IN THE SUPREME COURT

OF THE

REPUBLIC OF THE MARSHALL ISLANDS

Supreme Court Case No. 2025-0297

Cansee Jorkan Alik,
Defendant-Appellant,
v.

Robinson Abner,
Plaintiff-Appellee.

BEFORE: CADRA, C.J., SEABRIGHT, A.J; SEEBORG, A.J.

CADRA, C.J. with whom SEABRIGHT, A.J.[1] and SEEBORG, A.J.[2] concur:

I. INTRODUCTION

Jack Jorbon, Cansee Alik, and Harrington Dribo appeal from judgments of the High Court in High Court Case Nos. 2003-059 and 2017-226. The High Court, in reaching its judgments, adopted the findings and conclusions of the Traditional Rights Court (TRC) declaring that:

(1) As between claimants, Walur Beaja, Alee Jorkan, Harrington Dribo, and Bernie Hitto; Walur Beaja is the proper person to hold the *alap* title and rights on Aiboj weto, Bikej Island, Kwajalein Atoll;

(2) As between claimants Jack Jorbon, Cansee Alik, Handy Emil, and Robinson Abner; Robinson Abner is the proper person to hold the *senior dri jerbal* title and rights on Aiboj weto, Bikej Island, Kwajalein Atoll; and

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

(3) that *alap* Walur Beaja and *senior dri jerbal* Robinson Abner should distribute the Kwajalein Land Use Agreement (LUA) payments for Aiboj weto, Bikej Island, to the members of their *bwij*, including those who secured the *bwij's* claims under the "[e]arlier Action, in accordance with the customary law and traditional practices of the Marshall Islands and the considerations and restraints that typically guide the exercise of that discretion."

In brief, the High Court found substantial evidence supported (and therefore adopted) the TRC's findings that Aiboj weto, Bikej Island, is land belonging to Liriwa's *bwij* and that Walur Beaja is the proper person to hold the *alap* title because she is the eldest surviving member of the senior extant matrilineal lineage of Liriwa's *bwij*.[3] In reaching the conclusion that Walur Beaja is *alap*, the trial courts (TRC and High Court) rejected Harrington Dribo's and Robinson Abner's *katlep*[4] and *bwilok*[5] theories.

The High Court found substantial evidence supported (and therefore adopted) the TRC's conclusion that Robinson Abner is the proper person under custom to hold the *senior dri jerbal* title because the *botoktok* line now flows "from Abner (a grandson of Libonar) to his eldest son Kotemene, and now to Kotemene's son, Robinson Abner." Cansee Alik's claim to the *senior dri jerbal* title was rejected because "although a child of a male *alap*, Lisos, a great-grandson of Libonar, she must wait until the elder *botoktok* line from Abner becomes extinct" before she can become *alap*. Jack Jorbon's claim to the *senior dri jerbal* title was rejected because he is a generation younger than both Abner and Cansee (and thus not presently entitled to the *alap* title.)

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[3] The custom being that, in *bwij* lands, the *alap* title descends horizontally through the matrilineal line from eldest to youngest.

[4] "Katlep" is defined by the TRC as "The placement of a commoner on a piece of land by an *Iroij*, requiring the people there to move off. In doing this, it does not necessarily mean it is a punishment for an offense they committed but rather it is to place on the land a person without land(s)."

[5] "Bwilok/Tum" is defined by the TRC as "Cutting off or the divesting of land rights of a person or bwij for serious offense of custom."

As discussed below, we AFFIRM the judgments of the TRC and High Court that Walur Beaja is the proper person to hold the *alap* title, interests and rights to Aiboj weto, Bikej Island. Accepting the findings of the trial courts which are supported by substantial evidence, we find that Walur Beaja is the proper person to hold the *alap* title pursuant to the CUSTOMARY LAW (SUCCESSION OF CUSTOMARY TITLE, RIGHT, AND INTEREST)(RALKIK CHAIN) ACT, 2023, Title 39 MIRC, Sec. 901 et. seq.

We, however, REMAND the claims of Cansee Alik and Robinson Abner to the *senior dri jerbal* title for further explanation of the custom or reconciliation of apparent inconsistent findings regarding whether Liriwa's *bwij* is extinct and the custom of *tor-en-botoktok* as that custom applies to its findings of fact in light of the CUSTOMARY LAW (SUCCESSION OF CUSTOMARY TITLE, RIGHT, AND INTEREST)(RALIK CHAIN) ACT, 2023, Title 39 MIRC, Sec. 901 et seq.

On remand, the trial courts may render judgment based on the existing record without further briefing or input from the parties or may require additional briefing, evidence or testimony as the courts believes appropriate.

II. BACKGROUND & PROCEEDINGS BELOW

This consolidated case is one of a long-standing series of disputes regarding ownership of wetos on Bikej Island, Kwajalein Atoll. This case concerns the *alap* and *senior dri jerbal* titles to Aiboj weto, Bikej Island (as distinguished from Aiboj weto, Jaluit).

This case commenced with the filing of a complaint for declaratory judgment and injunctive relief on September 27, 2017. The court then issued a *sua sponte* order on October 23, 2017, consolidating High Court Civil No. 2003-059 with High Court Civil Action 2017-226.

On July 17, 2018, the High Court referred the case to the TRC to answer two questions:

1. As between Walur Beaja ("Walur"), Alee Jorkan ("Alee"), Harrington Dribo ("Harrington"), and Bernie Hitto ("Bernie"), who is the proper person to hold and exercise the title, rights, and interests of *alap* on Aiboj weto, Bikej Island, Kwajalein Atoll?
2. As between Jack Jorbon ("Jack"), Cansee Alik ("Cansee"), Roboinson Abvner ("Robinson"), and Handy Emil ("Handy"), who is the proper person to hold and exercise the title, rights, and interests of *senior dri jerbal* on Aiboj weto, Bikej Island, Kwajalein Atoll?

A trial spanning approximately 35 days between January 22, 2020, and April 6, 2020, was held before the TRC. The TRC heard from 16 witnesses and considered approximately 47 exhibits including 21 *memenbwij* (genealogy charts).

A. The TRC "Opinion in Answer."

The TRC issued its "Opinion in Answer" on March 11, 2021 (Marshallese version) and April 1, 2021 (English version). The TRC found that Aiboj weto, Bikej Island, Kwajalein Atoll, was originally *marjinkot*[6] land awarded by *Iroijlaplap* Laninbit to Laemokmok for Laemokmok's valor in war. Laemokmok then gave Aiboj weto to his younger sister Liriwa (as *imon bwij*).[7] Aiboj weto, Bikej Island, was then passed down through Liriwa's *bwij* (as *bwij* land). The TRC found that all parties are descendants of Liriwa and are members of Liriwa's *bwij*. The TRC found Liriwa's *bwij* is not extinct.

1. The *Alap* title.

The TRC found that Walur Beaja and Bernie Hitto are matrilineal descendants of Liriwa of the same generation (the fifth or sixth, depending on whether Libonar was Liriwa's daughter or

[6] *Marjinkot* is defined by the TRC as "the giving of one or more wetos or islands by an *Iroij* to a warrior for bravery in battle...."
[7] *Imon bwij* is defined by the TRC as "If an *Iroij* or an *Alap*, having informed the *bwij*, transfers land to someone who may or may not be a member of their *bwij*."

granddaughter.)[8] Walur Beaja is the eldest member of the senior extant matrilineal lineage of Liriwa's descendants (i.e. Liriwa's *bwij*).

The TRC concluded that Walur Beaja, being the eldest member of the senior extant lineage of Liriwa's *bwij*, is the proper person to hold the *alap* title pursuant to custom. The TRC explained:

> "Notwithstanding Harrington (Dribo) being the son of a female, in his generation, he is the grandson of Abner. Therefore, and rightfully so, the line of succession must continue down through the *bwij* members considering the *bwij* is not extinct... At his time, however, the botoktok has flowed from Abner to his eldest son Kotmene, and now to Abner's son, Robinson Abner. Therefore, it is clear from the order of the *bwij* in the two-family genealogy charts that Walur Beaja is the rightful and most appropriate person, based on the order of the *bwij* of Liriwa, to hold and exercise the *alap* right at this time, for the reason that Limaile's (sic.) *bwij* is not extinct, which continues down to her daughter Lijileej, and to Lijileej's daughter Agnes, and now Walur, who is the daughter of Agnes."

In reaching its conclusion that Walur Beaja is the proper person to hold the *alap* title, the TRC rejected Harrington Dribo's (Harrington's) theory of the case. Harrington claimed he was entitled to the *alap* title because, although Aiboj initially belonged to Liriwa's *bwij*, at some time between 1955 and 1977 *Iroijlaplap* Lojein Kabua gave Aiboj, Bikej to Abner and his descendants as *katlep* to the exclusion of other members of the *bwij*.

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[8] The TRC in making its findings relied on the *memenbwij* (genealogy charts) introduced as plaintiff/intervenor Exhibit B, the genealogy chart of Liriwa' *bwij* and plaintiff's exhibit P-1, the genealogy chart of Laemokmok's children and descendants. As relevant to the TRC's findings, Exhibit B traces Liriwa's *bwij* as follows:

Liriwa (female-deceased)

Libonar (daughter of Liriwa-deceased). Generation 1 (from Liriwa)

Kallep (daughter of Libonar-deceased); Likbad (female-deceased); Liwabat (female-deceased), etc. Generation 2.

Lujeel (daughter of Kallep and spouse of Kobin. Kobin was a first cousin of Luleej being the child of Jiokbed, a son of Libonar-deceased.), Nebun (female) Generation 3.

Zaion (male, son of Lujeel-deceased); Agnes (daughter of Lujeel-deceased); Carl (son of Nebun-deceased); Lisos (Lijoj)(male, son of Nebun-deceased); Kane (female, daughter of Nebun-deceased); Eobi (daughter of male Abner); Kotmene (male, son of Abner); Anet (daughter of Abner). Generation 4.

Riwa (female, daughter of Zaion); **Walur** (daughter of Agnes); Alee (male, son of Carl); **Cansee** (daughter of Lisos); **Bernie**; **Harrington** (son of Eobi); **Robinson** (son of Kotmene); **Handy** (son of Anet). Generation 5.

Jack (male, son of Riwa). Generation 6.

Harrington asserted this *katlep* was evidenced by *Iroijlaplap* Lojelan giving a machete to Abner to clean Aiboj; by Abner's family living on Aiboj for many years (to the exclusion of other *bwij* members); and by a statement from the-then *Iroijlaplap* recognizing the *katlep.*

The TRC found insufficient evidence to support Harrington's *katlep* claim because:

(1) Abner was not the only person given a machete from *Iroijlaplap* Lojelan Kabua for Bikej Island. The gifting of the machete was "not an act of *katlep*" based on Dribo's own testimony that "Abner was not the only person who received a machete to clean and clear Bikej." The gifting of the machete to Abner was to hold and exercise the *alap* right to Aiboj, Bikej, on behalf of the *bwij.*

(2) There was no removal of people from the land and planting of a new *bwij*. The TRC stated the custom is "that at the time the *katlep* is made, the Iroij will move the people who were on the land" (citing Tobin, 1958). The TRC found that *Iroijlaplap* Lojelan did not move people who were on the land. In making that finding the TRC relied on the testimony of William Briand that he and other members of Liriwa's family used to visit Aiboj weto, Bikej,

(3) There was no contemporaneous documentation of *Iroijlaplap* Lojelan Kabua's purported *katlep*, as well as no mention of *katlep* in the affidavits of Koteme Abner, Mathrine Abner, and their father Abner; and

(4) Under the custom of *berber ijin, berber ijon* (we are the same even though one stays here and one stays there),[9]Abner's presence on Aiboj, Bikej, was on behalf of Liriwa's *bwij*, including those on Aiboj, Jaluit, not just Abner's immediate family.

[9] The TRC stated: "*Berber ijin, berber ijon*" is a proverb meaning "we are the same notwithstanding one stays here and one there."

The TRC explained that the custom of *berber ijin, berber ijon* applied to the gifting of the machete and Abner's presence on Aiboj:

> "The panel also recognizes that while it is true the older *bwijs* remained on Jaluit and other locations throughout the islands, and Abner stayed in Kwajalein Atoll, it was only appropriate then that the *Iroijlaplap* Lojelan recognize Abner and hand down the machete to him to hold and exercise the *alap* right. *Berber ijin, Berber ijon*, although the others were in Jaluit, and elsewhere, but Abner being the family member there, held and exercised the right on behalf of the entire family, during his time."

The TRC also rejected Harrington Dribo's contention that Walur's claim to the *alap* title is barred because her grandmother Lijileej married her first cousin Kobin. According to Harrington Dribo, a *bwilok* occurred under custom because of this prohibited marriage of cousins. Dribo also claimed a *bwilok* had occurred because the *Iroij's* directions were not followed. The TRC found there was insufficient evidence to support these *bwilok* claims.

2. The *senior dri jerbal* title.

The TRC found that Robinson Abner is the rightful holder of the *senior dri jerbal* title, rights and interests. The TRC explained the custom is that the *alap* title descends through the *bwij* (matrilineally) whereas the *senior dri jerbal* title descends through the elder *botoktok* line (patrilineally or through the male line, father to son.)[10] The TRC rejected Cansee Alik's claim to the *senior dri jerbl* title because, although a child of a male (and thus from the *botoktok* or patrilineal lineage) she must wait for the elder *botoktok* line (through which Abner Robinson claims) to become extinct. The TRC rejected Jack Jorbon's claim to the *senior dri jerbal* title because he "is a generation younger than Cansee and Robinson and cannot supersede those who are a generation older than him."

[10] The Marshallese version of the TRC "Opinion in Answer" describes this custom by using the term *toor-in-botoktok* also spelled throughout the briefing as *tor-en-botoktok* or *tor-in-botoktok*. The TRC does not define that term in the English version but describes its application as above stated.

The TRC reasoned:

> "Coming now to who the rightful and proper person is to hold and exercise the *senior dri jerbal* title, rights and interests, alongside Liriwa's *bwij*. First off, Jack Jorbon is a generation younger than Cansee and Robinson and cannot supersede those who are a generation older than him. With respect to Cansee Jorkan Alik, she will have to wait until the *botoktok* becomes extinct, since the *botoktok* has flowed from Abner to Kotemene and at this time to Robinson. Therefore, we consider that the second *botoktok* is with Cansee because although she is the daughter of a male, Cansee's father is considered *bwij*, being the son of a female. Accordingly, the court recognizes Robinson Abner as the rightful and proper person to hold and exercise the *senior dri jerbal* title, rights and interests on Aiboj weto, Bikej Island, Kwajelein Atoll."

B. The High Court's Final Judgment.

The High Court held a Rule 9 hearing and issued its Final Judgment on May 3, 2024, adopting the opinions of the TRC in its April 1, 2021 "TRC Opinion in Answer."

The High Court found "substantial evidence" supported the conclusion of the TRC awarding the *alap* title to Walur Beaja and, accordingly, adopted the TRC's findings in that regard.

The High Court summarized the TRC's findings regarding the *alap* title:

> First, Aiboj is *imon bwij* belonging to Liriwa's *bwij*. Second, Walur was the eldest member of the senior extant matrilineal lineage of Liriwa's descendants. Third, Alee and Harrington are not descendants of extant matrilineal lineages. They are both descendants of male members of Liriwa's *bwij*. Moreover, Alee and Harrington are not descendants of extant matrilineal lineages. They both are descendants of male members of Liriwa's *bwij*. Moreover, Alee's adopted father Carl, was a male child of the *bwij* as was Harrington's grandfather. Fourth, Alee, as an adopted child, could only inherit rights in Aiboj if Liriwa's *bwij* and *botoktok* lineages had become extinct, which they have not.

The High Court rejected Harrington Dribo's *katlep and bwilok* theories for the reasons set forth by the TRC. The High Court also rejected Harrington's numerous procedural due process challenges to the TRC's judgment. Harrington claimed he had been improperly denied rebuttal testimony; that he had been denied a post-trial motion to introduce "new evidence" for the deaths of Jeimata in 1955 and Lejelan in 1981; and that TRC judge Milton Zachios should have been

recused or disqualified from hearing the case because, as the clerk of court, he had given testimony in a prior case as well as having received a machete into evidence in a prior case.

The High Court rejected Harrington's claim that he had been denied rebuttal testimony because his counsel "failed to identify any 'new testimony or other evidence' presented by a defendant that he sought to refute" and therefore "failed to articulate a proper basis for rebuttal under Rule 7(c)."

The High Court rejected the claim that Harrington had erroneously been denied a post-trial motion to introduce new evidence because "Harrington's counsel did not claim the dates of death were at issue, were newly discovered evidence, or could not have been obtained months or years before from public records."

The claim that TRC judge Zachios should have been disqualified was rejected because Harrington failed to demonstrate that Judge Zachios had "played a role" in the current action, was "otherwise disabled by a conflict of interest," had an actual bias or conflict of interest, and that he had served as a "material witness in the matter in controversy."

The High Court found "substantial evidence" supported the conclusions of the TRC awarding the *senior dri jerbal* title to Robinson Abner and, accordingly, adopted those findings. The High Court noted that the TRC considered the claims of Cansee Alik and Jack Jorbon but rejected those claims.

C. The Appeals

Jack Jorbon, Cansee Alik, and Harrington Dribo timely filed separate appeals. Alee Jorkan,[11] Handy Emil, and Bernie Hittto did not appeal. Although filing a Notice of Appeal, Harrington

[11] Alee Jorkan did not file a Notice of Appeal and did not file an Opening Brief. However, a "Responding Brief of Defendants-Appellees (sic) Jorkan & Alik to Opening Brief of Plaintiffs-Appellants Dribo & Abner" was filed on August 12, 2025. Because a Notice of Appeal was never filed on behalf of Alee Jorkan, we find she is not a party to this appeal.

Dribo did not file an Opening Brief.[12] Appellee Walur Beaja did not participate in this appeal by filing any briefing or appearing at oral argument.[13] Alee Jorkan,[14] Handy Emil, and Bernie Hittto did not appeal. Appellee Robinson Abner did not appeal or cross-appeal but argues the TRC and High Court erred in not finding that a *katlep* occurred and that the trial courts misapplied the principle of *bedbed ijen, bedbed ijon.* Robinson Abner requests this court to make alternative findings of fact supporting his claim to the *senior dri jerbal* title. He requests we find that *katlep,* as well as the TRC's reasoning regarding the *tor-en-botoktok* custom, supports his claim to the *senior dri jerbal* title. Robinson Abner states his argument for an alternative basis supporting his claim is made to support his co-party, Harrington Dribo's, claim to the *alap* title.

III. THE PARTIES' CONTENTIONS ON APPEAL

A. Cansee Alik's Contentions on Appeal.

Cansee Alik contends that the TRC and High Court erred in applying the custom of *tor-en-botoktok* when awarding the *senior dri jerbal* title to Robinson Abner. According to Cansee, the proper custom is that, when the *bwij* is not extinct, the child of the paternal bloodline (*botoktok*) which is closest to the matrilineal *bwij* is *senior dri jerbal*. According to Cansee, the custom of *Aliek en* or *bwijlok* applies to Robinson's claim and precludes him from holding the *senior dri jerbal* title. That custom allegedly provides that descendants of the paternal bloodline

[12] The briefing in this case is confusing. On August 8, 2025, a cover sheet captioned "Answering Brief" for "Plaintiff-Appellant Harrington Dribo" was filed but the brief itself was captioned "Plaintiff-Appellee Robinson Abner's Answering Brief." The signature line of counsel at the conclusion of the brief states "Attorney for Plaintiff-Appellee Robinson Abner." At oral argument it was clarified that the "Answering Brief" was an "Opening Brief." We construe this ambiguous filing as a filing on behalf of both Harrison Dribo and Robinson Abner.

[13] Walur Beaja was represented below by Jack Jorbon, who was also a claimant below and an appellant in this case. No briefings were submitted on behalf of Walur Beaja who remained unrepresented throughout this appeal. Walur Beaja did not appear at oral argument.

[14] Alee Jorkan did not file a Notice of Appeal and did not file an Opening Brief. However, a "Responding Brief of Defendants-Appellees (sic) Jorkan & Alik to Opening Brief of Plaintiffs-Appellants Dribo & Abner" was filed on August 12, 2025. Because a Notice of Appeal was never filed on behalf of Alee Jorkan, we find she is not a party to this appeal. Alee Jorkan did not appear at oral argument.

"are on the way out" the further they are from the *bwij*. Applying this custom to the facts of this case, Cansee claims she is closest to the *bwij* whereas Robinson Abner, although in the same generation, is further from the *bwij* (maternal bloodline descending from Liriwa). Therefore, Cansee claims she is the proper person to be determined *senior dri jerbal*. Cansee also claims Aiboj Weto, Bikej Island is *bwij* land. The *tor-en-botoktok* custom, according to Cansee is applicable to *ninnen* land, not *bwij* land thus making the *tor-in-botoktok* custom inapplicable.

B. Jack Jorbon's Contentions on Appeal.

Jack Jorbon appeals claiming the High Court erred in not remanding the case to the TRC to "determine a designated question on how the customary right of *Senior Dri Jerbal* on a *bwij* land has been evolving and/or changing since the inception of the RMI Constitution."

C. Harrington Dribo's Contentions on Appeal.

Harrington Dribo raises a plethora of issues on appeal. He claims the High Court and TRC erred in failing to find that a *katlep* occurred; failing to find that a *bwilok* occurred; that the courts erred in applying the custom of *berber ijin, berber ijen*; that, procedurally, TRC judge Milton Zachios should have recused himself from the case; and that High Court Chief Judge Carl Ingram should have recused himself from the case; that his due process rights were denied by repeated denial of continuances; and that his due process rights were denied by the failure of the TRC to allow rebuttal.

D. Robinson Abner's Contentions

Robinson Abner did not appeal, cross-appeal or challenge the High Court and TRC's conclusion that he is *senior dri jerbal* on Aiboj weto, Bikej. Rather, he joins with co-party Harrington Dribo contending that the TRC and High Court erred in failing to find that a *katlep* occurred and that those courts erred by misapplying the custom of *bedbed ijin, bedbed ijen*; that

TRC judge Milton Zachios should have recused himself; and that High Court judge Carl Ingram should have recused himself.

E. The Customary Law (Succession of Customary Title, Right, and Interest)(Ralik Chain) Act, 2023 and Request for Additional Briefing.

After submission of the parties' briefing and after oral argument, additional briefing was requested on the application of the "CUSTOMARY LAW (SUCCESSION OF CUSTOMARY TITLE, RIGHT AND INTEREST) (RALIK CHAIN) ACT, 2023, 39 MIRC, Sec. 901 et seq. to this case. We take judicial notice that Aiboj weto, Bikej Island, Kwajalein Atoll is within the Ralik Chain, thus, making this Act applicable.

39 MIRC, CUSTOMARY LAW (SUCCESSION OF CUSTMARY TITLE, RIGHT, AND INTEREST) (RALIK CHAIN) ACT, 2023, Sec. 905 "Succession of Customary Title, Right and Interest" states, in relevant part:

> (1) Customary title, right and interest to land are passed down horizontally by matrilineal descent through the female members of the bwij, starting from the eldest to the youngest.
> (2) The bwij shall become extinct ("*lot*") when there are no more female members to continue the lineage, and, the title, right and interest to the land will pass through the male members of the bwij. The offspring of the male members of the bwij, in this instance, are otherwise characterized to by the term, "*Jiblok.*"
> (3) The first female born of a male member of the original bwij shall be the progenitor of a new bwij, an occasion referred to as "*toor in botoktok,*" who shall pass down the title, right and interest to land through her female offspring.
> (4) Any female offspring of the eldest daughter, or of the younger siblings of the eldest daughter, of a male member of the original bwij shall be characterized as "*Jibtok.*" These female offspring shall inherit the title, right and interest to the land from their mother, to pass down and continue the new matrilineal descent, and their male descendants shall become the reigning titleholders on a particular land.

Cansee Alik, in her additional briefing, claimed that 39 MIRC, 905(2) and (3) do not apply to the facts of this case. The "main reason being that the land (Aiboj at Bikej, Kwajalein Atoll) is a *bwij* land" and that the *bwij* of Liriwa is not extinct (or *lot*). Therefore, the *tor-in botoktok* manit (custom) cannot apply. Rather, Cansee contends that, as *bwij* land, the titles to Aiboj weto should be determined pursuant to Subsection (1). Cansee argues:

> Appellant (Cansee) is a granddaughter of the mother (a female) of her father who was *alap* of the *bwij* and lands. Robinson is a grandson of a male (not a female). Robinson's status of *jiblok* is much further or distant from the inheritance or benefit on this *bwij* land. His father Kotmene would be closer to the position of *senior dri jerbal* of the *bwij* being a grandson of a female (Abner's mother). Kotmene was not *alap* as a male offspring (Abner's son). Appellant's father (Lisos) was *alap* as a female offspring.

Harrison Dribo and Robinson Abner claimed Liriwa's *bwij* was extinct and that the custom of *tor-en-botoktok* set forth in Subsections (2) and (3) "applies perfectly." They argue:

> Liwabat, Abner's mother, was the last female alap, and was the last and youngest female in the *bwij* of Liriwa. See Dribo Exhibit P-7. Liwabat was the youngest member of the *bwij* of Liriwa, the common ancestress to all of the parties in this case. Abner, who was from the *jowi* of his mother (Ijjirik) had only male children, and was the last *bwij* member of his generation. See Dribo Exhibit P-7. Upon the death of Abner, *tor en botoktok* begins through Liobi (*jowi* of Raur), the first-born female of Abner. She established the new bwij. Under the *tor-en-botoktok* theory, then, Harrington Dribo would be alap, and Robinson, son of the oldest male child of Abner (Kotmene) should be *senior dri jerbal.* Because Liwabat was the youngest and last female for Liriwa's *bwij*, Liobi had the strongest "blood" in her *vis-à-vis* the other claimants, i.e., she was the strongest *tor-en-botoktok.*

Given the briefing of the parties, the threshold issue under the statute is whether Liriwa's *bwij* is extinct or *lot.* An ambiguity in the trial courts' decisions exists because, on the one hand, it found the *bwij* of Liriwa was not extinct and awarded the *alap* title to Walur Beaja but, applying the *tor-en-botoktok* custom awarded the *senior dri jerbal* title to Robinson Abner.

Under the statute the *tor-en-botoktok* custom only comes into play if the *bwij* is extinct (*lot*). As discussed below, because we do not make factual findings on appeal, we remand for further explanation or findings considering Title 39 MIRC, Sec. 901 et seq.

IV. STANDARD OF REVIEW

Our standard of review is well settled. Matters of law are reviewed *de novo*. *Lobo v. Jejo*, 1 MILR (Rev.) 224, 225 (1991). Findings of fact are reviewed under the "clearly erroneous" standard. *Dribo v. Bondrik, et al*, 3 MILR 127, 131 (2010). 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. *Lebo v. Jejo, supra,* at 225-6. 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).

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. Jejo, supra,* at 226; *Zaion v. Peter*, 1 MILR (Rev.) 228, 231 (1991); *Kabua v. Malolo, supra.*

Expressions of custom by the courts of the prior Trust Territory Administration, while instructive, are not binding. *Langiota 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.* We are also not bound by lower court, High Court or Traditional Rights Court decisions although they may be instructive.

V. DISCUSSION

A. Why We Reject Jack Jorbon's Appeal.

Jack Jorbon (Jorbon) claims the case should be remanded because:

"[A] "trial on the merits of the issue of *senior dri jerbal* title on *bwij* land was not fully pursued with experts in custom and traditional practice during the trial of this matter. Therefore, this matter should be remanded to the TRC for further deliberation and

clarification on the issue of *senior dri jerbal* on a *bwij* land, as to whether it will always remain with the descendants of the original male or *botoktok* lineage until it is extinct."

Jorbon also claims the TRC erred by not considering how the custom has been evolving and/or changing since the inception of the RMI Constitution on May 1, 1979.

We reject Jorbon's assignments of error because he had the opportunity to present whatever evidence, including expert witness testimony, he had of the applicable custom and the "evolving custom" at trial. He does not refer us to any instance in the record where he was denied the opportunity to present expert testimony or that relevant evidence was wrongfully excluded. A party who fails to present sufficient evidence at trial should not be allowed to challenge the inadequacy of evidence on appeal. *See, e.g., Miles v. Miles*, 816 P.2d 129, 132 (AK 1991).

Jorbon also claims the High Court erred by "not consulting the transcripts of the trial in order to see whether the Defendant/Appellant (i.e. Jorbon) had provided any substantial evidence ...to support his (i.e. Jorbon's) claim to the *senior dri jerbal* right on Aiboj weto, Bikej Island, Kwajalein Atoll." We reject this claim of error because the burden was on Jorbon to refer to the transcripts and direct the High Court at the Rule 9 hearing (as well as this Court on appeal) to the evidence supporting his claim (as well as the evidence which does not support his claim.) It was not the duty of the High Court (or this Court on appeal) to search the record and make out appellant's case for him. *See, e.g., Credit Bureau of Fulton County, Inc. v. Faulstitch*, 135 Ind.App. 511, 513 (In. 1964)("It is a well settled rule that the appellate court will not search the record in order to seek sufficient evidence to support a reversal for the appellant."); *see also, Slone v. El Centro Regional Medical Center*, 106 Cal.App.5th 1160, 1174 (Cal.App. 2024)("As with all substantial evidence challenges, an appellant ...must layout the evidence favorable to the

other side and show why it is lacking. Failure to do so is fatal. A reviewing court will not independently review the record to make up for appellant's failure to carry his burden.")

Furthermore, Jorbon fundamentally misconstrues or misapprehends the standard of review. Even if we were to review the record and identify credible evidence supporting his claim to the *senior dri jerbal* title our standard of review only requires us to review the record to determine whether substantial evidence supports the trial court's findings (not whether substantial evidence supports appellant's theory of recovery.) We have reviewed the record and found substantial evidence supports the finding that Jorbon is a generation younger than the other claimants to the *senior dri jerbal* title and that, as the youngest, he is not yet entitled to be *senior dri jerbal* under custom and under 39 MIRC 901 et seq.

B. Why We Affirm the Claim of Walur Beaja to the *Alap* Title.

1. "Substantial evidence" supports the TRC and High Court's finding that Walur Beaja is the proper person to hold the *alap* title under the custom as found by the TRC and as codified by the Customary Law (Succession of Customary Title, Right and Interest) (Ralik Chain) Act, 2023.

We apply the law which exists at the time we render our decision on appeal. *See, e.g., Lambert v. Blodgett*, 393 F.3d 943, 973 n. 21 (9th Cir. 2004)(citing *Thorpe v. Durham Hous. Auth.*, 393 U.S. 268, 281 (1969))("[I]t is well settled that a court generally applies the law in effect at the time of its decision, and that if the law changes while the case is on appeal the appellate court applies the new rule."); *Dobbins v. Schweiker*, 641 F.2d 1354, 1360 n. 8 (9th Cir. 1981)(citing *United States v. The Schooner Peggy,* 5 U.S. (1 Cranch) 103 (1801) and *Bradley v. Richmond School Board*, 416 U.S. 696 (1974))("As a general rule, appellate courts will apply changes in laws that come into effect after an initial judgment, but before an appeal is decided. In

fact, this presumption applies unless there is a clear indication to the contrary in the legislation, or when it becomes necessary to avoid manifest injustice.")

39 MIRC 905(1) codifies the custom that the title, right and interest to land is passed down horizontally by matrilineal descent through the female members of the *bwij*, starting from the eldest to the youngest. That statute states in relevant part:

> (1) Customary title, right and interest to land are passed down horizontally by matrilineal descent through the female members of the *bwij*, starting from the eldest to the youngest.

In applying this statute to the instant case on appeal we rely on, and accept, the trial court's findings of fact if supported by substantial evidence. Substantial evidence supports the finding that Liriwa's *bwij* is not extinct and that Walur Beaja is the eldest member of the senior extant matrilineal lineage of Liriwa's *bwij*. That factual finding is supported by the *memenbwij* introduced as "Plaintiff/Intervenor Exhibit B," cited and relied upon by the TRC, tracing the matrilineal lineage of Liriwa's *bwij* from Liriwa (female) to Libonar (female) to Luleej (female) to Agnes (female) to Walur (female), who is the eldest surviving member of her generation.

The finding of the trial courts regarding the applicable custom that the *alap* title to *bwij* land goes to the eldest member of the surviving matrilineal *bwij* is supported by substantial evidence and is consistent with our decision in *Latdrik v. Laik*, 4 MILR 377, 389 (2022)(The custom is that "the descendants of females inherit the *alap* rights and the descendants of males inherit the *dri jerbal* rights over (*bwij)* land.")

39 MIRC 905(1) codifies the custom that title, right and interest to land passes horizontally through the female members of the *bwij*, from eldest to youngest. Applying the custom as set forth by the statute to the factual findings of the TRC supports the award of the *alap* title to Walur Beaja. We therefore affirm the High Court's judgment that Walur Beaja is

the proper person to hold the *alap* title, rights and interests to Aiboj weto, Bikej Island, Kwajalein Atoll.

2. Harrison Dribo's claims of error lack merit.

a. It was within the trial courts' discretion to reject Harrington Dribo's *katlep* and *bwilok* claims.

Harrison Dribo (and Robinson Abner) claims the TRC "committed error in determining that there was insufficient evidence presented that Aiboj weto, Bikej Island was given to Abner as *katlep* and that the custom of *bedbed ijin, bedben ijen* applied." They also claim the TRC erred in failing to find a *bwilok* occurred.

It is well settled that, as fact finder, the trial court can make credibility findings and reject testimony which findings are binding on the appellate courts on review. *See, e.g., Anderson v. Bessemer City*, 470 U.S. 564, 574 (1995)("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. *Citations omitted.* This is so even when the district court's findings do not rest on credibility determinations....") The TRC considered the evidence supporting the *katlep* and *bwilok* claims and rejected that evidence. We are bound by those findings even though we may have decided the case differently.

b. Remand is not warranted by TRC Judge Zachios' failure to recuse himself.

Harrington Dribo argues that TRC Judge Milton Zachios should have disqualified or recused himself because, in his prior role as clerk of the court, he accepted a machete introduced into evidence in the first Bikej case in 1980 and gave testimony.

We agree with the High Court that Judge Zachios' former role as a court clerk in receiving a machete into evidence in a prior case does not make him a material witness to any facts at issue in the present case. The only evidence of Judge Zachios' testimony in the prior case

was that, as a court clerk, he was called to confirm that he file-stamped court a will signed by Lojelan Kabua. That testimony does not make him a material witness to any fact at issue in the instant case and a reasonable person would not impute any bias or appearance of bias to him for performing his roles as a court clerk. Such routine administrative tasks do not make a court clerk a factual witness to disputed matters. Judge Zachuios' testimony and receipt of a machete into evidence does not make him a material witness to any issue in the instant case.

c. Remand is not warranted for High Court Chief Justice Ingram's failure to recuse himself.

Harrington Dribo argues that High Court Chief Justice Ingram should have recused or disqualified himself because he was involved in the negotiation of the Compact of Free Association. This claim was never raised below and was raised only after Harrington Dribo lost his claim to the *alap* title.

We find this claim has been waived. Strategic delay in raising recusal issues constitutes procedural waiver and is disfavored as gamesmanship and playing fast and loose with the courts. *See, e.g., Jones v. Pittsburg Nat. Corp.*, 899 F.2d 1350, 1356 (3rd Cir. 1990)(Finding recusal motion filed after entry of dismissal order was not timely because 'any other conclusion would permit a party to play fast and loose with the judicial process by 'betting' on the outcome."); *Newport News Holding Corp. v. Virtual City Vision, Inc.*, 650 F.3d 423, 432 (4th Cir. 2011)(discussing federal recusal statute, the court stated "[T]imeliness is an essential element of a recusal motion...To prevent inefficiency and delay, motions to recuse must be filed at the first opportunity after discovery of the facts tending to prove disqualification, ... The timing of VCA's motion [to recuse] smacks of gamesmanship. Allowing such belated and seemingly tactical recusal motions would permit a party 'to gather evidence of a judge's possible bias and then wait and see if proceedings went his way before using the information to seek recusal.");

Schurz Communications, Inc. v. F.C.C., 982 F.2d 1057, 1060 (7th Cir. 1992)("Litigants cannot take the heads-I-win-tails-you-lose position of waiting to see whether they win and if they lose moving to disqualify a judge who voted against them.") We find that Harrington's delay in raising the issue of recusal until after he lost his bid for the *alap* title was made for strategic purposes and, therefore, deny his claim as untimely.

Furthermore, Dribo's allegations regarding recusal are meritless. He has not identified any connection between the negotiation of the Compact of Free Association with his claim to the *alap* title in this case. *See, e.g., Duke v. Simon*, 238 P.3d 808 (Nv. 2008)("The party seeking disqualification or recusal bears the burden to demonstrate that disqualification or recusal is warranted and speculation is not sufficient.")

C. Why We Reject Robinson's Abner's Claims Raised on behalf of Harrington Dribo.

Robinson Abner (Abner) argues that the High Court and TRC erred in failing to find *katlep* and misapplied the principle of *bedbed ijin, bedbed ijen*. He requests that we consider these errors "that do not affect the result below, but do effect the results of his co-party, Plaintiff-Appellant Harrington Dribo." He does not contest the reasoning of the TRC awarding him the *senior dri jerbal* title. Rather, he is asking us to make factual findings regarding an alternate theory which would support the TRC and High Court's decision awarding him the *senior dri jerbal* title but which would also support the award of the *alap* title to his co-party Harrington Dribo.

The decision whether to consider alternate theories is within the appellate court's discretion. *U.S v. Damoto*, 672 F.3d 832 (10th Cir. 2012). Factors guiding that discretion include "(1) whether the ground was fully briefed; (2) whether the parties have had an adequate opportunity to develop the factual record; and (3) whether, in light of factual findings to which

we defer or uncontested facts, our decision would involve only issues of law.")(emphasis by underlining added). *Id.* at 844 *citing Elkins v. Comfort*, 392 F.3d 1159, 1162 (10th Cir. 2004.) The court in the case of *Interest of A.B. v. ST., Y.T. and the Office of the Guardian ad Litem*, 523 P.3d 168, 179 (UT 2022) explained the rule as follows:

> "An appellate court has 'discretion to affirm [a] judgment on an alternative ground if it is apparent in the record.' *Citation omitted.* [T]o be apparent,' '[t]he record must contain sufficient and uncontroverted evidence supporting the ground or theory to place a person of ordinary intelligence on notice that the prevailing party may rely thereon on appeal. *Citation omitted.* And 'not only must the alternative ground be apparent on the record, it must also be sustainable by the factual findings of the trial court.' *Citation omitted.* That means the appellate courts 'are limited to the findings of fact made by the trial court and may not find new facts or reweigh the evidence in light of the ... alternate ground.'" (Emphasis by underlining added.)

We do not consider Robinson Abner's alternate theories supporting his claim to the *senior dri jerbal* title because the findings of the TRC and High Court do not support those alternate theories. The TRC rejected his and his co-party's *katlep* and *bwilok* claims for insufficient evidence. We affirm those findings and, as the appellate court, we do not find new facts or reweigh the evidence in light of the alleged alternative ground. An appeal is not a retrial.

D. Why We Remand the Claims of Cansee Alik and Robinson Abner to the *Senior Dri Jerbal* Title.

When a statute relevant to a dispute is enacted while the case is pending on appeal, remand to the trial court is generally required or appropriate to allow the lower court to apply the new law. This principle reflects the understanding that appellate courts should not be the first to apply intervening legislation to the facts of a case. *See, e.g., Tinker Nat. Bank v. Union Sav. Bank of Long Island*, 400 F.2d 771 (D.C. Cir. 1968)("where, while appeal was under consideration, law was enacted that altered controlling aspect of case, proper procedure was to remand case."); *see also, Lake v. Cameron*, 364 F.2d 657, 662 (D.C. Cir. 1966)("where there has occurred, as

here, a change in the applicable statutory law pending the appeal, remand for consideration of the trial court under the intervening statute is appropriate, if not required.")

A remand is also appropriate when a trial court's findings of fact are internally inconsistent or contradictory, as such conflict prevents meaningful appellate review. *See, e.g., Salmon v. Davis County*, 916 P.2d 890, 901 (Ut 1996)("[T]he trial court should resolve factual inconsistencies before we review an issue on appeal. Otherwise, we would have to resolve those factual inconsistencies by making our own findings, and it is not the function of an appellate court to make findings of fact.") Remand is appropriate under such circumstances even if we believe the trial court correctly decided the case. The TRC's findings are apparently inconsistent or contradictory because it found, on the one hand, that Liriwa's *bwij* was still alive but awarded Robinson Abner the *senior dri jerbal* title based on the custom of *tor-en-botoktok.*

Additional briefing was requested from the parties as to the application of 39 MIRC 901 et seq. to their respective claims. Cansee Alik argues that subsections 2 and 3 do not apply because Aiboj weto is *bwij* land. According to Cansee "the *bwij* of Liriwa is still alive (not *lot*) and that the *toor-in-botoktok* custom only comes into play on Aiboj when Liriwa's *bwij* becomes extinct or *lot. Lot* has not happened for a very long time on the *bwij* owning Aiboj. Aiboj is *bwij* land and Subsections 2 & 3 of Section 905, 39 MIRC do not apply." Cansee thus claims "Subsection 1 of Section 905, 39 MIRC applies to the facts of this case." In other words, Cansee claims that because Liriwa's *bwij* is not *lot,* the *toor-in-botoktok* custom does not apply.

Appellee Robinson Abner and Appellant Harrison Dribo, on the other hand, claim that Liriwa's *bwij* is extinct (*lot*) because Liwabat, Abner's mother, was "the last ...female in the bwij of Liriwa" and Abner "was the last bwij member of his generation. See, Dribo, exhibit P-7." They contend that "upon the death of Abner, *tor-en-botoktok* begins through Liobi, the first born

of Abner. She established the new *bwij*. Under *tor-en-botoktok* theory, then, Harrington Dribo would be *Alap*, and Robinson, son of the oldest male child of Abner (Kotmene), should be *Senior Dri Jerbal*. Because Liwabat was the youngest and last female for Liriwa's *bwij*, Liobi has the strongest 'blood' in her *vis a vis* the other claimants, i.e. she was the strongest *tor en botoktok*. This is the custom."

The TRC did not make the finding that Liriwa's *bwij* became extinct. Rather, the TRC found that Liriwa's bwij was still alive (and was therefore not extinct or *lot*). If the bwij was not extinct then it would seem to follow that the customary titles, rights and interests to Aiboj weto would be passed down horizontally through the female members of the *bwij* from the eldest to the youngest pursuant to Section 905(1). The TRC did not adequately explain why the *toor-in-botoktok* custom now codified in Section 905(3) would apply to the facts as found in this case if, as it found, Liriwa's *bwij* was not extinct (*lot*).

It may be that the matrilineal line of the *bwij* became extinct (or *lot*) thus explaining why the TRC found the *senior dri jerbal* title descended to Robinson Abner through the eldest *botoktok* or patrilineal line and that Cansee Alik, as a member of a younger *botoktok* or patrilineal line, is not yet entitled to be *senior dri jerbal,* even though she is closest to the bwij (or last female in the matrilineal line) but we cannot make these factual findings.

Because we do not make factual findings on appeal, we remand the claims of Cansee Alik and Robinson Abner back to the trial courts for further consideration and explanation of its conclusions under the new law. We are not suggesting that the decision below awarding the *senior dri jerbal* title to Robinson Abner was incorrect. Rather, we are saying that its reasoning is unclear under the new law and the applicable custom is not clearly stated.

VI. CONCLUSION

We find substantial evidence supports the trial court's findings that Liriwa's *bwij* is not extinct and that Walur Beaja is the eldest surviving matrilineal descendant of the bwij. We, therefore, AFFIRM the trial courts' conclusion that under both the custom and 39 MIRC 905(1) that Walur Beaja is the proper person to hold the *alap* title to Aiboj weto, Bikej Island, Kwajalein Atoll.

We find an apparent inconsistency in awarding the *senior dri jerbal* title to Robinson Abner given the finding that the *bwij* of Liriwa is not extinct and the application of the *toor-in-botoktok* custom under the intervening law, 39 MIRC 901 et seq. We therefore REMAND the claims of Cansee Alik and Robinson Abner to the *senior dri jerbal* title for further consideration and explanation of who the proper person is to hold that title considering the custom as now codified in 39 MIRC 905. We are not suggesting the *senior dri jerbal* title was decided incorrectly but, rather, want a further explanation of the TRC's findings considering the new law. On remand, the TRC and the High Court can re-issue its decision based on the current record or take such further evidence and argument as it deems necessary to decide this issue.

Dated: 4/12/2026

/s/

Daniel Cadra, Chief Justice

/s/

J. Michael Seabright, Associate Justice

/s/

Richard Seeborg, Associate Justice