largely conclusory and are not sufficiently detailed as to reveal the precise reasoning and evidence relied upon in reaching those findings. Nevertheless, where the trial court does not make detailed written findings of fact, we will assume that the trial court made those findings [of fact] necessary to support its judgment, unless such findings would be clearly erroneous. *See, e.g., Ex Parte Blackstock*, 47 So.3d 801, 806 (Ala. 2009). A remand is not necessary if we can reasonably infer from the court's findings other facts that would suffice to support the court's decision. *See, e.g., Brock v. Big Bear Market No. 3*, 825 F.2d 1381, 1384 (9th Cir. 1987)("[W]henever from facts found, other facts may be inferred which will support the judgment, such inferences will be deemed to have been drawn. The findings of fact by a trial court must receive such a construction as will uphold, rather than defeat, its judgment. *Wells Benz, Inc. v. United States*, 333 F.2d 89, 92 (9th Cir. 1964).)

1. *The TRC's finding regarding the applicable custom is not clearly erroneous.*

The TRC identified the "applicable customary law and traditional practice" to the facts of this case was "*imon aje* and will by an *alap,* from *alap* Litiria to Lisen Leit." The TRC did not define *imon aje* or explain how that custom applies to the facts of this case. In the absence of a definition or explanation offered by the TRC and in the absence of legislation or a final Supreme Court decision defining that custom and its application we look to the commentaries.

Tobin, Land Tenure in the Marshall Islands, p. 26, defines *Burij in aje (imon aje)* as "the descriptive term for land that was given by the *iroij* for outstanding services in war and peace time. Many types of land are included in this general category, each with its descriptive name."

Tobin, *supra*, at p. 30, further defines *imon aje* or *burij in aje* as "land given to a person who performs personal services for the chief, such as nursing, bringing food, running other errands, making medicine and the like."

Significantly, Tobin's treatise makes no reference to the necessity of *bwij* consent to such transfers of land as *imon aje*. Also significant is that Tobin states it is the *iroij* who makes such transfers of land, not *alaps* and/or *senior dri jerbal*. Tobin, *supra,* at p. 30, states "the chief may give land to a commoner, either *alap* or worker; no one else may do so."

The 1975 will or *kalimur* explained that Monloklap was being devised to Lisen because of personal services Lisen performed for Litiria, much like land given as *imon aje* by an *iroij* as described by Tobin. The 1975 will states:

> The reason for the Will is because she (Lisen) was with me during the days I was struggling and in need of food. She was the one that bring my *iu* and she was suffering because of me. She helped clean the land and the land is my gift to her and her children, especially Mackson Jinna.

It is unclear whether the TRC reasoned that the signature of *iroij* Jeltan Lanki was sufficient to render the will a transfer of land by the custom of *imon aje* or whether that custom extends to an *alap* making a transfer of land for personal services rendered by the recipient. There was, however, testimony in the record regarding the concept of *ajej* or division of land. Alfred Capelle testified that if the *iroij* and *bwij* consent to such a division then it is permissible under custom. The TRC found that there was agreement of both the *bwij* and the *iroijs* of Monloklap weto to the transfer of the *alap* and *senior dri jerbal* rights to Lisen Leit from Litiria.

As discussed above, we are to infer factual findings in support of the judgment unless such inferred findings would be clearly erroneous or unsupported by the record. It can be reasonably inferred that the TRC found *bwij* consent to the 1975 will or *kalimur* because Litiria

was the *bwij* being the last surviving member. Therefore, the will did not require the consent of anyone else from the junior *bwij* (i.e., Litiria's children) for it to be valid. This interpretation of the evidence is consistent with Leit's theory of the case. We cannot say such a finding is "clearly erroneous."

Regarding the issue of *iroij* consent to the 1975 will or *kaimur,* that document is signed by *iroij* Jeltan Lanki and Telnan Lanki. It can reasonably be inferred that *iroij* consent to the will was obtained as evidenced by those signatures. The required consents under custom having been obtained, we cannot say that the TRC's conclusion that "Lisen Leit is the *alap* and *senior dri jerbal* for Monloklap weto pursuant to the agreement by the *bwij* and the *iroijs* of Monloklap weto" pursuant to the custom of "*imon aje* or will of an *alap,* from *alap* Litiria to Lisen Leit" is clearly erroneous.

2. *Zedhkeia's objections to the 1975 (and 1980) will or* kalimur *present factual issues on which we defer to the TRC's express or inferential findings.*

Zedhkeia argues the 1975 Kalimur is defective or invalid because (1) it lacked *droulul* consent as required by the law in effect at the time that will was made; (2) it lacked the signatures of the entire *bwij* of Litiria, including Ronny whose signature was missing; (3) it was not executed or signed by Litiria herself; (4) according to witness Zed Zedhkeia the signatures of *iroijs* Telnan and Jeltan Lanki were invalid because the signature of the then current *leroij* Reab Amon was the required critical signature; and, finally, (5) the will is a forgery because the evidence indicated that Litiria could not write and the printing of the will is similar to a will or *kalimur* which had been found to be a forgery in a previous case. [29]

We address each of these contentions *seriatim* construing the evidence in the light most favorable to upholding the TRC's and High Court's decision and drawing every reasonable

[29] Reply Brief, pp. 6-7.

inference in favor of upholding its findings. *See, e.g., Lake v. Reed*,16 Cal.4th 448, 457 (Ca. 1997)("In deciding whether there is substantial evidence, we resolve all evidentiary conflicts and draw all reasonable inferences in favor of the trial court's decision and we will not reverse that decision merely because a different decision could also reasonably have been reached.")

a. *The issue of* droulul *consent.*

As discussed above, the "Customary Law (Restoration) Act 1986" abolished the *droulul* and therefore also abolished any requirement that *droulul* approval be obtained for a will or *kalimur* transferring land rights or titles. We do not find the lack of *droulul* approval invalidates the wills or *kalimurs*.

b. *The issue of* bwij *consent.*

Zedhkeia argues that as a matter of custom any transfer of land rights or land division is required to be approved by the *iroij*, as well as the senior members of the *bwij*.[30] According to Zedhkeia, the *bwij* of Litiria consisted of Berta (deceased), Jumos (deceased), Emile, Lutdrik, Lisen and Ronnie. The *bwij* of Litiria, as defined by Zedhkeia, did not approve or consent to the 1975 will or *kalimur* transferring the *alap* and *senior dri jerbal* rights to Leit. Therefore, according to Zedhkeia, the will or *kalimur* is invalid under custom.

In response, Appellees/Defendants contend that *alap* Litiria had no siblings, that she was therefore the *bwij*, and as the sole member of the *bwij* she was free to make whatever disposition of her lands that she felt appropriate.

In countering Appellees' theory that Litiria was the sole member of the *bwij* Zedhkeia points out that Appellees'/Defendants' own Exhibit A (*memenbwij*) shows that Litiria had a brother named Jorlikiep. Zedhkeia put on testimony that Jorlikiep was alive during the period

[30] Opening Brief, p. 7.

between 1975 and 1980. Zedhkeia thus contends that Jorlikiep as a member of Litiria's *bwij* should have signed the 1975 *kalimur*. It is undisputed that the signature of Jorlikiep is absent on both the 1975 and 1980 *kalimurs*.

Because it is undeniable that the wills or *kalimurs* are not signed by any *bwij* members other than Litiria and because there is no testimony in the record that Litiria consulted with any members of the *bwij* in making those wills or *kalimurs*, we can only conclude that the TRC accepted Defendant's theory that Litiria was the *bwij* and that as the sole member of the *bwij* she could make whatever disposition of the *alap* and *senior dri jerbal* rights she felt appropriate. We defer to this inferential finding by the TRC.

It can also be inferred that the TRC did not find credible or otherwise rejected the testimony that Jorlikiep was alive when these wills or *kalimurs* were made. Again, credibility determinations are factual issues to which we are required to defer even if we would have decided the issue differently.

Finally, we recognize that as a general rule *bwij* consent to an *alap's* will is required. However, it has been recognized that "[u]nder Marshallese custom, approval of an *alap's* will by the *iroij* makes it valid, with or without approval of the *bwij*, although the better practice is to consult with and obtain the approval of the *bwij*." *Linidrik v. Main*, 5 TTR 561, 56 (H.C.T.T. Tr. Div. 1971) *citing Limine v. Lainej*, 1 TTR 231; *Lazarus v. Likjer*, 1 TTR 129. Because any custom requiring *bwij* approval of an *alap's* will has not been codified or declared by a final Supreme Court decision, we cannot find the TRC's reliance on the validity of the 1975 will or *kalimur* was "clearly erroneous" or contrary to law even if there were other members of the *bwij* who did not consent to *alap* Litiria's will or *kalimur.*[31]

[31] Regarding the issue of whether the 1975 will or *kalimur* is valid because it was signed by the *iroij*, *bwij* consent not being necessary, Appellees argue "*Iroij* Kelai Nemna made it clear in his testimony at trial as the Appellant's

c. *The issue regarding the lack of Litiria's signature on her will or* **kalimur.**

Examination of the 1975 will or *kalimur* reveals it is in block print and is not signed by Litiria. Whether the lack of Litiria's signature renders that will or *kalimur* invalid under custom is a factual issue. To the extent the lack of Litiria's signature was brought up to the TRC it can be inferred that the TRC found her signature was not necessary under custom and that the will, while not signed in script, accurately expressed her intent that Monloklap weto go to Leit. We defer to the TRC's implicit finding that the 1975 will was valid under custom despite not being signed in script or cursive by Litiria.

Further, we cannot say as a matter of law or custom, that a will or *kalimur* needs to be signed in script or cursive to be valid. That issue was not briefed and the parties do not reference any custom or applicable law regarding execution of *kalimurs.* It has been held that hand printing on a holographic will satisfies the requirement that the will "be in the handwriting of the testator." *See, e.g., In the Matter of the Est. of Jeffrey A. Hand*, 684 A.2d 521 (N.J. 1996). We make no findings and express no opinion on this issue.

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rebuttal witness that the parties must follow their *memenbwij*, but if there is a *kalimur* that declared a transfer of land by the *alap* and approved by the iroij of that land, then the kalimur must be followed by the members of the *bwij*. This is the true *manit* or *jebelbel in ke iju kan*." Joint Answering Brief, pp. 9-10. Appellees do not cite the record in support of that statement. If that was indeed the testimony then the TRC's implicit finding that the 1975 will or *kalimur* was valid under custom might be supported by that testimony and Exhibit S. However, our review of the transcript is that Kelai Nemna was equivocal in his testimony. He repeatedly stated it was up to the court to decide the effect of the *kalimur*. "Yes I recognize her from the beginning because she's the eldest according to custom. But I still recognize this lady's *kalimur*. Whichever the court goes with.' Tr. p. 530, lines 19-21. "Yes, but as I have said earlier yes because Emile is the eldest according to the *bwij* and under the Marshallese custom it's proper but as I have mentioned there was *kalimur* and it's up to the court to determine the weight of the *kalimur*." TR. p. 532, lines 18-21. "Yes, I said according to custom she's the second born … so she's the one exercising the rights, but as I mentioned before the *kalimur* if the *kalimur* deems her then it's up to the court to determine." Tr. p. 535, lines 11-14. "My understanding is, regardless of the documents I would have followed the custom and the custom says it's the eldest, the eldest of the *bwij* and because she's the eldest of the *bwij,* I would have gone with that, but because there is a *kalimur* made to this lady…" Tr. 542, lines 8-12. The point is that Nemna's testimony regarding the custom that a *kalimur* by an *alap* signed by an i*roij* must be followed by the *bwij* is not as clear as Appellees represent.

d. *The issue of* iroij *consent.*

Zedhkeia claims the 1975 will or *kalimur* is not valid under custom because it did not have the signature of *leroij* Reab Amon. Zedhkeia relies on the testimony of Zed Zedhkeia that Reab was the proper *leroij* at that time, not *Iroijs* Jeltan or Telnan Lanki.

The identity of the proper person to sign the 1975 will or *kalimur* as *iroij or leroij* is a factual issue. The TRC was free to reject Zed Zedhkeia's testimony as not credible. Because the TRC found *iroij* consent it can be inferred that it rejected testimony that Reab was the proper person to consent to the will. We cannot say that implicit finding was clearly erroneous and we therefore are required to defer to that factual finding.

e. *The issue of forgery.*

Whether a document is forged is a factual issue. "Because forgery of a will presents an issue of fact, the resolution of the issue necessarily turns on the court's assessment of the witnesses' credibility." *In Re Est. of Presutti*, 783 A.2d 803, 806 (Pa. 2001). To the extent the issue was raised and testimony adduced regarding forgery the TRC did not find the 1975 will or *kalimur* was forged. We defer to the TRC's implicit factual finding that the will was not forged.

3. The March 24, 2000, Division of Wetos.

The High Court found that "[i]n March 2000, Litiria purportedly set aside and transferred her *alap* and *senior dri jerbal* titles on four of the wetos, one weto each to each of her daughters."[32]

We agree with Zedhkeia that the High Court's above finding regarding the March 24, 2000, division of wetos is unsupported by the record and is therefore clearly erroneous. The uncontroverted evidence is that Litiria was deceased at the time of this March 2000 division of

[32] Rule 9 Decision & Judgment, Facts, p. 1.

wetos, having died in 1982.[33] The document itself does not bear the signature of Litiria. Rather it is purportedly signed by sisters, Berta Anari, Emile Aini, Lutdrik Clement and Lijen Leit.[34] That document is not signed by the *iroij* and, aside from the four signatures appearing on that document, is not signed by Ronny, a surviving male *bwij* member.[35] The issues presented by the March 24, 2000, will or *kalimur* (Exhibit 2J) are (1) whether *bwij* consent, including the consent of Ronny, was required for the division of wetos referenced in that document, and (2) whether Emile Aini signed that document.[36]

Emile testified she did not sign that document and contends her signature is a forgery.[37] Again, the authenticity of signatures or allegations of forgery present issues of fact. Because the TRC relied on the March 24, 2000, division of wetos in concluding that Leit is the proper *alap* and *senior dri jerbal* on Monloklap it can be inferred that the TRC did not find Emile Aini's signature was forged and, conversely, found that she signed it. We defer to the TRC's implicit factual finding that Emile Aini signed and consented to the division of Litiria's lands as stated in that document.

Regarding the necessity for the signature of Ronny as the surviving male member of the *bwij*, the TRC implicitly found his signature was not necessary. We cannot say the custom required Ronny's consent to this division of wetos between sisters. Ronny had already been transferred Ojaninnin by the February 10, 1980 *kalimur* by Litiria.[38] The custom governing this agreement between *bwij* members has not been codified or declared by a final Supreme Court decision. We, therefore, cannot say the TRC's reliance on this document in reaching its ultimate

[33] Reply Brief, p. 2 referencing testimony of Biten Meraktakin.
[34] *See* Defendant's Exhibit 2J.
[35] *Id.*
[36] Reply Brief, pp. 2-3
[37] *Id.* referencing Trial Transcript 207:15-23.
[38] *See* Defendant's Exhibit Q (although that *kalimur* is also challenged as invalid under custom.)

finding that Leit is *alap* and *senior dri jerbal* on Monloklap was clearly erroneous. Further, whether that 2000 division of wetos was valid under custom or not, the signature of Emile Aini on that document is probative evidence that she recognized Leit is *alap* and *dri jerbal* on Monloklap weto.

In our view, the validity of the March 24, 2000, division of wetos is irrelevant in light of the 1975 will or *kalimur* transferring Monloklap weto to Leit which the TRC found valid. Any error in the High Court's or TRC's findings regarding this 2000 division of wetos does not justify a reversal or remand.

4. Other Factual Findings To Which We Defer.

The other issues raised by Zedhkeia on appeal involve factual issues on which we defer to the lower courts' findings. Some evidence submitted to the TRC does, however, bear discussion.

Zedhkeia's Exhibit P is an "Affidavit of Lisen Leit" in the case of *Emilia Zedkeia on behalf of her mother Emila Aini v. Tenson Benjamin, et al*, High Court Civil Action Number 2009-078. In that April 17, 2009, affidavit Leit stated under oath that Emile Aini was *alap* on Monloklap weto. Leit's statement in her affidavit directly conflicts with her testimony and position in the instant case wherein she claims she is *alap* on Monloklap, not Emile Aini. No explanation is offered for the conflict in Leit's statements.

The conflicting and apparently irreconcilable or mutually exclusive statements and positions taken by Leit in these two cases raises a concern of playing "fast and loose" with the judicial system. Parties have been judicially estopped from "speaking out of both sides of [their] mouth with equal vigor and credibility before [the] court." *Mc Nemar v. Disney Store, Inc.,* 91 F.3d 610, 618 (3rd Cir. 1996). *See also, e.g., Ryan Operations G.P. v. Santiam Midwest Lumber*

Co., 81 F.3d 355, 361 (3rd Cir. 1996)("[j]udicial estoppel is intended to prevent parties from playing fast and loose with the courts by asserting inconsistent positions."). Nevertheless, Leit's prior statement that Emile Aini is *alap* on Monloklap weto whether characterized as an admission of a party opponent under Evidence Rule 801(d)(2) or prior inconsistent statement under Evidence Rule 801(d)(1) entails a credibility finding. Inferentially, the TRC found Leit's testimony in this case that she is *alap* credible despite the conflicting affidavit wherein she averred Emile Aini is *alap* on Monloklap. We defer to that credibility finding.

The bottom line is that the TRC's findings regarding the custom and its ultimate conclusion that Leit holds the titles of *alap* and *senior dri jerbal* on Monloklap are factual findings. We defer to those findings if there is support in the record even if we would have decided the case differently. While the TRC's findings are less than crystalline we find they are supported by the record. We therefore AFFIRM the TRC's and High Court's finding that Lisen Leit is *alap* and *senior dri jerbal* on Monloklap weto.

D. The High Court Did Not Err In Its Finding That The Ground Lease With Kedi Is Valid.

Zedhkeia contends the ground lease to Kedi is "defective for three reasons: it was not signed by the constitutionally required parties; it lacked the customary consent of all family members who need to agree to any valid land transfer; and there was no customary family meeting to discuss any transfer of the subject land to Defendant Kenneth Kedi."[39]

The Constitution, Article X, Section 2, provides:

> Without prejudice to the continued application of the customary law pursuant to Section 1 of Article XIII, and subject to the customary law or to any traditional practice in any part of the Republic, it shall not be lawful or competent for any person having any right in any land in the Republic, under the customary law or any traditional practice to make any alienation or disposition of that land, whether by way of sale, mortgage, lease, license or otherwise, without the approval of the *Iroijlaplap*, *Iroijedrik* where necessary, *Alap*

[39] Opening Brief, pp. 1-2.

and the *senior Dri Jerbal* of such land, who shall be deemed to represent all persons having an interest in that land.

The Constitution only requires the approval of the *iroijlaplap, iroijedrik* where necessary, and the *senior dri jerbal,* who are deemed to represent all persons having an interest in the land leased or transferred. The parties did not contest the authority of Alden Nemna to approve the ground lease as *alap*. Lisen Leit approved the lease as *alap* and *dri jerbal.* The TRC found that Lisen Leit is the proper *alap* and *dri jerbal* on Monloklap weto. Leit signed the lease. The ground lease to Kedi thus complies with the Constitutional requirements regarding its approval. Nothing more is required. There is no requirement under custom which has been codified or declared by a final Supreme Court decision that there be a family meeting and/or that all family members must consent to a lease which complies with the requirements of the Constitution.

E. The High Court Did Not Err In Failing To Award Attorney Fees, Costs or Sanctions to Zedhkeia.

The Supreme Court reviews a grant or denial of attorney fees and/or sanctions for abusive litigation practices under the "abuse of discretion" standard. *See, e.g., Lester v. Rapp*, 942 P.2d 502, 505 (Ha. 1997). Under the "abuse of discretion" standard of review applicable to attorney fees, the appellate court will make every reasonable presumption in favor of upholding the trial court's decision. There is no specific Rule of Civil Procedure authorizing an award of costs or attorney fees for abusive litigation practices. Such an award, however, is within the inherent powers of the court. *Lester, supra*, at 505. A finding that counsel's conduct constituted or was tantamount to bad faith is a necessary precedent to any sanction of attorney's fees under the court's inherent powers. *Lester, supra,* at 505-06.

The High Court explained its decision not to award costs or sanctions for two reasons: all parties were equally responsible for delays in the case and the court could not conclude there was any intentional misrepresentations or improper motives as alleged by Mr. Chickamoto.

Whether all parties were equally responsible for delays in this case is irrelevant because the necessary predicate for an award of attorney's fees and costs is bad faith conduct. *Lester, supra.* Whether there were any intentional misrepresentations or improper motives amounting to bad faith conduct in seeking a continuance of the trial date is a factual issue. The High Court could not find there was any intentional misrepresentations or improper motives. We defer to the High Court's finding in that regard.

VII. CONCLUSION

It should be emphasized that resolution of this appeal is dependent on the applicable standard of review which is "clearly erroneous." Under the Constitution and our case law we are required to defer to the factual findings of the TRC if supported by credible evidence. Credibility, in itself, involves a factual finding to which we defer unless we are convinced a mistake has been made. We cannot reverse simply because we believe the lower court's decision was probably wrong and we would have decided the case differently. "To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must …strike us as wrong with the force of a five-week old, unrefrigerated dead fish…To be clearly erroneous, then, the [decision being appealed] must be dead wrong…." *Booton v. Brown*, 8 Vet.App. 368, 372 (1995). While close, neither the TRC's nor the High Court's decisions have reached the five-week mark.

We therefore AFFIRM the High Court's judgment that Lisen Leit holds the *alap* and *senior dri jerbal* titles on Monloklap weto, Ajeltake, Majuro Atoll.

Having affirmed the High Court's judgment that Lisen Leit is the appropriate person to hold the *alap* and *senior dri jerbal* titles on Monloklap weto, and because the authority of the

iroij to sign the ground lease with Kedi is not challenged, we AFFIRM the High Court's judgment that the lease with Kedi is signed by the appropriate parties and is valid.

Finally, we AFFIRM the denial of attorney's fees, expenses and sanctions requested by Zedhkeia.

Dated: September 16, 2022.

/s/ Daniel N. Cadra
Daniel Cadra
Chief Justice

/s/ J. Michael Seabright
J. Michael Seabright
Associate Justice

/s/ Richard Seeborg
Richard Seeborg
Associate Justice