

# MAINTENANCE JURISDICTION IN PAPUA NEW GUINEA

## Introduction

Despite regular criticism and frequent appeals for reform, the body of colonial family law legislation introduced by the Australian government continues to operate in Papua New Guinea thirteen years after Independence. While much discussion and attention has recently been focussed on the complexities surrounding custody jurisdiction,<sup>1</sup> four recent decisions of the National Court<sup>2</sup> have been concerned rather with questions of jurisdiction relating to maintenance of spouses and children.

Before commenting on these decisions, it should be mentioned that there are in fact three pieces of legislation dealing with maintenance in Papua New Guinea. Where proceedings for dissolution of a statutory marriage have been instituted under the *Matrimonial Causes Act* (Ch 283) in the National Court, maintenance may be awarded under that Act for a former spouse and for the children of the marriage. Where the mother of an exnuptial child seeks maintenance for the child from the father, proceedings may be instituted in a Local Court or Children's Court under Part XI of the *Child Welfare Act* (Ch 276). The third piece of legislation is the *Deserted Wives and Children Act* (ch 277), under which a District Court, and in some instances a Local Court,<sup>3</sup> may make orders for a wife or for children who are deserted. As all of the recent National Court decisions deal with this last-mentioned statute, it may be helpful to set out the relevant provisions concerning jurisdiction.

## Provisions of Deserted Wives and Children Act (Ch 277):

By s 1, the word 'child', unless a contrary intention is shown, means a child under the age of 16 years whether born in wedlock or not. Sections 2 and 3 provide as follows:

2 Power of Court to issue summons or warrant

(1) Where

- (a) a husband has unlawfully deserted his wife or left her without means of support, or
- (b) a father has deserted his child or left him without means of support, or
- (c) a husband or father is about to leave the country without making adequate provision for the support of his wife or child,

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1 See O. Jessep, 'Custody Jurisdiction in Papua New Guinea', *PNG Law Reform Commission Working Paper No 22* (Port Moresby 1987).

2 *Agua Bepi v Aiya Simon* (1986) PNGLR 233, *Igua Nou v Karoho Vagi* (1986) PNGLR 1, *Martin Aeava v Oa Ikupu* (1986) PNGLR 65, and *PR v SC* (1986) PNGLR 68.

3 By s 18 of the Local Courts Act 1963 (now Ch 41, s 17) jurisdiction under the *Deserted Wives and Children Act* was extended to Local Courts in cases arising from a customary marriage.

a Court, on complaint on oath being made by the wife or by the mother of the child or by a reputable person on behalf of the wife or child, may -

- (d) issue a summons requiring the husband or father to appear before it to show cause why he should not support his wife or child; or
- (e) where it is satisfied that the circumstances justify it doing so, issue a warrant for the arrest of the husband or father.

(2) Where a warrant has been issued and the defendant cannot be found the Court, on proof of inquiry and search, may proceed in the case ex parte.

3. Hearing and order.

(1) On the hearing of a complaint under section 2, the Court shall inquire into the matter and-

- (a) where it is satisfied that -
  - (i) the wife is left without means of support; or
  - (ii) the defendant is about to leave the country without making adequate provision for support,

the Court may -

- (iii) order the defendant to pay such allowance as it considers reasonable for the use of the wife; and
- (iv) commit the legal custody of a child of the marriage to a wife or some other person; and
- (v) order the defendant to pay such allowance as it considers reasonable for the support of the child; and

b) where it is satisfied that -

- (i) a child of the defendant is left without means of support; or
- (ii) the defendant is about to leave the country without making adequate provision for the support of the child,

the Court may -

- (iii) order the defendant to pay such allowance as it considers reasonable for the support of the child; and
- (iv) commit the legal custody of the child to the mother or some other person...

Section 22 makes it an offence, punishable by up to one year's imprisonment, for a parent who is able to maintain a child to desert the child without reasonable cause and leave it without means of support, and section 23 similarly makes it an offence for a husband to desert his wife leaving her without means of support.

## Does the Act Allow Claims Against a Deserting Mother

In *Agua Bepi v. Aiya Simon* (1986),<sup>4</sup> the husband from Ialibu and the wife from Mount Hagen had been married by custom. Sometime after the marriage had finally broken down in 1984, the husband complained to the District Court at Ialibu, claiming that the wife had deserted him and their four children. In late 1985 and early 1986 the District Court magistrate made various orders granting custody of the children to the husband, requiring the wife's relatives to repay the brideprice, and sentencing the wife to a term of imprisonment. The wife appealed to the National Court.

In the National Court, Cory J found that the magistrate's actions and the conduct of the proceedings had been so irregular that the papers should be forwarded to the Chief Magistrate for further attention, and quashed all the orders.<sup>5</sup> Of note here is Cory J's treatment of the husband's complaint concerning desertion and custody.

In regard to the alleged desertion by the wife, Cory J found on the facts that she had been forced to leave home because of the husband's mistreatment, and had thus been constructively deserted by the husband.<sup>6</sup> In any event, the judge continued, no complaint as to her alleged desertion of either the husband or the children could be laid under ss2 and 3 of the *Deserted Wives and Children Act*, since those sections were 'restricted to the desertion of a wife and/or child by a husband'.<sup>7</sup> Further, desertion of a husband by a wife was not an offence under s22, and there was no basis on the evidence for saying that the wife had deserted the children. Even if there had been, proceedings under s22 could only have been initiated by laying an information rather than a complaint.<sup>8</sup>

As to the custody in favour of the husband, Cory J stated:

The power to make an order for custody under the *Deserted Wives and Children Act* only arises under s3 on a complaint under s2 where a father has deserted a child or left him without means of support... The magistrate was therefore acting without jurisdiction and his order granting custody to the [husband] is a nullity and of no effect.<sup>9</sup>

As a matter of interpretation of the Act, Cory J's conclusions are unquestionably correct. In contrast for instance to the more general language used in the *Matrimonial Causes Act* (Ch 282),<sup>10</sup> the restrictive wording of the *Deserted Wives and Children Act* does not permit orders for payment of children's maintenance to be made against a woman. In the perhaps unusual case of children being deserted by their mother, then, a person acting on

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4. (1986) PNGLR 233.

5. *Id.* 237, 240.

6. *Id.* 239.

7. *Id.* 237.

8. *Id.* 237.

9. *Id.* 239.

10. See Ch.282, s.73.

behalf of the children could only threaten prosecution under s22 of the Act or similar provisions in other legislation,<sup>11</sup> or seek to pursue a claim based on custom.<sup>12</sup>

### **Does the Act Allow Claims After a Customary Marriage Has Been Dissolved?**

In *Igua Nou v. Karoho Vagi* (1986),<sup>13</sup> the husband and wife were married by custom in 1980. After arguments over the husband's relationship with another woman, the wife left the husband in October 1982 and never returned. In April 1983 the wife obtained Local Court maintenance orders under the Deserted Wives and Children Act for herself and for her son. After various proceedings in the District Court for enforcement and for variation of the orders, an appeal was taken to the National Court. Barnett J indicated that if the point had been raised in the Local Court that, according to custom, the marriage was treated as dissolved shortly after the wife left, taking her belongings, and the irretrievable breakdown of the marriage had been accepted by the parties and their relatives, no order for the (former) wife would have been possible under the Act.<sup>14</sup> Maintenance for the child would however still have been available.<sup>15</sup> The basis for this reasoning was presumably that while it is still appropriate to speak of "father", "mother", and "child" after the parents have been divorced, it is no longer accurate to refer to the divorced parents as "husband" and "wife" for the purposes of ss2 and 3 of the Act.

This point was further elaborated by Barnett J in the subsequent case of *Martha Aeava v. Oa Ikupu* (1986),<sup>16</sup> where a Local Court in 1978 had made a maintenance order in favour of a customarily married wife. Following District Court proceedings in 1985 for discharge of the order, an appeal was taken to the National Court.

Barnett J held that on the evidence the customary marriage must be taken to have been dissolved by the end of 1979, 'when all parties and the relatives on both sides had come to accept that it had irretrievably broken down',<sup>17</sup> and ordered that the maintenance order should be discharged from that date. He went on to state:

The Deserted Wives and Children Act (Ch No277) is intended to oblige a husband to pay maintenance to a wife he had deserted during the continuance of the marriage. Once the marriage is dissolved no further payment can be enforced under that Act. For a statutory marriage dissolution is granted by a court order and there is provision for maintenance to be ordered under the Matrimonial Causes Act (Ch No282). If, however, the dissolution is by custom the question of possible continuous obligations for the former husband to pay

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11. See *Criminal Code Act* (Ch.262), s.362; *Child Welfare Act* (Ch.276), s.94.

12. For discussion of the jurisdiction of Village, Local and District Courts to entertain customary claims, see O. Jessep, and J. Luluaki, *Principles of Family Law in Papua New Guinea* (UPNG Press, 1985), 77-82. The relevant legislative provisions are Village Courts Act (Ch.44); Local Courts Act (Ch.41), s.12(1); and District Courts Act (Ch.40), s.21(1).

13. (1986) PNGLR 1.

14. *Id.* 3, 4.

15. *Id.* 4.

16. (1986) PNGLR 65.

17. *Id.* 66

maintenance to the divorced wife would have to be determined according to the custom involved.<sup>18</sup>

To summarise, in the case of divorce from a customary marriage, the wife has no future rights to maintenance in the absence of a claim based on custom,<sup>19</sup> but the children are still entitled to maintenance under the *Deserted Wives and Children Act*. In the case of divorce from a statutory marriage, in contrast, maintenance for both the wife and the children may only be sought under the *Matrimonial Causes Act* (Ch 282).

### Does the Act Extend to Ex-nuptial Children?

In *PR v. SC* (1986),<sup>20</sup> orders for maintenance and custody of a child were sought by the child's mother in the Lae District Court. The court found that the mother and the defendant were not married, and that the defendant was the father of the child. The mother was granted custody and the father ordered to pay maintenance for the child under the *Deserted Wives and Children Act*. The father appealed to the National Court on several grounds, but the court was asked to rule first on the jurisdictional question of whether maintenance and custody orders in relation to exnuptial children could be made under the Act.

Counsel for the father, in arguing that such children were not covered by the Act, made two submissions. First, that the definition of "child" in s 1 of the Act, which refers to a child under 16 years 'whether born in wedlock or not', was intended to apply only to children born out of wedlock who were subsequently legitimated by the marriage of their parents.<sup>21</sup> Secondly, even if the Act did extend to exnuptial children when originally enacted in 1951-52, the position changed when the *Child Welfare Act* was passed in 1961. (As noted earlier, Part IX of the *Child Welfare Act* deals with maintenance of ex-nuptial children.)

Los J rejected these submissions, and held that the wording of the Act was broad enough to include claims concerning ex-nuptial children. Although parts of his judgment are not easy to follow, Los J appears to have relied on two main arguments in reaching his conclusion. First, if the Act did not apply then ex-nuptial national children would have had no relief under any Act between 1952 and 1961, a result which the legislature could not have intended.<sup>22</sup> Secondly, the *Child Welfare Act* 1961 did not expressly or impliedly repeal or limit the operation of the *Deserted Wives and Children Act* insofar as it related to ex-nuptial children.<sup>23</sup> It followed that, while the provisions of each Act were not identical in their application to ex-nuptial children, both Acts could operate

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18. *Id.* 67.

19. Barnett J indicated that in his view such a custom would be "most unusual" in Papua New Guinea (*Id.*, 67). For discussion, see Jessep and Luluaki, n.12 *supra*, pp.86-87.

20. (1986) PNGLR 68.

21. *Id.* 69. See Marriage Act (Ch.280), s.52.

22. *Id.* 69.

23. *Id.* 70-72.

In the light of the history of the *Deserted Wives and Children Act*, however, both arguments advanced by Los J may be challenged. There can be no doubt that when the legislation was first passed (*Deserted Wives and Children Ordinance 1951*), replacing legislation which had previously operated separately in Papua and New Guinea,<sup>25</sup> the Ordinance was intended to apply to some ex nuptial children. Thus, in addition to the same definition of 'child' referred to earlier, which allowed the general jurisdictional sections of the Ordinance to apply to claims for both nuptial and ex nuptial children (ss 5 and 6, now ss 2 and 3 in the revised form of the statute), there were other sections of the Ordinance relating specifically to claims for ex nuptial children. For example, by s 7, where the defendant denied on oath his paternity of an ex-nuptial child, no order could be made by the court if the mother's evidence was uncorroborated, or if at the time of conception the mother was a 'common prostitute', or 'had been having sexual intercourse with a man other than the defendant'. Again, by s 32, attendance in court during the hearing of a complaint concerning an ex nuptial child was restricted to the parties, their lawyers, and officials unless the court otherwise ordered.

The crucial point, however, is that when originally enacted, the Ordinance was intended to apply only to expatriates, not to Papua New Guineans. Thus s 30(1), which bore the marginal notation 'Natives exempted from provisions of Ordinance', provided that no order might be made under the Ordinance 'against a native', or 'for the maintenance of any ex nuptial child of a native'. Consequently, the reasoning advanced by Los J as to the supposed intention of the legislature cannot be correct, since during the relevant period the *Deserted Wives and Children Ordinance* did not apply to Papua New Guineans at all.

There were, however, other statutory provisions intended to cover Papua New Guineans during this period. In Papua, Reg 77 of the *Native Regulations 1939* enabled a magistrate to order maintenance payments where a man had deserted his wife (defined for purposes of this Regulation to include a wife by customary marriage),<sup>26</sup> or child, whether legitimate or illegitimate. In New Guinea, although the *Native Administration Regulations 1924* did not contain an identical provision, civil claims based on custom could be recognised under Reg 57, customary marriages were recognised by Reg 65, and Reg 67 made it an offence for children not to be maintained by the appropriate person following dissolution of a customary marriage. Finally, where the father of a Papua New Guinean woman's child was an expatriate, he could be ordered to pay maintenance by the appropriate person following dissolution of a customary marriage. Finally, where the father of a Papua New Guinea woman's child was an expatriate, he could be ordered to pay maintenance under ss 6 and 8 of the *Part Native Children Ordinance 1950*. In sum, these various statutory provisions, while not exhaustive in their coverage, were designed to provide some measure of protection for Papua New Guinean wives and children.

The second argument by Los J, that the *Child Welfare Act 1961* was not intended expressly or impliedly to repeal and replace any provisions of the *Deserted Wives and Children Act 1951* in their application to ex nuptial children, may also be questioned. It is

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24 *Id* 71

25 *Deserted Wives and Children Ordinance 1912* (Papua), *Deserted Wives and Children Ordinance 134* (New Guinea)

26 Unlike the position in New Guinea there was no general recognition of customary marriage in Papua see *Marriage Ordinance 1912* (Papua), s 18

true that the *Child Welfare Ordinance 1961* (No 34 of 1961, now Ch 276) did not expressly repeal any part of the *Deserted Wives and Children Ordinance 1951*, although it did repeal the *Part-Native Children Ordinance 1950*.<sup>27</sup> Nevertheless, by the immediately preceding Ordinance, No 33 of 1961, which was assented to on the same day as the *Child Welfare Ordinance 1961*, significant amendments were made to the *Deserted Wives and Children Ordinance 1951*. Specifically, the amending Ordinance, referred to as the *Deserted Wives and Children Ordinance 1961*, repealed both s 30 of the 1951 Ordinance (which had exempted Papua New Guineans from its operation), and also ss 7 and 32 (which imposed certain requirements for hearing claims concerning ex-nuptial children). Similar provisions to those in s 7, such as the requirement of corroboration, were then included in Part IX of the *Child Welfare Ordinance 1961* (see now ss 53(2), 55(3) in Ch 276). It is then a reasonable inference that from this time, the *Deserted Wives and Children Ordinance* was intended to apply to Papua New Guinean and expatriate spouses alike,<sup>28</sup> but that claims over children, despite the unchanged definition of 'child' in the Act, were to be confined to children of a marriage. Ex-nuptial children, in contrast, were now to be dealt with under Part IX of the *Child Welfare Ordinance 1961*, which contained special provisions regarding confinement expenses, proof of paternity, possible involvement by the Director of Child Welfare, defences to claims, and the like.

The decision by Los J may have been welcomed by lawyers and litigants frustrated by the apparent inability of a District or Local Court to make an order for custody of a child except in conjunction with an order for maintenance under the *Deserted Wives and Children Act* (Ch 277).<sup>29</sup> As the *Child Welfare Act* gives no power to any court to make custody orders, the desire to bring ex-nuptial children under the *Deserted Wives and Children Act* for this purpose is perfectly understandable. Nevertheless, in the light of the reasons advanced by Los J, the decision is certainly vulnerable, and may not be followed in the future.

## Conclusion

In this short discussion I have reviewed several recent decisions of the National Court relating to the jurisdiction of Local and District Courts under the *Deserted Wives and Children Act*. While the issues of maintenance jurisdiction are less complex than those concerning custody jurisdiction,<sup>30</sup> the unfortunate consequences of the colonial legacy are again evident. Three separate pieces of legislation, long since repealed in their country of origin, continue to operate in regard to maintenance claims in Papua New Guinea. A simplified statute, clarifying and broadening the jurisdiction of Local and District Courts to deal with claims for maintenance and for custody, with due attention to custom where appropriate, is long overdue.

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<sup>27</sup> *Child Welfare Ordinance 1961* s 3(1) and 1st Schedule

<sup>28</sup> See also n 3, *supra*

<sup>29</sup> See *Toligur v Giwa* (1978) N 133, *Ex parte Nora Ume Re Martin Beni* (1978) PNGLR 71, and *Aoua Bepi v Aiya Simon* (1986) PNGLR 233. These cases are criticised in Jessep n 1 *supra*, pp 7-8, 20, 25.

<sup>30</sup> Jessep, n 1 *supra*