IN THE SUPREME COURT
REPUBLIC OF NAURU

Not Restricted

Civil Case No. 15 of 2012

Between:

Gad Demaunga
(trustee of Melson Demaunga) — Plaintiff

And:

Nauru Lands Committee — 1st Defendant

And:

Christina Dongobir — 2nd Defendant

JUDGE:	Eames, CJ.
WHERE HELD:	Nauru
DATE OF HEARING:	23 November 2012
DATE OF JUDGMENT:	27 November 2012
CASE MAY BE CITED AS:	Gad Demaunga v NLC & Another
MEDIUM NEUTRAL CITATION:	[2012] NRSC 18

Catchwords

Adoption – Succession – *Administrative Order No 3 of 1938* - Nauru Lands Committee grants equal shares to an intestate estate to the plaintiff, a natural child, and the 2nd defendant – 2nd defendant claimed to have been subject of customary adoption after 1965 –Whether customary adoptions after 1965 no longer effective to grant interest in estate of adopting parents, by virtue of *Adoption of Children Act* 1965–Whether Act was a Code replacing customary adoptions with a statutory scheme.

APPEARANCES:	Counsel
For the Plaintiff	Mr V Clodumar (Pleader)
For the 1st Defendant	Ms L Lo Piccolo (Secretary for Justice)
For the 2nd Defendant	In person

CHIEF JUSTICE:

1 This case raises the question of the rights of succession to an intestate estate by a person who claims to have been subject of a customary adoption by the deceased which had taken place after the commencement of the *Adoption of Children Act 1965 ("The Act")* but which was not formalised under that Act.

2 The Nauru Lands Committee was called upon to determine the distribution of the intestate estate of Cecilia Demaunga, who died in 2009. The Committee conducted family meetings, in compliance with the directions of *Administrative Order No 3 of 1938* concerning distribution of intestate estates.

3 The plaintiff, Melson Demaunga, is the sole natural child of the late Cecilia and Jonathan Demaunga. At the time of his mother's death he was twelve years old. The plaintiff is his guardian, and he claimed that, as the only child, Melson should gain the entire estate of Cecilia.

4 In family meetings conducted by the Committee, claims to an interest in the estate of Cecilia were also advanced by Christina Dongobir. Christina Dongobir is the natural daughter of Tiko and Villa Dongobir, and was born in 1983. She claimed that she was the adopted daughter of Cecilia and Jonathan Demaunga, a customary adoption, not one applied for or registered under the terms of the Act.

5 Several meetings were held by the Committee and at the meeting on 15th of September 2010 Christina Dongobir's claim to be the adopted daughter was supported by witnesses, including her natural parents, Tiko Dongobir and Villa Dongobir. Villa Dongobir is the sister of Gad Demaunga and of the late Jonathan Demaunga. Jonathan Demaunga was the father of Melson Demaunga.

6 Mr Clodumar, for the plaintiffs, conceded that Cecilia and Jonathan had taken Christina Dongobir as an infant with the intention to adopt her, but Gad Demaunga and others contended to the Committee that a customary adoption had not taken place because Cecilia

and Jonathan Demaunga had subsequently revoked their agreement to adopt Christina.

7 At that meeting the Committee expressed the opinion that Christina Dongobir could not claim an interest in the estate of Cecilia Demaunga because she had not been formally adopted under the 1965 legislation. The Committee so concluded because it was acting on the advice of the former principal legal officer of the Department of Justice who had advised them that by virtue of the introduction of the 1965 legislation and by virtue of the operation of section 3 (2)(b) of the *Custom and Adopted Laws Act 1971*, customary adoption "had been abolished". The Committee advised the meeting that it would therefore publish a determination in which it would declare Melson to be the sole beneficiary of the estate.

8 Subsequent to that meeting, and upon receiving further submissions on behalf of Christina Dongobir, the chairperson of the Nauru Lands Committee sought a further opinion, and contacted the then Secretary for Justice, Mr Lambourne.

9 In his opinion dated 29 September 2010 contended that the question was governed by the terms of s.3(1)(c) of th*e Custom and Adopted Laws Act* 1971, not by s.3(2)(b). He advised that the Committee had been acting on incorrect advice when they rejected the claim based on the customary adoption of Christina.

10 That provision reads:

> **3. Nauruan institutions, customs and usages**
> (1) The institutions, customs and usages of the Nauruans to the extent that they existed immediately before the commencement of this Act shall, save in so far as they may hereby or hereafter from time to time be expressly, or by necessary implication, abolished, altered or limited by any law enacted by Parliament, be accorded recognition by every Court and have full force and effect of law to regulate the following matters:
>
> (a) title to, and interests in, land, other than any title or interest granted by lease or other instrument or by any written law not being an applied statute;
>
> (b) rights and powers of Nauruans to dispose of their property, real and personal, inter vivos and by will or any other form of testamentary disposition;
>
> (c) succession to the estates of Nauruans who die intestate; and
>
> (d) any matters affecting Nauruans only.

(2) Any custom or usage by which:

(a) any person is, or may be, entitled or empowered to take or deal with the property of any other person without that person's consent; or
(b) any person is or may be entitled or empowered to deprive the parents of a child of its custody and control without their consent;

is hereby abolished.

11 I agree with Mr Lambourne that s.3(2)(b) was not relevant to the question whether customary adoptions were no longer effective for claims to the estate of an adopting parent. That provision, as Mr Lambourne pointed out, deals only with any customary practice whereby parents could be deprived of custody of their child without their consent. Mr Lambourne advised the Committee that s.3(1)(c) was the important provision, because it required that recognition be given to customary practices concerning the right to succession of intestate estates by virtue of customary adoption. That custom could only be overturned by legislation that expressly or by necessary implication abolished, altered or limited that cultural practice. Parliament had not passed such a law.

12 As I shall discuss, however, I do not agree with Mr Lambourne's opinion that when it came into effect in 1971 s.3(1)(c) governed the question, but he was correct to say that customary rights could only be removed by statute. In my opinion, in 1965 Parliament had already abolished the succession rights claimed by way of customary adoption.

13 Without holding a further meeting to advise Gad Demaunga of that changed advice, the Committee published a determination on 12 January 2011 which gave Christina and Melson an equal share of Cecelia's estate.

14 Having unwittingly allowed the time limit to expire for an appeal under s.7 of the *Nauru Lands Committee Act* 1965, the plaintiff sought, and obtained, leave to commence proceedings for judicial review of the Committee's decision.

15 The initial decision of the Committee to reject Christina's claim was solely based on their first legal advice. Prior to receiving that advice, the Committee had very often heard and accepted claims by adopted children to the estates of their adopting parents. The question whether a claimant had been adopted was an issue that the Committee regarded itself as

competent to resolve in the event there was a dispute, and had often performed. The members of the Committee issued a statement in June 2012 explaining their final decision, which they said "was based on customary adoption". They added:

> "Custom is that if a child was taken from childhood, they are naturally included as siblings (if recognised by family). This is a privilege given to the child as a gift.
>
> However, the child is still entitled to any shares of the biological parents as the child is still registered in their names. The adopted siblings do not have the right of shares in the biological siblings.
>
> (The Committee) truly believed that it is their duty to uphold the way of custom as it is still practised and recognised to date".

16 Although there is a significant factual dispute as to whether Christina's customary adoption was completed, or had been revoked, the parties agreed that I should first deal with a preliminary question, namely, whether a person could be a beneficiary of a deceased estate by virtue of customary adoption by the deceased that occurred after 1965, or whether it was essential that the adoption had been formalised pursuant to the *Adoption of Children Act*.

17 This is an important question for the Nauruan community.

18 Section 3(1) of the *Custom and Adopted Laws* Act 1971 preserved customs "to the extent that they existed immediately before the commencement of this Act". There is no doubt, and it is agreed on all sides, that at the time the 1965 Act was introduced there was an existing customary practice of adoption, which governed rights of succession. The principles relating to the rights of adopted persons were known to, and had been applied by, the Nauru Lands Committee for many decades. As I shall discuss, the Committee might well have done so on occasion in ignorance of rulings by the Supreme Court as to the effect of the Act.

19 Mr Clodumar submitted that the 1965 Act was a Code concerning adoption and rights to succession to deceased estates, both estates of natural parents and of adopting parents. The Parliament intended to deny recognition to customary adoptions for the purpose of succession, he submitted, those rights being available only to those who followed the

procedures for adoption set out in the Act. Upon an adoption order the rights of the adopted child were those set out in the Act, not any rights held by virtue of customary adoption.

20 One feature of customary adoption was that the adopted child not only gained rights to the estate of his/her adopting parents but also retained rights to the estate of his/her natural parents. The 1965 Act, by s.17(1) declared, however, that upon the making of an adoption order under the Act, any rights to the estate of the natural parents were extinguished. Mr Clodumar submitted that parliament intended, thereby, that the rights of succession of a person adopted after 1965 under customary law ceased altogether, unless they gained a formal adoption order under the Act. Only a person adopted after 1965 pursuant to the terms of the Act would have a right to succession, he submitted, and that right would be confined to the estates of the adopting parents.

21 The apparent harshness of that result would be ameliorated, Mr Clodumar submitted, by virtue of the fact that *Administration Order No 3 of 1938* allowed the Nauru Lands Committee to grant an interest in an estate to any person, including a person adopted under customary law, provided the relevant families agreed[1].

22 However, where, as in this case, there was no agreement among family members that, by virtue of customary adoption, a child had gained a right to share the estate of an adopting parent, it must follow from Mr Clodumar's submission that the Committee would not be entitled to grant such an interest under customary law, even if satisfied that the adoption had been completed, and that the adopted sibling had been treated as a member of the family. That constitutes the loss of a potentially significant benefit which would have been available under customary law. If parliament was intending to remove that valuable right, then it must have said so in clear terms[2]. The fact that the legislation contains a detailed exposition of the rights and obligations of those concerned, in this case, with

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[1] *Eidawaidi Grundler v Eibaruken & Others*, Thompson C.J. 8 May 1973, Nauru Law Reports [1969-1982] Part B, 92 at 94

[2] *Wade v New South Wales Rutile Mining Co Pty Ltd* (1969) 121 CLR 177; [1969] ALR 577; *Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Cmrs* (1927) 38 CLR 547, *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981)147 CLR 677 at 683 per Mason J; *Momcilovic v The Queen* (2011) HCA 34, at [444]; Halsbury's Laws of Australia, "Statutes", "Interpretation and Construction", [385-310], Lexis Nexis.

adoptions would indicate an intention "to formulate a comprehensive and exclusive code thereby displacing existing common law principles regulating property rights"[3].

23 If Mr Clodumar's contention is correct, then, in the case where the estate was that of a natural parent - rather than that of an parent who adopted the child under customary law - the child would retain the right to claim the estates of his/her natural parents, a right recognised under Nauruan custom and in law by *Administrative Order No 3 of 1938*. Thus the child would retain an entitlement to claim on his/her natural parents' estate that would have been denied had the adoption been achieved under the Act, although the child would lose any right to claim the estate of the adopting parent.

24 The question whether the 1965 Act was intended, and had, the consequence for which Mr Clodumar contends, turns not on the terms of s.3 of the *Custom and Adopted Laws Act 1971* but on the terms of the 1965 Act. Mr Clodumar contends that the 1965 Act had extinguished a right to succession by virtue of a customary adoption that had taken place after 1965. If that is so, then the customs of Nauruans had already been modified by the 1965 Act, in advance of the statutory protection of customs (as they existed in 1971) that was achieved when the *Custom and Adopted Laws Act* came into effect.

25 In determining whether parliament intended to create a Code it is relevant to look at what was the previous law (in this case, unwritten customary law) and what were the apparent reasons for making alterations to that law[4].

26 The *Adoption of Children Act* provided a comprehensive scheme, with clear principles governing rights to apply for a grant of custody and the consequences of such an order. It is notorious that over many years informal custody arrangements had been entered throughout the island and the question of succession rights upon adoption had frequently been contentious. The circumstances surrounding customary adoptions and evidence of the motives and intentions of various parties as to whether an arrangement was to constitute a customary adoption were often uncertain. The absence of a recognised scheme whereby adoptions could be registered, and proved, was a serious problem. Often

[3] *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677 at 683, per Mason J.
[4] *Wade v NSW*, supra, at 185, per Windeyer J

problems arose about the rights to travel, banking and other matters because persons could not simply and quickly prove their status as adopted children. It was the Nauru Lands Committee which bore the burden of trying to resolve these questions, and to do so without any clear statutory guidance.

27 The 1965 Act provides that it is the Family Court that is empowered to make adoption orders and the Court may receive applications to that end (s.4). No provision is made for the Nauru Lands Committee to determine who has been adopted, nor does s.4 provide that the application is to be considered by reference to customary laws of adoption.

28 The Act sets out conditions for applications by sole and joint applicants (ss.5 and 6), requires a certain age for the applicants, and provides for applications by married applicants (s. 7), requiring consent of both spouses. A sole male applicant could not adopt a female child except in exceptional circumstances (s.8).

29 The Act provides that a Nauruan may only adopt a Nauruan child, and a non Nauruan may only adopt a non-Nauruan child (s.9). Such questions have caused difficulty in the past for the Nauruan Lands Committee. In *John Aremwa & others v The Nauru Lands Committee,* Thompson, C.J. considered a case where a non-Nauruan child became a member of a Nauruan family but was not "formally" adopted. The Committee decided that the child was not entitled to share in his adopting mother's estate because he was not Nauruan. The Chief Justice concluded that Nauruan custom did not permit succession by a non-Nauruan, but having heard evidence of some instances where that had occurred, he held:

> "In my view, the circumstances in which Guado inherited the land are as consistent with his having been accepted as Nauruan by the Council of Chiefs as they are with his having inherited the land as a non-Nauruan. The history of Nauru is full of instances of non-Nuruans having been adopted into the Nauruan community and thereafter accepted as Nuarans. Before the Nauruan Community Ordinance 1955-1966 was enacted there was no statutory basis for this: that Ordinance now provides such a basis".

30 In Papua New Guinea, a Customary Adoption Bill was introduced in 1969 "to ensure

that the customary practices of the peoples of Papua New Guinea could continue and receive a legal recognition when the parties wanted that done"[5]. Part VI of the *Adoption of Children Act 1968* thus provides:

> **53.** ADOPTIONS BY CUSTOM.
>
> (1) Notwithstanding any other law but subject to this section, where a child is or has at any time been in the custody of and is being or has been brought up, maintained and educated by any person or by two spouses jointly as his, her or their own child under any adoption in accordance with custom, then for the purposes of any law the *child shall be deemed to have been adopted* by that person or by those spouses jointly, as the case may be.
>
> (Emphasis added)

31 No similar provision appears in the Nauru legislation. There is neither express acknowledgment that customary adoptions will continue to be given effect nor a statement that they will not. The above provision in PNG does not make such a clear statement, either. Section 53 of the PNG Act would not answer the question before me, since it merely provides a simplified means of proof that adoption had occurred, and by whom. Since nothing in the 1965 Act expressly confirms or denies the continued validity of customary adoption, then if it was intended to extinguish customary rights to succession for those adopted by custom after 1965 that intention must be manifest from the terms of the Act, when read together[6].

32 Section 17 of the *Adoption of Children Act* reads:

> **17 Effect of adoption order**
>
> (1) Upon the making of an adoption order, the rights, duties, obligations and liabilities of the natural parent or the guardian of the adopted child in relation to the custody, maintenance and education of the child . . . are extinguished, and every such right, duty, obligation and liability vests in, may be exercised by, and is enforceable against, the adoptive parent of the child as though the child was born to the adoptive parent in lawful wedlock.
>
> (2) Where a child has, under this Act, been adopted by a husband and wife jointly, the child shall . . .be deemed by the court exercising jurisdiction in the matter to have been born to the husband and wife in lawful wedlock.
>
> (3) . . . the adopted child is entitled to succeed (whether upon an intestacy, under a

[5] See *Elijah v Doery* [1984] PGNC 16.
[6] The Act must be construed as a whole: per Windeyer J, *Wade v NSW Rutile Mining Co Pty Ltd*, (1969) 121 CLR 177 at 186.

disposition or in accordance with Nauruan custom) to the real and personal property of the adoptive parent to the same extent as if the child was born to the adoptive parent in lawful wedlock.

(4) An adopted child does not have;

(a) a right of succession to the real or personal property of a relative of the half blood of his adoptive parent:

(i) upon the death of the relative, intestate; or

(ii) in accordance with Nauruan custom, upon the death of the relative; or

(a) a right to any real or personal property under a disposition made by a person, other than the adoptive parent, in favour of the issue, child or children of the adoptive parent, unless it appears that the person making the disposition intended to include the adopted child as an object of the disposition.

(5) . . . an adopted child does not have a right of succession to any real or personal property of his natural parent or parents to which, if the adoption order had not been made, the child would have been entitled (whether upon an intestacy, under a disposition or according to Nauruan custom) as a child born to his natural parents in lawful wedlock, unless, in the case of a disposition, the child is expressly named in the disposition.

(6) The making of an adoption order does not deprive an adopted child of:

(a) a right to succeed to any real or personal property of a relative of the half blood of a natural parent of the child:

(i) upon the death of the relative, intestate; or

(ii) in accordance with Nauruan custom, upon the death of the relative; or

(b) a right to any real or personal property under a disposition made by a person, other than the natural parent or parents of the child, in favour of the issue, child or children of the natural parent or parents of the child, unless it appears that the person making the disposition intended to exclude, as an object of the disposition, such child or children of the natural parent or parents as are adopted by a person other than the natural parent.

(7) An adoption order does not affect any estate, right or interest in real or personal property to which a person has become entitled, whether mediately or immediately, in possession, expectancy or contingency by virtue of a disposition made before the making of the adoption order or by virtue of a devolution by law, or in accordance with Nauruan custom, on the death of a person dying before the making of the adoption order.

(8) The law and customs for the time being in force in the Island with respect to the marriage of persons within the prohibited degrees of consanguinity or affinity that affect, at law, the validity of marriages in fact celebrated, and sections 222 and 223 of the *Criminal Code 1899*, apply to and in relation to a child adopted in pursuance of this Act, both with respect to the relatives by adoption of the child and with respect to the relatives by blood of the child.

33 Those provisions are to be read with the extensive list of matters in s.11 upon which the Court must be satisfied before it grants an adoption order. Those matters include ensuring

that consents have properly been obtained from relevant people; that the full effect of the order has been explained; that the interest of the child is being promoted; that no payment has been made for consenting to the adoption.

34 Section 10 sets out a rigorous regime for ensuring consents from relevant people, including those who will have to support the child; for dealing with people who are unable to consent; requiring that the person consents in writing or gives evidence on oath; prohibiting withdrawal of consent, without leave; seeking enquiry from the President or the Clerk where appropriate. Section 10(7) provides that it will be "in accordance with the customs and usages of Nauruans" that the Court will determine who is a person who is liable to contribute to the support of a child or is deemed to be in charge of the child.

35 These and many other provisions suggest strongly that parliament intended the Act to codify the law on adoption, and to address the very matters that on occasions might have been overlooked or caused difficulties or controversy with customary adoptions. Customary law was acknowledged, but was not allowed to undermine the principles stated in the Act.

36 The plain intention of Parliament to deny rights that existed under customary law may be seen in s.17(5). That subsection provides that upon making a custody order under the Act the adopted child no longer has any right to succession to the estate of his natural parents to which he would have been entitled "according to Nauruan tradition" if the adoption order had not been made. Likewise, s.17(3) provides that after the making of an adoption order the child is entitled to succeed to the estate of the adopting parents "whether upon an intestacy, under a disposition or in accordance with Nauruan custom". Thus, the provision allows the Nauru Lands Committee to continue to play its role, in the case of an intestacy, interpreting customary law, but confines the child's claims to the estate of the adopting parents.

37 This legislation recognises and eases the task of the Committee, providing a simple way of determining whether an adoption has occurred. That question is answered by registration of the adoption (s.22).

38 In section 21 parliament had regard to the situation of a person who had been the subject of customary adoption prior to 1965. It permitted those who had been subject to a customary adoption to apply to have the adoption registered under the new Act, without having to comply with all of the consent requirements set out in s.10. It did not similarly address persons who had been adopted after 1965. It did not need to if it was the case that it was intended that adoptions after 1965 were to be governed by the Act, not by way of customary adoption.

> **21 De facto adoptions**
>
> (1) In this section, ***'child'*** means a person under or over the age of twenty-one years who, before the date of commencement of this Act, was in the custody of another person, or of a husband and his wife jointly, and was being or had been brought up, and maintained by that other person, or the two spouses jointly, as his or their own child.
>
> (2) A person or a person and his spouse jointly may apply to the Court for an adoption order in respect of a child and the Court, if it is satisfied that in the circumstances of the case it is just and equitable and, in an appropriate case, it is for the welfare of the child so to do, may make an order directing that the applicant or applicants shall be deemed to be or deemed to have been the parent or parents of the child and that the child shall be deemed to be or to have been the child of the applicant or applicants.
>
> (3) A child or a person acting on his behalf may apply to the Court for an order that the child shall be deemed to be or deemed to have been a child of a person or of a husband and his wife jointly if he had been brought up and maintained by that person, or those two spouses jointly as his or their own child and, in the case of the person, he is dead or unable to make an application under the last preceding subsection, or, in the case of the husband and wife:
>
> (a) both are dead; or
>
> (b) both are or the survivor of them is unable to make an application under the last preceding subsection.
>
> (4) The Court, if it is satisfied that it is just and equitable and, in an appropriate case, for the welfare of the child so to do, may make the order referred to in the last preceding subsection, but the Court shall not make the order, if to do so would:
>
> (a) deprive a natural child or an adopted child of a person of a share or part of a share in the estate of the person who died before the date of the application; or
>
> (b) cause the administration of the estate of a person to be re-opened.
>
> (5) The Court may make an order referred to in this section:
>
> (a) notwithstanding that the parent is a male and the child is a female; and

(b) if the Court considers that it is just and equitable and in an appropriate case, for the welfare of the child so to do, without requiring the consent of any of the persons specified in section ten of this Act.

Decisions of the Court

39 Questions concerning the rights of children by virtue of customary adoption continued to come before the Nauru Lands Committee and the Supreme Court after 1965 but generally not concerning adoptions that had taken place after the Act was introduced. There have been some clear indications, however, that the 1965 Act was regarded by the Court as constituting a Code.

40 In *Edowe Apin v Nerina Apin & Others*[7] Barry Connell C.J. dealt specifically with the case of a child adopted under customary law, but not under the Act. His Honour heard evidence disputing that three children had been adopted under customary law and were entitled to share in an estate. An arrangement had been made to have a document certified in the office of a solicitor expressing the wish that the three children be given the common surname. His Honour held that that procedure was not in accordance with the *Adoption of Children Ordinance*. He doubted that that would constitute evidence of a customary adoption, in any event, but he added:

> "However, more importantly, for an adoption to be given credence, it must, if sought after 1965, comply with the procedure laid down in the *Adoption of Children Ordinance 1965-67*. This Ordinance applies to all children under the age of twenty-one years who had never been married and were to be the subject of an adoption"

41 Connell C.J. referred to *Eidawaidi Gundler v Eibaruken Namaduk and Others*[8], a decision of Thompson C.J. who held that a child adopted under Nauruan custom was a "child" under Reg 3(c) of the *Administration Order No 3 of 1938*. Connell C.J. held that "in the light of the present legislative provisions governing adoption, customary procedures previously accepted would not now be acceptable to the Court". He added:

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[7] Land Appeal No 1 of 2000, delivered 2 August 2001.
[8] Land Appeal No 14 of 1972 and No 8 of 1973, 8 May 1973, Nauru Law Reports [1969-1982], Part B, 92, Judgment 8 May 1973.

> "The *Adoption of Children Ordinance 1965-67* is carefully drawn legislation to govern the adoption of children. It is now necessary to obtain from the Family Court an adoption order, and to have such order registered before the Court will give credence in law to an adoption post-1965."

42 There is no inconsistency between the conclusions reached by their Honours. In the case of *Grundler v Namaduk* the customary adoption was held by Thompson C.J. to have been completed in about 1912, and the adopting mother died in 1938. Thus, the question of the effect of the *Adoption of Children Act 1965* did not arise. Likewise , in *John Demaure v Adamo and Others*, which involved an interesting discussion by Thompson, C.J. about the rights of adopted children under customary law, the issue again did not arise, as the adoption took place in about 1930.

43 Another case that did involve a post 1965 adoption was *Hedmon v Nauru Lands Committee*[9] .

44 In that case the child was born in 1967 and when a month old, and in accordance with custom, was taken by adopting parents to be brought up. The child lived with the adopting parents until the death of the adopting mother in 1975. Her estate was in question. Thompson C.J. observed: "Unfortunately they did not apply to adopt him formally; if they had done so, the circumstances giving rise to these proceedings would not have arisen."

45 The learned Chief Justice was concerned with a complicated application to have declared invalid a transfer under s.3 of the *Lands Act 1976* of a share of the adopting mother's estate to the adopted child. The customary adoption by one couple had subsequently been proposed to be replaced by a formal adoption by another under the Act, but that proved impossible to achieve as the wife was not Nauruan. His Honour's remarks, in passing, did not arise from a discussion as to the effect of the 1965 legislation on customary adoptions. His Honour is expressing the truism that in many cases where customary adoption was relied on, resolution of the question would have been much simpler had a formal adoption taken place. That is not to say that formal adoption was an

[9] [1980] NRSC 8 [1969-1982] NLR (A) 154, 15 August 1980.

essential pre-requisite for a claim by an adopted child. He did not appear to be deciding that question, although he may have presumed it to be so.

46 In an earlier decision, in 1976, Thompson C.J. had indeed implied that the 1965 Act was a Code.

47 In *Rongorongo v Secretary of the Nauru Local Government Council*[10], the Chief Justice had to consider (inter alia) whether the plaintiff was a member of the Nauruan Community by reason of his having been brought up by Nauruan 'parents'. On the facts before it, the Court held that the adoption was not complete by the time the *Adoption of Children Act 1965* came into effect, due to the fact that the plaintiff had not assimilated with Nauruan Community as was required by pre-Second World War custom.[11] The Court went on:

> "After March, 1965, it could not be completed, except by an adoption order made under section 21 of the *Adoption of Children Ordinance 1965*. However, by reason of section 9(1) of that Ordinance no such Order can be made, as [the parents] were Nauruan, and the plaintiff was non-Nauruan."

48 This finding proceeds on the assumption that 1965 Act is to be read as a Code, and that adoptions which do not comply with the requirements of the Act cannot be recognised as such. However, the learned Chief Justice, once again, was not specifically addressing the issue that arises in this case.

49 In *Leon Adeang v Monaro Mwareow and Anor*[12] Barry Connell C.J. also presumed that formal adoption was necessary if a child was to succeed to an estate of an adoptive parent by determination of the Nauru Lands Committee. Referring, it seems, to the 1965 Act, he observed:

> "I have one query, and that is over the adopted child. It is understood that application has been made to the Family Court, prior to the death of Anna Maria Adeang, but so far the child has not been formally adopted as yet. As the adoption has not been processed for whatever reason, it is clear that further steps are necessary before any claim on behalf of Gwendolyn can be considered to the estate".

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[10] [1976] NRSC (A) 42

[11] *Rongorongo v Secretary of the Nauru Local Government Council* [1976] NRSC (A) 42 p 4.

[12] Land Appeal No 3 of 2002, 29 October 2002.

50 In an earlier decision, *Maria Denuga v Nauru Lands Committee and Others*[13], Barry Connell C.J. similarly acknowledged that the *Adoption of Children Ordinance* had modified customary adoption laws. He acknowledged that before legislation had been passed on the subject, customary adoptions were given wide recognition. He noted that: "now with independence, Nauru enacts its own Statute law while at the same time recognising and retaining early custom and customary laws. An example of that progression can be found in the *Adoption of Children Ordinance* 1965". His Honour then set out sections 17(1)(2) and (3).

51 Although not all of those cases directly address the issue before me, they strongly imply that the 1965 Act was treated as a Code by the Court and the decisions of Connell C.J to which I have referred are quite specific about the impact of the Act. In my view, I should follow those decisions unless I think them to be clearly wrong.

Conclusion

52 In my opinion, the Nauru Lands Committee had made the correct decision in the first instance, when it concluded that Christina Dongibar was not entitled to share in the estate of Cecelia Demaunga. The claim was made on the basis of a customary adoption. Even assuming the evidence supported her claim that the adoption had been completed and was not revoked, it occurred after 1965 and was not the subject of an adoption order under the *Adoption of Children Act* 1965. Parliament removed the right of an adopted child to claim an interest in the estate of adopting parents unless the adoption was made under the Act.

53 In the event of intestacy, Christina retains rights to succeed to the estate of her natural parents. Furthermore, as Mr Clodumar acknowledged, the family of Cecilia Demaunga could agree at a family meeting to provide a share of Cecelia's estate to Christina, notwithstanding that she would not otherwise be eligible. In the event of agreement the Nauru Lands Committee would then be entitled to make a determination acknowledging her interest in the estate. That would constitute the exercise of charity and benevolence on the part of family members, including the infant plaintiff and his guardian.

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[13] Land Appeal No 4 of 1996, Civil Action No 12 of 1996, judgment 19 december 1997.

54 The determination of the Nauru Lands Committee published in GN No 21 of 2011, on 12 January 2011 is quashed. The matter will be referred back to the Committee to convene a family meeting and to make a fresh determination according to law.

Geoffrey M Eames
Chief Justice
26rd November 2012