

ELISINERY J. MUTONG, Appellant

v.

PELERINO MUTONG, Appellee

Civil Action No. 251

Trial Division of the High Court

Ponape District

September 10, 1964

Action for divorce brought by wife in district court, in which husband claims that he was never married to plaintiff. On appeal from judgment for defendant's husband, the Trial Division of the High Court, Associate Justice Paul F. Kinnare, confirmed both marriage and divorce under customary law and remanded to District Court for further hearings on customary law of child support.

Affirmed in part and remanded in part.

1. Domestic Relations—Marriage—Custom

While there are similarities between marriage under local custom and "common law marriage" under American law, alleged customary marriage cannot be determined solely on basis of precedents relating to common law marriage.

2. Domestic Relations—Marriage

Generally throughout Trust Territory, families of man and woman are required to consent to their union before marriage relationship between them is considered to exist.

3. Domestic Relations—Marriage—Presumption

Where there is evidence of consent by some members of families of parties to be married and evidence of cohabitation, well-recognized presumption of marriage operates in favor of party claiming validity of marriage.

4. Domestic Relations—Marriage—Presumption

Where man and woman are living together as husband and wife, marriage should always be presumed.

5. Domestic Relations—Marriage—Presumption

Where man and woman are living together as husband and wife, presumption of marriage is especially strong where legitimacy of children is concerned, and increases in strength with length of time of marriage.

6. Domestic Relations—Marriage—Presumption

Although presumption of marriage is not conclusive where man and woman are living together, court will give effect to presumption where parents recognize marriage, there is subsequent cohabitation, birth of children, and reconciliation after separation.

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7. Domestic Relations—Marriage

Registration or recording of marriage is not essential to its validity.

8. Custom—Judicial Notice

Where local custom is firmly established and widely known, court will take judicial notice of it. (T.T.C., Sec. 21)

9. Custom—Burden of Proof

Where there is dispute as to existence or effect of local custom, existence or applicability becomes mixed question of law and fact, and party relying upon it must prove it by satisfactory evidence.

10. Domestic Relations—Confirmation of Custom

The High Court may enter decree confirming annulment, divorce or adoption in accordance with recognized custom. (T.T.C., Sec. 715)

11. Domestic Relations—Support

In action for divorce, where customary law on child support is unclear, case should be remanded to district court for further hearing.

<i>Assessor:</i>	None
<i>Interpreter:</i>	EDWEL SANTOS
<i>Counsel for Appellant:</i>	YOSTER CARL
<i>Counsel for Appellee:</i>	CLETUS JAMES

KINNARE, *Associate Justice*

The complaint alleged that appellant had married appellee in 1958 and thereafter had lived with him as his wife—with one period of separation of several months in 1962—until appellee told appellant to leave him in December 1963, stating that he no longer wished to live with her. The complaint alleged that two children were born during the time appellant was living with appellee and that appellant was well advanced in pregnancy when she was told by appellee to leave him. At the hearing on the appeal, appellant stated, without objection from the appellee, that a girl child had been born to her on April 29, 1964 (after the judgment in this case) and that this child was a result of her union with appellee. Relief sought in the complaint was for alimony, child support, custody of the children, and that the parties be “legally separated”.

Appellee's answer denied that he had ever been married to appellant and denied that any sums were due her for alimony.

The court found that a marriage relation had never existed between appellant and appellee and ordered that appellee pay appellant nothing for alimony or child support, awarded custody of the children then born to appellant, and provided for right of reasonable visitation by appellee to children, after obtaining permission of appellant.

OPINION

After a careful review of the record, and consideration of the uncontradicted allegations made in appellee's presence by appellant at the hearing on the appeal, the court considers it clearly established that appellee approached appellant and her parents with an offer of marriage in 1958; that appellant's parents told him to wait until he had completed school; that thereafter appellee's father visited the appellant and her parents suggesting a marriage between appellant and appellee, and was told that this should not take place until appellee had completed school; that thereafter in 1960, when appellee had completed his schooling, he returned to appellant and lived with her in a husband-wife relationship, both at her home and at the home of his father; that appellant and appellee separated for a period of a few months in 1962, but were thereafter reconciled and resumed living together; that twin girls were born to appellant while she was living with appellee and that another girl child was born to appellant, as a result of cohabitation with appellee, on April 29, 1964.

It is equally clear from all evidence that no formal marriage ceremony was ever performed, either in church or before any public official legally authorized to perform marriages, although appellant and appellee had undergone a "physical examination for marriage" on September 26, 1961.

Appellant contended that her relationship with appellee was a valid marriage to him under local custom under the provisions of Section 694, T.T.C. which reads as follows:

“Marriages between citizens of the Trust Territory. Marriage contracts between parties both of whom are citizens of the Trust Territory, solemnized in accordance with recognized customs, shall be valid. A notice of such marriage, showing the names and addresses of the persons married, their ages and the date of marriage, shall be sent to the Clerk of Courts, who shall upon receipt thereof record the same in the Marriage Register.”

Appellee contended that the relationship between himself and appellant did not constitute a valid marriage under local custom, and invited attention to the fact that no notice of such marriage had ever been sent to the Clerk of Courts in Ponape and that the alleged marriage was never recorded in the Marriage Register.

The basic question, which must be decided before any of the related questions are answered, is whether or not the events described above constitute a valid marriage under local custom between appellant and appellee.

[1] While there are distinct similarities between marriage under local custom in the Trust Territory and marriage known as “common law marriage” in American and English law, the court considers that this case cannot be determined solely upon the basis of the well-established precedents relating to common law marriages where they are recognized.

“At common law no formal ceremony is essential to a valid marriage, and the agreement between parties per verba de presenti to be husband and wife constitutes a valid marriage, no other ceremony being necessary.” Am. Jur., Vol. 35, Marriage, § 28.

[2] Generally, however, throughout the Trust Territory the families of the man and woman are required to consent to their union before a marriage relationship between them is considered to exist.

[3] In the case before us it is to be noted that parents of appellant consented to her union with appellee and the father of the appellee testified at the trial that he had asked the parents of the appellant to consent to a marriage between appellant and appellee. He further testified that appellant and appellee had lived at his house, sleeping together, after his visit to appellant's parents.

[4, 5] Under these circumstances the court considers that a well-known and well-recognized presumption operates in appellant's favor.

"It is a fundamental maxim of our law that where a man and woman are living together as husband and wife marriage should always be presumed. . . . the presumption of validity is especially strong where the legitimacy of children is concerned and where it is supported by what has been the attitude of relatives, friends, and acquaintances of the parties and it increases in strength with the length of time of the marriage." Am. Jur., Vol. 35, Marriage, §§ 191 and 192.

[6] It is true that this presumption is not conclusive and it may be overcome, but the court considers that the great weight of the evidence here—the initial contact between parties and their parents, the subsequent cohabitation, the birth of children, the reconciliation after a period of separation—all indicate that the fundamental presumption should be given effect.

[7] The court considers that appellee's contention that the marriage could not take effect because no notice of it was sent to the Clerk of Courts and registered accordingly (Section 694, T.T.C.) is without merit.

"Generally speaking, registration or recording of a marriage is not essential to its validity, the statute being addressed to the officials issuing the license, certifying the marriage, and making the proper return and registration or recording." Am. Jur., Vol. 35, Marriage, § 27.

[8, 9] No evidence was offered at the trial as to any local custom concerning the support of children of a marriage when the parties thereto separate. This court has held,

“If the local custom is firmly established and widely known, this court will take judicial notice of it (T.T.C., Section 21). When, however, as in this case, there is a dispute as to the existence or effect of local custom, and the court is not satisfied as to either its existence or applicability such custom becomes a mixed question of law and fact, and the party relying upon it must prove it by evidence satisfactory to the court.” *Titus v. Trust Territory of the Pacific Islands*, Truk District, Criminal Case No. 146.

[10, 11] Section 715, Trust Territory Code provides that the High Court may enter a decree confirming an annulment, divorce or adoption in accordance with recognized custom. The court considers that a confirmation of the marriage and subsequent divorce of the parties hereto may properly be entered in this case. Also, as we have long recognized that the rights of children should be given special recognition and jealously guarded by the courts, we believe that the District Court should hold further hearings and enter a further order after its determination as to whether child support money is or is not payable in this case, and as to other appropriate matters.

Accordingly, it is ordered, adjudged, and decreed as follows:—

1. In 1960 Elisinery J. Mutong, female, and Pelerino Mutong, male, in Ponape District, in what is now the Trust Territory of the Pacific Islands, were duly married in accordance with recognized custom; that thereafter in December, 1963, the same parties were duly divorced in accordance with recognized custom from the bond of marriage between them, and that their marriage to each other was thereby dissolved, effective at that time, under recognized custom.

2. The above-mentioned marriage and the above-mentioned divorce between Elisinery J. Mutong and Pelerino Mutong, are hereby confirmed in accordance with Section 715, Trust Territory Code; and said Elisinery J. Mutong and Pelerino Mutong are determined to have been bound by the bond of the said marriage until their divorce in December 1963.

3. Nothing contained in the above two paragraphs shall become absolute until the period for appealing has expired without any appeal having been filed, or until any appeal taken shall have been finally disposed of.

4. The judgment entered by the District Court in its Civil Action No. 833 is hereby vacated and set aside.

5. This action is remanded to the District Court, Ponape District, with direction to re-open the trial and take evidence as to:— .

(a) The name, age, and sex of the children born to the said Elisinery J. Mutong as a result of her marriage to the said Pelerino Mutong;

(b) The existence and effect of any recognized local custom, if such custom exists and if it has effect, as to the responsibility of either of the above-named parties, or both of them, to provide for the support and maintenance of the said children.

6. The court is to consider all such evidence as well as the evidence introduced at the previous trial and then render a new judgment concerning the care and custody of the said children, their support and maintenance, and the rights of visitation between the children and their parents, in accordance with applicable Ponapean custom and the best interests of the children.

7. No costs are assessed against any party.