



CUSTODY JURISDICTION

IN

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by

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1. 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.¹ A recent decision of the Supreme Court, Re Sannga (1983) PNGLR 142, unfortunately served only to compound this confusion, and led to a hasty piece of legislative reform in the Infants (Clarification of Application) Act 1985. Despite this legislation, however, several unresolved matters of interpretation remain. In this paper 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 complexities arising from the case law and the inter-relationship of the various statutes. Finally I shall make a number of suggestions towards reform of the relevant laws.

2. VILLAGE, LOCAL AND DISTRICT COURTS

(a) Village Courts

It is clear that Village Courts, now available to some two thirds of the population of Papua New Guinea,² have in practice an extensive jurisdiction to deal with matters arising out of customary family law, including custody disputes. Under the Village Courts Act 1973 (Ch.44), a Village Court is directed to apply "custom" in the resolution of disputes (s.26). Although remaining subject to the Constitution, and to s.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 (s.27). The Court has unlimited mediatory jurisdiction, and mediated settlements may be recorded and enforced as orders of the Village Court (ss.16-18). Further, under s.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. So long as the case involves elements of custom, it does not matter whether the parents are married by statute, or by custom, or unmarried.³ Since non-compliance with Court orders may result in an order for imprisonment (subject to endorsement by a supervising magistrate),⁴ it will be seen that for custody matters arising within its area, the Village Court's jurisdiction is very comprehensive.

(b) Local and District Courts

While the position is less straightforward 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 (s.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.⁵ The Court is required to make such custody order as appears just, having regard primarily to the welfare of the child (s.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 s.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).⁶

It is commonly assumed that only children of a marriage are today covered by the Deserted Wives and Children Act. In the recent decision of Rarai v. Collins (1985) N529(M), however, Los J. upheld an order for custody and maintenance of an ex-nuptial child purportedly made under s.3 of the Act by the Lae District Court. The main argument put forward by Los J. in support of this result was that the Child Welfare Act 1961 (Act No.34 of 1961, now Ch.276), Part IX of which deals with maintenance of ex-nuptial children, did not expressly or impliedly repeal any provisions of the Deserted Wives and Children Act (at pp.5-8). Unfortunately this argument overlooks the fact that the Deserted Wives and Children Act 1951 was amended by Act No.33 of 1961 (referred to as the Deserted Wives and Children Act 1961), by the removal of those provisions which had previously referred specifically to claims in respect of ex-nuptial children. It is then a reasonable inference that from this time only claims in respect of children of a marriage were intended to be entertained under the Deserted Wives and Children Act 1951.

It will in any event be apparent that the powers 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 s.12(1) of the Local Courts Act 1963 (now Ch.41), 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 s.12 regard must also be paid to s.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 s.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 s.12.⁷ A similar argument can be made for customary cases coming within the jurisdiction of District Courts. Although the District Courts Act 1963 (now Ch.40) makes no specific mention of customary claims, s.21(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) PNGLR 199, Bredmeyer J. held that the phrase "at law" in s.21(1) meant "allowed by the law of the land, and encompasses common law, statutory law and also customary law" (at p.202). The approach of Bredmeyer J. has been followed in other cases,⁸ 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.

In Toligur v. Giwa (1978) 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) PNGLR 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. A similar argument was accepted by Cory J. in the recent decision of Bepi v. Simon (1986) N566 (M).

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 statutes (e.g. Infants Act, Deserted Wives and Children Act) not expressly declared to be applicable to them.⁹ As a second point, however, it is still arguable, despite the Court's decision in Toligur v. Giwa (1978) N 133, that customary cases for custody, including those concerning children of a marriage, should fall within the scope of s.21 of the District Courts Act or s.12 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 have been 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, except in the narrow circumstances indicated by the Deserted Wives and Children Act. The position is now complicated however by the 1983 Supreme Court decision in Re Sannga, and the subsequent legislative "clarification" of the operation of the Infants Act. These developments will be considered in the next section.

3. NATIONAL COURT

(a) The position prior to Re Sanga (1983)

The jurisdiction of the National Court to hear custody cases is derived from several sources. When a statutory marriage breaks down, either party may wish to bring divorce proceedings in the National Court under the Matrimonial Causes Act (Ch.282). The term "matrimonial cause" 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, e.g. a decree of nullity of a void marriage (s.1).¹⁰ 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. The Matrimonial Causes Act has no application to customary marriages (s.4). Moreover, the expense of proceedings in the National Court effectively precludes many people from seeking divorce from a statutory marriage, and consequently the other remedies offered by the Act are also unavailable to them.

The most detailed statutory provisions dealing with matters of custody and guardianship, which are also the most difficult to interpret, are those in the Infants Act 1956 (now Ch.278). The Act is set out in the Appendix to this paper. 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 s.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 s.4(4) allows the Court to make

an order for access (but not custody) on the application of a relative of a dead parent. Under s.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.

The extent of the jurisdiction intended to be given to the National Court by the Infants Act is unclear in a number of respects. For example, from the provisions outlined above, it follows that an application for custody, rather than merely access, 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 (e.g. grandparents) while both parents are still alive, would fall outside the Act. More importantly, the categories of children which were intended to be covered by ss. 3 and 4 of the Act are not clear. In the first place, and despite some suggestions to the contrary, the balance of reasoned authority is to the effect that these sections were not intended to apply to ex-nuptial children.

The basis for this view is that since at common law the father of an ex-nuptial child had no rights as to guardianship or custody, and words such as "father", "child", "parent" etc. in a statute were presumed as a matter of interpretation (i.e. unless a contrary intention was indicated) to apply only to legitimate relationships, s.3 of the Act, giving father and mother joint rights of custody, and s.4 of the Act, allowing either parent to apply for custody or access, were presumably intended to apply only to legitimate children.¹¹ 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 ss. 4, 6 and 7 of the Act (now ss. 1, 3 and 4, Ch.278) "reads too great a change into the law by unnecessary implication" ((1965) PNGLR 59 at p.61).¹²

As far as concerns legitimate children, on the other hand, courts in Papua New Guinea have until recently proceeded on the basis that the Infants Act applies equally to children of customary as well as statutory marriages, and to children who are, and who are not, citizens. For example, in Kariza-Borei v. Navu Renagi (1965) PNGLR 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.

As Minogue J. pointed out, however, the argument overlooked the fact that the 1912 Ordinance had been replaced by the Marriage Act 1963, s.55 of which had retrospective operation and expressly conferred validity on customary marriages (see now s.3, Ch.280):

Whilst there may have been considerable force in [counsel's] submission prior to the coming into operation of the Marriage Ordinance 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 Chief 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 make no discrimination between native and non-native children and I must take the law as I find it ((1965-6) PNGLR 134 at pp. 135-6).

Minogue J. then considered ss. 6 and 7 of the Act [now ss. 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).

Minogue J.'s initial finding in Kariza-Borei v. Navu Renagi that the Infants Act "makes no discrimination between native and non-native children" (at p.136) is quite surprising, because s.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 former of these statutes allowed "mandates" to be issued for the care and control of neglected children or juvenile offenders who were "native",¹³ and the latter statute made similar provision for "part-native"¹⁴ children and also provided for orders for maintenance of such children to be made against fathers who left them without support. As these statutes are 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.¹⁵ Reference to Hansard 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".¹⁶ It was presumably thought that in a customary custody dispute a decision could if necessary be made by the Court for Native Matters.¹⁷

Another possible reason for Minogue J.'s failure to give any consideration to the terms and meaning of the original s.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 s.5 was only intended to exclude those Papua New Guinean children 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.¹⁸ In Re Sannga (1983) PNGLR 142, nevertheless, the Supreme Court reached a contrary view. This decision will be considered below.

Whatever view is taken of the precise scope of the jurisdiction intended to be conferred on the National Court under ss. 3 and 4 of the Infants Act, attention must also be directed to s.2(1) of the Act which states that:

This Act does not restrict the jurisdiction of the Court to appoint or remove a guardian or otherwise in respect of infants.

The effect of this section, it is argued, is to make clear that the National Court has retained an inherent jurisdiction to determine custody cases or other applications concerning the welfare of children. This jurisdiction, formerly referred to as parens patriae or wardship jurisdiction, was described by Mann C.J. in the case of Ako-Ako (No.1) (1958) 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... (No.125, at p.3).¹⁹

The range of this jurisdiction is well illustrated in the English case of Re D. (A Minor) (1976) 2 W.L.R. 279, where the Court granted an application by a concerned educational psychologist to prevent the parents of a young girl, who was suffering from a number of abnormalities including slight mental retardation, from arranging to have the child sterilised. Such an inherent jurisdiction in the National Court may today be derived from ss.158 and 166 of the Constitution,²⁰ and would allow the court to intervene to protect and provide for the care and custody of children, on the application of any person with an interest in the children's welfare.

(b) The decision in Re Sannga (1983)

Having canvassed the several sources of the National Court's jurisdiction to determine custody disputes, it is necessary to examine recent developments in regard to the application of the Infants Act. The facts in Re Sannga (1983) PNGLR 142 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 s.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 s.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 s.5 of the Infants Act (i.e. that the Act did not apply to persons to whom the Native Children Ordinance 1950 or the Part Native-Children Ordinance 1950 applied), 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.²¹

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 (at p.172), noted that the original s.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.²² He 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) PNGLR 142 at p.154).

Kapi D.C.J. began by referring to the common assumption that the Infants Act applied to 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, 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,²³ 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.171). He also refused to formulate a new rule of the underlying law under Schedule 2.3 of the Constitution,²⁴ 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 and have no consideration for the customs of automatic citizens? Or further still, do we consider that all persons regardless of citizenship should have one law? ((1983) PNGLR 142 at p.170).

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 might 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 1 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 s.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.171). It is consequently not clear whether, if the facts of Re Sannga had arisen after the Revised Laws had come into force, the Court would have regarded itself as bound by the terms of the revised law, which does not exclude those categories of children, or rather would have looked beyond the revised law and taken the original exclusions into account.²⁵ Given the effect of the Infants (Clarification of

Application) Act 1985, shortly to be considered, it is not proposed to examine this general issue further in this paper.

It will be appreciated that the immediate effect of the decision in Re Sannga was to limit severely the application of the Infants Act, making it relevant mainly to the children of expatriate parents. Although Re Sannga dealt specifically with the issue of guardianship, the decision was directly applicable to issues of custody and access under ss. 3 and 4 of the Act. As the Supreme Court (Pratt, Kaputin, and McDermott JJ.) noted in Derbyshire v. Tongia (1984) PNGLR 148,

We cannot find any restriction in what their Honours say [in Re Sannga] concerning the application or non-application of that Act to other factual situations (at p.149).

It followed that orders for custody and access made by Amet J. under the Infants Act in respect of a child who was an automatic citizen were invalid. The Supreme Court, having repeated the earlier plea of Kapi D.C.J. for urgent legislative reform, referred the case back to the National Court,

for determination according to law, namely the common law, the customary law and any other statutory law excepting thereout the Infants Act which may be found to be applicable (at p.152).

Subsequently, Kidu C.J. in the National Court determined the case according to the applicable Motuan custom ((1984) PNGLR at pp.152-154).

The effects of Re Sannga were also noted in two other cases. In Matawawina v. Sinyoi (M.P. 178 of 1982, 23 October 1984), Bredmeyer J. considered that following the Supreme Court decision, the Constitution required that the custody case before him should be decided according to custom (at p.3). Since on the evidence before him there was a conflict as to the applicable custom (the husband was from Manus, and the wife was from Dobu), the judge preferred to turn to s.7(2) of the Customs Recognition Act (Ch.19), and decided to apply the "common law":

The common law is that I should give paramount consideration to the welfare of the children and also consider the conduct and wishes of the parties (at p.3).

Finally, in R.G. v. M.G. (1984) PNGLR 413, McDermott J. noted the "gap in the statute law" following Re Sannga, and continued:

By the Constitution, Schs 2.1, 2.2 and 2.3, the appropriate law in these circumstances arises by a process of elimination (at p.414).

In the absence of evidence of suitable custom, the judge turned to consider the suitability of common law. As the case concerned the custody of an ex-nuptial child, McDermott J. was doubtful whether the common law, which favoured the mother, was appropriate in the circumstances:

I am really not in a position to state clearly what the Common Law position is this late in the day and with so much Statute Law intervening, but the concepts of bastard and of a denial of right to the putative father seem to me out of place in this society. I have to come back to my *parens patriae* powers. Ultimately, I have to decide what is in the best interest of the child (at p.415).

(c) Infants (Clarification of Application) Act 1985

In response to the pleas for legislative reform by the Supreme Court in Re Sannga (1983) and in Derbyshire v. Tongia (1984), the Infants (Clarification of Application) Act 1985 was passed during the August 1985 sitting of Parliament, and certified on 5 September 1985. In introducing the Bill for the Act, the Minister for Justice, Mr Tom Pais, said that the Bill would "restore the legislation to the correct situation", i.e. that the Infants Act should also apply to automatic citizens.²⁶ The section of major importance is s.2, in which the Infants Act is referred to as the "Principal Act", and which provides as follows:

2. APPLICATION OF THE PRINCIPAL ACT.

- (1) For the removal of doubt it is hereby declared that, with effect on and from 1 January 1982, the Principal Act applies to all infants.

- (2) For the purposes of Subsection (1), where -
- (a) prior to 1 January 1982 the former Principal Act contained a provision to the effect that the former Principal Act did not apply to an infant who is or is commonly reputed to be the off-spring of parents both of whom are natives or an infant who is the off-spring of a father who is not a native and a mother who is a native; and
 - (b) that provision was omitted from the Principal Act purportedly by or under the authority of the Revision of the Laws Act 1973,
- the omission shall be deemed for all purposes to have been a repeal of that provision with effect on and from 1 January 1982.

Despite the apparent simplicity of the legislative amendment, a number of questions still surround the extent of the National Court's jurisdiction under the Infants Act, and the proper interpretation of the substantive sections of the Act. These issues will be addressed in the next section.

4. DISCUSSION AND CONCLUSION

It is extremely doubtful whether the recent "clarification" of the application of the Infants Act will resolve all the uncertainties noted in the earlier sections of this paper. Several points need to be examined here.

(a) The jurisdiction of lower courts

The first question concerns the interpretation to be placed on s.2(1) of the Infants (Clarification of Application) Act 1985, to the effect that the Infants Act "applies to all infants". Does this mean that no other Act can also be applicable, and that the jurisdiction of the National Court under the Infants Act is exclusive, or is it possible for lower courts to have concurrent jurisdiction in some matters? Of course, if the National Court's jurisdiction is to be regarded as exclusive and mandatory, then the Act will simply remain irrelevant for the great majority of the people of Papua New Guinea, because of the consequent expense, complexity and delay involved in National Court proceedings. In my view, however, it is not necessary to reach such a conclusion.

In the first place, the plain wording of s.4 of the Infants Act does not cover disputes where a deceased parent's relative (who has not been appointed a guardian) is seeking custody, or where both parents are still alive and a third party, such as a grandparent, is seeking custody or access. Such disputes therefore cannot be instituted under the Infants Act, and might consequently fall only within the inherent jurisdiction of the National Court, or the jurisdiction of a lower court. Further, however, it is arguable that those disputes which are covered by the Infants Act may also be determined in a lower court. In this respect, it is clear that the Infants Act, and the 1985 clarification, has no effect on the jurisdiction of Village Courts to entertain custody cases involving elements of custom, since those Courts are not bound by statutes not expressly declared to be applicable to them (Ch.44, s.27).

The position in regard to Local and District Courts, on the other hand, is more complex. I have referred earlier (see Part 2 above) to the unfortunate decisions of the National Court in cases such as Toligur v. Giwa (1978) N133, to the effect that Local and District Courts have no jurisdiction to entertain custody claims except in the narrow circumstances indicated in the Deserted Wives and Children Act (Ch.277). The status of these first instance decisions in the light of Re Sannga (1983), and the subsequent 1985 clarification, is not clear. It is certainly arguable that the reasoning in those cases is unsatisfactory, and that on a proper construction of the Acts, it should also be possible to bring customary custody claims to a Local Court under s.12(1)(c) of the Local Courts Act (Ch.41), or to a District Court under s.21(1) of the District Courts Act (Ch.40).²⁷

If this argument was accepted, it may also be possible to rely on the jurisdiction of Local and District Courts in regard to actions "at law or in equity" (s.12(1)(b) Local Courts Act, s.21(1) District Courts Act) to cover

custody cases which do not involve elements of custom. Again this jurisdiction would be concurrent with that of the National Court under the Infants Act. So far as I know, this point has not yet been argued, possibly because of the presumed authority of decisions such as Toligur v. Giwa (1978) N133. The matter seems clearly open to further debate.

(b) Ex-nuptial children

A further question arising from s.2(1) of the Infants (Clarification of Application) Act 1985 is in relation to ex-nuptial children. If the Infants Act now emphatically applies to "all infants", then some interesting and possibly unintended consequences will follow, in addition to the also relevant issue of concurrent lower court jurisdiction just discussed. A short sketch of the historical background to the Infants Act (Ch.278) may be helpful here.

At common law the father had almost exclusive rights to the guardianship and custody of his legitimate children. A series of English statutes during the 19th and early part of the 20th centuries gradually changed this position, by improving the mother's position at law, and by referring specifically to the welfare of the child as a factor to be balanced if necessary against the interests and wishes of the parents.²⁸ These statutes were in turn adopted by most of the Australian States and provided the model for the Infants Act (Ch.278) in Papua New Guinea. The effect of s.3 of the Act is that subject to any court order to the contrary, the father and mother of a child are "jointly and severally entitled" to the custody (but not the guardianship) of the child.

With ex-nuptial or illegitimate children, the father's position at common law was quite different. By the end of the 19th century, it was recognised that the mother had a more or less exclusive claim to custody of the child, and the father in effect had no rights or interest at all.²⁹ It was largely

for this reason that Mann C.J. in Hevago-Koto v. Sui-Sibi (No.2) (1965-66) PNGLR 59 held that ss.3 and 4 of the Infants Act had not been intended to apply to ex-nuptial children (see the discussion of this case in Part 3, above).

If, as now seems to be the case following the 1985 clarification Act, these sections are to apply to ex-nuptial as well as legitimate children, then the fathers of children born to a de facto relationship, or to a proposed customary marriage which is not finalised, will prima facie be entitled to share custody with the mother. Further, fathers of children born after a fleeting liaison with the mother, or a semen donation, or even a rape, will theoretically also be entitled to joint custody. Given the Court's powers to make orders to the contrary under s.4, this consequence may only remain of theoretical interest. Nevertheless, in countries such as Australia and England, which have recently considered and in some cases introduced legislation designed to produce equality of status between nuptial and ex-nuptial children, the issue of whether so-called "unmeritorious fathers" should be precluded from custody rights has been hotly debated.³⁰ That legislation of this sort should be introduced in Papua New Guinea without discussion, and only as an indirect consequence of an amendment intended to clarify the jurisdiction of the National Court in custody cases, is somewhat remarkable.

A further anomaly may arise in the application of ss.5 and 6 of the Infants Act, dealing with guardianship. These sections again bear witness to the historical origins of the Papua New Guinean legislation. Section 5 provides that on the death of a child's father, the mother is to be the child's guardian, either alone or jointly with a guardian appointed by the father or by the Court. Section 6 allows the mother in some circumstances to appoint someone by deed or will to act as guardian after her death. Both

these sections acted to clarify and improve the original common law position of the mother in relation to her legitimate children, without affecting the underlying and primary position of the father as sole guardian during his lifetime.³¹ If these provisions (and the common law rules on which they are predicated) are now supposed to apply also to ex-nuptial children, will the father of an ex-nuptial child be regarded during his lifetime as the child's sole guardian (subject of course to the Court's power of removal), with possible relevance to matters such as possession of property, schooling, religion, health care, issue of passports and consents to adoption (see e.g. s.15(2)(b) Adoption of Children Act (Ch.275))? Again, it seems unlikely that such a result was intended by the 1985 clarification Act, but it may nevertheless follow if the entire Infants Act now "applies to all infants".

(c) The application of custom

The previous examples concerning custody rights and guardianship of an ex-nuptial child may also be considered in connection with a third issue, that of inconsistency between custom and the provisions of the Infants Act. The question here is not simply what weight is to be accorded to custom once a custody dispute is before the Court,³² but more generally whether ss.3, 5 and 6 of the Infants Act, as statements of substantive law, are intended to override custom (whether concerning nuptial or ex-nuptial children).

As indicated above, in Kariza-Borei v. Navu Renagi (1965) PNGLR 134, Minogue J. was of the view that the relevant sections of the Infants Act 1956 "must be read subject to the Native Customs Recognition Ordinance of 1963" (at p.136), presumably on the basis that the later statute overrode the earlier in the event of inconsistency.³³ In Re Sannaga (1983) PNGLR 142, nevertheless, this argument was not raised by the customary relatives of the deceased, who were objecting to the deceased's appointment by his will of two expatriate

persons to be joint guardians, with his wife, of the elder child. The argument put forward by counsel for the customary relatives was not that s.5 of the Infants Act was inconsistent with custom (as recognised by s.6 of the Customs Recognition Act), according to which other relatives of the child would have been regarded as guardians, but rather that the Infants Act as a whole did not apply to automatic citizens. The Supreme Court, too, appeared to approach the matter on the basis that custom only became relevant once it had been concluded that the Infants Act had no application. If so, then if the facts in Re Sannga (1983) had arisen after the passing of the Infants (Clarification of Application) Act 1985, the Court might have ruled that s.5 of the Infants Act (Ch.278) overrode the terms of the Customs Recognition Act (Ch.19). Given the importance of such a result, it is a pity that the point was not raised in Re Sannga.

Despite the previously quoted views of McDermott J. in R.G. v. M.G. (1984) PNGLR 413, to the effect that the denial of rights to the father of an ex-nuptial child seemed "out of place in this society" (at p.415), it may nevertheless be suggested that the prevailing custom in many Papua New Guinean communities would favour the claims of the mother and her relatives in relation to an ex-nuptial child, in preference to the claims of the father. If this is so, as for example appears to be the case in a Motuan community, it is interesting to speculate on the likely approach of the Court if similar facts to those in Derbyshire v. Tongia (1984) PNGLR 148 arose today. Would the Court follow the approach of Kidu C.J. and give effect to Motuan custom ((1984) PNGLR at pp.152-154), or would it be considered instead that s.3 of the Infants Act improved the father's position, and overrode any custom to the contrary which might otherwise have been recognised by virtue of the Customs Recognition Act? Certainly the Supreme Court in that case (Pratt, Kaputin and McDermott JJ.), while unfortunately assuming without any discussion that the

Infants Act might prima facie have applied to ex-nuptial children as well,³⁴ were of the opinion that the non-application of the Infants Act (following the decision in Re Sannga (1983)) made a difference to the matters to be considered by the trial judge:

Perhaps the most important distinction which would have to be decided by a trial judge weighing up the effect of the evidence of each party upon him and their standing before the court, is the considerable difference in status afforded to a natural father under the Infants Act when compared with his status under the common law...Furthermore although certain areas of customary law were covered during the giving of evidence it is also obvious that these areas might well be approached from an entirely different point of view if the court had ruled that customary law was either the most important area to be covered or even that it was a possible area to be covered (at p.150).

Again it is regrettable that the paramountcy of the relevant provision of the Infants Act over the Customs Recognition Act was simply assumed. In the absence of any reasoned decision to this effect, the point is clearly open to further argument.

(d) Suggestions for reform

The above discussion has highlighted the main points of confusion and uncertainty surrounding the jurisdiction of courts in Papua New Guinea to hear custody cases. No-one could have disagreed with the Supreme Court's requests in Re Sannga (1983) and Derbyshire v. Tongia (1984) for immediate clarification and amendment, but the Infants (Clarification of Application) Act 1985 may nevertheless have succeeded only in "clarifying" one issue at the expense of creating further difficulties.

It is not too much to say that the law dealing with custody jurisdiction 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 the relevant law and the appropriate Court with jurisdiction in the particular

case. Further, decisions such as Toligur v. Giwa (1978), to the effect that some custody disputes may only be entertained in the National Court, would effectively exclude most of the people of Papua New Guinea, because of the complexity and expense involved in National Court proceedings. That problems of this sort should still arise out of colonial family law legislation after more than a decade of Independence is indefensible.

There is an urgent need to review and rewrite the whole of the Infants Act, which continues to reproduce and reflect the obsolete provisions of bygone eras in other countries such as England and Australia. Consideration must therefore be given to the formulation of appropriate laws of custody and guardianship for children in Papua New Guinea, both legitimate and ex-nuptial. Although a comprehensive review of the legislation seems unlikely in the near future, nevertheless, 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 s.12 of the Local Courts Act and s.21 of the District Courts Act. However, to resolve possible questions of inconsistency between the latter jurisdictions, and other 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, while the Act now appears to apply to all children, the restrictive wording of s.4 needs to be amended to permit all types of applications not only by parents but also by any third party with an interest in the child's welfare and future (e.g. relatives).

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. s.3(b) Customs Recognition Act, National Goals para (1)). Provisions dealing with proof of custom and conflicts of custom might be similar to those in the Underlying Law Bill 1977³⁵ or the Customs Recognition Act. In light of the concerns expressed by Kapi D.C.J. in Re Sannga (1983) PNGLR 142 (at p.170), 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.

The above 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,³⁶ 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 marriages should certainly be given further consideration.³⁷

It is suggested that 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.

APPENDIX

INDEPENDENT STATE OF PAPUA NEW GUINEA.

CHAPTER No. 278

Infants Act

Being an Act to provide for the guardianship and custody of infants and infants' property and settlements, and for related purposes.

1. Interpretation

In this Act, unless the contrary intention appears -

"the Court" means the National Court or a Judge;

"parent", in relation to an infant, includes a person liable to maintain the infant or entitled to his custody;

"person" includes a scholastic or charitable institution.

2. Effect of Act

(1) This Act does not restrict the jurisdiction of the Court to appoint or remove a guardian or otherwise in respect of infants.

(2) This Act does not -

(a) affect the power of the Court to consult the wishes of the infant considering what order ought to be made; or

(b) diminish the right which an infant possesses to the exercise of his or her own free choice.

3. Rights of parents to custody

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

4. Power of Court

(1) On the application of the father or mother of an infant the Court may make such order as it thinks proper regarding the custody of the infant and the right of access of either parent having regard to -

(a) the welfare of the infant; and

(b) the conduct of the parents; and

(c) the wishes of each parent.

(2) The power of the Court to make an order under Subsection (1) as to the custody of, and the right of access to, an infant may be exercised notwithstanding that the parents of the infant are residing together.

(3) An order under Subsection (1) -

- (a) is not enforceable while the parents continue to reside together; and
- (b) ceases to have effect if the parents reside together for any continuous period of three months after it is made.

(4) Where a parent of an infant is dead, the Court may, on the application of a relative of that parent, make such order as to access to the infant by the relative as to the Court seems proper.

(5) An order made under this section may, on the application of a parent or a guardian of the infant, be varied or discharged by a subsequent order.

(6) In every case under this section, the Court may make such order respecting the costs of the mother and the liability of the father for those costs, or otherwise as to costs, as it thinks just.

(7) An order made under this section ceases to have effect when the infant in respect of which it is made attains the age of 16 years.

5. Mother as guardian on death of father

(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.

(2) Where the mother is a guardian and -

- (a) a guardian has not been appointed by the father; or
- (b) the guardian appointed by the father is dead or refuses to act,

the Court may appoint a guardian to act jointly with the mother.

6. Appointment of guardian by mother

(1) The mother of an infant may by deed or will -

- (a) appoint a person to be the guardian of the infant after the death of herself and the father of the infant (if the infant is then unmarried); or
- (b) provisionally nominate some fit person to act after her death as guardian of the infant jointly with the father of the infant.

(2) If it is shown to the satisfaction of the Court after the death of the mother that the father is for any reason unfit to be the sole guardian of his children, the Court may -

- (a) confirm the appointment of the guardian provisionally nominated under Subsection (1)(b); or
- (b) make such other order in respect of the guardianship as the Court thinks proper.

(3) A guardian whose appointment is confirmed under Subsection (2) may act as guardian of the infant jointly with the father of the infant.

(4) Where guardians are appointed by both parents they shall act jointly.

7. Disagreement of guardians

(1) In the event of guardians being unable to agree on a question affecting the welfare of an infant, any of them may apply to the Court for its direction.

(2) On an application under Subsection (1) the Court may make such order regarding the matters in difference as it thinks proper.

8. Powers of guardian

A guardian appointed under or acting by virtue of this Act may -

- (a) take into his custody and management, to the use of the infant, the estate of the infant until the infant attains the age of 21 years, or for any lesser period according to the terms of the appointment of the guardian; and
- (b) bring such actions in relation to the estate of the infant as by law a guardian in common socage might have done; and
- (c) bring such other proceedings as are necessary to give effect to his powers under this section.

9. Removal of guardian

The Court may, in its discretion -

- (a) remove a testamentary guardian or a guardian appointed under or acting by virtue of this Act from his office; and
- (b) if it thinks it to be for the welfare of the infant, appoint another guardian in place of the guardian removed.

10. Divorce or judicial separation

(1) Where a decree for judicial separation or a decree nisi or absolute for divorce is pronounced, the Court pronouncing the decree may by the decree declare the parent (if any) by reason of whose misconduct the decree is made, to be a person unfit to have the custody of the children of the marriage.

(2) The parent declared under Subsection (1) to be unfit is not entitled as of right to the custody or guardianship of the children on the death of the other parent.

11. Separation deed

(1) An agreement contained in a separation deed made between the father and mother of an infant is not invalid by reason only of its providing that the father of the infant shall give up the custody or control of the infant to the mother.

(2) A Court shall not enforce an agreement referred to in Subsection (1) if it is of opinion that it will not be for the benefit of the infant to give effect to it.

12. Production of infant

(1) Where the parent of an infant applies to the Court for an order for the production of an infant and the Court is of opinion that the parent -

- (a) has abandoned or deserted the infant; or
- (b) has otherwise so conducted himself that the Court should refuse to enforce his right to the custody of the infant,

the Court may decline to make the order.

(2) If at the time of the application for an order for the production of an infant the infant is being or has been brought up by another person, the Court may, if it orders the infant to be given up to the parent, further order that the parent pay to that other person -

- (a) the whole of the costs properly incurred by him in bringing up the infant; or
- (b) such portion of the costs as seems to the Court to be just and reasonable having regard to all the circumstances of the case.

13. Conduct of parent

Where a parent has -

- (a) abandoned or deserted his infant; or
- (b) allowed his infant to be brought up by another person at that person's expense for such a length of time and under such circumstances as to satisfy the Court that the parent was unmindful of his parental duties,

the Court shall not make an order for the delivery of the infant to the parent unless he satisfies the Court that, having regard to the welfare of the infant, he is a fit person to have custody.

14. Infant's religious education

If, on an application by the parent for the production or custody of an infant, the Court is of opinion that -

- (a) the parent ought not to have the custody of the infant; and

- (b) the infant is being brought up in a different religion from that in which the parent has a legal right to require that the infant should be brought up,

the Court may make such order as it thinks proper to ensure that the infant is brought up in the religion in which the parent has a legal right to require that the infant should be brought up.

15. Trustee for settlement

(1) Where a verdict is recovered or a judgement entered for an amount as damages in proceedings brought by an infant by his next friend, the Court may

- (a) order that a settlement of the amount be made for the benefit of the infant; and
- (b) appoint a trustee for the settlement.

(2) The terms of a settlement under Subsection (1) shall be fixed by the court or, subject to its approval, by an officer of the Court appointed to do so.

16. Marriage settlements

(1) With the sanction of the court an infant may, on or in contemplation of his marriage, make a valid and binding settlement or contract for a settlement of any of his property or of any property over which he has a power of appointment, whether in possession, reversion, remainder or expectancy.

(2) A conveyance, appointment or assignment of property referred to in Subsection (1), or a contract to make such a conveyance, appointment or assignment, executed by an infant with the sanction of the Court for the purpose of giving effect to a settlement is as effectual as if the person executing the conveyance, appointment, assignment or contract were of full age.

(3) The sanction of the Court to a settlement or contract for a settlement referred to in Subsection (1) may be given on petition presented by the infant or his or her guardian in a summary way without the institution of a suit.

(4) If there be no guardian, the Court may require a guardian to be appointed or not, as it thinks fit.

(5) The Court may, if it thinks fit, require that a person interested or appearing to be interested in the property be served with notice of the petition.

(6) This section does not apply -

- (a) to a male infant under the age of 20 years or to a female infant under the age of 17 years; or
- (b) to powers expressly declared not to be exerciseable by an infant.

17. Powers of court in relation to certain property of infants

(1) The Court may by order authorize and direct that all or any part of the dividends due or to become due -

- (a) in respect of -
 - (i) any share or other interest in any company, society or association (established or to be established); and
 - (ii) any fund, annuity or security transferable in books kept by any company, society or association (established or to become established),transferable by deed alone or by deed accompanied by other formalities; or
- (b) in respect of any money payable for the discharge or redemption of any such share, interest, fund, annuity or security,

standing in the name of any infant who is beneficially entitled, be paid to -

- (c) the guardian of the infant; or
- (d) if there be no guardian to any person to be named in the order,

for the benefit of the infant.

(2) The Court may authorize and direct the guardian of an infant -

- (a) to surrender a lease to which the infant is entitled and to accept a new lease; or
- (b) to accept the surrender of a lease and to grant a new lease; or
- (c) to grant a lease of any property of the infant for building, agricultural or other purpose; or
- (d) to enter into an agreement for or on behalf of the infant.

ENDNOTES

- * A preliminary unedited version of this paper appeared in (1984) 12 Melanesian Law Journal pp.70-85. I am grateful to Val Haynes for his helpful comments on the earlier paper when in draft form.
1. See e.g. Toligur v. Giwa (1978) N133 per Kearney J; 1979 Annual Report by the Judges at p.4; "Inlaw-Outlaw" column in The Times (P.N.G.), 6 February 1981, p.28; 1984 Annual Report by the Judges at p.8.
 2. The figure of 68% was quoted recently (Post Courier, 15 April 1983).
 3. In Kevau v. Oru (O.S. 30 of 1983, 7 December 1983), 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 Guinean 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" (at p.2).
 4. Village Courts Act 1973 (Ch.44), ss.31-35.
 5. Deserted Wives and Children Act 1951 (Ch.277), s.1; Local Courts Act 1963 (Ch.41), s.17.
 6. See below, Part 3.
 7. For examples of customary claims falling within s.12, 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) PNGLR 124.
 8. See Buku v. Rikian (1982) N335(M), Bredmeyer J.; Tara v. Gugu (1982) N374(M), Bredmeyer J.; Camilus Billy v. Jubilee (1981) N360(M), Kearney D.C.J. A similar pre-Independence case involving bridewealth is Avi Guikau v. Heau Ederesi (S.C., 16 March 1972).
 9. Village Courts Act (Ch.44), s.27.
 10. By s.2 of the Act, "child of the marriage" means the adopted and natural children of the spouses, and also children of either spouse (e.g. by a prior relationship) who were ordinarily members of the marital household.
 11. A useful recent discussion of the common law position and rules of statutory interpretation is found in the judgments of the N.S.W. Court of Appeal in Gorey v. Griffin (1978) 1 NSWLR 739; see also Re M. an Infant (1955) 2 Q.B. 479.
 12. Other cases have tended to support the reasoning of Mann C.J. See especially Kariza-Borei v. Navu-Renagi (1965-66) PNGLR 134 at p.135, per Minogue J. In R v. Kaupa (1971-2) PNGLR 195, Kelly J. found it "unnecessary to decide" whether the Act applied to illegitimate children (at p.210). Cf. R v. Dogura, S.C. 11 March 1963. It must be noted, nevertheless, that a number of National and Supreme Court decisions have assumed without argument that orders under the Infants Act may be made

concerning ex-nuptial children; see e.g. State v. Onea and Lam (1980) N 242(H), and on appeal (1980) PNGLR 186. Cf. also the views of Amet J. (at p.149) and the Supreme Court (at p.150) in Derbyshire v. Tongia (1984) PNGLR 148, and McDermott J. in R.G. v. M.G. (1984) PNGLR 413, at p.414.

13. 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" (s.4, Native Children Ordinance 1950).
14. The Act 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" (s.4, Part-Native Children Ordinance 1950).
15. An example is given in Minister for the Interior v. Neyens (1964) 113 C.L.R. 411.
16. Legislative Council Debates, 30 May 1956, p.45 (Mr. McCarthy).
17. This assumption was found to be unjustified in the 1958 Supreme Court decision of Ako-Ako (No.1), 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. s.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.
18. E.g. Ex p. Yongoman Tongole, R v. Alfred Tongole (1975) N 5; Anis v. Anis (1977) PNGLR 5; Bean v. Bean (1980) PNGLR 307 (Supreme Court). See also the discussion in Toligur v. Giwa (1978) N 133, and Ex parte Nora Ume; Re Martin Beni (1978) PNGLR 71.
19. A writ of habeas corpus is directed to securing the presence of the child, often as a matter of urgency, before the Court, which then determines who is entitled to the possession of the child.
20. E.g. Monomb Yamba v. Maits Geru (1975) PNGLR 322; R.G. v. M.G. (1984) PNGLR 413; In the application of Derbyshire (O.S. 2 of 1983), 9 September 1983, per Pratt J. Cf. pre-Independence cases such as Ako-Ako (No.2), S.C. 9 September 1958; R v. Gary Rakatani, S.C. Judgment 193 (1961); Hevago-Koto (No.1), S.C. 25 August 1962, and Hevago-Koto (No.2) (1965-6) PNGLR 59. See also R v. Kaupa (1971-2) PNGLR 195.
21. Timereke v. Ferrie and Johns (1982) N379 at pp.24-25.
22. Cf. the definitions of "native" and "part-native" children in the two 1950 statutes, notes 13 and 14 above. Kidu C.J. noted that children whose fathers were "native" and mothers "non-native" were not thereby excluded from the operation of the Infants Act (at p.154). There were other

- categories of "automatic citizens" who were also 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 (i.e. whose parents have made a statutory marriage).
23. 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.
 24. He 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 s.5 (originally s.8) of the Infants Act only modifies the common law rules, at least in relation to legitimate children, by clarifying and improving the position of the mother.
 25. The status of the Revised Laws and the effects of the Revision of Laws Acts of 1973 and 1981 have not yet been determined. Cf. Kapi J. in Re Sannqa (1983) PNGLR 142 at p.171; and Pratt J. in E.T. and C.T. v. Director of Child Welfare (1984) PNGLR 25 at p.33. In Derbyshire v. Tongia (1984) PNGLR 148, the Supreme Court (Pratt J., Kaputin J., and McDermott J.) purported to follow Re Sannqa in a case arising after the Revised Laws came into force. Unfortunately, the court overlooked the change of wording in the revised Ch.278, and consequently failed to address the more general issue of the status and effect of the Revised Laws. For discussion of this complex issue, see D. Sriyastava and D. Roebuck, "Judicial Revision of the Revised Laws of Papua New Guinea", (1985) 11 Commonwealth Law Bulletin at pp.1450-1458.
 26. Draft Hansard, 20 August 1985.
 27. For the earlier argument that s.12 of the Local Courts Act 1963 (Ch.41) prevails over the Infants Act 1956 (Ch.278) where inconsistency arises, see T. Barnett, "The Local Court Magistrate and the Settlement of Disputes" in B. Brown (ed), Fashion of Law in New Guinea (Butterworths 1969), at pp.168-9; and N. Grant, "Custody and Guardianship of Children", in Magistrates Notes, Vol.2 No.3, pp.18-20 (1968).
 28. See e.g. P. Bromley, Family Law, 6th ed. (London 1981), pp.283-5.
 29. See P. Bromley, note 28 above, at pp.278, 285-6.
 30. See e.g. Law Commission (U.K.), Working Paper No.74, "Illegitimacy" (H.M.S.O., 1979) and Report on Illegitimacy (No.118, H.M.S.O., 1982). An example of the Australian legislation may be found in Children (Equality of Status) Act 1976 (N.S.W.). For judicial consideration of the equality of status legislation, see Douglas v. Longano (1981) 55 A.L.J.R. 352 (High Court of Australia), and Youngman v. Lawson (1981) 1 N.S.W.L.R. 439 (N.S.W. Court of Appeal).
 31. See S. Cretney, Principles of Family Law, 4th ed. (London, 1984), at pp.315-316; and P. Bromley, note 28 above, at pp.283-5.
 32. For discussion, see O. Jessep and J. Luluaki, Principles of Family Law in Papua New Guinea (U.P.N.G. Press, 1985) at pp.121-126.

33. See also the wording of what is now s.6 of the Customs Recognition Act (Ch.19), quoted earlier in Part 2 of the text.
34. See also R.G. v. M.G. (1984) PNGLR 413 at p.414, per McDermott J. This point is discussed at text to notes 11 and 12 above.
35. See P.N.G. Law Reform Commission, Report No.7, "The Role of Customary Law in the Legal System" (1977), which includes the draft Underlying Law Bill.
36. Be'O v. Ufui (1982) N343(M); Aisi v. Hoala (1981) PNGLR 199.
37. See Minutes of Meeting of Law Reform Commission No.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".