

[8] In view of the foregoing, we find that the trial court erred in not finding that the applicable statute of limitations had tolled against Selestino and his heir, and that the appellant's long continued possession and control of the land for over twenty years was sufficient to sustain her adverse holding.

Accordingly, we hereby reverse the decision of the trial court, and the trial court is hereby directed to enter a judgment in favor of the appellant.

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AWASIO ERAM, Appellant

v.

PRISCILLA THREADGILL, Appellee

Civil Appeal No. 294

Appellate Division of the High Court

Truk District

March 28, 1983

Appeal from trial court order awarding custody of child to the mother. The Appellate Division of the High Court, Miyamoto, Associate Justice, held that with respect to custody of an illegitimate child, although the best interest of the child is the ultimate concern, the natural mother has a prima facie right to custody, and evidence in the case showed that mother had cared for and supported the child previously, and was not an unfit mother, and therefore, order of the trial court was affirmed.

**1. Domestic Relations—Divorce—Custody**

With respect to custody of an illegitimate child as between two opposing parents, although the best interests of the child is the ultimate concern, the natural mother has a prima facie right to custody, and that right will not be defeated except upon a clear showing that she is not a fit person to be given custody.

**2. Domestic Relations—Divorce—Custody**

Trial court did not err, in child custody proceeding, by not considering Trukese customary law, where there was sufficient case law and statutory law on the subject to allow the court to render a decision.

**3. Domestic Relations—Divorce—Custody**

Trial court decision to award custody of child to mother was proper, where evidence showed that mother had cared for and supported the child

for over one year prior to the child's removal from her custody, had nurtured the baby with extra care because of the child's allergy to certain foods, had travelled many thousands of miles to fight a valiant battle to regain custody, prospects of continued care, support and education of the child by the mother were good, and nothing in the evidence indicated that she was an unfit mother.

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*Counsel for Appellee:* None

Before MUNSON, *Chief Justice*, MIYAMOTO, *Associate Justice*, and LAURETA,<sup>1</sup> *Associate Justice*

MIYAMOTO, *Associate Justice*

This is an appeal from the trial court's order following a custody hearing. Appellant's counsel submitted a brief and appeared for the arguments; however, appellee, who was represented by the Public Defender's Office at the trial court level, failed to file a brief or appear at the appellate hearing.

Appellant Awasio Eram and appellee Priscilla Threadgill are the natural parents of the minor child, Awasio Eram Threadgill, who was born out of wedlock in the state of Oregon on August 19, 1976. The father was a Trust Territory citizen (Trukese) and the mother was a United States citizen. Both were attending school in Oregon at the time.

In August, 1977, the father took the child, with the consent of the mother, to live with his family on Uman Island in the Truk lagoon. It was understood between them that the child would remain in Truk for a few months. On December 19, 1978, the mother came to Truk seeking custody

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<sup>1</sup> U.S. District Court Judge, Commonwealth of the Northern Mariana Islands, designated as Temporary Justice by Secretary of Interior.

of the minor child; however, the father balked, thus the custody hearing.

The custody hearing was conducted in Truk on February 8–10, 1979, and on February 13, 1979, the trial judge issued an Order awarding custody of Awasio Eram Threadgill to the mother. The child is now in the United States.

The court, in its Order, held:

*Everyone is agreed that the best interests of the child must be the Court's ultimate concern in determining custody; the Courts universally so hold. Nevertheless, it is equally clear that, as between competing parties, the natural mother has a prima facie right to custody, and that that right will not be defeated except upon a clear showing that she is not a fit person to be given custody. (Emphasis added.)*

. . . all jurisdictions recognize that the mother, if a suitable person, is the natural guardian of her illegitimate child, and, as such, has a legal right to the child's custody, care, and control superior to the right of the father or any other person . . . .

45 A.L.R.3d, 216, 220 (1971) (Subject of annotation: "Right of putative father to custody of illegitimate child").

The foregoing has been recognized as the law applicable in the state of Oregon, the place of residence of petitioner at all times pertinent to this dispute. See *Sparks v. Phelps*, 540 P.2d 397 (Or. App. 1975), citing 98 A.L.R.2d, 417, 421, 427 as to the primary right of a mother to custody of her illegitimate child.

Trust Territory Courts, subject to the cardinal principle that it is in the best interest of the child that must control, have regularly recognized the mother's primary right to custody, particularly as to very young children.

For those under about 12 years of age, the Court considers that custody by the mother will usually be best where that is consistent with the local culture, in the absence of a strong showing to the contrary . . . . *Yamada v. Yamada*, 2 T.T.R. 66 (Ponape Tr. Div. 1959) (a divorce action).

In *Kumer v. Peter*, 4 T.T.R. 102 (Palau Tr. Div. 1968) (guardianship) ". . . normally the mother has the legal right to custody, care and control of the child unless the welfare and permanent good of the child requires otherwise."

In Palau, where a father had retained custody of minor children for approximately one year prior to trial, the Court awarded custody to the mother, in the absence of evidence that she was not a "fit and proper person to have custody." *Ikeda v. Ngirachelbaed*, 5 T.T.R. 204, 207.

The Trust Territory Code is sadly silent on questions of custody. I find only the requirement in 39 TTC § 253 that, in adoption matters, written consent of, or notice to ". . . known living legal parents . . ." must be obtained. On the basis of that section, the Court said, in *In The Matter of the Adoption of Tianna Samuel*, 5 T.T.R. 420 (Ponape Tr. Div. 1971) that the father of an illegitimate child has no "legal claim" to it.

Given the primary right of a mother to custody, assuming that she is a "fit person," and has not abandoned the child, a temporary surrender of that custody will not preclude an award to her. See annotation, 98 A.L.R. 417, 455.

On the basis of my view of the admitted facts in this matter, and my conclusion as to the applicable law, it follows that the petitioner, Priscilla Threadgill, must be granted custody of the child Awasio.

The pertinent part of the Order is recited in full because it unquestionably represents the present state of the common law in the Trust Territory with respect to the custody of an illegitimate child as between two opposing parents.

The appellant, however, in opposition, advances the idea that this is not the state of the law at the present time, that the trial court failed to consider Trukese customary law, and that evidence did not support the award of the child to the mother.

On the issue of what the prevailing common law on the custody of an illegitimate child is, appellant contends that "[i]t is well established that the sole criterion in determining custody of legitimate and illegitimate children alike is the best interest of the child test, and that presumptions favoring the mother are no longer valid." We are not convinced of the validity of this statement.

In the annotation "Right of mother to custody of illegitimate child" appearing in 98 A.L.R.2d 417, the general rule is stated as follows:

It is almost universally held that the future welfare of the infant is the most important consideration of the court in awarding custody of an illegitimate child. It is often said to be the controlling consideration, or of paramount importance, or that all other interests, including the right of the mother to the custody of her child, must yield to the best interests of the child.

The annotation then specifies the mother's primary right to custody in the following language:

All jurisdictions recognize that within the framework of the cardinal principle that the welfare of a child determines its custody, the mother of an illegitimate child has a natural, primary, or prima facie right to the custody of her child, unless she is proved to be an unfit person to be entrusted with such a charge or it is demonstrated that she has abandoned the infant.

As against the putative father, the annotation indicates that:

At common law the right to the custody of legitimate children was generally held to be in the father, but as to illegitimate children the rule was different. As between the putative father and the mother of illegitimate children, it is well established that the mother's right of custody is superior, and the father's right, if any such exists, is secondary.

Where there is temporary surrender of custody of the child, as in this case, the annotation states:

The mere fact that the mother of an illegitimate child has voluntarily placed it with another will not by itself preclude an award of custody to her, provided that no valid decree of adoption has been entered, and that she is a fit person to be entrusted with the care of the child and has not abandoned it.

[1] Clearly, these annotations indicate that the common law enunciated by the trial court is the current law in custody cases.

The second issue presented is whether the trial court committed error in not using a domestic law, i.e., Trust Territory law or Trukese customary law, in determining the respective rights of the parents.

The normal American conflict of laws principle holds that a court having jurisdiction in an adoption or custody matter applies its own domestic law, including apparently its own rules concerning choice of law. *Huyuh Thi Auh v. Levi*, 586 F.2d 625 (6th Cir. 1978). See: *Restatement (Second) Conflict of Laws* § 79.

As indicated in the trial court Order, there is no specific Trust Territory statute applicable specifically to custody determination of a child born out of wedlock. However, 39 TTC § 103 provides that in annulment or divorce cases, custody of minor children shall be determined as the court "deems justice and best interests of all concerned may require." In 39 TTC § 254, the standard prescribed in adoption cases is "the adoption shall be granted only if the court is satisfied that the interests of the child will be promoted thereby." In *Ikeda v. Ngirachelbaed*, 5 T.T.R. 204, a divorce case, the court ruled that "unless it is demonstrated by the evidence that the mother is not a fit and proper person to have custody . . . , the court normally will award custody of minor children to the mother." The court, in *In Re Adoption of Samuel*, 5 T.T.R. 420 (1971), held that "the father of an illegitimate child has no legal claim to it." In *Yamada v. Yamada*, 2 T.T.R. 66 (1959), the court held that in an action for divorce, custody of children is controlled primarily by the best interests of the children, and in cases of children under twelve years of age, "the court considers that custody by the mother will usually be best where that is consistent with the local culture, in the absence of a strong showing to the contrary, but there is no firm rule to that effect."

[2] With sufficient authority as described above, it is not necessary to consider Trukese customary law on custody of illegitimate children, especially when the trial court judge did not see fit to make any findings of fact in this regard. It is not the duty of the appellate court to determine what the court's findings may have been; however, close reading of the transcript of the case indicates that the customary practices in Truk on custody matters are not inconsistent with Trust Territory statute or common law.

[3] The third issue is whether the court's decision to give custody of the child to the mother is supported by the evidence. Firstly, there is nothing in the evidence adduced to indicate that she is an unfit mother. In fact, the evidence shows otherwise, that she had cared for and supported the child for over one year prior to the child's removal to Truk, had nurtured the baby with extra care because of the child's allergy to certain foods, had travelled many thousands of miles to fight a valiant battle to regain custody of the child. Secondly, evidence indicates that prospects of continued care, support, and education of the child by the mother are good.

In view of the foregoing, the Order of the trial court is AFFIRMED.

#### DISSENT

LAURETA, *Associate Justice*

I cannot agree that absent any showing to the contrary the mother of an illegitimate child is entitled as a matter of law to the custody of the child. It is now almost universally accepted that the best interest of the child standard prescribes the overriding consideration in custody disputes between the mother and father. The issue of illegitimacy is

immaterial. See generally, *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972).

It is also true that if all other considerations as to the ability of either parent to care for the child are deemed to be equal, courts frequently resort to a preference in favor of awarding custody of the child to the mother. *Porter v. Porter*, 518 P.2d 1017, 21 Ariz. App. 300 (1974); *Prescott v. Prescott*, 542 P.2d 1176, 97 Idaho 257 (1975); *Libra v. Libra*, 484 P.2d 748, 157 Mont. 252 (1971); *Earnst v. Earnst*, 418 P.2d 351 (Okl. 1966).

On the basis of the trial record, I cannot say with any degree of assurance, or certainty, what would be in the best interest of the subject child in this case. I would, therefore, VACATE and REMAND this case for further proceedings to determine the factual basis for awarding custody of the child to either parent in terms of who would be better able to serve the child's best interest.

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FAUSTINA OSOMAI LITULUMAR, Appellant

v.

DOLORES SOMORANG TEREGEYO, Appellee

Civil Appeal No. 229

Appellate Division of the High Court

Mariana Islands District

March 31, 1983

Appeal from trial court determination of ownership in land dispute. The Appellate Division of the High Court, per curiam, held that since courts of Trust Territory are not precluded from making determinations as to the rightful recipients of Claim Commission awards, trial court erred in not considering the effect of an Amended Determination of Ownership issued by Land Title Officer, and therefore case was remanded to trial court.

**1. Appeal and Error—Findings and Conclusions—Clearly Erroneous**

Decision of trial court in a land ownership dispute will not be set aside on appeal unless there is clear and manifest error.