Wally v. Sukrad, 6 ROP Intrm. 38 (1996)
WILLIAM O. WALLY, JR.,
Appellant,

v.

VALENTINA SUKRAD,
Appellee.

CIVIL APPEAL NO. 7-95
Civil Action No. 333-92

Supreme Court, Appellate Division
Republic of Palau

Opinion
Decided: December 12, 1996

Counsel for Appellant: Oldiais Ngiraikelau

Counsel for Appellee: Carlos H. Salii

BEFORE: JEFFREY L. BEATTIE, Associate Justice; LARRY W. MILLER, Associate Justice; R. BARRIE MICHELSEN, Associate Justice

MILLER, Justice:

The lands at issue in this appeal are portions of the lands known as Blau and Lemel located in Ngerchemai Hamlet, Koror State. [1] The parties agree that the lands in question are registered in the Tochi Daicho as the individual property of Obakerbau. Obakerbau was the father of Tem, Omengkar, Oseked, who died at the age of two, Faustino Tirso and appellant Valentina Sukrad. Omengkar, who was also known as William O. Wally, Sr., was the father of appellee William O. Wally, Jr. After Obakerbau died, a judgment declared that Tem and Omengkar were the owners of Blau and Lemel. Judgment, *Wally v. Dirradai* , Civil Action No. 78 (July 21, 1958).

Omengkar died on January 11, 1972, leaving his eldest son Wally, other children and a wife. Omengkar's interests in Blau and Lemel were not distributed at Omengkar's eldecheduch. Wally argued ⊥39 below that he was entitled to Omengkar's interest in the lands in dispute pursuant to the original, unamended Palau District Code § 801. The Trial Division disagreed, however, reasoning that § 801 only applies when one landowner holds land in fee simple. Following a hearing, it determined that Sukrad, as the heir to both Omengkar and Tem, was the

[1] In the proceedings below, the Trial Division granted Kalisto Joseph portions of the lands originally in dispute. Neither party to this appeal contests that holding, and the new judgment that we direct the Trial Division to enter should also exclude the portions awarded to him.

sole owner of the disputed lands. Wally now appeals.[2]

DISCUSSION

Palau District Code § 801 was enacted in 1959. It was amended in 1975, and the amended version was later codified as 39 PNC § 102. In determining who shall inherit a decedent's property, we apply the statute in effect at the time of the decedent's death. *E.g., Arbedul v. Mokoll*, 4 ROP Intrm. 189, 192-93 (1994) (applying unamended version of § 801(c) to decedent who died before 1975); *Brel v. Ngiraidong*, 3 ROP Intrm. 107, 108 (1992) (same). The unamended language of § 801(c), operative in 1972 when Omengkar died, stated in relevant part that "[i]n the absence of [transfer] instruments and statements . . . 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 . . ." Accordingly, absent a conclusion that the statute does not apply, Wally, as Omengkar's "oldest living male child", is entitled to Omengkar's interest in the lands in dispute.

The Trial Division rejected Wally's claim because it determined that § 801(c) does not apply in connection with disposition of property owned in fee simple by more than one individual, here, Omengkar and Tem. We disagree.

Although § 801 is sometimes phrased in the singular, [3] we do not believe that the Palau District Legislature (or the OEK in enacting § 102) intended to make a distinction between lands held by one ⊥40 person in fee, and those lands held by two or more. To read such a distinction into the statute would -- for no apparent purpose -- create a statutory gap, leaving no guidance as to the disposition of jointly-owned fee simple lands.[4]

Rather, we understand the Legislature to have intended a distinction between clan or lineage land on the one hand, and individual property on the other. [5] Thus, although § 801(c)

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[2] In the proceedings below, Wally claimed an entitlement to the interests in the lands in question held by both Tem and Omengkar prior to their respective deaths. On appeal, Wally claims an entitlement only to the interest held by Wally's father, Omengkar.

[3] *See id.* §(b) ("Lands held in fee simple by an individual"); §(c) (same); §(d) ("the *owner* of fee simple land"); *but see* preamble ("Land now held in fee simple or hereafter acquired by *individuals*"); §(a) ("Land held in fee simple by *individuals*") (emphasis supplied). With slight exception, *see* note 6 *infra*, section 102, incorporating the 1975 amendments, remains the same in this respect.

[4] That gap would affect the disposition of the present case. Although the Trial Division applied § 102(d) in disposing of Omengkar's and Tem's interests, section (d) applies only to land that would otherwise be disposed of pursuant to section (b) or (c), when the conditions of those sections have not been met. Thus, if the Trial Division were right that section (c) did not govern the disposition of jointly-owned lands, then it would, for the same reason, be incorrect to apply section (d) for that purpose.

[5] The preamble paragraph of § 801, unchanged in its present form, declares that fee simple land owned or acquired by individuals may be disposed of "regardless of established local customs which may control the disposition or inheritance of land through matrilineal lineages or clans."

refers to "lands held in fee simple by an individual", [6] we understand the term "individual" to denote that the statute applies to individually-owned land, no matter how many individuals share in the ownership, but not to lands owned by lineages or clans. [7] We therefore conclude that § 801(c) applies in connection with the disposition of Omengkar's interest in the lands in question, and that Wally is entitled to such interest as Omengkar's oldest living male child.[8]

⊥41 Sukrad has offered alternative theories for affirmance of the judgment below. The Trial Division found that Omengkar had sold portions of Blau and Lemel during his lifetime without Tem's knowledge or consent. Sukrad argues that it was possible that Wally thereby had sold his entire interest in Blau and Lemel and that, accordingly, the Trial Division determination that Sukrad alone (as the successor to Tem) was entitled to the lands should be upheld.

We are not persuaded by this argument. As co-owners of Blau and Lemel, each of Omengkar and Tem held an undivided one-half interest in such lands. Consequently, when portions of Blau and/or Lemel were sold, each of Omengkar and Tem retained an undivided one-half interest in the lands not sold.[9]

Moreover, to the extent that Sukrad's argument rests on the contention that the Trial Division found that Omengkar no longer held an interest in Blau and Lemel upon his death, we believe she is mistaken. The Trial Division ordered a proceeding to determine Omengkar's and Tem's heirs for purposes of disposition of the lands in dispute, and concluded that Sukrad was the heir to both. But there would have been no need to determine Omengkar's heir if, as Sukrad contends, the Trial Division had concluded that Omengkar had disposed of his entire interest prior to his death.

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[6] Section 102(c) now refers to "lands held in fee simple, which were acquired by the owner as a bona fide purchaser for value."

[7] Consistent with this understanding, we have previously applied the current version of the statute, 39 PNC § 102, to determine ownership of land held in fee simple by multiple individual owners. *See Rengulbai v. Solang*, 4 ROP Intrm. 68, 74-76 (1993) (holding that disposition of the interests of four deceased co-owners should be governed by each co-owner's appropriate lineage pursuant to § 102(d)). Section 102(d), like § 801(d), refers to the "owner of fee simple land". The salient point is that we applied the statute to multiple owners notwithstanding the statute's use of the singular term.

[8] It is clear that lineage-and clan-owned lands are not covered by the statute. We leave to subsequent cases the question whether other forms of multiple ownership that we may encounter should be considered a form of collective ownership also outside the statute's reach or are more appropriately considered as a combination of individual interests as to each of which the statute should apply. *See, e.g., Riumd v. Tanaka*, 1 ROP Intrm. 597 (1989) (holding that land in dispute is family-owned).

[9] While a co-owner may sell his undivided share of the land, he may not sell the land or a portion of it without the agreement of all co-owners. Thus, on the Trial Division's finding, Omengkar may have acted wrongfully in purporting to sell pieces of the land without Tem's consent, and Tem might have been entitled to seek to invalidate such sales. Nevertheless, the time to remedy any such wrongdoing has long since past.

Nor are we persuaded by the argument that Blau and Lemel were owned by Tem and Omengkar as joint tenants with a right of survivorship, such that Tem became the sole owner of the lands after Omengkar's death. The Trial Division again did not make any such finding, nor do we believe it should have. "[A]s the concept of joint tenancy is foreign to Palau, it is only sustainable where the intention of the owners to create a joint tenancy is clearly established by an instrument." *Children of Ngeskesuk v. Espangel* , ⊥42 1 ROP Intrm. 682, 692 (1989). [10] According to the 1958 judicial determination whereby ownership of Blau and Lemel was determined, Blau and Lemel were "owned by . . . [Omengkar] and [Tem] who are the true sons of Obakerbau . . ." *Wally v. Dirradai* , Civil Action No. 78, slip op. at 1 (Tr. Div. 1958). Since this judicial determination did not "clearly establish" a joint tenancy -- or even refer to a joint tenancy or to a right of survivorship -- Omengkar and Tem did not own Blau and Lemel as joint tenants with a right of survivorship.

CONCLUSION

Palau District Code § 801 is applicable to the present appeal, notwithstanding that both Omengkar and Tem held fee simple interests in the lands in question. Accordingly, we REVERSE the judgment of the Trial Division in part and REMAND for the entry of a new judgment declaring that Wally and Sukrad are co-owners of the lands in dispute.

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[10] Citing 39 PNC § 102(d), Sukrad now argues that *Ngeskesuk* was mistaken as a matter of Palauan custom. We do not understand how § 102(d) bears on the existence vel non of joint tenancies under Palauan custom. Moreover, Sukrad having pointed to no evidence in the record that addresses this issue, we have no basis to reconsider *Ngeskesuk* at this time.