

Modes of Divorce under Myanmar Customary Law

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Abstract

A marriage may be dissolved at any time provided both parties assent. But one of a Myanmar Buddhist married couple cannot claim to divorce the other without proof of any matrimonial fault on that other. In Myanmar Customary Law there are three mainly kinds of divorce. They are (1) divorce by mutual consent (2) divorce when the husband enter into priesthood or *rahan* and (3) divorce by matrimonial faults. After a married couple divorced they have to sue for partition on both parties. At the time of divorce and partition of property Myanmar Buddhist couples usually settle everything about the custody of their children.

Introduction

A marriage amongst Myanmar Buddhists may be dissolved at any time by the consent of both parties. There are three kinds of dissolution of marriage under Myanmar Customary Law. They are divorce by mutual consent, divorce when the husband enters into priesthood or *rahan* and divorce by matrimonial faults. The mutual consent divorce is the commonest form of divorce amongst the Myanmar Buddhist. In matrimonial faults there are ordinary matrimonial faults and grievous matrimonial faults. In ordinary matrimonial faults the injured person can claim to divorce the marriage tie. But if one of a married couple commits grievous matrimonial fault the other party can claim divorce and the guilty party will be forfeited his or her share of the joint property on divorce.

Any one spouse of married couple may not sue for partition of his or her share in all joint properties during the subsistence of their marriage. However, after a married couple divorced they have to sue for partition on both parties. At the time of divorce and partition of property Myanmar Buddhist couples usually settle everything about the custody of their children.

According to Myanmar Customary Law there are three main kinds of divorce: divorce by mutual consent; divorce when the husband enters into priesthood or *rahan*; and divorce by matrimonial faults.

Divorce by Mutual Consent

Marriage by the Myanmar Customary Law is purely a civil contract, terminable at any time by mutual consent or under circumstances, against the will of the parties.¹

When the husband and wife no longer desire to continue the marriage tie, they may both agree to dissolve the same and in that case there is no difficulty. Mutual consent divorces are either *bona fide* or *sham*.²

Bona Fide Divorce

The commonest form of divorce amongst the Myanmar Buddhist is known as *bona fide* mutual consent divorce. The vast majority of such divorces are the result of momentary quarrels and a large percentage of them are followed by a re-union in the end.³

¹ E Maung, Dr., *Burmese Buddhist Law*, 1970, p.77.

² Lahiri, S.C., *Principles of Modern Burmese Buddhist Law*, 1957, 6th Edition, p.90.

³ *Ibid*.

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Bona fide mutual consent divorce must not be a hole- and- corner or secret affair. For such a divorce must be some formal and mutual agreement or expression of consent.⁴ Mere sending a letter to the wife intimating an intention to divorce her when she was out of her mind would not suffice to dissolve the marriage tie.⁵

In the case of *Maung Tin Saw vs. Ma Thein Mya*⁶ it was held that where any angry wife sends to her husband a hasty rejoinder containing expression which do not mention a proposal or even an agreement that a divorce should be effected between them or which do in themselves operate to effect a divorce, this cannot be taken advantage of by the husband to entitle him to consider the marriage as dissolved.

A mutual consent divorce is valid without a decree of the Court or a deed of divorce or the presence of the elders.⁷ But if a deed of divorce be drawn up it must be on a properly stamped paper as required under the provision of the Stamp Act.⁸

If a divorce deed is lost and secondary evidence is inadmissible, a party cannot prove the divorce by oral evidence.

With regard to this fact the Court had decided in the case of *Maung Aung Hla vs. Ma Shin*⁹ that-

“Where a divorce deed is lost and secondary evidence is inadmissible, a party to the suit cannot prove the divorce by the oral evidence although a valid divorce and partition of property can be affected orally.”

So, under Myanmar Customary Law a marriage may be determined at any time provide both parties assent. Marriage is as easily dissolved as it is contracted amongst Myanmar Buddhist by mutual consent.

Sham Divorce

Besides *bona fide* divorce there is another kind of divorce known as sham divorce. There is a peculiar custom amongst the Myanmar Buddhist where by a sham divorce sometimes takes place between a married couple.¹⁰

In order to get rid of illness or other ill-luck a temporary sham divorce, as recommended by a consulting astrologer until such time as the planets are favorably placed, is affected for a specified time. When stated time is over, the couple resumes cohabitation without a formal remarriage. This is known as *kyobye-nanbye* divorce.¹¹ The custom of *kyobye-nanbye* divorce is practically dead. It was not meant to be real, to ward off evil influence of the planets on the fortune of husband and wife.¹²

Karma or destiny is the governing force in Myanmar life, and when the astrologers, after looking at the stars, say that the stars of the husband and the wife are not sailing along happily together but at angry cross purposes, then indeed there is the serious situation of *kan-ma-sat*, of destinies not link together, and a temporary divorce, just to please the stars or cheat

⁴ Chan Toon, *The Principle Buddhist Law*, 1894, p.52.

⁵ 10 B.L.R, 255.

⁶ 10 B.L.R, 255.

⁷ *Ma Hnin Ngon vs. Maung Aung*, S.J, 73.

⁸ Stamp Act, Schedule 1, Article 29.

⁹ 12 B.L.R, 317.

¹⁰ May Oung, U, *Leading cases on Buddhist Law*, 2nd Edition, 1926, P.93.

¹¹ Lahiri, S.C., *Principles of Modern Burmese Buddhist Law*, 1957, 6th Edition, p.91.

¹² E Maung, Dr., *Burmese Buddhist Law*, 1970, p.91.

them may be called for. Such a *kyobye-nanbye* divorce is recognized by the Courts as a temporary divorce.¹³

A great controversy has centered round the words *kanmasat* which occurs in *Manugye* but in no other *Dhammathats*. Dr. Richardson has translated the words as “destinies not cast together”. According to Sir John Jardin the expression means “destiny does not agree”. According to Dr. Forchhammer the words express the idea of a desire to separate so as to avoid the suffering of punishment of the sin of other. Mr. Justice May Oung translated the words to mean “fortunes not linked together”.¹⁴

Sham divorce is a peculiar custom amongst the Myanmar Buddhist. It was not meant to be real but such divorce is recognized by the Court as a temporary divorce.

Regarding this point, in the case of *Maung Ba Oh vs. Maung San Bu*,¹⁵ where the wife lays seriously ill, and the astrologer advised that a temporary severance was needed to get her star out of an eclipse, the husband gave her a document of divorce. The next day she died, their question arose whether the divorce was real or temporary, and the Courts with the High Court of Calcutta agreeing as the final Court held that it was a temporary divorce by recognized Myanmar custom.

Hence it may be said that sham mutual consent divorce is a temporary divorce or in Myanmar a *kyobye-nanbye* divorce. Sham divorce arises from Myanmar Custom. It was not meant to be real but such divorce is recognized by the Courts as the temporary divorce.

Divorce when the Husband Enter into Priesthood or *Rahan*

A man may enter the priesthood or *rahan* and leave the earthly life behind, and then, as it is said figuratively though not fully accurately, he “dies a civil death”. His wife is freed from the marriage bond, and may remarry. If, on the other hand, the man enters the priesthood only for a short period, to meditate and seek solace, or to appease his stars, then the wife waits.¹⁶

The *Manugye Dhammathat* says that if a husband who has a wife becomes *rahan*, she must wait seven days; if after seven days the *rahan* shall return to the world, he shall not claim her as his wife; let the wife have a right to take a husband.¹⁷

In the case of *Ma Pwe vs. Maung Myat Tha*¹⁸ it was held that when a man leaves his wife and children in order to live the life of a monk, he retains no further interest in the properties after his ordination.

Similarly, in *A.R.L.P Firm vs. U Po Kyaing*¹⁹ case the Court held that a Myanmar Buddhist who enters into the order of *rahan* (monks), with the intention of remaining therein permanently, automatically divests himself of all his interest in or title to property in his ownership or possession at the time of his ordination.

But after his ordination he is at liberty to accept gifts and thus acquire new property. In renouncing the worldly life, a *phongyi* intentionally severs himself from all earthly ties of relationship is deemed to remain. Ordination causes divestment of all earthly ties of relationship and property.²⁰

¹³ Maung Maung, Dr., Law and Custom in Burma and the Burmese Family, 1963, p.74.

¹⁴ Lahiri, S.C., Principles of Modern Burmese Buddhist Law, 1957, 6th Edition, p.94.

¹⁵ 1 B.L.R, 14.

¹⁶ Maung Maung, Dr., Law and Custom in Burma and the Burmese Family, 1963, p.76.

¹⁷ Manugye Book, V, 17.

¹⁸ 11 U.B.R(97-01), p.54.

¹⁹ 1939 R.L.R, 311(F.B).

²⁰ Ma Nyunt Sein vs. Maung Chan Mya, 11 L.B.R, 342.

Entry into Buddhist priesthood as a *rahan*, strictly should entail dissolution of marriage, but a custom has grown up of Buddhist male becoming a *dullaba rahan* for a definite period of short duration, it was not a permanent renunciation of secular life, the intention being to enter civil life at the end of period as *dullaba rahan* and resume his original life,²¹ whereas Maung Nyunt Tin vs. Ma Pu²² a man became a *rahan* intending to renounce secular life and not merely to become a *dullaba rahan* the marriage tie is severed.

Divorce by Matrimonial Faults

A marriage between Myanmar Buddhists is determinable by a Court of competent jurisdiction on proof of the commission by one party of a matrimonial offence.²³

A divorce cannot be had merely because one of the parties has no love for the other or does not comply with the desire of the other. But there can be a divorce at the instance of one party on account of some recognized matrimonial fault on the other. There are two kinds of matrimonial faults: ordinary matrimonial faults and grievous matrimonial faults.²⁴

Ordinary Matrimonial Faults

According to Myanmar Customary Law there are five kinds of ordinary matrimonial faults. They are: misrepresentation; adultery on the part of the husband; taking another wife by the husband; desertion and ordinary cruelty.

Misrepresentation: Where a man had been induced by misrepresentation to marry a girl or a girl had been induced by misrepresentation to marry a man, the deceived person may claim dissolution of the marriage.

Some passages in the *Dhammathats* suggest that discovery of defects in the bride, actively concealed by her parents and the man's misrepresentation that he did not have a wife living would be grounds for dissolution of marriage brought about by such concealment or misrepresentation.²⁵

Two instances only of the claim for divorce on allegations of misrepresentation appear in the law reports. Neither in Ma Khin vs. Maung Gale²⁶ nor in Mg Po Nyunt vs. Ma Saw Tin²⁷ the Court found it necessary to decide if such misrepresentation could be a valid ground for divorce. In the first of these cases, the misrepresentation alleged was found not proved; and the second case proceeded on other grounds. It does appear, however, that the rules in these *Dhammathats* are absolute and the alleged matrimonial faults are practically impossible to establish.²⁸

Adultery on the Part of the Husband: Adultery by a wife will entitle the husband to a divorce but adultery committed by the husband is not a ground for divorce unless being coupled with ill treatment, the misconduct amount to legal cruelty.²⁹

A wife may not sue for divorce on the ground that her husband has committed adultery, but this constitutes a good defense against his suit for restitution of conjugal rights.

²¹ E Maung, Dr., Burmese Buddhist Law, 1970, p.91.

²² 1954, B.L.R, p.76.

²³ Moothan, O.H.,Burmese Buddhist Law, 1939, p.35.

²⁴ Lahiri, S.C., Principles of Modern Burmese Buddhist Law, 1957, 6th Edition, p.95.

²⁵ E Maung, Dr., Burmese Buddhist Law, 1970, pp.90-91.

²⁶ P.J. 130.

²⁷ (1925) 3 Ran. 160.

²⁸ E Maung, Dr., Burmese Buddhist Law, 1970, p.91.

²⁹ Mootham, O.H, Burmese Buddhist Law, 1939, p.41.

With regard to this fact the Court had decided in the case of *Ma Thein New vs. Maung Kha*³⁰ that:

“Mere adultery on the part of the husband does not by itself entitle a wife to a divorce according to Myanmar Customary Law. A suit for restitution of conjugal rights lies under Myanmar Customary Law. But a husband will not obtain such restitution on account of his misconduct.”

Where a man slaps his wife once and cohabits with another woman and begets a child by her, the wife is entitled to divorce the husband.³¹

In the case of *Mrs R Joubert Bwa vs. Mr Joubert Bwa*³², it was held that having the venereal disease from the husband to the wife is an apparent fact that the husband committed adultery with a prostitute. Infecting the wife by mean of that way is other kinds of cruelty and entitled the wife to claim a divorce.

According to the *Dhammathats* a wife may discard a husband who is a drunkard and a gambler and who seduces other men’s wives.³³ If the husband keeps a paramour he is to leave the house with only the clothes he is wearing.³⁴ As the Myanmar Customary Law recognizes polygamy on the part of the husband³⁵ a wife may not sue for divorce on the ground that her husband has committed adultery, but this constitutes a good defense against his suit for restitution of conjugal rights.³⁶

Taking another Wife by the Husband: As a consequence of polygamy among Myanmar Buddhists having been recognized by the Court as the legal the taking of a second wife did not entitle the first wife to a divorce.

With regard to this fact the Court has decided in the case of *Ma In Than vs. Ma Saw Hla*³⁷ that:

“As the Manugye gave unrestricted liberty to take a second wife, the first wife’s claim to treat the exercise of such liberty as a matrimonial fault was rejected.”

As polygamy is legal, the husband’s taking another wife without the consent of the wife may, only under certain circumstances, give ground to that wife for a divorce.³⁸

The *Dhammathats* say that if the first wife is barren “that is, if she does not conceive after eight years” the husband may take another wife without her consent. This simple test of who is the barren one is also prescribed: “If the husband does not beget children with another wife, it cannot be said that his former wife is barren, for he it is who is unproductive. The property brought by him at the time of separation from the former wife shall now be restored to her.” Other good causes for taking another wife are wife’s bearing daughters only, or her being afflicted with leprosy or a similar disease, her immodest conduct.³⁹

In *Maung Hme vs. Ma Sein*⁴⁰ decided in 1891, a Full Bench of the Chief Court of Lower Myanmar laid down the rule that if any of these grounds exists, the husband does not

³⁰ (1929) 7 Ran. 451.

³¹ *Maung Ngwe San vs. Ma Gyi*, A.I R, 1929 Ran 64.

³² 1948 B.L.R p.132.

³³ U Gaung’s Digest, Vol.II, Section, 230.

³⁴ U Gaung’s Digest, Vol.II, Section, 256.

³⁵ *Ma Wun Di vs. Ma Kin*, 4 L.B.R. 175 (P.C)

³⁶ *Ma Thein New vs. Maung Kha*, 7 Ran 451.

³⁷ S.J.103.

³⁸ *Maung Maung, Dr., Law and Custom in Burma and the Burmese Family*, 1963, p.78.

³⁹ U Gaung’s Digest, Vol. II, p.191.

⁴⁰ 9 L.B.R, p.191(F.B).

need the wife's consent in taking a second wife; in the absence of the ground, the wife whose dignity is injured by the second marriage, may sue for divorce.

Maung Hme case dealt with the wife's right to divorce her husband if he took a second wife without her consent, and no judicial decisions exist which would support the husband's right to divorce the first wife if she is barren, or only bears female children, etc., and it would appear that the rule in *Dhammathats* that she may be "put away" on any of those grounds is obsolete and contrary to Myanmar social custom in which while sons are cherished daughters also enjoy equal standing in the family.⁴¹

Some *Dhammathats* would appear to allow the husband to take a second wife if the first wife gave birth to female children only. The same considerations as in the case of barren wife would seem to apply.⁴²

As the Myanmar family favours the equality of the sexes Myanmar Buddhist son and daughter have equal rights. As the Myanmar Customary Law is always changing it is not necessary to follow the old *Dhammathats*. In the *Dhammathats* some facts may not be suitable for the present conditions of Myanmar society. At the present day, the husband cannot take a second wife without the consent of first wife upon exceptional cases.

In the case of *Maung Ba Thaung vs. Ma On Hmyin*⁴³ it was held that if a Myanmar Buddhist husband takes a second wife without his first wife's consent, she has a right to divorce him even if she claims the right a couple of months after her husband's new marriage.

Moreover, in the case of *Maung Set Maung vs. Ma Kyin Thwe*⁴⁴ the Court decided that while the wife sues for divorce on the husband's cruelty if the husband takes another wife the wife has a right to divorce him.

Nowadays according to Myanmar Customary Law if a Myanmar Buddhist husband takes a second wife without his first wife's consent, she has a right to divorce him.

Desertion: Manugye says that desertion is a ground for divorce, if it is committed with the intention to end the marriage tie and persisted periods of time. If it is the wife who leaves the husband, the period is one year, at the end of which the husband may, by "an express act of volition," terminate the marriage tie. If the husband deserts, the wife must wait for three years, at the end of which she may actively sever the tie, such as by marrying again.⁴⁵

In the case of *Thein Pe vs. U Pet*⁴⁶ it was held that desertion for the specified period by itself and without any further or expressed act of volition on the part of either party to the marriage does not dissolve the marriage tie.

But in the case of *Ma Nyunt vs. Maung San Thein*⁴⁷ the Full Bench decision of Yangon High Court where it has been held that when a Myanmar Buddhist husband deserts his wife and for three years neither contributes towards her maintenance nor has any communication with her, the marriage tie is automatically dissolved on the expiration of three years from the date of desertion and no further and expressed act of volition on the part of one party to the marriage is necessary to effect a dissolution of the marriage.

⁴¹ Maung Maung, Dr., *Law and Custom in Burma and the Burmese Family*, 1963, p.78.

⁴² May Oung, U, *Leading Cases on Buddhist Law*, 2nd Edition, 1962, p.109.

⁴³ 9 B.L.J, 22.

⁴⁴ 1963, B.L.R (C.C) 295.

⁴⁵ Manugye, Book V, Chapter 17.

⁴⁶ 3 L.B.R. 175 (F.B).

⁴⁷ 5. Ran 537(F.B).

Before the independence of Myanmar, there are three conditions which are necessary to treat a Myanmar Buddhist marriage tie as automatically dissolved, namely:

- (a) there should be desertion for the specified period;
- (b) during this specified period the husband should not contribute anything whatsoever towards the maintenance of the wife; and
- (c) after the desertion and during the specified period the husband should make no bona fide attempt to communicate with the wife or to effect a reunion with her.⁴⁸

After the independence of Myanmar where a Myanmar Buddhist husband deserts his wife and for three years neither contributes to her maintenance nor has any communication with her the marriage tie is automatically dissolved is incorrect. The reciprocation of the wife is necessary to dissolve the marriage tie.

With regard to this fact, the Supreme Court had decided in the case of *Dr. Thar Mya vs. Daw Khin Pu*⁴⁹ that:

“Desertion on the part of the husband evidences his desire for dissolution of the marriage tie, and cannot in itself suffice to dissolve the tie created by mutual consent of the husband and wife. For that bond to be dissolved it is necessary that the wife reciprocates the desires, the reciprocation may be express or by conduct clearly pointing to that direction.”

The husband has no intention to dissolve the marriage tie but if he leaves for unavoidable affairs such as business trip, the wars, foreign study, etc. the wife must wait.

Regarding this point, the Court had decided in the case of *Aung Byu vs. Thet Hnin*⁵⁰ that:

“If the husband is away on a business trip, or to the wars, or on foreign study, then, of course, the intention to dissolve the marriage being absent, time does not run against the marriage, and she must wait. A husband, who is compelled, against his wishes obviously, to serve a long term of imprisonment, is held not to have deserted his wife, and if she marries again while he is in jail, she is guilty of desertion herself, and adultery.”

According to the above mentioned facts before the independence of Myanmar a Myanmar Buddhist husband deserts his wife and for three years neither contributes towards her maintenance nor has any communication with her, the marriage tie is automatically dissolved on the expiration of three years from the date of desertion. But after the independence of Myanmar in *Dr. Thar Mya vs. Daw Khin Pu* case desertion for the specified period by the husband and without any further or expressed act of volition on the part of the wife to the marriage does not dissolve the marriage tie. It is necessary that the wife reciprocates the desire, and the reciprocation may be expressed or by conduct clearly pointing in that direction.

Ordinary Cruelty: According to Myanmar Customary Law there are two kinds of cruelty. They are ordinary cruelty and grievous cruelty. Ordinary cruelty is one of the ordinary matrimonial faults.

According to the legal sense, cruelty means not only for the physical cruelty but also for the infliction of mental pain. All sorts of mental sort tortures of an unbearable nature may

⁴⁸ *Maung San Myint vs. Ma Thein New*, A.I.R, 1933 Ran. 374.

⁴⁹ 1951, B.L.R, 108 (S.C).

⁵⁰ 8 L.B.R, 50.

be classed as cruelty.⁵¹ There are distinction between ill treatment or personal violence and cruelty.

The *Dhammathats* recognize the husband power of moderate chastisement with a light cane or split bamboo. Even in the early days of the British period it was thought that striking wife only once or pulling the wife by her hair and abusing her was not sufficient ground for a divorce. But the Courts in Myanmar no longer recognize the husband's power of chastisement. Physical assault by the husband on his wife is now considered to be a matrimonial fault.⁵²

In the case of *Mrs Pearl Kyaw vs. U Kyaw*⁵³ it was held that cruelty means any act of likely to cause the danger of body, life or health.

A divorce is now granted to a wife, on the terms of a divorce by mutual consent, on proof of a single act of cruelty on the part of the husband.⁵⁴

In the case of *Mrs Protima Ghosh vs. Bimalandu Ghosh*⁵⁵ it was held that cruelty may be in any means. Some mental pains are rather worse than the physical cruelty. Hence, one spouse is entitled to divorce if the other spouse makes cruelty leads to mental pain.

Divorce can be obtained not only for physical cruelty but also for cruelty in the legal sense.

With regard to this fact, the Court had decided in the case of *Maung Po Aung vs. Ma Nyein*⁵⁶ that:

“A false accusation of adultery persisted in by the husband might be sufficient cruelty in the legal sense to justify a divorce.”

The facts in *Maung Set Maung vs. Ma Kyin Thwe*⁵⁷ are peculiar. The husband, within a few days of marriage, left the matrimonial home, taking away kyats one thousand out of kyats one thousand and three hundred which the couple had received as wedding presents. After an absence of ten days, he came back to the town where the wife lived but not to the matrimonial home. He refused to return to his wife and also rejected the wife's offer to join him at his new residence.

On this, the wife sued for divorce claiming that the cumulative effect of the husband's acts amounted to mental cruelty. Her suit was rejected by the trial Court. On appeal, the first Appellate Court decreed her suit holding that these acts of the husband amounted to mental cruelty.

The husband appealed to the Chief Court and during the dependency of the appeal, the husband took another wife, a fact which was communicated to the Court.

U Bo Gyi, C.J, held that such conduct of a husband as spending half of the money got in the wedding time and not permitting his wife to cohabit with him and living separately amount to cruelty. Moreover, taking another wife without giving the first wife the severance of matrimonial tie, also amount to cruelty.

⁵¹ Lahiri, S.C, Principles of Modern Burmese Buddhist Law, 6th Edition, 1957, p.99.

⁵² Lahiri, S.C, Principles of Modern Burmese Buddhist Law, 6th Edition, 1957, p.97.

⁵³ 1967 B.L.R, p.249.

⁵⁴ *Po Han vs. Ma Talok*, 7 L.B.R. 79.

⁵⁵ 1963, B.L.R, p.526.

⁵⁶ 10, B.L.R, 132.

⁵⁷ 1963, B.L.R (C.C) 295.

In the case of *Mrs R Joubert Bwa vs. Mr Joubert Bwa*⁵⁸ it was held that having the venereal disease from the husband to the wife is an apparent fact that the husband committed adultery with a prostitute. Infecting the wife by mean of that way is another kind of cruelty and entitled the wife to claim a divorce.

Hence it may be said that cruelty includes not only for the physical cruelty but also for the infliction of mental pain. Cruelty may be in any means. Some mental pains are rather worse than the physical cruelty. So according to Myanmar Customary Law one spouse is entitled to divorce if the other spouse makes cruelty leads to mental pain.

Grievous Matrimonial Faults

In Myanmar Customary Law there are two kinds of grievous matrimonial faults. They are: adultery on the part of the wife and grievous cruelty.

Adultery on the Part of the Wife: According to Myanmar Customary Law the husband's adultery, unless accompanied also by cruelty to the wife is no ground for divorce. If however the wife commits adultery, the husband may divorce her or condone the offence but it is ground for divorce.⁵⁹

Although adultery committed by the husband is not a ground for divorce if he commits adultery with a married woman he offends the provision of section 497 of the Penal Code and exposes him to punishment.

The provision lays down under section 497 of Penal Code can be seen as follows:

“Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.”

In the case of *Maung Pya Gyi vs. Maung Po Kha*⁶⁰ it was held that according to Myanmar Customary Law if wife commits adultery, her husband is entitled to discard her and send her away with nothing but the clothes on her person. If it is proposed to abandon her for adultery, and she leaves her husband's house there is a divorce from the time she leaves her husband and the holder of a decree against her cannot attach property in her husband possession as she is no longer entitled to a share in it. A Court may presume adultery where it is satisfied that a guilty attachment subsisted between the parties, and that opportunities occurred when a guilty intercourse might with ordinary facilities have taken place.

If the husband resumes cohabitation with the wife, who to his knowledge has been guilty of adultery he loses his right to divorce her.⁶¹

Similarly in the case of *U Sin vs. Ma Ma Lay*⁶² case the Court decided that according to Myanmar Customary Law a husband may condone his wife's offence of adultery or may obtain her admission of guilt and the dissolution of marriage may then take place by mutual consent on the footing that the husband retains the *hnapason* property. But otherwise he cannot retain the property on his own allegation of his wife's guilt. He must bring a suit for divorce and prove the guilt in a Court of law.

⁵⁸ 1948, B.L.R, p.132.

⁵⁹ Maung Maung, Dr., Law and Custom in Burma and the Burmese Family, 1963, p.77.

⁶⁰ 9. B.L.T, p.74.

⁶¹ May Oung, U, Leading Cases on Buddhist Law, 2nd Edition, 1926, p.125.

⁶² 1941 Ran.14.

In the case of *Daw Thein Mya vs. Daw Kyin (a) Ah Kyin*⁶³ it was held that if the husband can prove his wife's adultery he has a right to confiscate the *hnapason* property.

Myanmar Customary Law contemplates the condonation of marital offences. Condonation means a full forgiveness of a known conjugal offence on the implied condition that the misconduct condoned will not be repeated.⁶⁴

Condonation on the part of the wife is not to be lightly presumed from a continuance of cohabitation after matrimonial offence against her.

With regard to this fact the Court had decided in the case of *Bimalandu Ghosh vs. Mrs Protima Ghosh*⁶⁵ that:

“Where a husband after knowledge of an act of adultery on the part of his wife continues to sleep in the same bed with her, a strong presumption arises that he had condoned the marital offence and had resumed cohabitation. But the conclusion of condonation by an innocent wife of her husband's previous misconduct is not in all cases so strictly drawn from the fact of subsequence intercourse, for there may be instances where the innocent wife, owing to the difficulties of her situation, may have no means of immediately breaking of relations. Then where a husband has been guilty of cruelty, a wife can ever maintain a suit where cohabitation was continued after the last act, and he concludes that subsequent cohabitation is not universally a bar to the wife's suit.”

Hence it may be said that adultery committed by the husband is not a ground for divorce unless being coupled with ill treatment, the misconduct amount to legal cruelty. But if the wife commits adultery, the husband may divorce her, or condone the offence. The condonation may be express or implied, but repetition may receive the condoned offence.

Grievous Cruelty: Cruelty is also ground for divorce. An isolated instance of ill-treatment or violence is not sufficient; there must be physical violence or infliction of mental pain with indifference to, or delight in, the pain cause to the sufferer.⁶⁶

Aggravated cruelty, such as the infliction of grievous hurt, may forfeit the guilty spouse of his or her share of the joint property on divorce for the partition of property goes by the cause of the divorce and the guilt of the offending party.

With regard to this fact the Court had decided in the case of *Daw Pu (a) Daw Pu Gyi vs. Maung Tun Kha*⁶⁷ that: -

“In this case Maung Tun Kha, age of 25 married Daw Pu, widow, age of 55. And Maung Tun Kha said that marrying Daw Pu is not affectionate but want of her properties. Besides that Maung Tun Kha made a brutal act in front of others and beat Daw Pu frequently. So it was held that where cruelty is aggravated by the fact that instead of being repentant, the guilty party is desirous of divorce or by the fact that it is committed with intent to make the other party to seek a divorce or by other facts that as frequent repetition or acts of cruelty or grievous hurt within the meaning of section 320 of the Penal Code, the guilty forfeits his or her interest in the joint property of the couple.”

Section 320 of Penal Code provides that the following kinds of hurt only are designated as “grievous”:

⁶³ 1984 B.L.R (C.C) 228.

⁶⁴ Lahiri, S.C, Principles of Modern Burmese Buddhist Law, 6th Edition, 1957, pp.105-106.

⁶⁵ 1963 B.L.R, p.598.

⁶⁶ Maung Kywe vs. Ma Thein Tin, 7 Ran, 790.

⁶⁷ 1946 R.L.R.125.

First	-Emasculation
Secondly	-Permanent privation of the sight of either eye
Thirdly	- Permanent privation of the hearing of either ear
Fourthly	-Privation of any member of joint
Fifthly	-Destruction or permanent impairing of the powers of any member or joint
Sixthly	-Permanent disfiguration of the head or face
Seventhly	-Fracture or dislocation of a bone or tooth
Eighthly	-Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits ⁶⁸

Hence it should be noted that according to Myanmar Customary Law cruelty takes an aggravated form and the guilty party, instead of being repentant, seeks the divorce, or drives the other to seek it by repeated acts of cruelty, then the guilty party is liable to forfeit his or her share of the joint property on divorce.

Consequences of Divorce

After a married couple divorce, there are two consequences of divorce under Myanmar Customary Law. They are: partition on divorce and custody of children

Partition on Divorce

Any one spouse of married couple may not sue for partition of his or her share in all joint properties during the subsistence of their marriage. However, after a married couple divorced, they have to sue for partition on both properties.⁶⁹

According to Myanmar Customary Law the Myanmar Buddhist married couple are not joint tenants nor business partners but tenant in common.

With regard to this fact the Court had decided in the case of U Pe vs. U Maung Maung Kha⁷⁰ that:

“A husband and wife governed by Myanmar Customary Law are tenants in common, not joint tenant, of property in which under that law, each has rights by virtue of the marriage.”

According to Myanmar Customary Law, if a married couple wants to divorce, they may sue divorce and partition of property at the same time or at first, they may sue only a suit for mere divorce and then they continue to sue a suit for partition of property.

Partition on divorce usually goes by mutual consent, or settlement under arbitration of friends and elders.⁷¹

A valid partition of properties can be affected orally but if a deed of partition be drawn up at all, it must be duly stamped and, where it concerns immovable property worth 100 kyats or upwards, it must also be registered.⁷²

Where divorce by mutual consent, a suit for divorce and partition of property is not settled by the Court, but when the parties do not get mutual consent, they go to the Court for decrees.

⁶⁸ Section 320 of the Penal Code, 1860.

⁶⁹ Maung Tun Lin vs. Ma Me Khin, 1965, B.L.R, 374.

⁷⁰ 10 Ran (P.C) 261.

⁷¹ Maung Maung, Dr., Law and Custom in Burma and the Burmese Family, 1963, p.95.

⁷² Maung Shwe Bwin vs. Ma Son, S.J, 655.

For the purpose of partition on divorce, the properties of Myanmar Buddhist married couple may be classified as follows⁷³:-

- (1) *Payin*
- (2) *Lettetpwa*
 - (a) Ordinary *lettetpwa*
 - (b) *Lettetpwa* by succession
- (3) *Hnapason*

In deciding the method of partition in each case there must be taken into consideration, namely:

- (1) whether the parties are *eindaunggyis* or *ngelin-ngemaya*;
- (2) whether the parties stand in the position of *nissaya* and *nissita*; and
- (3) whether the divorce is by mutual consent or for some matrimonial fault;⁷⁴

Partition upon Divorce by Mutual Consent: On divorce by mutual consent, the parties to a *ngelin-ngemaya* marriage take back their *payin* properties, while they are *eindaunggyi* they take back their *atetpa* properties.⁷⁵ If the relationship of *nissaya* and *nissita* exists, then the dependent takes a third of the *payin* or *atetpa* of the other spouse. Where there are joint properties of the marriage, the parties' share in them equally.⁷⁶

In the case of *Ma Paing vs. Maung Shwe Phaw*⁷⁷ it was held that when *eindaunggyis* divorce by mutual consent without fault on either party and the parties do not stand in the relation of *nissaya* and *nissita*, each is entitled to take back his or her *atetpa* property as the principle of *nissaya* and *nissita* is not applicable to such cases.

Where a widower with *atetpa* property marries a maiden with no property and they divorce by mutual consent without any fault on either party, the parties stand in the relation of *nissaya* and *nissita*; so the *nissita* gets one-third of the *nissaya*'s property.⁷⁸

Dhammathats are silent about the case where *ngelin-ngemaya* divorce by mutual consent without fault of both party, and the parties do not stand in the relation of *nissaya* and *nissita*. It seems that on equitable ground they ought to be allowed to take back their respective *payin* property as in the case of *eindaunggyis*.⁷⁹

Hence it may be said that when husband and wife, whether *eindaunggyis* or *ngelin-ngemaya*, divorce by mutual consent without any fault of either party, and the parties stand in the relation of *nissaya* and *nissita*, the *nissita* gets one-third of the *nissaya*'s *atetpa* or *payin* property, as the case may be. But when they do not stand in the relation of *nissaya* and *nissita* and are *eindaunggyis*, each takes back his or her *atetpa* property.

In the case of *Ma Dwe Naw vs. Maung Tu*⁸⁰ it was held that where husband and wife mutually agree to a divorce and the parties do not stand in the relation of *nissaya* and *nissita*, *hnapazon* property of the parties should be equally divided between them, they are *eindaunggyis* or *ngelin-ngemaya*.

⁷³ U Pe vs. U Maung Maung Kha, 10 Ran 261 (263) P.C.

⁷⁴ Lahiri, S.C., Principles of Modern Burmese Buddhist Law, 6th Edition, 1957, p.108.

⁷⁵ U San Yi, vs. Maung Po Yi, A.I.R 1940 Ran. 286.

⁷⁶ Maung Hmon vs. Maung Meik, 2 U.B.R 1.

⁷⁷ 5 Ran.296 (332) F.B.

⁷⁸ Maung Po Sein vs. Ma Pwa, P.J. 403.

⁷⁹ Lahiri, S.C, Principles of Modern Burmese Buddhist Law, 6th Edition, 1957, p.111.

⁸⁰ S.J.14.

On a divorce by mutual consent the parties should discharge their joint debts in proportion to their shares in the joint property.⁸¹ In the case of *lettetpwa* property by succession by one spouse, the other is entitled to receive a third share.⁸²

It should be noted that when there is a divorce by mutual consent between the husband and wife, partition must be affected on that basis even if one of the parties has been guilty of misconduct.⁸³

Where a man marries two wives in succession and his second wife desires to divorce him and he consents to it, on divorce and partition,

- (1) the second wife is entitled to get two-ninths of the property brought by the husband to the first marriage,
- (2) one-sixth of the jointly acquired property of the first marriage⁷
- (3) two-ninths of the property inherited by the husband during the first marriage,
- (4) one-third of the jointly acquired property of the second marriage,⁸⁴ and
- (5) one-sixth of the property inherited by the husband during his second marriage.⁸⁵

If it is the first wife who desires to divorce the husband and the husband to it, on divorce and partition,

- (1) the first wife is entitled to get one-third of the property brought by the husband to the first marriage,
- (2) half of the jointly acquired property of the first marriage,
- (3) one-third of the property inherited by the husband during the first marriage,
- (4) one-third of the jointly acquired property of the second marriage, and
- (5) one-sixth of the property inherited by the husband during his second marriage.⁸⁶

Hence it may be said that where a man marries two wives the first wife and the second wife must get one-sixth of the property inherited by the husband during his second marriage when they went to divorce. So their share is equal upon the property inherited by the husband during his second marriage.

Partition upon Divorce by Ordinary Matrimonial Fault: When there is a divorce by mutual consent between the husband and wife, partition must be effected on that basis even if one of the parties has been guilty of the matrimonial faults.

In the case of *Po Han vs. Ma Talok*,⁸⁷ it was held that a divorce is granted to a wife, on the terms of a divorce by mutual consent, on proof of a single act of cruelty on the part of the husband.

When the husband takes a second wife without the consent of first wife, on the first wife suing him for divorce and partition of property, the first wife is entitled to claim and get a decree for divorce as by mutual consent.

⁸¹ Manugye Book XII, Chapter 3.

⁸² *Ma Saing vs. Maung Yan Gin*, 2 U.B.R(14-016), p.127.

⁸³ *Ma Me Hla vs. Maung Po Thon*, 7 Ran. 98.

⁸⁴ *Maung Po Nyunt vs. Ma Saw Tin*, 3 Ran.160.

⁸⁵ *C.T.P.V Chetty Firm vs. Maung Tha Hlaing*, 3 Ran.322(F.B).

⁸⁶ *Ma Khin vs. Maung PoSein*, 6 Ran. 1.

⁸⁷ 7 L.B.R 191 (F.B).

Regarding this point, the Court had decided in the case of Maung Hme vs. Ma Sein⁸⁸ that:

“Where the husband of *ngelin-ngemaya* takes a second wife in the absence of justifiable cause and without the first wife’s consent, on the first wife suing him for divorce and partition of property, the first wife is entitled to claim and get a decree for divorce as by mutual consent and get one-half share in the jointly acquired property and one-third share to the other spouse’s *payin* or inherited *lettetpwa*.

In the case of Ma Thet vs. Ma San On⁸⁹ it was held that when one of a married couple deserts the other and the husband does not maintain the wife for the specified period, of one year when the wife is the deserter or of three years when the husband is the deserter, the marriage tie is dissolved after the expiration of the specified period and the deserted spouse is entitled to get the whole of the joint and separate properties of the guilty spouse.

If a man having two wives deserts one of them, the deserted wife is entitled to one-half of the *lettetpwa* property of the marriage in a partition on divorce for desertion by the husband.⁹⁰

But when Maung Po Nyun’s case went up to the Judicial Committee of the Privy Council it was declared that the innocent spouse could not claim the whole of the joint as well as separate property of the guilty spouse less the share of the first wife.⁹¹ But in this case as the deserted wife excluded the share of the first wife and did not claim the whole of her husband’s properties so her claim was allowed.

Hence it may be said that where a divorce is adjudged for desertion, the innocent spouse is no longer entitled to claim the whole property of the guilty spouse, for mere desertion is not such a fault as could cause forfeiture⁹² and when a marriage is dissolved by the desertion of the wife, she does not lose her interest in the joint property of the marriage.⁹³

Partition upon Divorce by Grievous Matrimonial Fault: According to Myanmar Customary Law there are two kinds of cruelty which are ordinary cruelty and grievous cruelty. When a spouse is guilty of ordinary cruelty partition of properties of marriage will be as in the case of divorce by mutual consent.⁹⁴

But where cruelty is aggravated by the fact that instead of being repentant the guilty party is desirous of divorce or by the fact that it is committed with intent to make the other party seek a divorce or by other facts such as frequent repetition of acts of cruelty or grievous hurt, the party guilty of such cruelty will be deprived of his or her share of the joint property on divorce.⁹⁵

Adultery on the part of wife is one of the grievous matrimonial faults. Where the wife of a *ngelin-ngemaya* couple commits adultery, the husband is entitled to divorce the wife and get all the joint properties as well as *payin* properties of both.⁹⁶

In the case of Maung Pya Gyi vs. Maung Po Ka⁹⁷ it was held that if a wife commits adultery her husband is entitled to discard her and send her away with nothing but the clothes

⁸⁸ 9 L.B.R 191 (F.B).

⁸⁹ 2 L.B.R, 85 (87).

⁹⁰ Ma Kin vs. Maung Po Sein, 6 Ran 1.

⁹¹ Maung Po Nyun vs. Ma Saw Tin, 5 Ran, 261 (271) P.C.

⁹² U Pe vs. Maung Maung Kha, 10 Ran, 261 (271)P.C.

⁹³ Ma Dun Mai vs. Maung San Tun, A.I.R, 1938 Ran. 168.

⁹⁴ Po Han vs. Ma Talok, 7 L.B.R, 79.

⁹⁵ Daw Pu (a) Daw Pu Gyi vs. Maung Tun Kha, 1946 R.L.R, 125.

⁹⁶ Maung Yin Maung vs. Ma So, 11 U.B.R (97-01), p.34.

on her person. If it is proposed to abandon her for adultery and she leaves her husband's house, there is a divorce from the time she leaves the house, and the entire properties vest in the husband alone.

A husband who believes his wife to be guilty of adultery may obtain her admission of guilt and by mutual consent dissolve the marriage tie and retain the whole of the *hnapazon* property. If he cannot do so and a separation ensues by reason of desertion for the specified period, his suit for divorce must be filed before the expiration of the specified period.⁹⁸

In the case of *U Sin vs. Ma Ma Lay*⁹⁹ the Court decided that when once the dissolution of marriage takes place automatically owing to desertion for the specified period, the husband can neither prove adultery on the part of the wife in his suit for divorce nor can bring a suit for a declaration that the dissolution of the marriage has taken place owing to adultery on the part of the wife, for he is then no longer a husband but a stranger to his former wife.

But if the wife denies the charge of adultery, the marriage tie subsists until the same is dissolved by a decree of the Civil Court.¹⁰⁰

In the case of *Ma Dun Mai vs. Maung San Tun*¹⁰¹ it was held that until the husband proves adultery on the part of the wife in a suit for divorce, the wife does not forfeit her share in the joint property on mere allegation of adultery; so the joint property of the marriage must be divided on the footing that the marriage has become dissolved by desertion.

Where the wife of an *eindaunggyi* couple commits adultery, according to *Attasankhepa*, the husband is entitled to get all the joint properties as also his *atetpa* properties but the wife is allowed to take back her *atetpa* property.¹⁰²

In *S.A.S. Chettyar Firm vs. U Maung Gyi*¹⁰³ case where the wife of an *eindaunggyi* couple commits adultery and deserts her husband and as a consequence a divorce has automatically taken place, the wife loses all her right in the *hnapazon* property and her share therein is forfeited to her husband.

In Myanmar Customary Law divorce is essentially a personal action and the penalties for adultery can be enforced by the husband alone (*Ma Dun Mai vs. Maung San Tun*). Hence it may be said that where a divorce is affected for adultery on the part of the wife, whether the parties be *ngelin-ngemaya* or *eindaunggyis*, the husband is entitled to the whole of the joint property as also his *payin* or *atetpa* property and in some cases to wife's *payin* property also.

Custody of Children

At the time of divorce and partition of property Myanmar Buddhist couples usually settle everything about the custody of their children. Where a guardian needs to be appointed to take care of a minor child, or represent his interests the welfare and happiness of the minor is very important point to consider by the Court.

⁹⁷ 9 B.L.T, 74.

⁹⁸ Lahiri, S.C., Principles of Modern Burmese Buddhist Law, 6th Edition, 1957, p.118.

⁹⁹ 1941, Ran, 118.

¹⁰⁰ *Ma Me Hla vs. Maung Po Than*, 7 Ran, 98.

¹⁰¹ A.I.R, 1938, Ran, 168.

¹⁰² *Attasankhepa*, Section.394 (3)

¹⁰³ 14 Ran, 329.

Effect of Divorce on Children: The family tie is severed by divorce, and the rights of the children of a divorced couple seem to depend upon the arrangement made at the time of the divorce as to which branch of the two families they shall belong to. Where a Myanmar Buddhist couple at the time of their divorce come to an amicable agreement as to the disposal of their children, not opposed to the principles of natural justice, the children are bound thereby.¹⁰⁴

In the case of *Ma San Mra Rhi vs. Ma Than Da U*¹⁰⁵ it was held that the children while minors are bound by the choice of their parents in this respect; but if brought up by the mother, as is usually the case, they can rejoin the father's family when they attain years of discretion.

At the time of divorce and partition of property it is the will of the parents which decides which child shall inherit from whom in future.¹⁰⁶ But after the divorce, on the attainment of the age of discretion, it is the conduct of the child which determines whether it shall inherit the estate of the parent it has not followed.¹⁰⁷

Generally daughters go with the mother and sons with the father. Sons lose right to succeed from the mother and daughters from the father. But such right is regained by resumption of filial relationship. Governing factor in determining whether there is such relationship is the will of the parent and not that of the child.¹⁰⁸

Child of a divorced couple loses all claims to inherit the estate of the parent deserted by him or her just as an adopted child loses all claim to its natural parent's estate. An adopted child, by abandoning the adoptive family, may re-enter the natural family and become a member of the same provided he is acknowledged as a child by the natural parents, so a child of divorce couple may inherit the estate of the parent it had not followed by reviving filial relations with such parent.¹⁰⁹

In *Ma Paw vs. Ma Mon*¹¹⁰ case the Court decided that although under the Myanmar Customary Law a child of a divorced couple is entitled to inherit yet it is a settled rule that the child inherits from the parent with whom he or she lives and not from the other parent who has married again and has children of the second marriage unless filial relations are established.

But in the case of *Ma Aye Me vs. Ma Shwe Thwe*¹¹¹ the Court decided that the right to claim a partition from the parent on his or her remarriage does not extend to a child of a divorced wife, even if such child has maintained filial relationship with such parent.

The mere fact that the child followed one parent after divorce and partition does not debar him or her from inheriting the estate of the other parent.¹¹²

The general rule which allows the child of a divorced couple to inherit only from the parent with whom he or she lives and not from the other is not confined to cases where one or the other of the parents remarries and has children by the new spouse, but applies with equal force to a case where the father without remarrying lives the rest of his life with a child by an earlier marriage.¹¹³

¹⁰⁴ *Maung Ba Thwin vs. Maung Po Hti*, 6 Ran, 510(518)

¹⁰⁵ 1 L.B.R, 161.

¹⁰⁶ *Ma Yi vs. Ma Gale*, 6 L.B.R, 167.

¹⁰⁷ *Maung Ba Kyu vs. Ma Zan Byu*, P.J, 299.

¹⁰⁸ *Ma Chit May vs. Ma Sak Shin*, 13 Ran, 166.

¹⁰⁹ Lahiri, S.C., *Principles of Modern Burmese Buddhist Law*, 6th Edition, 1957, p.125.

¹¹⁰ 4 L.B.R, 272.

¹¹¹ A.I.R, 1931 Ran, 302.

¹¹² *Maung Ba Kyu vs. Ma Zan Bya*, P.J, 299.

¹¹³ *Le Maung vs. Ma Kwe*, 10 B.L.R, 107.

The fact that a person was a mere child when his father died and consequently had no opportunity of expression any portion of renewing filial relationship with him is no reason for departing from the general rule that the child of a divorced couple inherits the property of the parent it follows.¹¹⁴

In the case of *Ma Nyo vs. Ma Nyein Tha*¹¹⁵ the rule excluding the child of a divorced wife who has lived with his mother and has not maintained filial relations with his father, does not extend to the case where the child was born after the divorce, and the father left no other wife or lineal descendants but lived with his co-heirs, in such a case the child is entitled to one-half of the property.

Hence it may be said that the child of a divorced wife must maintain or renew filial relationship with the father to inherit his estate, except when the child is born after the divorce and the father left no other heir or widow.

Custody of Children on Partition after Divorce: At the time of the divorce and partition of property Myanmar Buddhist couples usually settle everything about the custody of their children. Where the husband and wife divorce by mutual consent, the husband is entitled to the custody of the sons and the wife to that of the daughters. Very young sons ought to be left in the custody of their mother until they are sufficiently grown up. This is the view of *Dhammathats*.¹¹⁶

But the parties by mutual consent may arrange the matter in any way they please. Where a divorce is adjudged for the fault of one party, the *Dhammathats* do not say in clear terms that should have the custody of the children but say that the guilty spouse should leave the house and the innocent spouse should have all the animate and inanimate property of the couple. In such a case, it would be to the interest of the children to remain with the innocent spouse who gets all the properties.¹¹⁷

But in the case of *Po Cho vs. Ma Nyein Myat*¹¹⁸ it was held that if the children are sufficiently grown up to form an intelligent preference, their choice ought not to be easily disregarded.

In *Maung Pan Bu vs. Ma Nyun*¹¹⁹ case it was held that the proper person to have the custody of a daughter after divorce between the parents was the mother, while in *Ma Chok vs. Maung Po Sin*¹²⁰ case it was held that the father was the prima facie guardian of his children.

Similarly in the case of *Ma Chit May vs. Ma Saw Shin*¹²¹ it has been held that on a divorce taking place between the parents the daughters go with the mother and the sons with the father. In fact Myanmar Buddhist children are bound by the arrangement made by their parents at the time of divorce regarding custody of children. The parents have an unfettered discretion in this respect.

Even when without a divorce husband and wife live separately for the sake of peace, the custody of the children of tender years should be given to the mother and not to the

¹¹⁴ *Ma E Me vs. Maung Po Mya*, 11 B.L.R., 316.

¹¹⁵ 11 U.B.R (04-06) 15.

¹¹⁶ *U Gaung's Digest*, Vol.II, sec.254, 257.

¹¹⁷ Lahiri, S.C., *Principles of Modern Burmese Buddhist Law*, 6th Edition, 1957, pp.120-121.

¹¹⁸ 5 L.B.R., 133.

¹¹⁹ 9 B.L.R., 183.

¹²⁰ 11 U.B.R (92-96) p.645.

¹²¹ 13 Ran, 166.

father.¹²² Guardianship of the person, or the property, of minor children is governed by the Guardian and Wards Act, and not by the Myanmar Customary Law.¹²³

In *Tan Swee Kyu vs. Chan Chain Lyan*¹²⁴ where a guardian needs to be appointed to take of a minor child, or represent his interests, the Court may consider the child's preference for guardian, but the paramount considerations is the minor's own welfare and happiness. Thus in such case where a step-parent had entered a Buddhist family, and the need for appointing a guardian for a minor child arose, the Court recognized that the entry of a step-parent could be a disintegrating element under the circumstances, and after considering the qualifications of different persons for the guardianship, appointed the eldest sister of the minor child, in preference to the mother who had remarried.

Moreover in the case of *U Maung Maung vs. Ma Aye Bu*¹²⁵ it was held that the welfare and happiness of the minor, it has been ruled in the application of the Guardian and Wards Act, must weigh even against the rights of guardianship under the law to which the minor is subject. The father of an illegitimate child does not have a legal claim to his custody.

*Ma Ya Shin vs. Nehal Singh*¹²⁶ case is concerning with the custody of children of mixed marriage. In this case where a Myanmar Buddhist woman embraces Sikhism and marries a Sikh but later on, after having lived with him as husband and wife, reverts to Buddhism, the children born of such wedlock should normally be brought up as Sikhs. So the Sikh father is under such circumstances entitled to the custody of children as against such mother, unless he is shown to be by reason of his depraved moral character or such other sufficient reason, unfit to have the custody of his children.

So according to Myanmar Customary Law where a guardian needs to be appointed to take care of a minor child, or represent his interests, the Court may consider the child's preference for guardian, but the paramount consideration is the minor's own welfare and happiness.

Conclusion

A marriage may be dissolved at any time provided both parties assent. But one of a Myanmar Buddhist married couple cannot claim a divorce the other without proof of any matrimonial fault on that other. In Myanmar Customary Law there are three mainly kinds of divorce. They are (1) divorce by mutual consent (2) divorce when the husband enter into priesthood or rahan and (3) divorce by matrimonial faults. The mutual consent divorce is the commonest form of divorce amongst the Myanmar Buddhist. A mutual consent divorce is valid without a decree of the Court or a deed of divorce or the presence of the elders. In matrimonial faults there are ordinary matrimonial fault and grievous matrimonial fault. In ordinary matrimonial faults the injured person can claim to divorce the marriage tie. But if one of a married couple commits grievous matrimonial fault the other party can claim divorce and the guilty party will be forfeited his or her share of the joint property on divorce.

In matrimonial faults grievous cruelty is rare between the husband and wife. It shows that most of the Myanmar Buddhists are gentle. Adultery on the part of the husband is not a ground for divorce but if he commits adultery with a married woman he offends the provision of section 497 of the Penal Code and exposes himself to punishment. In that case the wife shall

¹²² *Ma Thein May vs. Maung Po Gywe*, 8 B.L.T, 73.

¹²³ *C.T.V.E.V. Chettyar vs. Ma Saw Mwe*, 12 Ran, 47.

¹²⁴ 1947, R.L.R, 107.

¹²⁵ 1952, B.L.R 406 (H.C).

¹²⁶ A.I.R, 1937 Ran, 360.

not be punishable as an abettor. But adultery on the part of the wife is a ground for divorce and she will be forfeited her share of the joint property on divorce.

As regards partition on divorce, when there is a divorce by mutual consent between the husband and wife, partition must be affected on that basis even if one of the parties has been guilty of the matrimonial faults. The family tie is severed by divorce, and the rights of the children of divorced couple seem to depend upon the arrangement made at the time of the divorce as to which branch of the two families they shall belong to. Generally daughters go with the mother and sons with the father. Sons lose right to succeed from the mother and daughters from the father. But such right is regained by resumption of filial relationship. Governing factor in determining whether there is such relationship is the will of the parent and not that of the child. Where a guardian needs to be appointed to take care of a minor child, or represent his interests the welfare and happiness of the minor is very important point to consider by the Court.

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