

**IN THE SUPREME COURT OF TONGA
DIVORCE JURISDICTION
NUKU'ALOFA REGISTRY**

FD 5 of 2015

Solicitor General

03/11/15

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03/11/15

BETWEEN: SIONE FA'AVAE FA'APOI

- Petitioner

AND: FIFITA VAVA'U KUPU

- Respondent

BEFORE THE LORD CHIEF JUSTICE PAULSEN

Hearing: 24 September 2015

Decision: 6 October 2015

Appearances: Mr. 'O. Pouono for the petitioner
 No appearance for the respondent

RULING

[1] This is an unopposed petition for divorce on the grounds stated in the petition as follows:

*Recd 12/10/15
[Signature]*

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The respondent has misbehaved in an unreasonable manner where it is irreconcilable for the parties to be together.

[2] Although not specifically referred to in the petition it is understood that the petitioner relies on section 3(1)(g) of the Divorce Act which provides that the Court may dissolve a marriage where the Court is satisfied that:

..the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.

[3] The petitioner gave evidence. He said that the parties were married on 7 October 1993 at Nuku'alofa, Tongatapu. They have three children of the marriage ranging in age between 21 and 17 years. There have been no previous proceedings between the parties in any Court.

[4] The cause of unhappiness between the petitioner and respondent is that the respondent travels overseas, usually at Christmas time, and as a consequence since 2009 the family has not spent Christmas together. The petition alleges that during 2014 the respondent took four trips overseas but the petitioner gave no specific evidence of the

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frequency or duration of her travel in other years except to say that she was away each Christmas since 2009.

- [5] The respondent travels to visit family and sometimes works while away. She usually pays for the travel herself, although the petitioner has paid for her on some occasions. There was no evidence that her travel imposes a financial burden on the marriage.
- [6] The petitioner referred to difficulties he had caring for the children while his wife was overseas (although I understand one studies in Fiji) and to problems at his work at the Prisons Department because he would be late arriving to work.
- [7] The petitioner said that the couple had argued about her travel and that he had told her that if she continued to travel she may return one day to find him gone. In fact the petitioner filed his petition for divorce while the respondent was on her last trip. Since the respondent returned from that trip, in February 2015, the parties have been separated and she has had the care of two of the children of the

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marriage with one daughter studying overseas. When I asked the petitioner where his wife lived upon her return to Tonga in February 2015, he said that she had returned to the family home at Pea because he was overseas on holiday having left the children with his cousin.

[8] The petitioner said that he has lost all feeling for his wife and he thought that it was longer appropriate for them to continue living within a marriage relationship. He also said that there were times that he needed his wife and she was not there because of her traveling and this led him to conclude that the marriage was over. He believed that if she had feelings for him she would not have travelled overseas.

[9] In *Fe'ao v Fe'ao* [2001] TLR 243, 246, Ford J said

The legal test for the type of behaviour that would make it unreasonable for the petitioner to live with the respondent is stated in *Halsbury*, 4th edition, vol 13, para 574, as follows:

"The matter has been approached by considering whether any right-thinking person would come to the conclusion

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that the (respondent) had behaved in such a way that (the petitioner) could not reasonably be expected to live with the (respondent) taking into account the whole of the circumstances and the characters and personalities of the parties."

In *Stevens v Stevens* [1979] WLR 887, Sheldon J adopted the following passage from *Rayden on Divorce*:

"In all these cases the totality of the evidence of the matrimonial history must be considered, and the conclusion will depend on whether the cumulative conduct was sufficiently serious to say that from a reasonable person's point of view, after a consideration of any excuse or explanation which this respondent might have in the circumstances, the conduct is such that this petitioner or not to be called upon to endure it."

[10] In my view the evidence in this case fails to establish the ground for divorce relied upon by a considerable margin. The sort of conduct justifying divorce under section 3(1)(g) must be more than the ordinary wear and tear of married life. In my view section 3(1)(g) is concerned with acts of a party to the marriage that destroy the fabric of the relationship such as physical or emotional abuse, chronic alcohol or drug dependency, a total failure to maintain and the like. Any other interpretation would effectively mean

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that parties would be entitled to divorce on demand and would deprive the grounds for divorce set out in section 3 (1)(a) to (f) of the Divorce Act of any meaning. I do not consider such an interpretation reflects the laws of Tonga or the expectations of Tongan society.

[11] In his written submissions Mr. Pouono put his client's case this way:

The petitioner submits that it was not only the respondent's frequent travelling overseas but also how those travels and those absences had caused the love and affection to become less and less. Once that is achieved the inevitable would happen and the relationship comes to an end

[12] That may well be so, but the fact that the parties (or one of them) have decided that their relationship has run its course does not of itself entitle them to a divorce unless one of the grounds in the Divorce Act are made out. In this case the ground relied upon is not made out, in my view. The exact extent of the wife's travel, except in 2014, was not disclosed in the evidence. The wife has apparently taken trips at Christmas time since 2009 and the parties have remained

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together raising their family throughout. The petitioner acknowledged that he has paid for some of the trips, so he has not always been opposed to her travel, and there is evidence that he has travelled himself, leaving the children with a relative. As I have noted, there was no suggestion that the family could not afford the wife's travel. The purposes for which the wife travels are the entirely reasonable ones of visiting family and, on occasions, finding work. Many Tongans travel frequently for just these reasons. The problems that the petitioner says he experienced when looking after the children, while his wife was away, strike me as no more than mere inconveniences. In all of the circumstances of this case, no reasonable person would conclude that the wife's conduct is so unreasonable that the petitioner cannot be expected to live with her.

[13] The parties are now separated, apparently with no intention of maintaining or resuming marital relations, and should that state of affairs continue they may in due course obtain a divorce on the grounds set out in section 3(1)(f).

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Other matters

[14] In the petition the petitioner has sought joint custody of the youngest child of the marriage. In his submissions Mr. Pouono sought, on behalf of the petitioner, joint custody of the two youngest children of the marriage. As I understand it the second child is at University and is now almost 20 years old. I can make no orders in respect of her nor are any necessary (section 10 Guardianship Act). In respect of the youngest child, I understand he no longer attends school but lives with the respondent. The petitioner accepts that this child should remain with his wife. In those circumstances I am not prepared to make a joint custody order but make an order that reasonable access to the child is reserved to the petitioner.

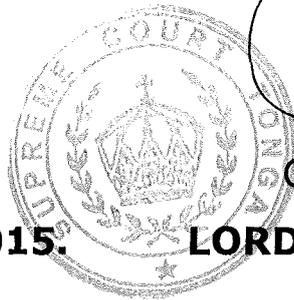
Result

[15] The petition for divorce is dismissed.

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[16] Reasonable access to the youngest child of the marriage namely Kaloni Henryton Fa'apoi (m) born 6 May 1998 is reserved to the petitioner.



The seal of the Supreme Court of Tonga is circular, featuring a central crown emblem surrounded by a wreath. The words "SUPREME COURT OF TONGA" are inscribed around the perimeter of the seal.

O.G. Paulsen

NUKU'ALOFA: 6 October 2015. LORD CHIEF JUSTICE