In re Estate of Rechetuker, 13 ROP 203 (Tr. Civ.[sic] 2005)
In the Matter of
THE ESTATE OF OSEKED B. RECHETUKER,
Decedent.

ROSE ONGALIBANG,
Petitioner.

CIVIL ACTION NO. 04-033

Supreme Court, Trial Division
Republic of Palau

Decided: October 17, 2005
⊥204
KATHLEEN M. SALII, Associate Justice:

BACKGROUND AND INTRODUCTION

Rose Ongalibang (hereinafter "Petitioner") petitioned the Court to probate the estate of Oseked Belai Rechetuker (hereinafter "Oseked" or "Decedent"), claiming interests in and seeking to quiet title to various parcels of lands in Ngchesar which Oseked either owned in fee or had pending claims to in the Land Court. Michael Ongalibang (hereinafter "Michael") filed a Claim of Inheritance for Oseked's properties on behalf of Oseked's two sisters, Tmur Omechelang (hereinafter "Tmur") and Etmachel Rdialul (hereinafter "Etmachel"), and ten of the eleven surviving children of Etmachel, namely, Pauline Toyoko Ongalibang, Paulus Ongalibang, Sadara Ongalibang, Michael Ongalibang, Juliana "Nana" Ongalibang, Sadaria Ongalibang, Evangelisto "Aban" Ongalibang, Grace Ongalibang, Arius Ongalibang, and Asaria Ongalibang, [1] hereinafter referred to as Claimants. Petitioner is the eleventh surviving child of Etmachel.

The parcels of land listed in the estate which Petitioner seeks to quiet title to in her name are identified below:

1) Lot No. 136-9067, Tochi Daicho Lot Nos. 771 and 772, land known as *Emeltaoch*;
2) Temporary Lot No. P-047, land known as *Ngetmelwis*;
3) Tochi Daicho Lot No. 627, land known as *Erocher*;
4) Tochi Daicho Lot No. 855, land known as *Meketii* or *Ngerungos*;
5) Tochi Daicho Lot Nos. 897, 898, 899, 900, 901 and 902;
⊥205 6) Land known as *Oletull*.

On November 30, 2004, a hearing on Petitioner's claim was held at which time Mariano Carlos represented Petitioner and the Claimants appeared pro se. The hearing resumed on July 12, 2005, with Petitioner now represented by Salvador Remoket as co-counsel, and Claimants now represented by counsel, Clara Kalscheur. The Court proceeded to hear evidence and makes

[1] Two of the siblings, Rosalinda and Abedneko, are deceased.

the following findings of fact based on a preponderance of the evidence and the reasonable inferences to be drawn therefrom.

FINDINGS OF FACT

1. The lands which Petitioner claims Oseked's interests in are located in Ngchesar State. The property known as *Emeltaoch*, Tochi Daicho Lot Nos. 771 and 772, was issued Determination of Ownership (hereinafter "D.O.") No. 846, dated April 23, 1981, to Tmur, Etmachel, and Oseked. The property known as *Ngetmelwis*, Tochi Temporary Lot No. P-047, is in actuality Tochi Daicho Lot No. 679 and not 771 and 772. [2] On May 8, 1998, D.O. No. 06-118 was issued for *Ngetmelwis* to Oseked in fee simple. The property *Erocher*, Tochi Daicho Lot No. 627, is listed in the Tochi Daicho listing as belonging to Orekou, adoptive father of Oseked. No D.O. has been issued although claims to the property have been heard at the Land Court. The remainder of properties at issue in this estate hearing, Tochi Daicho Lot Nos. 855, 897, 898, 899, 900, 901, and 902, are listed in the Tochi Daicho as belonging to Belai, and the claims thereto are pending at the Land Court.

2. Oseked is the biological son of Belai and Kerengel and is survived by his two biological sisters, Tmur and Etmachel. Tmur does not have any children, and Etmachel has 11 surviving children. Petitioner is one of the children of Etmachel.

3. Oseked was adopted to a man named Orekou, who was Ngirchoiremech of Ngerngesang Hamlet, Ngchesar. Oseked lived with different relatives throughout his life, both in Ngchesar and in Koror. In Ngchesar, he lived with Saito; in Koror, he lived with his cousin, Bares Oderiong, then with Deborah Saito, and then with Olsingch Emul. Some time in the early 1990's, Oseked lived for a short period of time in Ngerkebesang, first with Etmachel, and then with Paulus Ongalibang, Petitioner's oldest brother. In 1993 or 1994, Oseked moved into Petitioner's house and continued to live with her until his death on March 2, 2001. A ⊥206 retired government employee, Oseked collected social security and pension benefits on a monthly basis of approximately $500.00, which he used to support himself.

4. Oseked executed a Deed Of Assignment dated September 3, 1993, through which he conveyed a piece of property, *Mrong*, as well as his interest in a piece of Palauan money, Ralmeau, to Petitioner. Petitioner did not inform Claimants of Oseked's conveyance of *Mrong*

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[2] Robat Saburo, former Land Registration Officer (LRO) for Ngchesar State, credibly testified that the numbering system for lands in Ngchesar begins with smaller numbers in the northernmost hamlet and moves on to larger numbers as you continue. For the five hamlets beginning with the northernmost hamlet, the numbers assigned to Tochi Daicho lots, roughly, are as follows: Ngeruikl: 1 - 300; Ngeraus: 400; Ngchesar: 500; Ngerngesang: 600 - low 700; and Ngersuul: high 700 - 800.

After looking at the Tochi Daicho listings for properties in Ngerngesang and Ngersuul, Saburo testified that based on his knowledge and understanding of the survey of lands in Ngchesar, the land known as *Ngetmelwis*, located in Ngerngesang, is erroneously described as being Tochi Daicho Lot Nos. 771 and 772, and that it is more likely Tochi Daicho Lot No. 679. Saburo bases this on the numbering system, where lands in Ngerngesang were assigned numbers in the 600's and low 700's, and that it makes sense that *Ngetmelwis* would be Lot No. 679 since it is located in Ngerngesang and not in Ngersuul.

and Ralmeau to her. However, Petitioner learned from Oseked that some of the Claimants, including Tmur, Juliana Ongalibang, and Toyoko Ongalibang, were upset when they learned that he had conveyed *Mrong* to her and they spoke to Oseked separately regarding the transfer of *Mrong* to Petitioner.

5. Oseked and Petitioner had several conversations over the years following the execution of the Deed of Assignment, where Oseked told Petitioner he was giving her his individual properties without specifically identifying any of these properties. Petitioner's brother, Aban Ongalibang, corroborated his account of these conversations. Nevertheless, there is no deed or other documentation confirming these alleged transfers.

6. While Oseked was alive and living with Petitioner, he continued to visit with his sisters, who lived in the same area, and he spoke with various family members, including some of the Claimants. Petitioner's siblings also visited him regularly and provided assistance with his care at different times over the years. Petitioner and her family, however, were the ones primarily responsible for his care.

7. On March 2, 2001, Decedent died intestate. He was not married and had no children at the time of his death.

8. Decedent claimed various parcels of land, most of which remain pending at the Land Court. He claims lands in Ngerngesang hamlet through his adoptive father, Orekou, and lands in Ngersuul hamlet through his biological father, Belai.

9. Palauan custom recognizes the making of an "oral will" where an individual, as he ages, informs his siblings and close relatives of the manner in which he would like his properties to be disposed. Pursuant to custom, these and other wishes are to be honored and followed by his relatives.

10. It is also proper Palauan custom that a person adopted to another family can receive as well as inherit from both his biological father and his adoptive father. Property inherited jointly with siblings from his biological father's side will remain for his biological siblings to dispose, however, while property inherited from his adoptive father's side will be for his adoptive relatives, not his biological family, to dispose. If a person owns property with his biological siblings, and nothing specific is stated, then his share of that property then becomes the property of his surviving biological siblings. Regardless of whether he is adopted or not, a person can dispose of his individual property as he wants while he is alive.

11. Under Palauan custom, it is the responsibility of a person to take care of his or her maternal uncle without expecting compensation, and a person is expected to take care of his maternal uncle without question.

ANALYSIS

Petitioner now comes to settle the ⊥207 estate of Decedent, Oseked, and to be recognized

as his successor in interest and current owner of the properties previously described, which are Decedent's individual properties. She does not claim interest in those properties to which Decedent was named as a trustee for a lineage or clan. An adverse claim was filed by Petitioner's mother, aunt, and siblings.

At trial, Petitioner presented evidence that Oseked told her as far back as 1993 that he was giving her his properties, and that he told her to take care of her siblings. Petitioner's testimony was corroborated by her brother, Aban Ongalibang, who testified that Oseked told him that he (Oseked) wanted his properties to go to Petitioner, and that Petitioner should take care of everyone else, especially the younger children of Etmachel and Ongalibang.

Petitioner's claims raise three distinct legal issues: (1) whether Oseked's oral conveyance to Petitioner is invalid under the statute of frauds; (2) if so, whether Petitioner nevertheless inherits Oseked's property under the relevant intestacy statute; and (3) whether Petitioner inherits Oseked's estate under Palauan custom. The court will address each of these issues in turn.

I. Statute of Frauds[3]

Petitioner claims that Oseked orally conveyed his individual lands to her shortly after he moved in to her house in either 1993 or 1994, and that he repeatedly told her to "fix the papers" so that ownership of his individual properties would be transferred to her. Despite these instructions, however, it is undisputed that no deed of conveyance or other document was presented to show that Oseked conveyed his interests in real property, other than *Mrong*, to Petitioner.

Generally, the Statute of Frauds requires conveyances of interests in real property to be reduced to writing. Palau's Statute of Frauds, 39 PNC § 501 states:

> (a) Except for a lease for a term not exceeding one year, no estate or interest in real property, and no trust or power over or concerning real property, or in any matter relating thereto, can be created, granted, assigned, transferred, or declared, otherwise than:
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> . . .
>
> (2) By a deed of conveyance or other instrument in writing signed by the person creating, granting, assigning, transferring, surrendering, or declaring the same. . .

The statute became effective as of April 1, 1977. *Andres v. Masami* , 5 ROP Intrm. 205, 205 (1996). Oseked's conveyance of his properties to Petitioner took place in 1993 at ⊥208 the

[3] Despite its obvious relevance, neither party raised the statute of frauds issue during the trial in this matter. The court will nevertheless consider the application of the statute of frauds to the claimed oral conveyance. "When an issue . . . is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law. The court may consider an issue antecedent to . . . and ultimately dispositive of the dispute before it, even an issue the parties fail to identify." *Ongalibang v. ROP*, 8 ROP Intrm. 219, 220 (2000) (internal citations and quotations omitted).

earliest and is therefore subject to the statute of frauds. *Cf. Otobed v. Ongrung*, 8 ROP Intrm. 26, 29 (1999) (holding that oral conveyances of land before the effective date of the statue of frauds are valid even if the conveyance was not registered or documented).

On cross-examination, Petitioner acknowledged that although Oseked had executed a Deed of Assignment for *Mrong*, no similar documents were prepared for the rest of his properties that he purportedly conveyed to her. [4] Since no deed or other instrument in writing was ever executed by Oseked and the oral conveyance occurred after the effective date of Palau's Statute of Frauds, any oral conveyance to Petitioner is invalid.

II. 25 PNC § 301(b)

Having found that Oseked's oral conveyance to Petitioner is invalid under the Statute of Frauds, the Court turns to Petitioner's argument that under the applicable intestacy statute, she is the appropriate person to dispose of his properties since she was the person actively and primarily responsible for Oseked prior to his death.

At the time of his death in 2001, Oseked, who died intestate, had interests in various properties, both as trustee for lineage or clan lands, and individually in fee simple. Petitioner is only claiming those lands listed as belonging to Oseked individually. Because he died without a will, the Court looks to determine the applicable statute to determine disposition of his property.

The Court first addresses Petitioner's claim to properties inherited by Oseked through his biological father, Belai. When Belai, Oseked's biological father, died in 1965, the applicable intestacy statute was Palau District Code Section 801, which was enacted in 1959. *Wally v. Sukrad*, 6 ROP Intrm. 38, 39 (1996). In determining who inherits a decedent's property, we apply the statute in effect at the time of a decedent's death. *See Arbedul v. Mokoll*, 4 ROP Intrm. 189, 192-93 (1994) (applying unamended version of § 801(c) to decedent who died ⊥209 before 1975). This provision states in relevant part that ". . .lands held in fee simple by an individual shall, upon the death of the owner, be inherited by the owner's oldest living male child of sound

[4] Petitioner further testified that she did not want Oseked to convey his properties to her, even with the proviso that she take care of her siblings, because she had seen that his conveyance of *Mrong* to her upset her siblings, and she did not want to go through the same thing if he conveyed the rest of his properties to her. Petitioner told neither Oseked's sisters nor her siblings about the transfer of *Mrong* to her. When some of her siblings subsequently learned of this conveyance, they complained not to Petitioner, but to Oseked. There was never any conversation where Oseked told Petitioner and Claimants, at one time and in one place, what his wishes were with respect to his property. There was evidence, however, that Oseked told Michael a few months before he died that he wanted a piece of *Mrong* to go to Petitioner's son, Tom, and for the remainder to stay within the family. Whether Oseked did in fact tell Michael to transfer only a portion of *Mrong* to Petitioner's son and to keep the rest of the land within the family is almost irrelevant because it is inconsistent with what Oseked actually did: execute a deed transferring *Mrong* to Petitioner in 1993. It is entirely possible that Oseked told Petitioner that he wished his properties go to her, and then subsequently told Michael and the other siblings something different some seven years later. People are entitled to change their minds with respect to who they want to leave their property to when they die. This is one reason that the Statute of Frauds requires conveyances of interests in real property to be reduced to writing.

mind, natural or adopted..." Section 801(c). Applying this statute, Petitioner claims that when Belai died, Oseked inherited Belai's fee simple lands since he was the oldest living male child of Belai, despite having been adopted to another family. Claimants, on the other hand, contend that because Oseked was adopted out to Orekou, and Paulus, a biological child of Etmachel, one of Belai's daughters, was adopted to Belai, it is Paulus, and not Oseked, who inherited Belai's properties under § 801(c).

The Court finds that this issue can be resolved relatively quickly. There is no dispute that Oseked was the oldest living biological son of Belai at the time of his death. Even if the Court were to consider Oseked's adoption to another family and Paulus' status as the adopted son of Belai, there is no room in the language of § 801(c) to apply custom and award Belai's individual lands to someone other than his oldest living son at the time of his death, which is Oseked. *See Ngiraswei v. Malsol* , 12 ROP 61, 64 (2005). Section 801 thus dictates that Belai's properties vested in Oseked when Belai died. Accordingly, any argument that it is Paulus, Belai's adopted son, who inherits his properties must be rejected based on the existing law.

Turning now to Petitioner's claim that she inherits Oseked's properties, the effective intestacy statute at the time of Oseked's death was 25 PNC § 301, which states:

> Lands now held in fee simple . . . may be transferred, devised, sold or otherwise disposed of at such time and in such manner as the owner alone may desire, regardless of local customs which may control disposition or inheritance through matrilineal lineages or clans.
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> . . . (b) If the owner of fee simple land dies without issue and no will has been made . . . or if such lands were acquired by means other than as a bona fide purchaser for value, then the land in question shall be disposed of in accordance with the desires of the immediate maternal or paternal lineage to whom the deceased was related by birth or adoption and which was actively and primarily responsible for the deceased prior to his death.

Oseked was not married and did not have issue at the time of his death so there was no *eldecheduch* to dispose of his individual properties. Between his death in Koror and his burial in Ngchesar, the nightly gatherings to discuss funeral arrangements were held at Petitioner's house. The wives of Decedent's male relatives prepared food, and Paulus, Petitioner's oldest brother, was responsible for all the funeral arrangements in Ngchesar. After the funeral, the money gathered was used to take care of Decedent's expenses, including hospital bills, outstanding debts at neighborhood stores, funeral-related expenses, and payment of $500 and one *toluk* to Petitioner's husband, Marcelo Ngirkelau, as a gesture to thank him for allowing Decedent to live with him and Petitioner for nearly eight years. Petitioner and some of her other siblings participated in the distribution of money to take care of his debts. Other ⊥210 siblings, particularly Pauline, Juliana, and Michael Ongalibang, did not participate in any discussions regarding distribution of money and did not know exactly how much money was raised.

The lineage actively and primarily responsible for Oseked prior to his death includes both

Petitioner and Claimants. Thus, they are the proper lineage members responsible under Section 301(b) for disposing the land in question. While it is true that it was Petitioner and her immediate family who took care of Oseked, on a day-to-day basis, for nearly eight years, this does not entitle her to sole responsibility for disposal of his properties under section 301. Under that statute, the term "actively and primarily responsible" refers to the lineage that provides assistance in fulfilling family obligations and responsibilities, not merely to those individuals who provided nursing care during a person's final decline. This reading is clear from the plain language of the statute, which provides that land is to be disposed of "in accordance with the desires of the . . . lineage to whom the deceased was related by birth or adoption and which was actively and primarily responsible for the deceased prior to his death." *See, e.g.*, *Dalton v. Borja*, 8 ROP Intrm. 302, 303 (2001) (considering the desires of all family members of woman and son who had cared for decedent in disposing of decedent's property under section 301). In light of this language, the court will honor the wishes of the majority of this lineage, represented by Claimants and expressed at trial, that Oseked's siblings and their children, and not Petitioner alone, dispose of his property.

III. Palauan Custom

Having determined that Petitioner does not inherit under the applicable intestacy statute, the court turns to the question of whether she nevertheless inherits under Palauan custom. Palauan custom, as clearly established by the expert testimony of Techetbos William Tabelual, [5] is that a person can give his individual property to anyone while he is alive, regardless of whether he acquired the property through his biological or his adoptive family. Such transfers need not be reduced to writing; rather, custom allows a person to establish an oral will for the disposition of his property by telling his siblings or other close relatives to whom he wants his properties to pass upon his death. Whether written or not, it is expected that the decedent's requests will be respected and carried out by those to whom he conveyed his wishes or instructions.

In this case, Decedent attempted to convey his property to Petitioner, his niece, via a customary oral will. In doing so, however, he told Petitioner and one of her brothers, Aban Ongalibang, of his desire to leave his property to Petitioner, but did not tell either of his sisters or the other claimants, most of whom are older than Petitioner and Aban. While Petitioner testified that some of her siblings were aware of Decedent's wishes to convey his properties to her, and that Oseked told her that he had told some of the Claimants of his conveyances, Claimants Pauline, Juliana, and Michael Ongalibang testified that this was not the case. Michael testified that Decedent told him that while he never mentioned specific properties, Oseked wanted the lands to remain for everyone to use, and that he wanted to make sure a portion ⊥211 of *Mrong* went to Tom, Petitioner's son.

While the evidence on Palauan custom clearly established that custom did not require written evidence of a transfer of land, the Court finds that the evidence failed to show that Decedent created an oral will in accordance with custom as established by the expert. The

[5] The existence of a customary law is a question of fact that must be established by clear and convincing evidence. *Filibert v. Ngirmang*, 8 ROP Intrm. 273, 277 (2001) (citing *Udui v. Dirrecheteet*, 1 ROP Intrm. 114 (1984)).

evidence shows that Decedent told Petitioner and Aban of his wishes, two of the younger children of Etmachel, but told neither his siblings nor other relatives close, particularly the older ones, of his wishes. While it may certainly be true that he told Petitioner he wanted his properties to go to her since he had lived in her household for the last eight years or so, the evidence is that he did not tell any *other* close relatives, who, under custom, are usually expected to be included in discussions of a maternal uncle's estate.

Both sides acknowledged, and the experts who testified on Palauan custom clearly established, that an individual is expected to take care of his maternal uncle without question, and without expectation of any compensation. The Court has no reason to discredit Petitioner's testimony that she took Oseked into her house with no expectation of being compensated, because she knew he was her maternal uncle and that it was the responsibility of her and her siblings to take care of him. The Court also has no reason to doubt Petitioner's testimony that it was Oseked, on his own, who wished to convey his individual properties to her. The evidence also establishes, however, that Petitioner's siblings also provided assistance to Petitioner to help with Oseked's care if and when she asked for such assistance, and that Oseked told other relatives something different from what he told Petitioner regarding disposition of his properties. Because the preponderance of Petitioner's evidence fails to establish that Oseked conveyed his individual properties to her in accordance with either statutory or customary law, it remains for the lineage represented by his siblings and their children to dispose of his properties.

Despite this conclusion, the Court would like to take time to recite just a few of Petitioner's efforts not only for Oseked, but for her siblings as well, and to recognize her commendable contributions to her family. According to Petitioner's evidence, the well-being of Petitioner's family weighed heavily on Decedent's mind, because Tmur bore no children while Etmachel had many children. Testimony from both sides established that Oseked was concerned with keeping the lands within the family. For her part, Petitioner went to great lengths to secure these goals. Aban, for example, testified that when he needed money to buy a boat, he asked for a loan from Oseked. Oseked had no money, but agreed to use one of his pieces of land for collateral for a bank loan. [6] Aban then had documents prepared to transfer one of Oseked's properties, Ngerbechudel, which was given to Oseked by his adoptive father, Orekou. Aban subsequently sold the land to Joan Demei and used the proceeds to buy his boat, but did not mention any of this to either Petitioner, his mother, his aunt, or his other siblings. When Petitioner learned of this transaction, she eventually bought the land ⊥212 back from Demei and she now owns the land. Petitioner also took it upon herself to pursue the claim of one of her siblings, Abedneko, Michael's twin brother who is now deceased. She successfully pursued this claim at her own expense, not for herself, but for her brother. Petitioner, prior to filing this estate case, also informed her aunt, Tmur, and some of her siblings that Decedent's estate needed to be probated because of his pending properties, and they told her to "go ahead and file the case."[7]

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[6] Michael testified that it was Oseked's understanding that his land was used as collateral on a loan, and that he was not aware that he had signed a power of attorney giving Aban full authority to pursue the claim for Ngerbechudel, including title and ownership thereto. Defendant thus sold Ngerbechedul, consisting of a little over 8,000 square meters, for $10,000, so that he could purchase a boat.

[7] Michael testified, however, that their understanding was that Petitioner would file the case and

The Court also notes Petitioner's testimony of the difficulties of taking care of an 80 year old, ill uncle for nearly eight years. While no one can dispute Petitioner's contributions to her family, there nevertheless remains the question why Oseked would convey all his properties and interests in any Palauan money to Petitioner, and to her only, when he recognized that she had many siblings? If he did, in fact, wish for Petitioner to inherit his properties, he failed to tell those whom, under custom, should be informed of his wishes, including his siblings. As eloquently stated by one of the Claimants, Oseked was related to all of them, not just to Petitioner, and they all helped with his care. Only later, when this case was filed some three years after Oseked's death, did they hear that Oseked's wishes were different from what they understood his wishes to be. The oral conveyances to Petitioner, if they occurred, are inconsistent with Palauan custom, as well as with what Oseked told Michael and the other siblings. The Court is of the belief, and the evidence shows, that Oseked's relatives, including Petitioner, are the proper people to dispose of his properties. The Court believes this conclusion is consistent with both Petitioner and Claimants' statements that Oseked wanted the land to be used by everyone.

CONCLUSION

It is clear to the Court that Decedent had many different conversations with his relatives over the last years of his life regarding the disposition of his property upon his death and that he said different things to different relatives. Unfortunately, at no point did Decedent hold, pursuant to Palauan custom, a single gathering in which to make his wishes clear to Petitioner and her siblings, as well as his own siblings. The court also might observe that, as with most families, communication among the siblings could have been better. It is therefore entirely possible, perhaps even likely, that Decedent had conversations with Petitioner where he conveyed his wish that she get his properties upon his death, as well as similar conversations with other relatives, including some of the Claimants, in which he expressed different sentiments. The difficulty facing the court is that Oseked's attempted conveyances were made in accordance with neither applicable statutory law nor Palauan custom. It therefore continues to remain with Oseked's family to get together and decide how to dispose of his properties.

Accordingly, for the reasons discussed above, Petitioner's claims to *Emeltaoch*, *Ngetmelwis*, *Erocher*, *Oletull*, and Tochi Daicho Lot Nos. 855, 897, 898, 899, 900, 901, and 902 are disallowed. Under both 25 PNC § 301(b) and Palauan custom, the proper lineage to dispose of Oseked's properties includes Claimants as well as Petitioner. A separate judgment will be issued in accordance herewith.

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the family would then discuss Decedent's properties in accordance with Palauan custom.