

MARTIN NGIRARORO, Plaintiff

v.

BLUU MARTIN, Defendant

Civil Action No. 31-76

Trial Division of the High Court

Palau District

September 28, 1976

Appeal by wife against whom divorce was granted on ground of her adultery, challenging decision that, due to her adultery, husband was not required to pay child support. The Trial Division of the High Court, Hefner, Associate Justice, held that the customary law under which the decision was made does not violate the territorial equal protection provision.

1. Palau Custom—Divorce—Support

When a Palauan couple are married by custom, have a child, the husband obtains a divorce on ground of adultery by the wife, and the wife or her parents are given custody of the child, customary law provides that neither the wife nor her parents are entitled to child support from the father, the family of the wife is not entitled to *Olmesumech*, the wife and her family have the obligation to support the child, and the child has obligations to the matrilineal line to compensate for the support it receives.

2. Custom—Generally

Public policy may forbid the enforcement of a custom.

3. Custom—Equal Protection

Customary law must comply with the Trust Territory equal protection provision, even though the customary law is not a legislative enactment, for the equal protection provision provides that “No law shall be enacted . . . which discriminates . . . ; nor shall equal protection of the laws be denied”, and since the provision uses the term “laws” it is all inclusive and the Trust Territory Code makes it clear that customary law is part of all the laws of the Trust Territory so long as it does not conflict with certain laws. (1 TTC §§ 7, 101, 102)

4. Custom—Equal Protection—Particular Cases

Trust Territory equal protection clause providing that “No law shall be enacted in the Trust Territory which discriminates against any person on account of sex . . . ; nor shall equal protection of the laws be denied”, does not bar the application of the Palauan customary law which eliminates any liability of a husband for child support when a divorce is obtained on ground of adultery by the wife, for the customary law passes the “reasonable classification” test in that it is intended to deter and punish adultery and provide for stable marriages, and since the matrilineal line is, under customary law, required to support the child in such instances, the child is not deprived of an essential right. (1 TTC § 7)

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HEFNER, *Associate Justice*

This matter was appealed from a District Court Divorce Decree wherein the appellant was the defendant.

The Court found that the defendant-wife had committed adultery and the custody of the child was given to her parents. The plaintiff-husband was not required to pay any child support.

It is this latter portion of the judgment that appellant argues is in error, claiming that to deny child support violates the equal protection provisions of 1 TTC 7 and is an erroneous interpretation of Palau District Code, Section 402.¹

Stated as succinctly as possible, the facts of this case are as follows:

[1] A Palauan man and woman became married by custom and had a child. The wife commits adultery with a relative of the husband. The husband files for a divorce and obtains a decree of divorce on the ground of adultery. The wife or her parents are given custody of the child.

Under such facts, the customary law is as follows:

Neither the wife nor her parents are entitled to child support from the father. The family of the wife is not entitled to *Olmesumech* (a form of alimony). The father of the child can pay whatever support he may decide upon but is under no obligation to pay child support. The wife and her family have the obligation to support the child and the

¹ *Child Support.* Whosoever, being legally married either by law or in accordance with established custom, causes such marriage to terminate, either on his own initiative or for any of the reasons enumerated in Section 698(a), (b), (c), (d), and (i) of the Code of the Trust Territory, shall provide support for each child of that marriage under eighteen (18) years of age, including offspring born of that union and children adopted legally or in accordance with established custom during the time of the marriage. The amount of money or the value of the goods for support shall be determined by a court of competent jurisdiction. If the child is too young to receive what is given for his support, then such support shall be given to the spouse having custody of the child to use solely for the benefit of the child or to any other custodian selected by the court. Such custodian as selected above or the spouse having custody of the children shall be prohibited from using the support for his own benefit. Such support is to be used solely for the benefit of the child. Nothing in this section shall nullify or alter any established custom for the payment of *olmesumech* or the provision of children's money (*ududir ar ngalk*), nor contradict the provisions of Section 704 of the Code of the Trust Territory. (PL 13-4-66, 6-13-66)

child has obligations to the matrilineal line to compensate for the support it receives.

Section 402 does not state that a spouse guilty of adultery shall not receive child support. It does state that the spouse causing the marriage to terminate on certain grounds (now found in 39 TTC 201(1), (2), (3), (4) and (9)) shall provide support. The latter does not mean the former.

It is correct, as appellant points out, the trial court referred to Section 402 in its judgment. Any interpretation of the section which results in the simple declaration that a spouse causing the termination of the marriage on one of the enumerated grounds is not entitled to child support, is erroneous.

However, a reading of the judgment in its entirety convinces this court that the trial court only used Section 402 to require the wife to support the child. The portion of the judgment relieving the husband from supporting the child is based on unwritten Palau customary law.

1 TTC 14 provides that:

“Due recognition shall be given to local customs in providing a system of law, and nothing in this Chapter (Chapter 1, Title 1) shall be construed to limit or invalidate any part of the existing customary law, except as otherwise provided by law.”

Title 1, Section 7 of the Trust Territory Code provides:

“No law shall be enacted in the Trust Territory which discriminates against any person on account of race, sex, language or religion; nor shall equal protection of the laws be denied.”

It has been held in the Trust Territory that where a customary law is in conflict with a statute, the latter will prevail. *Lazarus v. Tomijwa*, 1 T.T.R. 123 (Tr. Div. 1954); *Ngirasmengesong v. Trust Territory*, 1 T.T.R. 615 (App. Div. 1958).

[2] Public policy may forbid the enforcement of custom. *Yangilemau v. Mahoburimalei*, 1 T.T.R. 429 (Tr. Div. 1958).

In the field of domestic relations, the courts recognize the customary law so long as it is not in conflict with the statutory provisions enumerated in 1 TTC 101. *Mutong v. Mutong*, 2 T.T.R. 588 (Tr. Div. 1964); *Ketari v. Taro*, 3 T.T.R. 279 (Tr. Div. 1967).

Title 1, Sections 102 and 103 must also be considered. Reading these two sections together, it is apparent that if there is a customary law which is not in conflict with statutory provision, the common law will not prevail over the customary law.

Except for 39 TTC 103 and Palau District Code Section 402, there is no other statute dealing directly with child support. 39 TTC 103 only gives the court authority to award support and it is not in conflict with the customary law. Section 402 goes one step further, making it an obligation for the offending spouse to support the child but it also is not in conflict with the custom involved.

Appellant argues that 1 TTC 7 is the statute which puts the customary law in conflict and therefore makes the latter void. Therefore the question which must be answered is: Can the equal protection provision of 1 TTC 7 be used to strike down an unwritten customary law?

All of the cases cited by appellant's counsel and indeed the cases annotated to 1 TTC 7 deal with legislative enactments. In this case, it is not the legislature that has established a classification which distinguishes between persons, but it is custom derived over many, many years which has the effect of a law.

[3] It is concluded that a customary law must comply with the provisions of the equal protection clause even though it is not a legislative enactment.

Since 1 TTC 7 uses the term "laws" it is all inclusive. 1 TTC 102 makes it clear that customary law is part of all the laws of the Trust Territory so long as it does not conflict with those listed in 1 TTC 101. Consequently, the application of the equal protection provision as it relates to customary law reaches a new dimension and one which goes beyond the normal treatment as discussed in the United States cases dealing with the fourteenth amendment of the U.S. Constitution.

Since there is no legislative act, there is no possible way to inquire into the intent of the legislature and the purpose of the classification made.

What must be done is to search for and find the purpose of the custom and if the application of the custom then violates the commonly accepted view of equal protection.

Palau has a very definite pattern and system of clan and lineage relationships with corresponding rights and obligations.

The duty to contribute at an *Ocheraol* may also entitle one to have relatives to contribute to his own house building program. If one fails in his obligation to contribute, it is a serious affront to the relative. *Imeong v. Eban*, 3 T.T.R. 144 (Tr. Div. 1966). Custom largely provides the manner in which debts are paid and distributions are made upon the death of a relative. *Rechemang v. Belau*, 3 T.T.R. 552 (Tr. Div. 1968). *Olmesomech* and food money is a matter which is usually left to the families of the divorced spouses to arrange. *Itelbang v. Gabrina*, 2 T.T.R. 194 (Tr. Div. 1961).

The common thread which weaves its way through the Palauan society is the strong obligation the people have to assist each other and to cooperate. This is also true in the matter of child support. The basic protection of a child for support is from the matrilineal lineage. It is said that this source of support is often more certain than any liability

that might be imposed on the father. *Orak v. Ngiraukloi*, 1 T.T.R. 454 (Tr. Div. 1958). The latter case held that "... for those in the Palau Islands living in good faith under the Palauan system of society, there is no liability on a father to support his children who do not live with him or his 'side' after a divorce, in the absence of special circumstances."

Section 402 has at least amended this portion of the custom and allows the wife to obtain child support if she has custody of the child and has not committed adultery.

[4] The question remains if 1 TTC 7 bars the application of that part of the custom which eliminates any liability on behalf of the husband for child support when the wife commits adultery. It is concluded that it does not.

Adultery is treated as a serious matter in Palauan society. This is particularly true when the wife commits the act with a close relative of the husband. The living pattern of the family, the close physical and customary relationships demand strict adherence to certain moral codes. When one is broken, the effect on a close society is dramatic.

The purpose of the custom in question is to deplore and punish the offending spouse and to impress the society with the severe consequences of committing adultery. Therefore the custom is intended as a deterrent to the act. As applied to the Palauan society, the custom plays a very important part in the regulation of the lives of its people and tends to support the stability of the marriages in its society. In the context of the "reasonable classification" aspect as used in applying the equal protection provisions, it passes the test.

The child still has its major source of support, the matrilineal line. This is not a case where the child is or may be without support such as in *Ngirchechebangel v. Benge*, Civ. 6-75 Palau District (April, 1975). In *Benge*, the child

was illegitimate and in addition the father was an expatriate. Therefore, the child did not fit into the established customary support pattern as we have here.

The very custom that cuts off support from the father provides for support in the matrilineal line. Hence the child is not deprived of an essential right.

The judgment of the trial court is affirmed.