CUSTODY JURISDICTION IN PAPUA NEW GUINEA

by

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I. INTRODUCTION

The confusion which surrounds questions of custody jurisdiction of courts in Papua New Guinea has been remarked upon frequently in recent years by judges, magistrates and other observers. (see Toligur v. Giwa (1978) Unreported Judgment N133, per Kearney J., 1979 Annual Report of the Judges p.4, Times of PNG 6 Febuary 1981 p.28).

It is unfortunate that a recent decision of the Supreme Court in Re Sannga (1983) Unreported Judgment S.C.255 has only added to the confusion. In this article I shall examine the limits of jurisdiction of the several courts in which custody disputes may be entertained, and attempt to clarify some of the complex issues of interpretation which arise, including those dealt with in Re Sannga . Finally I shall make a number of recommendations for reform of the relevant laws.

II. VILLAGE, LOCAL AND DISTRICT COURTS

Village Courts.

It is clear that Village Courts, now available to some 68% of the population of P.N.G., (Post Courier 15, April 1983) have in practice an extensive jurisdiction to deal with matters arising out of customary family law. Under the Village Courts Act 1973 (Ch.44), a Village Court is directed to apply "custom" in the resolution of disputes (sec. 26). Although remaining subject to the Constitution, and to section 3 of the Customs Recognition Act 1963 (Ch.19) which states that custom should not be recognised if injustice would result or if recognition would be contrary to the public interest, or contrary to the best interests of a child, a Village Court is not bound by any other Act which is not expressly applied to it (sec.27). The Court has unlimited mediatory jurisdiction, and mediated settlements may be recorded and enforced as orders of the Village Court (secs.16-18). Further,

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under sec.21(3), the Court is given unlimited jurisdiction to adjudicate in matters of custody, and, if necessary, make orders for payment of compensation, and for custody or guardianship of a child. Since non-compliance with Court orders may result in an order for imprisonment (subject to endorsement by a supervising magistrate) (Village Courts Act ss 31-35), it will be seen that for custody matters arising within its area, the Village Court's jurisdiction is very comprehensive. Indeed in an unpublished judgment (O.S. 30 of 1983, 7 December 1983, at p.2) Pratt J. pointed out that it was quite possible for the Village Court and the National Court to share a common jurisdiction in respect of custody of Papua New Guinea children, and that where parents were disputing custody of their child, the Village Court's jurisdiction existed irrespective of whether "the couple are married by statute or by custom or not married at all".

Local and District Courts

While the position is less straight forward than in regard to Village Courts, some custody cases may be entertained in Local and District Courts. Under the Deserted Wives and Children Act 1951 (Ch.277), a wife, but not a husband, may apply for maintenance for herself and the children if she is deserted without adequate means of support. A custody order in favour of the wife or some other person may be made under this Act, but only in conjunction with an order for maintenance of either the wife or the children (sec.3(1)). The Court is not given any power to make orders with regard to access. Jurisdiction under the Act is conferred on the District Court, where either a customary or a non-customary marriage is involved, and also on the Local Court in the case of a customary marriage (Deserted Wives and Childrens Act s.1, Local Courts Act s.18).

The Court is required to make such custody order as appears just, having regard primarily to the welfare of the child (sec.14). After dissolution of a customary marriage, the wife is no longer able to seek maintenance for herself under the Act, although maintenance for the children, and an accompanying custody order, may still be available (see the wording of sec.3(1)(b)). On divorce from a non-customary marriage, in contrast, questions of custody and maintenance will be dealt with in the National Court under the Matrimonial Causes Act (Ch.282) (see III, below).

The powrs of a Local Court or a District Court under the Deserted Wives and Children Act to make custody orders are extremely limited. Do Local Courts or District Courts have any other source of custody jurisdiction? By sec.13(1) of the Local Courts Act 1963, a Local Court has jurisdiction (subject to monetary limits etc.) over:

... (b) all civil actions at law or in equity;

(c) all matters arising out of and regulated by native custom ...

In considering what matters of "custom" may be considered under sec.13, regard must also be paid to sec.5 of the Customs Recognition Act 1963 (Ch.19), which provides that custom may be taken into account in relation to "custody or guardianship of infants" in a case concerning a customary marriage, and also sec.6 of the Act, which states:

> "6. Notwithstanding anything in any other law, custom shall be taken into account in deciding questions relating to guardianship and custody of infants and adoption."

It might be argued, then, that a custody case arising out of a customary marriage, or otherwise involving elements of custom, might be heard by the Local Court under sec.13. (For examples of customary claims falling within sec.13, see Warave v. Evera (1980) N269, Kearney D.C.J.; Be'o v. Ufui (1982) N343(m), Kidu C.J.; cf. Madaku v. Wau (1973) P.N.G.L.R. 124). A similar argument can be made for customary cases coming within the jurisdiction of District Courts. Although the District Courts Act 1963 makes no specific mention of customary claims, sec.29(1) of the Act gives the District Court jurisdiction (again subject to monetary limits and certain exceptions) in "all personal actions at law or in equity." In Aisi v. Hoala (1981)N316(m), Bredmeyer J. held that the phrase "at law" in sec.29(1) meant "allowed by the law of the land, and encompasses common law, statutory law and also customary law" (at p.4). The approach of Bredmeyer J. has been followed in other cases, and would therefore appear to support the conclusion that customary claims for custody should come within the jurisdiction of District Courts. Nevertheless, the current view of the National Court is to the contrary. (See Buku v. Rikian (1982)N335(m), Bredmeyer J.; Tara v. Gugu (1982) Unreported Judgment N374(m), Bredmeyer J.; Camilus Billy v. Jubilee (1981) Unreported Judgment N360(m), Kearney D.C.J. A similar Pre-Independence case involving bridewealth is Avi Guikau v. Heau Ederesi Supreme Court, unpublished reasons for judgment 16 March 1972).

In Toligur v. Giwa (1978) Unreported Judgment N133, a District Court magistrate on Buka Island had made a custody order in favour of the wife. On appeal to the National Court by the husband, it was argued that the District Court lacked jurisdiction to make the order, since the wife had not sought maintenance, and the District Court could only make a custody order if it was in conjunction with a maintenance order under the Deserted Wives and Children Act 1951 (Ch.277). The judge, Kearney J., accepted the appellant's argument and, following the earlier decision of Pritchard J. in Ex parte Nora Ume; Re Martin Beni [1978] P.N.G.L.R. 71 held that the law relating to the custody of children of a marriage is contained in the Infants Act 1956

(Ch.278) and the Deserted Wives and Children Act (at p.2). As a result, if no maintenance order was sought only the National Court under the Infants Act had jurisdiction to make a custody order.

Two comments should be made concerning these cases. First, assuming that other conditions as to locality, presence of the parties etc. were satisfied, a Village Court would have had jurisdiction to deal with each case in accordance with any relevant custom, and to make orders for custody or guardianship as required. This is because Village Courts are not bound by any statues (e.g. Infants Act, Deserted Wives and Children Act) not expressly declared to be applicable to them (Village Courts Act , s.27). As a second point, however, it is not clear why the existence of this maintenance and custody legislation prevents customary cases for custody coming within sec.29 of the District Courts Act , or sec.13 of the Local Courts Act .

It is true that by Schedule 2.1 of the constitution custom will not be adopted and applied as part of the underlying law if it is inconsistent with a statute. Nevertheless it is difficult to see how the restrictively drafted Infants Act , shortly to be considered, could possibly be thought to reflect a legislative intention to "cover the field" of custody of children, so that it would be "inconsistent" for a Local or District Court to entertain a custody claim based on custom. Further doubts as to the Court's reasoning in these cases have now arisen as a result of the Supreme Court's decision in Re Sannga . This case will be considered in the next section.

III. NATIONAL COURT

Under the Matrimonial Causes Act 1963 (Ch.282), the National Court has jurisdiction to hear proceedings which fall within the definition of "matrimonial cause". This term extends to include proceedings such as those for "custody or guardianship of infant children of a marriage", so long as the custody proceedings are "in relation to" proceedings for divorce or other varieties of principal relief (s.1). The Matrimonial Causes Act applies only to non-customary marriages (s.4). The Court is required by s.74 to treat the interests of the child as the paramount consideration in custody and guardianship proceedings, and the Court may make such orders for custody, access or otherwise as it thinks proper. It should be noted that even though an increasing number of Papua New Guineans may be marrying under the Marriage Act (Ch.280), the fact that National Court proceedings for dissolution, even if undefended, might cost well over K500, effectively precludes most people from obtaining a divorce as well as the other remedies offered by the Act.

The most comprehensive statutory provisions dealing with matters of custody and guardianship, which are also the most

difficult to interpret, are those contained in the Infants Act 1956 (Ch.278). Section 3 of this Act, described as "an Act to provide for the guardianship and custody of infants and infants' property and settlements, and for related purposes", provides that:

> "3. Subject to Section 4, the father and mother of an infant are jointly and severally entitled to the custody of that infant."

By sec.4 of the Act, the father or mother of an infant may apply to the National Court for orders as to custody or access, and sec.4(4) allows the Court to make an order for access (not custody) on the application of a relative of a dead parent. Under sec.4(5), a parent or guardian may apply for variation of existing orders. Sections 5-9 deal with the appointment, powers and removal of testamentary guardians.

It follows that an application for custody by a deceased parent's relative who had not been appointed a guardian, or any application in relation to the child by a third party while both parents are still alive, would fall outside the Court's jurisdiction as conferred by the Act. Since sec.2(1) states that "This Act does not restrict the jurisdiction of the Court to appoint or remove a guardian or otherwise in respect of infants", however, it is arguable that applications of this ort may still be heard by the National Court as part of its inherent jurisdiction. This jurisdiction, formerly referred to as parents patriae or wardship jurisdiction, was described by Mann C.J. in the case of Ako-Ako (No.1) as follows:

> "The jurisdiction in question is part of that which was exercised in England by the Court of Chancery.... The textbooks trace the jurisdiction back to the Sovereign power to provide for the protection and welfare of persons unable to look after their own affairs including infants, persons of unsound mind and others. This protection extends to all children within the realm regardless of nationality or status...A frequent but by no means the only way of invoking the aid of the Court was by Writ of Habeas Corpus..."((1958) Unreported Judgment SC125 at p.3)

Other examples of the exercise of this jurisdiction are to be found in Ako-Ako (N.2) (1958) Unpublished reasons for judgment of the 9 September 1958, R. v. Gary Rakatani (1961) Unreported Judgment SC193, Hevago-Koto No.1 Unpublished reasons for judgment of the 25 August 1962, Hevago-Koto No.2 [1965-6] PNGLR R. v. Kaupa [1971-2] PNGLR 195.

Such a jurisdiction in the National Court may today be derived from secs.158 and 166 of the Constitution, (Monomb Yamba v. Maits Geru (1975) P.N.G.L.R. 322; R.G. v. M.G. (1984) N 494; In the Application of Derbyshire (o.s.2 of 1983, 9 September 1983, per Pratt J.) and would allow the Court to intervene to protect and provide for the custody of children, on the application of any person with an interest in the children's welfare.

Having now outlined the main sources of custody jurisdiction in the National Court, the important issue to be canvassed is the extent of the jurisdiction conferred by the Infants Act . More specifically, to what classes of children and what types of cases are secs.3 and 1 of that Act intended to apply? Does the Infants Act apply to ex-nuptial children ?

In State v. Onea and Lam (1980) Unreported Judgment N242(h) the mother of an ex-nuptial child sought a writ of habeas corpus against the child's grandparents who had refused to return the child to the mother. In the National Court, Miles J. granted an order nisi returnable before the Supreme Court, but expressed the opinion that an application for custody under the Infants Act would have been a preferable form of proceedings (at p.3). This opinion was echoed by the Supreme Court (Andrew J., Pratt J., and Miles J.) which laid down a Practice Direction that unless there are exceptional circumstances, custody applications "should normally be made to the National Court under the Infants Act 1956 and not by way of writ of habeas corpus" [1980] P.N.G.L.R. 186 at p.187).

Despite this recent statement by the Supreme Court (see also Derbyshire v. Tongia (1984) Unreported Judgment SC272 at p.3), there are several earlier cases which suggest that secs. 3 and 4 of the Infants Act have no application to ex-nuptial children. This conclusion was reached for example by Mann C.J. in the 1965 case of Hevago-Koto v. Sui-Sibi (No.2) , where the judge found that the father and mother had not made a valid customary marriage (because the wife was still a party to an existing statutory marriage), and consequently the child was illegitimate. The father had nevertheless sought to argue that the Infants Act gave him an "equal right and claim" with the mother to the child. This argument was rejected. Mann C.J. holding that such a construction of sections 4, 6 and 7 of the Act (now sections 1, 3 and 4, Ch.278) "reads too great a change into the law by unnecessary implication" ((1965-6)P.N.G.L.R. 59 at p.61). On this view it would seem that because at common law the father of an ex-nuptial child had no rights as to guardianship or custody, sec.3 of the Act, giving father and mother joint rights of custody, and sec.4 of the Act, allowing either parent to apply for custody or access, were intended to apply only to nuptial children. This result is also reflectd in the old rule of statutory construction of documents and legislation that unless the contrary is indicated, words such as "child", "father", "parent" etc. are presumed to

refer only to relationships arising out of marriage, and a recent discussion of the authorities is found in the judgments of the New South Wales Court of Appeal in Gorey v. Griffin (1978) 1 N.S.W.L.R. 739; Re M an Infant (1955)2 Q.B. 479 is also partinent other cases have in general supported the reasoning of Mann C.J., (see Kariza-Borei v. Navu-Renagi [1965-66] PNGLR 134, 135, per Minogue J). In R v. Kaupa [1971-2] PNGLR 195, 120 Kelly J. found it "unnecessary to decide whether the Act applied to illeqitimate children (see also R v. Dogura (1983) unpublished reasons for judgment of the Supreme Court, 11 March 1963). It must be noted, nevertheless, that a number of National Court decisions have assumed without argument that orders under the Infants Act may be made concerning ex-nuptial children; for example Williams v. Karafa (M.P. 10 of 1983. 18 November 1983), Natera v. Awasa (M.P. 25 of 1983, 14 November 1983). See also Derbyshire v. Tongia (1984) Unreported Judgment S.C. 272 at p.3.

Does the Infants Act apply to children of a customary marriage?

In Kariza-Borei v. Navu Renagi [1965-6]P.N.G.L.R. 134, a wife brought proceedings against her husband for custody of the children of the marriage. Both parties came from Central Province and they had been married according to custom since 1954. The wife's counsel argued that because the Papuan Marriage Ordinance 1912 did not recognise the validity of customary marriages, the children should be regarded as illegitimate and hence the custody proceedings were not covered by the Infants Act . In doing so, counsel was no doubt hoping to rely on the stronger position given to the mother of ex-nuptial children in cases coming within the Court's inherent jurisdiction. As Minogue J. pointed out, however, the argument overlooked the fact that the 1912 Ordinance had been replaced by the Marriage Act 1963 , sec.55 (now s.30, Ch.280) of which had retrospective operation and expressly conferred validity on customary marriages:

> "Whilst there may have been considerable force in [counsel's] submission prior to the coming into operation of the Marriage Act 1963 , in my opinion that Ordinance puts the validity of the marriage in question beyond doubt... [and] so for the purposes of this application I regard the children as legitimate and as coming within the provisions of the Infants Ordinance . As has been said by the Cheif Justice of this Court in the case of Hevago-Koto v. Sui-Sibi (No.2) , the view has commonly been held that the European concepts of marriage and legitimacy are not held in and are not appropriate to native society. However the Infants Ordinance makes no discrimination between native and non-native children and I must take the law as I find it." ((1965-6)P.N.G.L.R. 134 at pp. 135-6).

Minogue J. then considered secs. 6 and 7 of the Act [now secs. 3 and 4] and stated:

> Both these sections must be read subject to the Native Customs Recognition Ordinance of 1963, but I have not had before me any evidence of native custom contrary to the provisions of the Infants Ordinance to which I should give effect (at p. 136).

For almost twenty years after Minogue J.'s decision, superior Courts in Papua New Guinea have proceeded on the basis that children of a customary marriage are covered by the terms of the Infants Act . This result has however recently been challenged in the Supreme Court decisions in Re Sannga (1983).

Does the Infants Act apply to children who are automatic citizens?

Minogue J.'s initial finding in Kariza-Borei v. Navu Renagi that the Infants Act "makes no discrimination between native and non-native children" ([1965-6]PNGLR 134, 136) is quite surprising, because sec.5 of the Act in its original form provided:

> "5. This Ordinance does not apply to a person to whom the Native Children Ordinance 1950 or the Part Native Children Ordinance 1950 applies."

The Native Children Ordinance 1950 allowed "mandates" to be issued for the care and control of neglected children or juvenile offenders who were "native". The Act applied to a child under fourteen years of age "who is, or is commonly reputed to be, the offspring of parents both of whom are natives" (Native Children Ordinance 1950 s.4).

The Part Native Children Ordiance 1950 applied to a male ex-nuptial child under sixteen years of age, or a female ex-nuptial child under eighteen years of age, "who is the offspring of a father who is not a native and a mother who is a native" (sec.4, Part-Native Children Ordinance 1950). This Ordinance also provided for orders for maintenance of such children to be made against fathers who left them without support. As these statutes where in the nature of child welfare laws, and gave no jurisdiction to any Court to resolve disputes over custody and guardianship, the exclusion of these children from the terms of the Infants Act is at first puzzling.

One possibility is that the Infants Act only ceased to apply when a "mandate" had actually been issued in respect of a particular child. This would be in keeping with analogous developments in Australia, where State Acts have purported to make the decisions of child welfare authorities over children admitted to their care immune from review by the Supreme Court. (For an

example see the Minister for the Interior v. Neyens (1964)113 C.L.R. 411). Reference to Hansard (Legislative Council Debates, 30 May 1956, p.45 (Mr McCarthy)) when the draft Infants Bill was introduced into the Legislative Council nevertheless indicates that the Act was indeed intended to apply only to "non-native" children. Except where mandates were issued, guardianship of native children was to be regulated by "Native customs". It was presumably thought that in a customary custody dispute a decision could if necessary be made by the Court for Native Matters. As has been seen this assumption was found to be unjustified by the 1958 Supreme Court decision of Ako-Ako (No.1) , (referred to earlier in the text) where the Chief Justice concluded that the Papuan Native Regulations 1939 did not cover custody disputes and hence the Court for Native Matters had no jurisdiction to hear customary custody claims. As a result, cases of this sort could only be heard by the Supreme Court in its inherent wardship jurisdiction (S.C. Judgment 125, at pp.2-4). Whether this decision in fact affected the everyday operations of Courts for Native Affairs is a matter for speculation. In New Guinea the legal position may well have been different, since by Reg. 57(2) of the Native Administration Regulations 1924 "native customs" were generally to be recognised and given effect to (cf. sec.10 Laws Repeal and Adopting Ordinance 1921-1939 (New Guinea) which permitted "tribal institutions, customs and usages" to continue). The laws of Papua contained no similar general recognition of custom.

Another possible reason for Minogue J.'s failure to give any consideration to the terms and meaning of the original sec.5 of the Infants Act is that both the Native Children Ordinance 1950 and the Part-Native Children Ordinance 1950 had by the time of his decision been repealed and replaced by the Child Welfare Act 1961, which applied to all children in Papua New Guinea. It could be argued, therefore, as a matter of statutory construction, that sec.5 was only intended to exclude those Papua New Guinean childern while the two acts listed remained in force. On this interpretation, once the two statutes had been repealed, all such children (or at least those who were legitimate) then came within the terms of the Infants Act when issues of custody or guardianship arose.

Whatever the reasoning behind Minogue J.'s conclusion, the same approach has since been followed by various judges, and numerous custody orders under the Infants Act have been made concerning Papua New Guinean children, whether born of a customary or a non-customary marriage. (for examples see Ex.p. Yongoman Tongale, R v. Alfred Tongale (1975) Unreported Judgment N.5, Anis v. Anis (1977) Unreported Judgment N 76, Bean v. Bean [1980] PNGLR 307 (Supreme Court). Relevant discussion is also to be found in Toligur v. Giwa (1978) Unreported Judgment N 133, and Exparte Nora Ume; Re Martin Beni [1978] PNGLR 71).

Nevertheless, in Re Sannga (1983) Unreported Judgment SC 255, the Supreme Court reached a contrary view.

Re Sannga's Case

The facts in Re Sannga are complicated, and the Supreme Court was asked to decide several issues relating to testamentary capacity of automatic citizens, partial intestacy, and the construction of testamentary documents. The deceased, who was survived by his wife and their two children from a customary marriage, had purported to appoint by will two expatriate persons to be joint guardians, with his wife, of the elder child. Section 5(1) [originally sec.8] of the revised Infants Act is in the following terms:

> 5(1) Where the father of an infant is dead, the mother of the infant, if surviving, is the guardian of the infant -
>
> (a) alone where a guardian has not been appointed by the father; or
>
> (b) jointly with a guardian appointed by the father.

In challenging the appointment of the joint guardians, counsel for the customary relatives of the child argued that the Infants Act had no application to children who were automatic citizens, and that consistently with the effect of sec.6 of the Customs Recognition Act , the matter of the child's guardianship should be determined according to custom.

At first instance the relatives' argument, based on the exclusory terms of the original sec.5 of the Infants Act , was rejected by Pratt J., who said:

> "This would certainly be a departure from the practice of this Court and is one which I consider unnecessary. Both the Infants Act and the Child Welfare Act have worked together harmoniously since 1961, and I see no reason for interfering with such a long standing view of the law." (Timereke v. Ferrie and Johns (1982) Unreported Judgment N 379, 24-5)

On appeal to the Supreme Court (Kidu C.J., Kapi D.C.J., and Andrew J.), the argument met with greater success. Kidu C.J., with whose judgment Andrew J. agreed on this issue, ((1983) Unreported Jdgment SC 255 at p. 46) noted that the original sec.5 of the Infants Act had never been repealed, despite the repeal of the two statutes mentioned there and replacement by the Child Welfare Act 1961 . In his view, the children to whom the two statutes formerly applied were consequently still excluded from

the operation of the Infants Act . His Honour noted that children whose fathers were "native" and mothers "non-native" were not thereby excluded from the operation of the Infants Act (at p.17). There are other categories of "automatic citizens" who are not excluded, namely children over fourteen years with two "native" parents (orders under the Infants Act may be made until a child turns sixteen), and otherwise "part-native" children who are legitimate (whose parents have made a statutory marriage).

The Chief Justice concluded:

> "Guardianship of Native Children is still exclusively the province of customary law and therefore the appointments of the respondents [i.e. the expatriates] as guardians were invalid." ((1983) Unreported Judgment SC 255 at p.17).

Kapi Dep. C.J. began by referring to the common assumption that the Infants Act applied t automatic citizens, but pointed out that the issue had never been argued or determined in any of the decided cases. Taking support from three English cases (Clarke v. Bradlaugh (1881)8 Q.B.D. 63; R v. Smith (1873)L.R. 8 Q.B. 146; R v. Inhabitants of Merionethshire (1844)6 Q.B. 345), to the general effect that the repeal of an Act which has been incorporated into a second Act does not affect the operation of the second Act, he reached the same conclusion as Kidu C.J., and said that the Court at a later date would have to give attention to the issue of who was entitled by custom to be guardian (at p.43). He also refused to formulate a new rule of the underlying law under Schedule 2.3 of the Cosntitution, as to whether or not an automatic citizen should be able to appoint a guardian by statutory will, because of the policy considerations which were more appropriately decided by Parliament than by the Court:

> Should the principle of law formulated by the Court be dominated by concepts of custom? Is this fair on those automatic citizens who have lost contact with custom or should it be dominated by such provisions as the Infants Act which were intended for non-automatic citizens? Or further still, do we consider that all persons regardless of citizenship should have one law? (S.C.255 at pp. 42-3).

Kapi Dep.C.J. did not however consider whether any common law rules relating to a father's capacity to appoint a guardian by will were applicable and appropriate in the circumstances; cf. Schedule 2.2 of the Constitution . The current sec.5 (originally sec.8) of the Infants Act only modifies the common law rules, by clarifying and improving the position of the mother. Cf. Derbyshire v. Tongia (1984) Unreported Judgment S.C. 272.

Finally, Kapi D.C.J. said that Parliament should consider the amendment and updating of the Infants Act as a matter of "absolute urgency", and pointed to a further complication which may arise in later cases. Argument in Re Sannga had been based upon the unrevised laws, as the case had commenced before the Revised Laws came into force on 1st January, 1982. Future cases however would have to deal with the fact that in the revised version of the Infants Act (Ch.278), the original sec.5 had been omitted . Would this omission amount to a substantial change of the law, beyond the power given to the legislative counsel under the Revision of Laws Act 1973 ? Kapi D.C.J. reserved consideration of this point for the future (at p.43).

IV. DISCUSSION

It should be evident from the several cases reviewed above that judges have adopted a number of conflicting views as to the purpose and meaning of the Infants Act 1956 , and in particular as to the ambit of custody jurisdiction conferred by the Act on the National Court. Although Re Sannga dealt specifically with the issue of guardianship, the decision is directly applicable to issues of custody and access under secs. 3 and 4 of the same Act. Leaving aside for the moment the effects of the legislative counsel's revision of the statute (Ch.278), the following preliminary conclusions may be put forward:

1. Any type of custody case may if necessary be dealt with by the National Court in its inherent wardship jurisdiction. In addition, some custody disputes may be brought in the National Court under the Matrimonial Causes Act , or under the Infants Act , and some disputes can be dealt with by the lower courts.

2. As to the jurisdiction conferred on the National Court by the Infants Act , the most convincing authoirty suggests that the Act was not intended to apply to ex-nuptial children, notwithstanding the comments of serveral judges in State v. Onea and Lam [1980]PNGLR 186. But see also Derbyshire v. Tongia , where the same point was assumed without argument.

3. In line with the reasoning of the Supreme Court in Re Sannga (1983), the Act would consequently only apply to a small number of children that is, those children who are legitimate and are not automatic citizens. Further, given the restrictive wording of sec.4, some disputes concerning those children would still fall outside the Act, e.g. if a deceased parent's relative wanted custody rather than merely access (unless that relative had been appointed guardian), or if any third party (grandparents etc.) wished to apply for custody or access while both parents were still alive.

4. Which court has jurisdiction to hear custody disputes over ex-nuptial children who are not automatic citizens? These cases may of course be dealt with by the National Court in its inherent jurisdiction. The slight possibility of concurrent lower court jurisdiction is referred to below.

5. Following Re Sannga , custody disputes over almost all children who are automatic citizens, whether nuptial or ex-nuptial, are outside the Infants Act and fall exclusively "within the province of customary law" (Kidu C.J. at p.17). As discussed earlier, these disputes may be determined in Village Courts. Two earlier National Court Judgments, Ex parte Nora Ume; Re Martin Beni [1978]P.N.G.L.R. 71 and Toligur v. Giwa) (1978)N133, held that custody cases (at least those involving children of a marriage) could only be entertained by Local or District Courts in the narrow circumstances indicated by the Deserted Wives and Children Act . Even before Re Sannga this result was questionable, given the restrictive drafting of the Infants Act and the difficulty of arguing that the statute was intended to "cover the field" of custody disputes, even for children of a marriage, and also the clear wording of s.13 of the Local Courts Act 1963. For the argument that sec.13 of the Local Courts Act 1963 prevails over the Infants Act 1956 where inconsistency arises, see T. Barnett, "The Local Court Magistrate and the Settlement of Disputes" in B. Brown 9ed), Fashion of Law in New Guinea (Butterworths 1969), at pp. 168-9; and N. Grant, "Custom and Guardianship of Children", in Magistrates Notes pp. 18-20 (1968). After Re Sannga , the reasoning and decision in the earlier cases is no longer tenable. In my view, customary custody claims may now be heard by a Local Court under sec.13 of the Local Courts Act 1963 . Again, adopting the interpretation of Bredmeyer J. in Aisi v. Hoala (1981)N316(m), these custody claims may also be heard by a District Court under sec.29 of the District Courts Act 1963 .

6. If a custody case over a child who was an automatic citizen did not involve elements of custom, which court would have jurisdiction? Would the jurisdiction given to Local and District Courts to hear actions "at law or in equity" (sec 13(1) (b) Local Courts Act 1963, sec.29 District Courts Act 1963) extend to cases of this sort? Or, for that matter, to some cases involving ex-nuptial children who were not automatic citizens (see paragraph 4 above)? So far as I know, this point has not yet been argued, possibly because

> of the presumed authority of the two National Court decisions referred to above. Once the basis of those decisions has been upset by Re Sannga (1983), the argument becomes more plausible. Thus, a father's common law claim for custody of the child of his marriage, or a mother's claim, recognised in equity, in relation to her ex-nuptial child (see, for example, Bromley, Family Law , 5th ed. London, 1976, pp 298-300) might be construed as coming within the lower courts' jurisdiction over claims "at law or in equity". On the other hand, if, as was suggested in Ako-Ako (No.1) ((1958) Unreported Judgment S.C.125 at p.3), in the absence of specific statutory jurisdiction custody cases in England were only heard by superior Courts, it might be thought that cases of the type described could today only be referred to the National Court in its inherent wardship jurisdiction. The matter is clearly open to further debate.

These conclusions must now be reconsidered in view of the omission by the legislative counsel of the original sec.5 from the revised version of the Infants Act . On its face, then, the present Ch.278 does not exclude automatic citizens, and in light of the interpretation of the previous law by the Supreme Court in Re Sannga , this obviously represents a substantive change in the law. Kapi Dep C.J., as mentioned, expressly reserved consideration of the point for another case. If the legislative counsel, who is not permitted under the Revision of Laws Act 1973 to make substantive amendments (although such provision "is directory only" - sec.9), goes beyond the powers conferred by the Act, will the resulting amendment be invalid? (compare the approach of Pratt J. in E.T. and C.T. (1984) Unreported Judgment N455(L) at p.13). The alternative view is that whatever the unathorised changes, the fact that Parliament approved and brought into force the Revised Laws removes any question of their invalidity. In Derbyshire v. Tongia (1984) Unreported Judgment S.C.272, the Supreme Court (Pratt J., Kaputin J., McDermott J.) purported to follow Re Sannga in a case arising after the Revised Laws came into force. Unfortunately, the court overlooked both the difference in wording in the revised Ch.278, and the important point identified by Kapi Dep C.J. as to the status and effect of the Revised Laws. If the court was later to decide, after proper reflection, that cases concerning automatic citizens are not now excluded by the terms of the Act, then several points in this summary must be reassessed. In particular, although ex-nuptial children and third party claims would still be outside the Act, the customary custody jurisdiction of Local and District Courts (at least for children of a marriage) would again be controversial, with decided cases holding against the lower courts. The Village Courts' jurisdiction would nevertheless not be affected (sec.27, Village Courts Act 1973) .

V. SUGGESTION AND CONCLUSIONS

Whatever view is taken about the precise state of the authorities, and the extent of jurisdiction of particular courts in Papua New Guinea to hear custody disputes, no-one could disagree with Kapi Dep C.J.'s plea for immediate clarification and amendment. In short, custody law is a mess. It is extremely unfortunate that people experiencing the hardship and tragedy often attendant upon custody disputes should also be subjected to a time-consuming and expensive obstacle course in their efforts to locate both the relevant law, and the appropriate Court with jurisdiction to determine the particular case. The fact that many custody cases can only be dtermined in the national Court effectively excludes most of the people of Papua New Guinea, because of the consequent expense, complexity and delay involved. That problems of this sort should still arise out of colonial family law legislation after ten years of self-government is indefensible.

Although comprehensive family law reform seems unlikely in the near future, it is possible to make modest proposals which would remove much of the doubt and confusion over issues of custody jurisdiction. The following suggestions are put forward with this aim in mind.

While the inherent wardship jurisdiction of the National Court will remain unaffected, it is suggested that the jurisdiction of lower Courts to hear custody disputes should be clarified and expanded. As at present, the Village Court should continue to exercise its custody jurisdiction, and customary custody cases should be allowed under sec.13 of the Local Courts Act and sec.29 of the District Court Act . However, to resolve possible questions of inconsistency between the latter jurisdictions, and statutory provisions dealing with custody, certain amendments will be required. The Infants Act should be amended to give jurisdiction under the Act to Local and District Courts. Further, the Act should expressly extend to all children, nuptial or ex-nuptial, and applications should be permitted by anyone with an interest in the child's future (relatives etc.). A Court exercising jurisdiction under the Act should have wide powers to engage in mediation and to frame orders relating to custody, access, residence and so on. Where the custody claim involves elements of customary law, it is proposed as a guiding principle that custom should be taken into account, unless this would be inconsistent with the Constitution or in the circumstances be detrimental to the child's best interest (cf.sec.3(b) Customs Recognition Act). In light of the concerns expressed by Kapi Dep C.J. in Re Sannga (1983), it is of course important to take into account the situation of adults and

children living in towns away from their home, or who have no relevant custom, or for whom custom does not provide adequate means of support and security.

These suggestions have dealt specifically with custody jurisdiction, but it must be recognised that disagreements over custody will sometimes be intimately connected with disputes over bridewealth or divorce. In such cases it would be artificial to have to treat the custody dispute as though it was quite separate from the other issues. It is evident that Local and District Courts already have jurisdiction to hear bridewealth disputes, (see Be'o v. Ufui (1982) Unreported Judgment N343(m) and Aisi v. Hoala (1982) Unreported Judgment N316(m)) and the proposal put forward by several observers that Local or District Courts should have powers to grant divorces from both customary and non-customary marriage should certainly be given further consideration. (See Minutes of Meeting of Law Reform Commission N.4 of 1977, referring to proceedings of a conference on family law reform held at the University of Papua New Guinea in 1976, and P.N.G. Law Reform Commission, Working Paper No.9(1978), "Family Law").

In my view, amendments of this kind would go part of the way towards removing some very unsuitable aspects of the persisting colonial family law legislation, and thereby seek to ensure that disputes over children which the parties are unable to resolve for themselves will be determined as simply and cheaply as possible.

Postscript

The results of the decision in Re Sannga have been noted in Derbyshire v. Tongia (1984) S.C. 272; Derbyshire v. Tongia (o.s.2 of 1984, 10 December 1984, per Kidu C.J.); Matawawina v. Sinyoi (M.P.178 of 1982, 23 October 1984); and R.G. v. M.G. (1984) N 494.