F. *Summary*

Weighing the fou s and including the security requirement, the court concludes that, on balance, they favor the e of the preliminary injunction Continental seeks. Three factors favor Continental. The fou favor the defendants. The preliminary injunction shall issue once Continental has provid ity.

IV. CONCLUSION

The court has jur n to hear this case and, upon receipt of the required security, will issue a preliminary injunction t the defendants from enforcing Chuuk State Law No. 10-09-13 against Continental Micronesia

* * * *

C STATE SUPREME COURT APPELLATE DIVISION

EZIKIEL PETER, individ nd on behalf of the Saporenong lineag	)	APPEAL CASE NO. 01-2003
Appellan	)	
vs.	)	
REJOICE JESSY, HERS UBEN, MORIA RUBEN, and TONIS EP intervener),	)	
Appellee	)	

OPINION

Argued: March 29, 2010
Decided: June 23, 2010

BEFORE:

Hon. Midasy O. Aisek, ociate Justice, Presiding
Hon. Dennis K. Yamas
Hon. George Z. Isom*

*Associate Justice, FS preme Court, Pohnpei
**Attorney at Law, FS blic Defender's Office, Chuuk Branch, Weno, Chuuk

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* * * *

HEADNOTES

Civil Procedure – Dismissal – After Plaintiff's Evidence; Evidence – Burden of Proof

The burden of producing evidence in a civil trial generally lies with the plaintiff, who must establish a prima facie case to avoid dismissal. To make out a prima facie case, the party carrying the burden of proof must provide enough evidence to allow the fact-finder to infer the fact at issue and rule in the party's favor. Peter v. Jessy, 17 FSM Intrm. 163, 170 (Chk. S. Ct. App. 2010).

Civil Procedure – Dismissal – After Plaintiff's Evidence

Once the plaintiffs concluded their case-in-chief and the defendants moved for a Rule 41(b) dismissal for failure upon the facts and law to show a right to relief, the court as trier of the facts then had the authority to determine the facts and render judgment against the plaintiff or could decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiffs, the court is required to make findings of fact as provided in Rule 52(a). Peter v. Jessy, 17 FSM Intrm. 163, 170 (Chk. S. Ct. App. 2010).

Appellate Review – Standard of Review – Civil Cases

On appeal of a trial court's Rule 41(b) dismissal order on sufficiency of the evidence, the appropriate standard of review for findings of fact is whether they are clearly erroneous. A finding is clearly erroneous when the trial court's factual finding was not supported by substantial evidence in the record, or if the factual finding was the result of an erroneous conception of the applicable law, or, if after a consideration of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made. Peter v. Jessy, 17 FSM Intrm. 163, 170-71 (Chk. S. Ct. App. 2010).

Appellate Review – Standard of Review – Civil Cases

If an appellant alleging clear error fails to show that the trial court's factual finding was not supported by substantial evidence in the record, or that the factual finding was the result of an erroneous conception of the applicable law, or that, if after a consideration of the entire record, the appellate court is not left with a definite and firm conviction that a mistake has been made, the appellate court can only affirm. Peter v. Jessy, 17 FSM Intrm. 163, 171 (Chk. S. Ct. App. 2010).

Appellate Review – Standard of Review – Civil Cases

Because findings of fact must not be set aside unless clearly erroneous, the appellate court starts its review of a trial court's factual findings by presuming the findings are correct. If it determines that substantial evidence supports the trial court's findings, it does not mean that the evidence was uncontroverted or undisputed. Rather, if the findings were adequately supported and the evidence was reasonably assessed, the findings will not be disturbed on appeal. Peter v. Jessy, 17 FSM Intrm. 163, 171 (Chk. S. Ct. App. 2010).

Appellate Review – Standard of Review – Civil Cases

The appellant's burden to clearly demonstrate error in the trial court's findings is especially

strong when the findings are based upon oral testimony because, before reaching its conclusions as to the witnesses' credibility, the trial court had the opportunity to view the witnesses' demeanor as they testified, while the reviewing court has not. Peter v. Jessy, 17 FSM Intrm. 163, 171 (Chk. S. Ct. App. 2010).

Civil Procedure – Dismissal – After Plaintiff's Evidence; Evidence – Burden of Proof

In ruling on a 41(b) motion to dismiss, the trial court, in determining whether the plaintiff has shown a right to relief, is not required to view the facts in the light most favorable to the plaintiff but draws permissible inferences. If the court determines that the plaintiff has not made out a prima facie case, the defendant is entitled to have the case dismissed. Even if a plaintiff makes out a prima facie case, the court as the trier of fact, may, in assessing the evidence on a Rule 41(b) motion, weigh the evidence, resolve any conflicts in it, and decide for itself where the preponderance of the evidence lies. In weighing the evidence, the trial court is required to view the evidence with an unbiased eye, without any attendant favorable inferences, but it is also required to sift and to balance the evidence, and to give the evidence such weight as it deems fit. Peter v. Jessy, 17 FSM Intrm. 163, 171 (Chk. S. Ct. App. 2010).

Custom and Tradition – Chuuk; Evidence – Burden of Proof

Proof of the existence of a custom is a factual issue. The burden is therefore on the proponents to prove by a preponderance of the evidence that achemwir is a custom practiced in Chuuk, and they have the further burden of proving that the requirements of the custom were met. Peter v. Jessy, 17 FSM Intrm. 163, 171 (Chk. S. Ct. App. 2010).

Custom and Tradition – Chuuk; Domestic Relations – Adoption

To prove an achemwir adoption, the consent of the adoptive lineage's members must be proven. Peter v. Jessy, 17 FSM Intrm. 163, 171 (Chk. S. Ct. App. 2010).

Custom and Tradition – Chuuk

Consent of lineage members, if not given contemporaneously, may, at least in some contexts, be shown by evidence of ratification through the lineage members' later conduct. Peter v. Jessy, 17 FSM Intrm. 163, 171 (Chk. S. Ct. App. 2010).

Custom and Tradition – Chuuk; Domestic Relations – Adoption

When Epen Inong brought Yosko Epen to live among members of his lineage, but his lineage members did not treat her as a lineage member since she did not participate in lineage member meetings and decision-making and since she was referred to as Epen Inong's daughter and not as a "sister" as would be proper if she had been a lineage member through an achemwir adoption, there is no admitted evidence showing that the lineage members, by their subsequent conduct, consented to or ratified an achemwir adoption of Yosko Epen. Peter v. Jessy, 17 FSM Intrm. 163, 171-72 (Chk. S. Ct. App. 2010).

Appellate Review – Standard of Review – Civil Cases

The appellate court will not substitute its judgment for that of the trial court when the trial court made findings of such essential facts as provide a basis for the decision. Peter v. Jessy, 17 FSM Intrm. 163, 172 (Chk. S. Ct. App. 2010).

Appellate Review – Standard of Review – Civil Cases; Evidence

If an objection to the admission of evidence is not raised at the trial level, it is not preserved for appeal and the appellate court will not consider the issue. In rulings excluding evidence, however, the issue is preserved for appeal so long as the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. The offering of the

evidence must otherwise be on the record and it must reveal the grounds for admission. Peter v. Jessy, 17 FSM Intrm. 163, 173 (Chk. S. Ct. App. 2010).

Evidence – Authentication

Prima facie authenticity is extended so long as the proffered document is accompanied by a certificate of acknowledgment under the seal of a notary public or other authorized officer. Peter v. Jessy, 17 FSM Intrm. 163, 173 (Chk. S. Ct. App. 2010).

Evidence – Authentication

When the trial court excluded an affidavit from admission because the prima facie authenticity for notarized documents extended by Evidence Rule 902(8) was rebutted by the clerk's testimony that he should not have notarized it because the affiant had not appeared before him and it was not signed in his presence, whereupon the court concluded that the affidavit could not be authenticated under Rule 902(8) and when the proponents did not seek to authenticate the affidavit by other means such as by calling another witness to authenticate the signature on the affidavit despite its defective notary seal, the trial court, without any additional testimony to authenticate the signature, had no way of determining whether the signature on the affidavit was in fact genuine. The court's determination not to admit the affidavit was thus within its discretion. Peter v. Jessy, 17 FSM Intrm. 163, 173 (Chk. S. Ct. App. 2010).

Evidence – Hearsay

To admit statements regarding personal or family history under Evidence Rule 804(b)(4), the proponent would have to show that the declarant was unavailable. Peter v. Jessy, 17 FSM Intrm. 163, 173 (Chk. S. Ct. App. 2010).

Appellate Review – Standard of Review – Civil Cases; Evidence

Grounds for admission of a document that were not raised in the trial court, may be considered waived. Peter v. Jessy, 17 FSM Intrm. 163, 173 (Chk. S. Ct. App. 2010).

Appellate Review – Standard of Review – Civil Cases; Evidence – Authentication

When the proponents failed to raise any other basis for admission of an affidavit other than as a self-authenticating document, the appellate court is left to review whether the trial court's exclusion was proper on the basis that the document was not authenticated. Peter v. Jessy, 17 FSM Intrm. 163, 173 (Chk. S. Ct. App. 2010).

Appellate Review – Standard of Review – Civil Cases; Evidence – Authentication

When the trial court denies admission of documentary evidence on the basis that it was not properly authenticated, the appellate court's review is limited to determining whether the trial court abused its discretion in deciding whether the movant made a prima facie showing as to the document's authenticity. Peter v. Jessy, 17 FSM Intrm. 163, 173 (Chk. S. Ct. App. 2010).

Evidence – Authentication

Generally, the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Peter v. Jessy, 17 FSM Intrm. 163, 173 (Chk. S. Ct. App. 2010).

Civil Procedure – Affidavits; Evidence – Authentication; Notaries

A notarized affidavit may be authenticated without the affiant's testimony, as it is presumed to be authentic so long as it is acknowledged in the manner provided for by law. A clerk of court's manner of acknowledging an affidavit is for the affiant to swear to it under oath in the clerk's presence. Peter v. Jessy, 17 FSM Intrm. 163, 173-74 (Chk. S. Ct. App. 2010).

Civil Procedure – Affidavits; Notaries

Before a notary can apply the notary seal to an affidavit, the notary must confirm that the affiant has personally appeared to sign the affidavit before the notary, the affiant must be identified at that time by the notary, and the affiant must sign the affidavit in the notary's presence. The notary confirms the affiant's identity by personal knowledge or by reviewing appropriate documentation. When applying the notary seal, the notary notes on the affidavit that the affiant's identity and signature have been verified. Peter v. Jessy, 17 FSM Intrm. 163, 174 (Chk. S. Ct. App. 2010).

Civil Procedure – Affidavits; Notaries

The act of notarizing a document is in itself a verification of the identity and signature of the person who signed the document. If an affiant is not present, however, the notary cannot make the necessary verifications and should under no circumstances notarize the document, and is subject to liability for misconduct of a notary public. Peter v. Jessy, 17 FSM Intrm. 163, 174 (Chk. S. Ct. App. 2010).

Appellate Review – Standard of Review – Civil Cases; Civil Procedure – Affidavits; Evidence – Authentication

When the affidavit was not acknowledged in the manner provided for by law since the affiant was not present at the time that the affidavit was acknowledged, the trial court's determination that the presumption of self-authentication had been rebutted and that the affidavit was not otherwise authenticated was proper. There was therefore no abuse of discretion in the trial court's denial of the affidavit's admission into evidence for the reason that it was not authenticated. Peter v. Jessy, 17 FSM Intrm. 163, 174 (Chk. S. Ct. App. 2010).

Evidence – Authentication

When an affidavit's substance was only read into the record for the purpose of ruling on its admissibility, the better practice may have been to allow the presentation of a foundation for admission, including establishing the document's authenticity, before proceeding with testimony regarding its contents. That practice would avoid confusion as to whether the substance of inadmissible documentary evidence has become a part of the evidentiary record. Peter v. Jessy, 17 FSM Intrm. 163, 174 (Chk. S. Ct. App. 2010).

Evidence

The weight to be accorded admissible evidence is for the court as trier of fact to determine. Peter v. Jessy, 17 FSM Intrm. 163, 174 (Chk. S. Ct. App. 2010).

Civil Procedure – Affidavits; Evidence – Burden of Proof

Even if an affidavit were admitted, the proponents have the burden to come forward with a preponderance of credible evidence to establish the document's veracity because notarization does not conclusively establish the truth of the statements made in the document, but only the identity and signature of the person who signed the document. Peter v. Jessy, 17 FSM Intrm. 163, 174 (Chk. S. Ct. App. 2010).

Civil Procedure – Affidavits; Evidence – Burden of Proof

The plaintiffs' burden of proof to show the truth of the statements in a notarized affidavit is not met when the purported affiant did not appear in person to have the document notarized and there is no other evidence regarding the circumstances of its signing. Without even testimony to authenticate her signature, let alone the circumstances surrounding her signature, the trial court, as finder of fact, had no way to determine whether the purported affiant fully understood and freely signed the document, or whether she signed it under coercion, mistake, or as a result of fraud, or misunderstanding, let alone whether it was indeed her who signed her name to it. Thus, the affidavit,

even if it had been admitted into evidence, would rightly be accorded little weight since significant questions were raised regarding its authenticity, reliability, and veracity. Peter v. Jessy, 17 FSM Intrm. 163, 174 (Chk. S. Ct. App. 2010).

Appellate Review – Standard of Review – Civil Cases; Evidence

In reviewing a dismissal for insufficiency of evidence, once the appellate court determine the trial court's findings are not clearly erroneous, the appellate court asks whether those factual findings are sufficient or insufficient to meet the plaintiff's burden of proof. The trial court's answer to that question forms a legal conclusion, and as such is a ruling on a point of law that is reviewed de novo. Peter v. Jessy, 17 FSM Intrm. 163, 175 (Chk. S. Ct. App. 2010).

Appellate Review – Standard of Review – Civil Cases

When, given the trial court's wide discretion in weighing the credibility of evidence, there is credible evidence to support the trial court's findings, the appellate court will reject an argument that the trial court's legal conclusions were erroneous because the trial court's factual findings are not supported by credible evidence. Peter v. Jessy, 17 FSM Intrm. 163, 175 (Chk. S. Ct. App. 2010).

Evidence

Uncontradicted and unimpeached evidence will be taken as true to the extent that it cannot arbitrarily be disregarded. Peter v. Jessy, 17 FSM Intrm. 163, 175 (Chk. S. Ct. App. 2010).

Appellate Review – Standard of Review – Civil Cases; Evidence – Expert Opinion

A trial court's grant or refusal to adopt an expert's opinion is a question of fact and will not be reversed unless clearly erroneous. Peter v. Jessy, 17 FSM Intrm. 163, 175 (Chk. S. Ct. App. 2010).

Appellate Review – Standard of Review – Civil Cases; Custom and Tradition – Chuuk; Domestic Relations – Adoption

When the proponents did not present any evidence or argument to support their contention that achemwir doesn't require lineage member consent or to otherwise impeach the testimony of their own expert to that effect and when they had ample opportunity, at the trial level, to raise any issues regarding achemwir's requirements and their own expert witness presented evidence that the trial court found credible, and which clearly articulated its requirements including the lineage member consent requirement, they failed to meet their burden of proof to show otherwise at trial. The appellate court will not, therefore, entertain a new theory regarding achemwir's requirements. Peter v. Jessy, 17 FSM Intrm. 163, 175 (Chk. S. Ct. App. 2010).

Appellate Review – Decisions Reviewable

When an intervener did not appeal the trial court decision, the appellate court need not address his trial court claim. Peter v. Jessy, 17 FSM Intrm. 163, 175 (Chk. S. Ct. App. 2010).

Custom and Tradition – Chuuk; Property

Lineage rights descend through the female lineage members and that patrilineal descendants, as afokur, have only permissive use rights in lineage land. Peter v. Jessy, 17 FSM Intrm. 163, 175 (Chk. S. Ct. App. 2010).

Custom and Tradition – Chuuk; Property

Once all the lineage members died, the intervener, as an afokur to the lineage ceased having even permissive rights to lineage lands because once the lineage was extinct, all lineage rights ceased. The lands were then validly acquired by another person and her descendants, not as lineage members, but as heirs. Peter v. Jessy, 17 FSM Intrm. 163, 175-76 (Chk. S. Ct. App. 2010).

* * * *

COURT'S OPINION

MIDASY O. AISEK, Associate Justice, presiding:

I. INTRODUCTION

This is an appeal from the dismissal in Chuuk State Supreme Court trial division Civil Action 224-2001, effectively confirming the validity of appellees' transfer of certain lands. We affirm.

II. BACKGROUND

At issue was the validity of the sale of two lands, Tameor #1 and Mesanawar #1, both located in Neauo Village, Weno Island, Chuuk, which had been lineage lands owned by members of the Saporenong lineage of Neauo. According to the determinations of ownership, on May 20, 1978, the properties were lineage lands belonging to "the lineage members in Neauo and in the charge of Epen" otherwise known as the Saporenong Lineage of Neauo On July 29, 1993, the Land Commission issued certificates of title for the properties to'"Nengeni Jessy and her [Saporenong] lineage members in Neauo Village."

The appellants claim they are members of the Saporenong lineage of Neauo by descent from Yosko Epen. Yosko Epen was born a member of the Saporenong lineage of Sapeor in Fefen. Yosko Epen's descendants claim she became a member of the Neauo lineage when the lineage's sole living male member, Epen Inong, adopted her into the lineage through the custom of Achemwir. Achemwir is a customary adoption practice whereby the adoptive parent adopts a female child from another lineage into the adoptive parent's lineage in order to provide the lineage with a child-bearing member to provide children for the lineage. Yosko Epen's descendants believe Yosko Epen was recruited by Epen Inong for an Achemwir because Nengneni Jessy who was the last living female member of the lineage presumably was childless and past the child-bearing age. They did not, however, establish when the Achemwir took place, or if Nengeni Jessy was past the child-bearing age when Epen Inong recruited Yosko Epen. Based on their belief that they were lineage members by descent from Yosko Epen, Yosko Epen's descendants claimed that they had lineage member rights to Tameor #1 and Mesanawar #1. Therefore, since they did not consent to the sale, Rejoice Jessy's transfer of the lands to Moria Ruben and Hersin Ruben was invalid.

Nengeni Jessy was the last living naturally born member of the Saporenong lineage of Neauo. Appellee Rejoice Jessy is her adopted daughter. In defense to Yosko Epen's descendant's claim, Rejoice Jessy contended that she inherited the lands from Nengeni Jessy, not by rights of the lineage which ended with Nengeni Jessy's death, but as Nengeni Jessy's heir. Co-appellees Hersin Ruben and Moria Ruben purchased the lands from Nengeni Jessy and, after her death, made payments to Rejoice Jessy. The appellees all disputed that Yosko Epen was a member of the Saporenong Lineage of Neauo. They contended that Yosko Epen was only Epen Inong's adopted daughter, and not a lineage member by Achemwir.

Appellee intervener Tonis Epen, Epen Inong's son, also claimed an interest in the lands.

At trial, after Yosko Epen's descendants closed their case, Rejoice Jessy and the Rubens moved for a Rule 41(b) dismissal on the basis that, upon the facts and the law, Yosko Epen's descendants and Epen Inong had shown no right to relief. In its order granting the motion, the court found that Yosko Epen's descendant's had proven the custom of Achemwir, but made an insufficient showing of proof

that there had been an Achemwir of Yosko Epen. Judgment issued in Rejoice Jessy, Hersin Ruben and Moria Ruben's favor and against Yosko Epen's descendants and Tonis Epen.

Yosko Epen's descendants timely appealed.

III. Issues

In their appeal Yosko Epen's descendants raise the following issues regarding the trial court's Rule 41(b) dismissal:

1. The trial court improperly found that they failed to meet their burden of proof to show consent to the Achemwir.

2. An affidavit indicating consent to the Achemwir, which the court denied for admission into evidence, should have been admitted into evidence.

3. The substance of the affidavit, which was admitted into evidence, if it had been properly considered by the trial court, made out a prima facie showing of consent to the Achemwir, which would have precluded a Rule 41(b) dismissal.

4. The trial court improperly found that Achemwir required consent of the adoptive lineage's members.

IV. Analysis

The burden of producing evidence in a civil trial generally lies with the plaintiff, who must establish a prima facie case to avoid dismissal. Nakamura v. FSM Telecomm. Corp., 17 FSM Intrm. 41, 45 (Chk. 2010); Berman v. Santos, 7 FSM Intrm. 624, 627 (App. 1996). To make out a prima facie case, the party carrying the burden of proof must provide enough evidence to allow the fact-finder to infer the fact at issue and rule in the party's favor. Nakamura, 17 FSM Intrm. at 45 n.2; Hauk v. Lokopwe, 14 FSM Intrm. 61, 64 n.1 (Chk. 2006).

After Yosko Epen's descendants concluded their case-in-chief, the appellees moved for a Rule 41(b) dismissal for failure upon the facts and law to show a right to relief. Chk. Civ. R. 41(b). The court as trier of the facts then had the authority to determine the facts and render judgment against the plaintiff or could decline to render any judgment until the close of all the evidence. Hauk, 14 FSM Intrm. at 64. If the court rendered judgment on the merits against Yosko Epen's descendants, the court was required to make findings of fact, as provided in Rule 52(a). *Id.* In this case, the trial court made the requisite findings, indicating therein that the Yosko Epen's descendants failed to make a showing of the necessary element of lineage member consent to Yosko Epen's alleged Achemwir.

On appeal of a trial court's Rule 41(b) dismissal order on sufficiency of the evidence, the appropriate standard of review for findings of fact is whether they are clearly erroneous. Worswick v. FSM Telecomm. Corp., 9 FSM Intrm. 460, 462 (App. 2000); Senda v. Mid-Pac Constr. Co., 5 FSM Intrm. 277, 280 (App. 1992); Opet v. Mobil Oil Micronesia, Inc., 3 FSM Intrm. 159, 165 (App. 1987).

A finding is clearly erroneous when the trial court's factual finding was not supported by substantial evidence in the record, or if the factual finding was the result of an erroneous conception of the applicable law, or, if after a consideration of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made. If an appellant alleging clear error fails to show that the trial court's factual finding was not supported by substantial evidence in the record, or

that the factual finding was the result of erroneous conception of the applicable law, or that, if after a consideration of the entire record, tl ellate court is not left with a definite and firm conviction that a mistake has been made, the appe court can only affirm. Enengeitaw Clan v. Heirs of Shirai, 16 FSM Intrm. 547, 553 (Chk. S. Ct. 2009); Emilios v. Setile, 6 FSM Intrm. 558, 561 (Chk. S. Ct. App. 1994); Cheni v. Ngusuan, 6 FS rm. 544, 546 (Chk. S. Ct. App. 1994); Worswick, 9 FSM Intrm. at 463; Damarlane v. United St 7 FSM Intrm. 45, 53 (App. 1997).

Because findings of fact shall not aside unless clearly erroneous, the appellate court starts its review of a trial court's factual findin presuming the findings are correct. Cheni, 6 FSM Intrm. at 546; Hadley v. Bank of Hawaii, 7 FSI rm. 449, 452 (App. 1996). If it determines that substantial evidence supports the trial court's findi does not mean that the evidence was uncontroverted or undisputed. Rather, if the findings adequately supported and the evidence was reasonably assessed, the findings will not be distur appeal. Heirs of Mackwelung v. Heirs of Mongkeya, 16 FSM Intrm. 368, 374 (Kos. S. Ct. Tr.). The appellant's burden to clearly demonstrate error in the trial court's findings is especially str when the findings are based upon oral testimony because, before reaching its conclusions as to tnesses' credibility, the trial court had the opportunity to view the witnesses' demeanor as they t , while the reviewing court has not. Cheni, 6 FSM Intrm. at 546; Hadley, 7 FSM Intrm. at 452.

Therefore, in ruling on the 41(b) n, the trial court, in determining whether the plaintiff has shown a right to relief, is not required v the facts in the light most favorable to the plaintiff but draws permissible inferences. If the co determines that the plaintiff has not made out a prima facie case, the defendant is entitled to have case dismissed. Even if a plaintiff makes out a prima facie case, in assessing the evidence on a 1(b) motion the court, as the trier of fact, may weigh the evidence, resolve any conflicts in it, and ue for itself where the preponderance of the evidence lies. In weighing the evidence, the court is re ed to view the evidence with an unbiased eye, without any attendant favorable inferences. But, th court is also required to sift and to balance the evidence, and to give the evidence such weight a ems fit. Nakamura, 17 FSM Intrm. at 46; Hauk, 14 FSM Intrm. at 64.

Yosko Epen's descendants' cla epended on proof that Yosko Epen was a lineage member through Achemwir. Proof of the exis of a custom is a factual issue. The burden was therefore on Yosko Epen's descendants to prove preponderance of the evidence that Achemwir is a custom practiced in Chuuk. Setik v. Ruben, FSM Intrm. 158, 163 (Chk. S. Ct. App. 2008); Narruhn v. Aisek, 16 FSM Intrm. 236, 240, 24 pp. 2009). They also had the burden of proving that the requirements of the custom were met. , 16 FSM Intrm. at 163; Narruhn, 16 FSM Intrm. at 240, 242; Tulensru v. Wakuk, 10 FSM In 128, 132 (App. 2001); Nimeisa v. Department of Public Works, 6 FSM Intrm. 205, 212 (C S. Ct. Tr. 1993). To prove the custom, Yosko Epen's descendants called an expert witness. d on the expert's testimony regarding the custom and its requirements, along with witness testi intended to establish that the requirements of the custom had been met, the trial court found t osko Epen's descendants had proven the existence of the custom, but failed to prove one of its ements–the consent of the adoptive lineage's members.

Yosko Epen's descendants now nd that there was sufficient evidence showing the lineage's consent to the Achemwir. At trial, the duced little or no direct, substantive evidence showing that there was lineage member consent to hemwir when Epen Inong first brought Yosko Epen to live in Neauo. Consent of lineage members t given contemporaneously, may however, at least in some contexts, be shown by evidence of rati n through the lineage members' later conduct. Nakamura v. Moen Municipality, 15 FSM Intrn , 219 (Chk. S. Ct. App. 2007). The evidence produced showed that after Epen Inong brougt o Epen to live among members of his lineage, his lineage members did not treat her as a linea ber. Yosko Epen did not participate in lineage member

meetings and decision-making, and she was referred to as Epen Inong's daughter and not as a "sister" as would be proper if she had been a lineage member through Achemwir. Although Yosko Epen's descendants urge the court to consider the circumstances of Epen Inong's adoption of Yosko Epen as evidence of the lineage members' intent for an Achemwir, at best, the circumstances demonstrated only Epen Inong's intent for an Achemwir. There was no admitted evidence showing that by their subsequent conduct the lineage members consented to or ratified the Achemwir. On the other hand, it appears that there was substantial evidence to support the trial court's conclusion that one of the essential requirements for an Achemwir, that the lineage members' had consented to it, was not shown. It was upon the failure to show consent of the lineage members that the trial court based its dismissal. The appellate court will not substitute its judgment for that of the trial court where the trial court made findings of such essential facts as provide a basis for the decision. Tulensru, 10 FSM Intrm. at 133. The essential fact that consent was not shown adequately supports the trial court's conclusion that Yosko Epen's descendants failed to make out a prima facie case for relief. *Id.*

Therefore, based on the trial court's finding that Achemwir requires consent of the lineage members and that consent to the Achemwir had not been shown, which findings were supported by substantial evidence in the record, we conclude that Yosko Epen's descendants did not meet their burden to prove Yosko Epen's membership in the lineage.

Yosko Epen's descendants also argue that there was actually substantive, uncontroverted evidence demonstrating Nengeni Jessy's consent or ratification of the Achemwir, but the trial court failed to consider it. This contention focuses on an affidavit Yosko Epen's descendants sought to admit into evidence, which Yosko Epen and Nengeni Jessy purportedly executed on September 9, 1993. In it, the stated affiant is Yosko Epen who attests to her belief that she was a lineage member. Yosko Epen did not sign the document, but Nengeni Jessy and others purportedly signed it as witnesses attesting to their belief that Yosko Epen's declaration was true. Yosko Epen's descendants assert that the affidavit's substance was read into evidence without objection, and that it therefore should have been considered as substantive, uncontroverted evidence of Yosko Epen's membership in the lineage. Alternatively, Yosko Epen's descendants argue that the affidavit should have been admitted under Evidence Rule 804(b)(4) regarding statements concerning a declarant's personal or family history and Evidence Rule 801(d)(2) regarding admissions of a party opponent. Yosko Epen's descendants' arguments do not address the basis for the court's ruling, which was that the affidavit's authenticity could not be established. Nor do they contend that they actually sought admission of the document at trial under either Evidence Rule 804(b)(4) or Evidence Rule 801(d)(2).

A review of the record reveals that the affidavit was presented to the court for admission into evidence and that its substance was read into the record by the Clerk of Court who had notarized it. It is apparent from the record that the reason the Clerk read the affidavit's substance in to the record was in order to determine whether it could be authenticated for admission into evidence. The Clerk also gave uncontroverted testimony, however, that the affidavit had not been notarized in Nengeni Jessy's presence, and, as a result, the Clerk believed he should not have notarized it and that the notary seal was improper and should be removed. After the clerk's testimony, when Yosko Epen's descendants moved for its admission into evidence, the court denied the motion. It reasoned that the affiant, Yosko Epen, had not signed it and that, on the basis of the Clerk's testimony, Nengeni Jessy's signature was not authenticated. Yosko Epen's descendants did not object to the ruling or attempt to call other witnesses who might authenticate Nengeni Jessy's signature, and because it was not authenticated, the court denied its admission.

As an initial objection to Yosko Epen's descendants' assertion that the trial court should have admitted the affidavit, Appellees Hersin Ruben and Moria Ruben point out that Yosko Epen's descendants did not object when the court excluded the affidavit from evidence. So, they assert that

the issue was not p[reserved] for appeal. It is true that, if an objection to the admission of evidence is not raised at the t[rial] level, it is not preserved for appeal and the appellate court will not consider the issue. Chk. Evid. R. 103(a)(1); Pohnpei v. AHPW, Inc., 14 FSM Intrm. 1, 19 (App. 2006). In rulings excluding evidence, however, the issue is preserved for appeal so long as the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Chk. Evid. R. 103(a)(2); see also Chk. Civ. R. 46 (exceptions to evidentiary rulings unnecessary to preserve issue for appeal). The offering of the evidence must otherwise be on the record and it must reveal the ground for admission. JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE MANUAL § 2.03[3] (2006). It is apparent from the context that Yosko Epen's descendants sought admission of the affidavit as a self-authenticating document pursuant to Evidence Rule 902(8). Under that rule, prima facie authenticity is extended so long as the proffered document is accompanied by a certificate of acknowledgment under the seal of a notary public or other authorized officer. WEINSTEIN & BERGER, *supra*, § 902[10].

The court's determination as to whether or not to admit evidence was otherwise within the trial court's discretion. Ngirae v. Phillip, 13 FSM Intrm. 449, 455 (Kos. S. Ct. Tr. 2005). The trial court excluded the affidavit from admission because the prima facie authenticity for notarized documents extended by Evidence Rule 902(8) was rebutted by the Clerk's testimony, whereupon the court concluded that the affidavit could not be authenticated under that rule.

Yosko Epen's descendants apparently did not seek to authenticate the affidavit by other means. Presumably, Yosko Epen's descendants could have called another witness to authenticate Nengeni Jessy's signature on the affidavit despite its defective notary seal. See 29 AM. JUR. 2D *Evidence* § 854 (1967) (If an instrument is not attested by a subscribing witness, proof that the signature on the instrument is that of the person it purports to be is sufficient to warrant its introduction into evidence). Without any additional testimony to authenticate Nengeni Jessy's signature, however, the trial court had no way of determining whether Nengeni Jessy's signature on the affidavit was in fact her signature.

Yosko Epen's descendants' contention now is that the affidavit was admissible despite the defective notarization either pursuant to Evidence Rule 801(d)(2), for party opponent admissions, or Evidence Rule 804(b)(4), for statements regarding personal or family history, although under that rule they would have had to show that the declarant was unavailable. These grounds for admission, however, were not raised in the trial court and may be considered waived. WEINSTEIN & BERGER, *supra*, § 2.03[3]. If either of these grounds for admission had been raised, despite the document's inadmissibility as a self-authenticating document, the court may have allowed its admission albeit with considerable reservations regarding its reliability.

As a result of their failure to raise any other basis for admission of the affidavit other than as a self-authenticating document, the appellate court is left to review whether the trial court's exclusion was proper on the basis that the document was not authenticated. Where the trial court denies admission of documentary evidence on the basis that it was not properly authenticated, the appellate court's review is limited to determining whether the trial court abused its discretion in deciding whether the movant made a prima facie showing as to the document's authenticity. Cholymay v. FSM, 17 FSM Intrm. 11, 21 (App. 2010).

Generally, the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Chk. Evid. R. 901(a); Elaija v. Edmond, 9 FSM Intrm. 175, 182 (Kos. S. Ct. Tr. 1999); Joker v. Fritz, 2 FSM Intrm. 38, 46 (App. 1985). A notarized affidavit may be authenticated without the affiant's testimony, as it is presumed to be authentic so long as it is acknowledged in the

manner provided for by law. *See* Chk. Evid. R. 902(8) (an affidavit may be self-authenticating if it is acknowledged in the manner provided for by law); see generally 29 AM. JUR. 2D *Evidence* § 853, at 5 (1967). A clerk of court's manner of acknowledging an affidavit is for the affiant to swear to it under oath in the clerk's presence. See Chk. S.L. No. 190-08, § 23 (clerks of court have the power to administer oaths and certify documents in the manner of a notary public). Thus, before the notary can apply the notary seal to an affidavit, the notary must confirm that the affiant has personally appeared to sign the affidavit before the notary, the affiant must be identified at that time by the notary, and the affiant must sign the affidavit in the notary's presence. The notary confirms the affiant's identity by personal knowledge or by reviewing appropriate documentation. When applying the notary seal, the notary notes on the affidavit that the affiant's identity and signature have been verified. In re Phillip, 11 FSM Intrm. 243, 245 (Kos. S. Ct. Tr. 2002). In other words, the act of notarizing a document is in itself a verification of the identity and signature of the person who signed the document. *Id.* If an affiant is not present, however, the notary cannot make the necessary verifications and should under no circumstances notarize the document, subject to liability for misconduct of a notary public. 31 TTC 206 (adopted as Chuuk state law through the transition provision, Chk. Const. art. XV, § 9).

Since the Clerk's testimony established that the affiant was not present at the time that the affidavit was acknowledged, the affidavit was not acknowledged in the manner provided for by law. Therefore, the trial court's determination that the presumption of self-authentication had been rebutted and that the affidavit was not otherwise authenticated was proper. We conclude there was no abuse of discretion in the trial court's denial of the affidavit's admission into evidence for the reason that it was not authenticated.

Yosko Epen's descendants also argue that the affidavit's substance, if not the affidavit itself, was admitted into evidence and should have been considered by the trial court. Although we believe that affidavit's substance was only read into the record for the purpose of ruling on its admissibility, we note that the better practice may have been to allow the presentation of a foundation for admission, including establishing the document's authenticity, before proceeding with testimony regarding its contents. That practice avoids confusion as to whether the substance of inadmissible documentary evidence has become a part of the evidentiary record. Since the trial court allowed the affidavit's substance to be read into the record without objection, albeit for the purpose of making its admissibility ruling but perhaps causing some confusion about the state of the evidence, we will consider whether the affidavit, or its substance, if admitted, supports a prima facie showing of their claim.

The weight to be accorded admissible evidence was for the court as trier of fact to determine. Phillip, 13 FSM Intrm. at 455. Since the success of Yosko Epen's descendants' claim boils down to the affidavit, even if the affidavit was admitted, Yosko Epen's descendants had the burden to come forward with a preponderance of credible evidence to establish the document's veracity. Lukas v. Stanley, 10 FSM Intrm. 365, 366 (Chk. S. Ct. Tr. 2001). The reason is that notarization does not conclusively establish the truth of the statements made in the document, but only the identity and signature of the person who signed the document. In re Phillip, 11 FSM Intrm. 243, 245 (Kos. S. Ct. Tr. 2002). Thus, in light of other conflicting evidence, the plaintiffs' burden of proof is not met to show the truth of the statements in a notarized affidavit when the purported affiant did not appear in person to have the document notarized, and there is no other evidence regarding the circumstances of its signing. Lukas, 10 FSM Intrm. at 366. Without even testimony to authenticate her signature, let alone the circumstances surrounding her signature, the trial court, as finder of fact, had no way to determine whether Nengeni Jessy fully understood and freely signed the document, or whether she signed it under coercion, mistake, or as a result of fraud, or misunderstanding, let alone whether it was indeed her who signed her name to it. In other words, the affidavit, even if admitted into evidence, would rightly be accorded little weight since significant questions were raised regarding its authenticity, reliability, and veracity. Cholymay, 17 FSM Intrm. at 22.

We find no error in the trial court's determination that the affidavit was inadmissible, or to the extent it was admitted or should have been admitted, its determination that the affidavit did not support a sufficient showing of Yosko Epen's descendants' claim.

We must also consider the court's dismissal order itself. In reviewing a dismissal for insufficiency of evidence, once we determine the trial court's findings that are not clearly erroneous, we ask whether those factual findings are sufficient or insufficient to meet the plaintiff's burden of proof. That trial court's answer to that question forms a legal conclusion, and as such is a ruling on a point of law that is reviewed de novo. Kosrae Island Credit Union v. Palik, 10 FSM Intrm. 134, 138 (App. 2001); Worswick, 9 FSM Intrm. at 462 (citing Damarlane v. United States, 8 FSM Intrm. 45, 53 (App. 1997)).

The trial court's dismissal order was based on its finding that Yosko Epen's descendants failed to show lineage member consent to the Achemwir of Yosko Epen. As proven by Yosko Epen's descendants' own expert, in the absence of a showing of consent there could be no Achemwir. When, given the trial court's wide discretion in weighing the credibility of evidence, there is credible evidence to support the trial court's findings, the appellate court will reject argument that the trial court's legal conclusions were erroneous because the trial court's factual findings are not supported by credible evidence. Narruhn, 16 FSM Intrm. at 242. Given the credible evidence supporting its factual findings, there was no error in the trial court's determination that Yosko Epen's descendants failed to make a sufficient showing of their claim.

Yosko Epen's descendants contend, for the first time on appeal, that lineage member consent to the Achemwir was not a requirement, since Epen Inong as lineage leader had the authority to perform an Achemwir without such consent. At trial, Yosko Epen's descendants had the burden to prove Achemwir's requirements. Setik, 16 FSM Intrm. at 163; Narruhn, 16 FSM Intrm. at 240, 242. The trial court based its findings regarding the requirements for an Achemwir on their expert witness's testimony that Achemwir required lineage member consent. The testimony was uncontradicted and unimpeached. Uncontradicted and unimpeached evidence will be taken as true to the extent that it cannot arbitrarily be disregarded. Ngirchelui v. Rabechong, 5 TTR 115, 119 (Pal. 1967). And, the trial court's grant or refusal to adopt an expert's opinion is a question of fact and will not be reversed unless clearly erroneous. Sellem v. Maras, 9 FSM Intrm. 36, 38 (Chk. S. Ct. App. 1999); Pohnpei v. Ponape Constr. Co., 7 FSM Intrm. 613, 622 (App. 1996). Yosko Epen's descendants did not present any evidence or argument to support the contention that Achemwir doesn't require lineage member consent, or otherwise impeach the testimony of their expert. Since they had ample opportunity to raise any issues regarding Achemwir's requirements at the trial level and their own expert witness presented evidence that the trial court found credible, and which clearly articulated its requirements, including the lineage member consent requirement, they failed to meet their burden of proof to show otherwise at trial. We will not, therefore, entertain their new theory regarding Achemwir's requirements. Paul v. Celestine, 4 FSM Intrm. 205, 210 (App. 1990).

Finally, the intervener did not appeal the trial court decision, so we need not address his trial court claim. We note, however, that the intervener made his claim as a male descendant of a male lineage member. It is well established that lineage rights descend through the female lineage members and that patrilineal descendants, as afokur, have only permissive use rights in lineage land. Chipuelong v. Chuuk, 6 FSM Intrm. 188, 196 (Chk. S. Ct. Tr. 1993). The intervener was an afokur of the lands. The trial court apparently concluded that once the lineage members died, the intervener, as an afokur to the lineage ceased having even permissive rights to lineage lands. The reason was that once the lineage was extinct, all lineage rights ceased. See Patricia L. Parker, *Land Tenure in Trukese Society: 1850-1980, A Dissertation in Anthropology* 131-49 (1985) (unpublished Ph.D. dissertation, University of Pennsylvania) (general discussion of Chuukese lineage extinction). The lands were then validly

acquired by Rejoice Jessy and her descendants, not as lineage members, but as heirs.

V. Conclusion

Accordingly, we conclude that there was no abuse of discretion in the trial court's dismissal pursuant to Rule 41(b) for failure to show a right to relief. The trial court decision is affirmed.

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FSM SUPREME COURT TRIAL DIVISION

CARLOS ETSCHEIT SOAP COMPANY, Plaintiff/Counterdefendant, vs. ERINE McVEY and DO IT BEST HARDWARE, a business organization, Defendants/Counterclaimants/ Cross-Claimants, vs. BOARD OF TRUSTEES OF THE POHNPEI STATE PUBLIC LANDS TRUST, Defendant/Cross-Defendant.	CIVIL ACTION NO. 2005-007

ORDER DENYING STAY WITHOUT PREJUDICE

Ready E. Johnny
Associate Justice

Decided: June 25, 2010

APPEARANCE:

For the Plaintiff: Stephen V. Finnen, Esq.
P.O. Box 1450
Kolonia, Pohnpei FM 96941

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