

Separation, divorce and annulment

[Family](#), [Marriage](#)



SEPARATION, DIVORCE& ANNULMENT Introduction When two people are in a relationship they are usually in it forever. Unfortunately, it isn't always the case and as you will learn in this unit, there are many things that could potentially be blamed for the breakdown of such relationships. This topic takes you into the world of divorce which is never an easy thing for any couple and if there are children involved (and there usually are); it makes the experience even worse. Some couples split amicably while for others the parting can drag on in what could seem like forever where the accusations and blame is often hurled from one party to another.

In many countries, there has been a shift towards 'no fault' divorce. A no fault divorce is divorce in which the dissolution of a marriage does not require fault of either party to be shown, or the requirement of any evidentiary proceedings to take place. So either party may request a divorce despite the objections of the other party. No fault divorce systems are where the law provides for only one ground for divorce - this is that the marriage has broken down irretrievably (see example, s30(1)FamilyLaw Act, Fiji).

This does not necessarily mean that both parties to the marriage were equally blameless for the breakdown in the relationship but it does recognise that both may have contributed to that breakdown and that blame and accusation can aggravate what is likely to already be an unhappy and often bitter situation. Accusations and recriminations do not help this and may be particularly damaging for any children of the marriage, who, despite whatever the feelings of their parents, still need to have a mother and father.

While marriage remains an important cornerstone for the stability of society and social ordering, the law allows divorce and provides a framework both for that divorce and for the consequences of that change of status especially as regards any children of the marriage and any property interests which have arisen due to the marriage.

1. Grounds for Divorce

Grounds for divorce are statutorily provided for throughout the region. They include:

- i. adultery
- ii. desertion
- iii. refusal to consummate
- iv. cruelty
- v. habitual drunkenness or habitual intoxication
- vi. convictions for various criminal acts
- vii. failure to financially support the petitioner
- viii. failure to comply with a decree for the restitution of conjugal rights
- ix. being of unsound mind
- x. living apart for five years from the respondent with no intention of cohabiting
- xi. Presumed dead.

LW310 Family law 4. 6 In Tuvalu, unless one party to a marriage has wilfully refused to consummate it, or the marriage was induced by fraud, duress or mistake, the sole ground for divorce is that the marriage has broken down completely (Matrimonial Proceedings Act [Cap 21] (Tuvalu) section 9).

Evidence which may be accepted by the court to show that the marriage has broken down includes adultery, desertion, cruelty, being of unsound mind or if, in the circumstances, it would be unreasonable to expect one party to continue in the marriage. Whatever the evidence, however, the court must determine whether or not the marriage has completely broken down. A more restrictive approach is taken by Nauru where the court must find that the marriage has broken down irretrievably and it may only do so on one of four grounds.

These grounds are desertion, separation for two years with consent of both parties or separation for five years and certain behaviour. These grounds need to be proved or parties need to fulfil strict conditions. The conditions relate to: • living apart, • attendance at court each month for six months after presentation of the petition, • consistent and voluntary statements requesting the marriage to be dissolved and • attempts by the court to promote reconciliation (Matrimonial Causes Act 1973 (Nauru) ss 10 and 12).

Tonga prescribes eight matrimonial offences although, with consent, the parties may also divorce after two years of separation. READ s 3 Divorce Act [Cap 29] (Tonga) There are only three grounds for dissolution of marriage in Tokelau - adultery, cruelty and three years of living apart (Divorce Regulations 1987 Reg 3). In Kiribati, fault grounds predominate. I-Kiribati parties may divorce if the court finds that their temperaments are incompatible (Native Divorce Act [Cap 60] s 4).

However, the Matrimonial Causes Act 1950 (UK) which applies to other races in Kiribati and to foreigners in Solomon Islands, reinforces the fault based position by insisting on the blameless character of the petitioner and the fault of the respondent. In Fiji, the Family Law Act provides only one ground for divorce and that is irretrievable breakdown (s 30). This marks a shift to 'no fault' divorce, although often one of the various 'matrimonial offences' which may be relied on as a grounds for divorce elsewhere may have contributed to the irretrievable breakdown of the marriage - for example, adultery by one of the spouses.

However a variety of lesser 'fault' may have led to the irretrievable breakdown of the marriage. What the court is looking for is evidence of <https://assignbuster.com/separation-divorce-annulment/>

conduct which makes it impossible for the two parties to continue to live as husband and wife in close proximity to each other and sharing the same home, resources and living space. I. Adultery Adultery is one of the most common grounds of divorce where it is still necessary to show fault.

For the purposes of obtaining a divorce on the ground of adultery in fault based jurisdictions, a petitioner must prove that the respondent engaged in voluntary sexual intercourse with another person of the opposite sex during the subsistence of the marriage (Coffey v Coffey [1989] P 169). All jurisdictions except for Fiji, Nauru and Tuvalu list adultery as a ground for divorce. READ s3 (1) (a) Divorce Act [Cap 29] (Tonga) In Tuvalu adultery, if proved, is prescribed as evidence which a court may accept as causing the marriage to completely break down.

READ s 9(a) Matrimonial Proceedings Act [Cap 21] (Tuvalu) The fact of adultery must be proved to the satisfaction of the court although the required standard of proof is unclear. In *Elisara v Elisara* [1994] WSSC 14 the proof consisted of testimony of the petitioner and her sister that they had found the co-respondent " half dressed inside the matrimonial home" as well as the respondent's admission. Chief Justice Sapolu recited the facts as follows; „ The petitioner, the wife, and the respondent, the husband, are a married couple having been married on 5 January 1980.

In the first quarter of 1993, the petitioner was under suspicion that her husband, the respondent, was having an affair with the co-respondent. The respondent was director of the Department of Lands and Environment until near the end of 1992. The co-respondent was a secretary in the same department. Due to her suspicions, the petitioner and her cousins kept watch

of the respondent? s whereabouts on the nights that the petitioner and the respondent were not together. Then one night in the beginning of April 1993, the petitioner asked the respondent to drop her off at her family at Savalalo.

Not very long after the petitioner was dropped off, she headed back with her sister and cousins to their matrimonial home at Waivaseuta. When they arrived at Vaivase-uta the lights downstairs of the matrimonial home were on but not the lights upstairs. The respondent came out of the house and asked the petitioner as to why she was there. The petitioner gave the excuse that she was there to look for a parcel. She searched every bedroom in the house and found the co-respondent in one of the bedrooms half-naked. She told the respondent this is the last time you will see me again in this house and then left.

The petitioner? s sister also testified that she saw the co-respondent half dressed inside the matrimonial home at Vaivase-uta on the same night. LW310 Family law 4. 8 In his evidence, the respondent admits having committed adultery with the co-respondent. He says he has never denied to his wife, the petitioner, that he had committed adultery with the co-respondent. The corespondent did not appear to give evidence. On this evidence, I find that the ground of adultery alleged in the petition had been established. Accordingly a decree is granted to dissolve the marriage of the petitioner to the respondent.?

However, in *Bhagmati & Another v Ishri Prasad* [1974] 20 FLR 75, the Court dismissed an appeal by a wife against an order for dissolution of the marriage on the basis that admissions made by her were not voluntary. Mr. Justice Bodilly stated that: ' The Court must have sufficient evidence before it

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to be reasonably satisfied. I think that it is clear that a court would not be reasonably satisfied upon a mere balance of probability, on the other hand I do not think that the standard of proof required is as high as that in criminal cases, namely beyond any reasonable doubt. It lies somewhere between the two?. READ THE CASE NOW

Proving adultery can be difficult and may depend on circumstantial evidence. Read the case of *Sugar v Fatafeti* [1993] TOSC 2 for an illustration of this. A fraudulent secret understanding between the parties - collusion - is also one of the discretionary bars available to some courts in the region. READ s 11 (2) Divorce Act [Cap 29] (Tonga) Condonation or connivance may also act as a bar to the relief sought by the petitioner, whilst forgiveness by the petitioner provides the respondent with a defence in the Marshall Islands, provided that the forgiving party is treated with "conjugal kindness" (26 MIRC 1 s17).

See the Vanuatu case of *Ilaisa v Ilaisa* [1998] VUSC 16 where the question of condonation is considered. Adulterers must be joined as co-respondents in proceedings for divorce on the basis of adultery in most jurisdictions unless they are excused by the Court on special grounds. See Cook Islands Matrimonial Proceedings Act 1963 (NZ) s 22; Samoa Divorce and Matrimonial Causes Ordinance 1961 s 11; Kiribati and Solomon Islands Matrimonial Causes Act 1950 (UK) s 3 and Vanuatu Matrimonial Causes Act [Cap 192] s17. In Niue this is at the discretion of the court ((NZ) Niue Act 1966 s537.

READ s 11 Divorce and Matrimonial Causes Ordinance, 1961 (Samoa) Proceedings against co-respondents may be dismissed by the Court if there is insufficient evidence against them. See for example, Samoa s. 10. LW310 Family law 4. 9 READ s 6 Divorce Act [Cap 29] (Tonga) In some countries <https://assignbuster.com/separation-divorce-annulment/>

petitioners have a right to claim damages against corespondents. See for example, Vanuatu, Solomon Islands and Kiribati. The Solomon Island and Vanuatu Acts provide that a petitioner relying on adultery as a ground for divorce may claim damages from any person.

The amount of damages which may be claimed against co-respondents is prescribed in Tonga. READ s. 13 Divorce Act, 1927 (Tonga) In Cook Islands, Vanuatu and Tonga the courts may direct the manner in which such damages are to be paid or applied and the sex of the petitioner or respondent is irrelevant. However, only petitioner husbands in the Solomon Islands and non i-Kiribati in Kiribati may claim damages in adultery cases. The categorisation and amount of such damages, which are not specified in the Acts, (except in Tonga) has been the subject of some judicial concern.

In Tonga where the amount claimed is specified, the court found in ' Afa v Tali & Sika [1990] Tonga LR 185 that the maximum amount of damages should only be awarded where it was shown on the balance of probabilities that the conduct of the co-respondent brought about the breakdown of the marriage by, for example, seducing or enticing away the respondent. Further, damages were to be based on- (a) The actual value of the wife (sic) (in terms of money and companionship); and (b) Compensation for injury to feelings, honour and family life. Damages are measured as compensation and not to punish or make an example of the Co-respondent.

This idea of damages as compensation rather than punishment was elaborated further in Lamatau v Mau [1991] TOSC 3. It has been indicated however that the award of damages is becoming less common and that the courts are reluctant to allow a change of claim to include damages – see <https://assignbuster.com/separation-divorce-annulment/>

Mamata v „ Akolo [2001] TOSC 47. The Vanuatu case of Banga v Waiwo is further illustrative of the difficulties faced by courts in the region when interpreting legislation derived from colonial sources whilst attempting at the same time to acknowledge custom law and respond to local social conditions.

This matter originated in the Senior Magistrates Court where the petitioner gave evidence that customary meetings had been held with regard to the marital dispute. As a result of these meetings the chiefs decided that the husband was to pay 20, 000 vatu to the co-respondent's husband and the co-respondent was to pay the wife 5, 000 vatu and two pieces of calico. The petitioner was also to pay the co-respondent 5, 000 vatu because she had "insulted" the co-respondent. Having refused to accept this decision, the petitioner approached the Court for a divorce and claimed 100, 000 vatu damages against the co-respondent.

The solicitor for the co-respondent argued that the sum claimed was excessive and amounted to punitive damages. Reference was made to the Matrimonial Causes Act 1965 (UK) on which the Vanuatu Act is based. In the UK, it was argued, damages are awarded on a compensatory basis only and this should also be the approach of the law in Vanuatu. The amount awarded by the Chiefs, namely 5, 000 vatu, was submitted as being appropriate as compensation " for the loss of the Husband (sic). "

On behalf of the petitioner it was submitted that section 17 (1) of the Act should be interpreted according to the intention of Parliament. That section states that; • A petitioner may on a petition for divorce claim damages from any person on the ground of adultery with the respondent. " • It was also

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contended that " adultery is a serious offence in Vanuatu communities and that punitive damages are often given for adultery which show clearly that Vanuatu local circumstances are different from those of the United Kingdom.

The Senior Magistrate (then) considered the issue of the interpretation of section 17 of the Act and referred to the rules in *Heydon's case* (1584) as restated in *Re Macmillan v Dent* (1907) 1 Ch 120, *Brett v Brett* (1826) 2 D and s 8 of the Vanuatu Interpretation Act CAP 132. In determining the intention of parliament the Senior Magistrate found circumstances in Vanuatu to be quite different from those in the United Kingdom and the Acts themselves to differ in important respects. Unlike the position in the UK Act, which allows only a petitioning husband to claim damages, the Vanuatu Act is not so limited.

In comparing the UK and Vanuatu jurisdictions, it was noted that in Vanuatu the law recognises civil, religious and custom marriages and customary law, pursuant to Article 95(3) of the Constitution. Further, because adultery is considered a serious offence on the basis of custom, ' any damages claimed by the Petitioner against the Co-Respondent should be awarded in accordance with customary law. ' The Senior Magistrate did not categorise the type of damages to be awarded. He found in favour of the petitioner with regard to the amount of damages, however, stating that, '... 00, 000 Vatu damages claimed against the Co-Respondent is not excessive and it should be awarded to the Petitioner in accordance with customary law. ' The matter then went on appeal to the Supreme Court of the Republic of Vanuatu where Chief Justice Vaudin d'Imecourt held that, whilst exemplary damages could be awarded in an appropriate case, no evidence justifying such an award had

been presented to the court. His Honour considered that custom law only LW310 Family law 4. 11 applied where no other law was in force. The Court also found that custom law is not uniform in Vanuatu and; Although it is conceivable that there might not be a need for strict rules regarding the obtaining of evidence of a particular custom if and when the need arises to establish a particular custom, evidence must, nevertheless, be obtained and a clear custom must be established. ' READ Waiwo v Waiwo [1996] VUMC 1 and Banga v Waiwo [1996] VUSC 5 In Solomon Islands and Kiribati where UK Acts still apply, damages for adultery may be claimed by petitioner husbands. Where damages are not available the court may order an adulterer to pay costs. S t u d y T a s k 1 CONSIDER THE FOLLOWING QUESTIONS

Adultery and Divorce 1. Do you think it is sufficient for the petitioner to simply show that the respondent has committed adultery OR that the respondent has committed adultery AND ALSO that the petitioner finds it intolerable to live with the respondent? 2. If it is sufficient only to show that the respondent has committed adultery is one incident of adultery sufficient? 3. To what extent should the court investigate the claim? If the petitioner files an affidavit stating he or she believes the respondent to have committed adultery is that sufficient? . What does adultery as a ground for divorce which is frequently relied on tell us a) about marriage b) about people? 5. Should it make any difference to a divorce petition if the petitioner has also committed adultery? 6. Is the adultery of a woman more serious than that of a man? If yes why? 7. If the ground for divorce is irretrievable breakdown or final breakdown of a marriage and the

matrimonial fault relied on is adultery, should this be viewed more gravely than other matrimonial offences such as cruelty, habitual drunkenness, or desertion? . Could adultery be claimed as the ground for divorce even if in fact it is not this but other factors which have led to the irretrievable breakdown of the marriage? 9. To what extent should the law of divorce be used to punish adultery? 10. What is the advantage/disadvantage of joining a co-respondent to adultery in a divorce action? 11. Should a petitioner be able to claim damages from more than one corespondent? What are damages for in such cases? 12.

Would it make any difference if the respondent had promised to marry the coLW310 Family law 4. 12 respondent? 13. Should a co-respondent ask if the respondent is married before having intercourse with him or her? 14. Should it make a difference - in law - if the co-respondent is married or not? 15. Is adultery a) unlawful b) immoral c) a fact which may be evidence of the breakdown of a marriage? 16. Should any consideration be given to the fact that there are children born from the adulterous union? II. Desertion

In Tuvalu and Nauru the sole ground upon which a petition for divorce may be presented is that the marriage has " completely broken down" (Matrimonial Proceedings Act Tuvalu s 9(1) and " broken down irretrievably"(Matrimonial Causes Act 1973 s 8 Nauru) respectively. In Tuvalu, desertion " without reasonable cause" (s. 9(2)(b) may be accepted as evidence of marriage breakdown whilst in Nauru it is one of the grounds which, if proved, can lead to a finding that the marriage has broken down irretrievably. (s 9 (1)(a)(ii) Desertion is not a ground for divorce in Tokelau.

READ ss 9(1) and 9 (2)(b) Matrimonial Proceedings Act [Cap 21] (Tuvalu) The applicable provisions in Kiribati, (Native Divorce Ordinance s 4(b) and Matrimonial Causes Act (UK) 1950 s 1(b)) Niue ((NZ) Niue Act 1966 s 534(3) (c)) Solomon Islands (The Islanders Divorce Act [Cap 48] S5(1)(b) and Matrimonial Causes Act 1950 (UK.) s 1(b)) and Vanuatu (Matrimonial Causes Act [Cap 192] s 5(a)(ii)) state that the respondent must have deserted the petitioner without just cause (the wording in the Kiribati and Solomon Islands legislation is " without cause") for at least three years.

In the Cook Islands and Nauru the period is two years prior to filing the petition (Matrimonial Proceedings Act, 1963 (NZ) s 21 (c) and Matrimonial Causes Act 1973 ss 9(1)(ii), 12 (3). 54) Wilful desertion is statutorily provided for in Cook Islands (Matrimonial Proceedings Act, 1963 (NZ) s 21 (c)); Marshall Islands (26 MIRC 1 s 15 (c)); Samoa (Divorce and Matrimonial Causes Ordinance 1961 s 7(1)(b)) and Tonga (The Divorce Act [Cap 29] s 3(1)(c)). LW310 Family law 4. 13

The Marshall Islands Act prescribes a period of not less than one year before wilful desertion may be alleged, Samoa prescribes three years and the other jurisdictions prescribe two years. READ s 7(1) (b) Divorce and Matrimonial Causes Ordinance, 1961(Samoa) There appears to be no difference in law between wilful desertion and desertion as in all cases the burden is on the petitioner to show that throughout the statutory period the desertion subsisted without cause. A distinction can be made however between desertion and constructive desertion.

Facts presented to the court must show that the respondent intended to leave the marriage and that the desertion was against the will of the
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petitioner. If the behaviour of one party to the marriage causes the other to leave the matrimonial home then constructive desertion may be argued. Cook Islands also allow desertion to continue notwithstanding that during the period of the desertion the deserting party becomes "incapable of forming or having an intention to continue the desertion" (Matrimonial Proceedings Act, 1963 (NZ) s 24)

A review of desertion as a ground for divorce can be found in the Solomon Island case of *Kikolo v Aberam* [2002] SBHC 28. In the Fiji case of *Kistamma v Sarojini* [1977] 23 FLR 86, desertion was not made out because the respondent was found to have made a genuine offer to return to the marriage. See also *Ledua v Uluiborotu* [1994] FJHC 182 and compare *Peck v Peck* [1993] FJHC 34. There may be some confusion between desertion as a ground for divorce and separation. This was considered in the case of *Peck v Peck* [1993] FJHC 34 III. Failure to Consummate the Marriage

The issue as to whether or not the marriage has been consummated is dealt with in some jurisdictions as a ground for divorce and in others as rendering the marriage voidable. The latter approach is taken by Cook Islands (Matrimonial Proceedings Act, 1963(NZ) s 18 (2)(a)); Nauru (Matrimonial Causes Act 1973 s 22 (e)); Samoa (Divorce and Matrimonial Causes Ordinance 1961 s 9(3)(a)); Solomon Islands (The Islanders Divorce Act [Cap 48] s13 (1)(a) and Matrimonial Causes Act 1950 (UK.) s 8 (1)(a)) and Vanuatu (Matrimonial Causes Act [Cap 192] s 2(1)(a)).

In Fiji, if a party was incapable of consummating, the marriage used to be rendered voidable (Matrimonial Causes Act [Cap 51] s 9(1) (a)) 70 whilst wilful and persistent refusal to consummate was a ground for divorce <https://assignbuster.com/separation-divorce-annulment/>

(Matrimonial Causes Act [Cap 51] s 14(c)). The new Family Law Act abolishes this ground for divorce. Inability of failure to consummate may however lead to the irretrievable breakdown of the marriage. In Tuvalu the term "voidable" is not used but wilful refusal to consummate provides an entitlement to divorce (Matrimonial Proceedings Act [Cap 21] s 8).

LW310 Family law 4. 14 The Marshall Islands legislation provides that:- ' A decree annulling a marriage may be rendered on any ground existing at the time of the marriage which makes the marriage illegal and void or voidable. A court may, however, refuse to annul a marriage which has been ratified and confirmed by voluntary cohabitation after the obstacle to the validity of the marriage has ceased, unless the public interest requires that the marriage be annulled. (26 MIRC 1 s 12)?

In Kiribati it is a ground for divorce if the respondent has either wilfully refused or is incapable of consummating the marriage (Native Divorce Act [Cap 60] s 4(d)) whilst in Tonga the section is much wider and provides that if:- ... the respondent at the time of the marriage is and continues to be incapable of consummating the marriage by reason either of some structural defect in the organs of generation which is incurable and renders complete intercourse impracticable or of some incurable mental or moral disability resulting in an invincible repugnance to sexual intercourse with the petitioner. Divorce Act [Cap 29] s3 (1) (e)) The petitioner has grounds for the marriage to be dissolved. In the region, only Tokelau does not provide for failure to consummate as either a ground for divorce or as possibly rendering a marriage voidable. IV. Cruelty Whilst cruelty is not mentioned specifically in the legislation of Cook Islands, Nauru, Niue and Tonga it is a ground for

divorce elsewhere in the region in Kiribati Marshall Islands and Samoa. In Vanuatu, such cruelty must be "persistent".

A clear consideration of what may amount to cruelty was considered in the case of *Kong v Kong* [1999] VUSC 41. See also the approach taken in the Marshall Islands where; „ the guilt of either party toward the other of such cruel treatment, neglect or personal indignities, whether or not amounting to physical cruelty, as to render the life of the other burdensome and intolerable and their further living together unsupportable? (26 MIRC 1 s 15(b)81) ...is a ground for divorce.

The scope of the cruelty is extended by the Regulations in Tokelau which specify that the cruelty can be directed to the applicant or " a child of the applicant" (Tokelau Divorce Regulations 1987 Reg. 3). The applicable provisions in Cook Islands, Niue and Samoa require that the respondent be not only habitually cruel but a " habitual drunkard" as well ((NZ) Matrimonial Proceedings Act, 1963 s 21 (e); (NZ) Niue Act 1966 s 534 (3)(d); Divorce and Matrimonial Causes Ordinance 1961 s 7(1)(c)83). LW310 Family law 4. 5 In the Solomon Islands case of *Elaine Bui v Anthony Makasi* [1993] SBHC 3, the applicant succeeded in obtaining a divorce on the ground of cruelty. Justice Palmer held that it was not necessary to find physical violence and considered four specific allegations. Three of the allegations involved assaults and threats against the petitioner whilst the respondent was drunk and the fourth allegation involved an assault on the eldest child of the parties. READ THE CASE NOW V. Criminal Convictions

In the Cook Islands, Samoa, and the Solomon Islands and for non i-Kiribati only a respondent husband can be guilty of rape, sodomy or bestiality and <https://assignbuster.com/separation-divorce-annulment/>

sued for divorce by his wife. (Cook Islands Matrimonial Proceedings Act, 1963(NZ) s 21(1)(h); Kiribati Matrimonial Causes Act 1950 (UK) s 1; Samoa Divorce and Matrimonial Causes Ordinance 1961 s 7(1)(k), Solomon Islands The Islanders Divorce Act (Cap 48) s 5 (1) and Matrimonial Causes Act 1950 (UK.) s 1) In Vanuatu, a wife may divorce her husband if he has been " convicted of rape or an unnatural offence" (Matrimonial Causes Act [Cap 192] s5).

Incest, attempted rape or assault with intent to rape a child of the either party provides a ground for divorce in the Cook Islands Matrimonial Proceedings Act 1963 (NZ) s 21(1) (g) and Niue (Niue Act 1966 (NZ) s 543(f)) as does sexual intercourse or attempted sexual intercourse with the child. Husbands in Niue who commit rape or buggery(s 543(g) or either party to a marriage in the Cook Islands, Samoa or Niue who is convicted of murder may also be divorced.

Other criminal convictions which provide a ground for divorce are those which result in various periods of imprisonment including for a life sentence, seven years and five years. (E. g. Marshall Islands 26 MIRC 1 s 15(e) stipulates imprisonment for life or for three years or more; see also: Samoa Divorce and Matrimonial Causes Ordinance 1961 s 7(1)(l) and Tonga The Divorce Act, 1927 s 3 (1)(a)). Serious offences against the petitioner are also specifically provided as a ground for divorce in three jurisdictions.

In three of these, offences against a child of the parties are included: Cook Islands (Matrimonial Proceedings Act, 1963(NZ) s 21(1) (f); Niue (Niue Act 1966 (NZ) s 534 (3) (e)) and Samoa (Divorce and Matrimonial Causes Ordinance 1961 s 7 (d)) READ s 7(d) Divorce and Matrimonial Causes <https://assignbuster.com/separation-divorce-annulment/>

Ordinance, 1961(Samoa) VI. Drunkenness In the jurisdictions where drunkenness is a ground for divorce, such as Cook Islands (Matrimonial Proceedings Act 1963(NZ) s 21(1) (f)) Samoa (Divorce and Matrimonial Causes Ordinance 1961) s 7(1) (d)) and Niue (Niue Act 1966 (NZ) s 534 (3) (e)) the legislation is not uniform although the Cook

Islands, Niuean and LW310 Family law 4. 16 Samoan Acts are in very similar terms. As noted above these Acts link drunkenness and cruelty. They also link other behaviour with drunkenness along the lines of traditional gender roles in marriages, as illustrated by the Samoan provision which states; that the respondent has for three years or more been a habitual drunkard and has either habitually left his wife without sufficient means of support or habitually been guilty of cruelty toward her; or, being the petitioner? wife has for a like period been a habitual drunkard and has habitually neglected her domestic duties and rendered herself unfit to discharge them. (Divorce and Matrimonial Causes Ordinance 1961) s 7(1) (c)) In the Cook Islands and Niue, the relevant section is in similar terms with a three year time period for a husband who is a habitual drunkard or drug addict and who either leaves his wife without means of support or who is habitually cruel to her. (Cook Islands Matrimonial Proceedings Act, 1963(NZ) s 21(1) (e); Niue, Niue Act 1966 (NZ) s 534(3) (d)).

A wife must be similarly addicted and either habitually neglect her domestic duties and have been unfit to discharge them or be habitually guilty of cruelty towards the husband. (Cook Islands Matrimonial Proceedings Act, 1963 (NZ) s 21 (e)(i) which prescribes a period of two years following amendment by the Cook Islands Amendment Act 1982; Niue Niue Act 1966

(NZ) s 534(3) (d)(i)). In the Marshall Islands the time period is reduced to not less than one year.

The applicable section requires "habitual intemperance in the use of intoxicating liquor or drugs" (26 MIRC 1 s 15(d)). Obviously the time restrictions are used to bar applications for divorce after one or several episodes involving excessive use of alcohol or other drugs. VII. Failure to Maintain In Niue and in Samoa a petitioner wife may only rely on insufficient means of support if the respondent husband is a habitual drunkard or addict (Niue Act 1966 (NZ) s 534(3) (d) (i) and Divorce and Matrimonial Causes Ordinance (1961) s 7(1) (c) (Samoa)).

The equivalent provision in Marshall Islands targets the "wilful neglect by the husband to provide suitable support for his wife when able to do so or when failure to do so is because of his idleness, profligacy or dissipation" (26 MIRC 1 S15 (I)). VIII. Presumed Dead In the Cook Islands it is a ground for divorce if the respondent can be presumed dead on reasonable grounds. (Matrimonial Proceedings Act, 1963 (NZ) s 19) Separate provision is made for this in Samoa where five years absence is required (Divorce and Matrimonial Causes Ordinance (1961) s 8) and in Nauru, Marshall LW310 Family law 4. 7 Islands and Vanuatu the period is seven years (26 MIRC 1 s 29; Matrimonial Causes Act 1973 s 29; Matrimonial Causes Act (Cap 192) s13). The United Kingdom legislation applying in Kiribati and Solomon Islands also makes separate provision for a decree of presumption of death and dissolution of marriage after seven years of absence (Kiribati Matrimonial Causes Act 1950 (UK) s 16; Solomon Islands Matrimonial Causes Act 1950 (UK.) s 16). IX. Unsound Mind or Insanity

In the Cook Islands a marriage is rendered voidable if at the time of the marriage either party was a " mental defective" (Matrimonial Proceedings Act, 1963 (NZ) s 18 (2) (b)). Insanity, provided that it has existed for three or more years may provide grounds for divorce in one country (see Marshall Islands 26 MIRC 1 s15 (f)) but other jurisdictions refer to the " unsound mind" of the respondent to divorce proceedings. The length of time that a person has been of unsound mind, possibility of recovery and proof of the condition are material.

Some jurisdictions require that the respondent be under care and treatment continuously for five years prior to the presentation of the petition for divorce (e. g. Cook Islands Matrimonial Proceedings Act, 1963(NZ) s 21(1)(l); Kiribati Native Divorce Ordinance [Cap 60] s 4(e); Kiribati Matrimonial Causes Act 1950 (UK) s 1(d); Niue, Niue Act 1966 (NZ) s 534(3)(k); Samoa Divorce and Matrimonial Causes Ordinance (1961) s 7(f), (g); Solomon Islands The Islanders Divorce Act [Cap 48] s 5 (1)(d) and Matrimonial Causes Act 1950 (UK. s 1 (d); Tonga The Divorce Act, 1927 s 3 (1)(d); Vanuatu Matrimonial Causes Act [Cap 192] s 5 (a)(iv)). Samoa extends its provision to cover the possibility of a confinement in another country (Divorce and Matrimonial Causes Ordinance (1961) s 7(1) (g)). The Cook Islands, Niue and Samoa also cover the possibilities of respondents being of unsound mind intermittently and continuously for a number of years (Matrimonial Proceedings Act, 1963 (NZ) s 21(1) (j), (k); Niue Act 1966 (NZ) s 534(i) (j); Divorce and Matrimonial Causes Ordinance (1961) s7 (f) & (g)).

Respondents must be either " unlikely to recover" (Cook Islands, Niue, Samoa, Tuvalu) or " incurably of unsound mind" (Kiribati, Solomon Islands,

Tonga and Vanuatu). Reference may be made to applicable Mental Health legislation (Kiribati, Niue, Samoa, Solomon Islands and Tuvalu). There is no reference to insanity or unsound minds in Nauru or Tokelau. READ s 7 Divorce and Matrimonial Causes Ordinance, 1961 (Samoa) X. Marital Breakdown - Living Apart The legislation in Marshall Islands, Nauru and Tonga provides a "catch all" provision in identical terms dealing with the behaviour of the respondent generally.

The provisions require that the petitioner "cannot reasonably be expected to live with the respondent" because of that behaviour (Marshall Islands 26 MIRC 1 s 9(1) (a); Nauru Matrimonial Causes Act 1973 s 9(1) (a) (i); Tonga The Divorce Act, 1927 s 3 (1) (g)). The parties are treated as living apart in Nauru unless they are living with each other in the same household although they may live together for a period or periods not exceeding six months, in an attempt to reconcile, without prejudice.

In wider terms, the Tuvalu Act allows parties to divorce on proof that the marriage has broken down where "in the circumstances it would be unreasonable to expect one party to continue in the marriage relationship with the other". READ s 9(2) Matrimonial Proceedings Act, (Cap 21) (Tuvalu) When a party asks for a divorce on the ground that petitioner and spouse are living apart, is this just another way of claiming that petitioner has been deserted or is this a different ground? Some answer to that question might be provided in the case of Ng Lam v Ng Lam from Samoa.

READ the Ng Lam case now XI. Incompatible Temperaments Kiribati is the only jurisdiction to allow divorce on the basis that the temperaments of the parties are incompatible (Native Divorce Ordinance [Cap 60] s 4(j)). This is a <https://assignbuster.com/separation-divorce-annulment/>

significant departure from other jurisdictions and is clearly a no fault ground for divorce. The closest comparison is the provision in Tuvalu relating to " circumstances" as described in the preceding paragraph. However in Fiji, incompatibility of temperament might be a cause of the irretrievable breakdown of the marriage.

XII. Disease Whilst the contraction of disease may render a marriage voidable in most jurisdictions it can be used as a ground for divorce in others. Kiribati prescribes " venereal disease" as a ground for divorce if certified as such by " a medical officer"(Native Divorce Ordinance [Cap 60] s 4(g)) whereas Tonga specifies affliction with " an incurable disease capable of being transferred to the petitioner by contagion of infection" (The Divorce Act [Cap 29] s 3 (1) (d)).

The Marshall Islands prescribes leprosy as a ground for divorce (26 MIRC 1 s 15(g)) XIII. Other Grounds The Marshall Islands lists " neglect" or " personal indignities" as grounds for divorce if this renders the life of the other party " burdensome and intolerable" and the married life " unsupportable" (26 MIRC 1 s 15(b)). Kiribati has the additional grounds of epilepsy (Native Divorce Ordinance [Cap 60] s 4(f)); duress or mistake (s 4(h)) and parties within prohibited degrees of LW310 Family law 4. 9 consanguinity or affinity (s 4(i)) as grounds for divorce. Other jurisdictions categorise such issues as rendering a marriage void or voidable (e. g. Cook Islands Matrimonial Proceedings Act, 1963(NZ) s 7(1) (a) (ii); Niue Niue Act 1966(NZ) s 515). Similarly, the Tongan Act states that it is a ground for divorce if a respondent has a former spouse still living (s 3 (1)(b)), whereas this situation renders a marriage void in Cook Islands, Nauru, Solomon Islands, Samoa and Fiji.

The Cook Islands and Niue provide that a husband can file for a divorce if without his consent his wife has been "artificially inseminated with the semen of some man" other than himself (Matrimonial Proceedings Act, 1963 (NZ) s 21(1)(b) and Niue Act 1966 (NZ) s 534(3)(b)). A marriage is rendered voidable in Cook Islands (Matrimonial Proceedings Act, 1963 (NZ) s 18 (2) (d) and IN Vanuatu (Matrimonial Causes Act (Cap 192) s 2 (1) (d)) if a wife is pregnant at the time of her marriage by some person other than the petitioner.

The Cook Islands takes this situation further by providing for dissolution where a woman other than the petitioner wife is pregnant by the respondent (Matrimonial Proceedings Act, 1963 (NZ) s 18 (2) (d)) 2. Customary divorce The divorce laws of the region are governed by written legislation - much of it introduced under colonial administration and now therefore, quite out of date. Where marriages may be entered into according to custom then customary divorce applies. This occurs in Vanuatu and Solomon Islands. Customary divorce also has some problems.

Consider the two cases below. Both are from Melanesia. In all other respects, the two cases are very different. As you read *To? ofilu v Oimae*, a case from Solomon Islands, and the *Wagi Non* case from Papua New Guinea, consider what differences, if any, there are between the customary law of divorce and the statutory law of divorce. Consider also the attitudes of the two judges towards custom. READ *To? ofilu v Oimai* now And, when you have finished that case READ Application of *Wagi Non* 3. RECOGNITION OF FOREIGN DIVORCE DECREES

As Pacific people acquire greater mobility and come into contact with people of other nationalities and who are domicile in other countries it is not unusual that marriages and divorces occur outside the region or in a different jurisdiction. It is therefore important to know what recognition is given by domestic law to these decrees. LW310 Family law 4. 20 In Nauru, the Recognition of Foreign Divorces, Legal Separations and Nullity of Marriages Act 1973 provides guidelines for judicial recognition of foreign orders or decrees. The following sections give the grounds for recognition and the exceptions from recognition respectively:- . 4 (1) The validity of a foreign divorce, legal separation, annulment of marriage or declaration of invalidity of marriage shall be recognised if, at the date of the institution of the proceedings in the country in which it was obtained - (a) either spouse was habitually resident in that country, (b) either spouse was a national of that country; or (c) the proceedings by means of which it was obtained were held in the exercise in that country of a jurisdiction similar to any jurisdiction conferred in the Family Court in respect of proceedings in Nauru by section 44 of the Matrimonial Causes Act 1973. 2) In relation to a country the law of which uses the concept of domicile as a ground of jurisdiction in matters of divorce, legal separation or nullity of marriage, paragraph (a) of the preceding section shall have the effect as if the reference to habitual residence included a reference to domicile within the meaning of that law. (3) In relation to a country comprising territories in which different systems of law are in force in matters of divorce or legal separation, the preceding provisions of this section, except those relating to nationality, shall have effect as if each territory were a separate country". s. 9 (1) Recognition by

virtue of this Act of the validity of a divorce, legal separation, annulment of marriage or declaration of invalidity of marriage obtained outside Nauru may be refused if, and only if - (a) it was obtained by one spouse - (i) without such steps having been taken for giving notice of the proceedings to the other spouse as, having regard to the nature of the proceedings and all the circumstances, should reasonably have been taken, or ii) without the other spouse having been given, for any reason other than lack of notice, such opportunity to take part in the proceedings as, having regard to the matters aforesaid, he should reasonably have been given: or (b) its recognition would manifestly be contrary to public policy. (2) Nothing in this Act shall be construed as requiring the recognition of any findings of fault made in any proceedings for divorce, legal separation or annulment or of any maintenance, custody or other ancillary order made in any such proceedings. LW310 Family law 4. 21 READ the following case *Meleisea v Meleisea* [1994] WSSC 24 Where legislation does not deal with the recognition of foreign decree, courts must have recourse to the common law. The case example above shows how this may occur in practice. It also highlights possible evidentiary problems when dealing with overseas decrees. 4. Divorce: Marital Agreements, Collaborative Law, Mediation and Family Arbitration Litigation has for a long time been the traditional battlefield for disputing parties within the Family Law.

The financial and emotional cost of litigation in the Family Courts is an issue that has often prompted debate over the years. When parties engage themselves in long, drawn out disputes, the strain is not just felt financially, the children will often be victims, courts are clogged with an overflow of

cases and the public will end up bearing the burden of resources spent. The time has come for courts to begin utilising different forms of resolving disputes within the courts and one such mechanism is arbitration or alternative dispute resolution (ADR).

Dispute resolution is not a new concept to the South Pacific as most societies are familiar with one form or another. ' Most Pacific societies are familiar with the ideas of " alternative dispute resolution" without necessarily being familiar with the term. As Vanuatu Chief Justice Lunabek informed a conference on conflict resolution held in Vila in 2000: " ADR is not a new concept to Pacific Island jurisdictions and, in particular, to Vanuatu. It is, in fact, consistent with traditional methods of dispute resolution that predated the introduction of the formalised system of justice. The resolution of conflict is described as being " deeply embedded in the culture" in many societies, so that its structures remained unobtrusive.' (Graham Hassal, „ Alternative Dispute Resolution in Pacific Island Countries? [2005] 9 (2) Journal of South Pacific Law) In jurisdictions that utilise ADR in the Family Court, there are different processes currently available and these include: i. Counseling This can be likened to a sort of therapeutic process that is aimed at examining the underlying conflict between parties and with the goal of assisting with reconciliation.

Parties are encouraged to sort out their differences rather than opting to go to court. In Fiji, one of the key strategies in the Family Law Act to provide support to troubled families is to make available within the Family Court an on-site counseling service. There is statutory requirement under s. 11 of the LW310 Family law 4. 22 Act for the Director of Counseling to „ advertise the

existence and availability of the counseling and welfare facilities of the respective Family Division? and as far as practicable, to make those facilities available to those seeking such services.

The Act provides for three different types of counseling and these are marriage reconciliation, family and child counseling and financial and property conciliation. (See also the Family Protection Act, Vanuatu) Child counseling is an important component because the focus is on the parents coming to an agreement about issues pertaining to the child (ren) and this is done with the belief that the best judges of the children's best interest are the parents and not the court. Section 50 and 51 of the Family Law Act, Fiji make provisions for child counseling.

This is where a parenting plan may be drawn up by the parents. Some issues that the plan will address is where and with whom the child is to reside (focus will be on the effect of relocating a child from a familiar environment), the issue of contact between the child and the non-custodial parent and other persons, the maintenance of a child and any other aspect of parental responsibility towards the child. ii. Negotiation (including round table conferences and collaborative law) This seems to be the most common form of dispute resolution in family law.

The simplest example of negotiation is where separated parties have discussions with each other to determine if they can resolve some or all of their issues. This is very similar to counselling where parties may be focused on what type of parenting arrangement they will agree to. Parties may choose to conduct negotiations on their own or if this proves too difficult then they may engage the services of their lawyers who will negotiate on

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their behalf. The latter form is now known as round table conference. A round table conference is one where parties and lawyers meet together, generally at one of the lawyers offices, to undertake settlement discussions. One or both lawyers will initiate the meeting. The conference can be used to resolve any type of legal issues, such as those about parenting and property and finances. Lawyers need to come to the meeting prepared with all relevant information, such as valuation of properties and superannuation entitlements, where there is property dispute. If a dispute is complex, a series of round table conferences may be needed.? Alexander Harland et al, Family Law Principles (1st ed. 2011) A more complex form of negotiation is known as collaborative law which aims to resolve matters without recourse to litigation. Parties who choose to participate in this type of negotiation must sign an agreement that commits each of them to the process and this agreement includes an undertaking that parties will not resort to litigation. If one party wishes to opt for litigation then the disputing parties' lawyers must be changed as they had originally signed the agreement on litigation.

This is one drawback of this option. ' Collaborative law may be appropriate where: ; Parties in low conflict are motivated to work together with the assistance of their lawyers to resolve their dispute, without going to court; ; Parties are committed to negotiating a settlement outcome; ; Parties may have substantial assets, and then can involve their accountant and financial advisors in the negotiation process.? (Alexander Harland et al, Family Law Principles (1st ed. 2011) This form of negotiation first began in the United States and Canada and is today used in Australia. ii. Mediation Mediation is a process where a third party enters the dispute as a sort of referee and to

facilitate the discussion between disputing parties. This third party may be someone from the community, the family court, a counsellor, and even lawyers. The Family Court of Fiji operates according to simple, appropriate and effective procedures, offers counseling and mediation support services. „ Mediation may be appropriate where: | Parties are able to negotiate with assistance and want to work towards settlements; Both parties are able to negotiate during the process and are not prevented from doing so by an overwhelming power imbalance, due to family violence, mental health problems, cultural factors or other issues (or the process can be structured in an appropriate way; for example, shuttle mediation in separate rooms and each party has a lawyer representative during the mediation).? (Alexander Harland et al, Family Law Principles (1st ed. 2011) iv. Conciliation This process is not one aimed at getting the parties back together.

Rather it is designed to allow for the disputing parties to settle issues regarding the settlement of matrimonial property. ‘ The conciliator will be a qualified lawyer who will receive training in conciliation and alternative dispute resolution skills. They will discuss who will live in the matrimonial home or whether it should be sold; whether payments are to be made to the Bank for loans; how much maintenance is to be paid for the children or the other spouse if relevant; how income once going into one family will be shared between two homes; their various financial commitments to the Bank or other debtors and any other financial matters.? Imrana Jalal (2009) in Narawa-Daurewa U, The Family Law Act of Fiji, 2003: A Brief Review of Provisions in the Act; The Impact on the Family (with Emphasis on Women? s Access to Justice) (LLM thesis, University of the South Pacific, 2010) Again

the idea of this type of service in the Family Courts is to ensure that parties are the best judges and should try to resolve the issues themselves rather than litigating. v. Arbitration Arbitration is again another means of trying to resolve disputes by means of a third party involvement.

The difference between arbitration and mediation is that with the latter you always have the choice of backing out or not accepting the options being offered by the other party (spouse). In arbitration, although the arbitrator cannot grant a divorce, they do have power over how property distribution and custody and access issues are resolved. An upside to arbitration is that parties are able to keep matters out of court and private and it is also more cost effective. The downside is that for jurisdictions that offer arbitration processes in family law the order made by the arbitrator is not binding until registered in court.

See for example, the Family Law Act of Australia. Conclusion Arbitration should be advanced as a desirable alternative to litigation. A revision of the family legislation in countries of the South Pacific is necessary at this time in light of the ever-increasing use of arbitration and the developments of the law in this area. Alternative dispute resolution is being used in other areas of law as a means of resolving disputes without litigating and so it begs the question, why is the family law being left behind? . Conclusion There are various models of divorce law evident in the USP region which can provide comparisons for reformers. Tuvalu, Kiribati, Nauru and Tuvalu have partial no fault systems and the remainder are largely fault based. Some, however, have retained the concept of matrimonial fault whilst allowing divorce after a

relatively short period of separation. Those laws which focus on " fault" do so because this was the approach of colonial law prior to independence.

This has also led, in two countries, to the application of different matrimonial laws to people in the same jurisdiction on the basis of race rather than relying on the domicile or residence of the petitioners. The legislation also reflects a time and culture when the roles of men and women were largely unquestioned and family life was designed for the procreation of children, the passing of inheritance to ones offspring and the restriction of sexual activity to the parties of the marriage exclusively. This is reflected most dramatically in some of the ' failure to maintain' grounds.

In Samoa, alcoholic husbands must be sure to financially support their wives or face the possibility of divorce while alcoholic wives must determine the nature of their domestic duties and carry them out without neglect. Niue and the Cook Islands alert husbands to the possibility of wives being artificially inseminated with semen which is not theirs, whilst husbands in the Cook Islands and Vanuatu may opt out of a marriage if their wives, at the time of marriage and without their knowledge, were pregnant by a person other than themselves. Wives in the Cook Islands also have redress if their husband has fathered a