

DIVORCE RULES 1991

Rule 1. Citation and Commencement

These rules may be cited as the Divorce Rules 1991 and shall come into operation on 1st January 1992.

Rule 2. Interpretation

"The Act" means the Divorce Act. (Cap 29).

"Ancillary relief" means any claim made under Section 17, or 18 of the Act.

"Court" means the Supreme Court of Tonga.

"Child of the family" has the same meaning as in Section 2 of the Act.

"Children statement" means the statement referred to in Rule 4(5).

"Judge" means the Chief Justice and any other judge of the Supreme Court.

"Lawyer" means a law practitioner enrolled under the Law Practitioners Act 1989.

"Petition" includes a cross-petition.

"Registrar" means the Registrar of the Supreme Court.

"Service Officer" means a police officer or an officer of the Court authorised to effect service of documents.

Rule 3. Application of other Rules

Subject to the provisions of these Rules the practice and procedure of the Supreme Court shall apply, with any necessary modifications, to the commencement and conduct of all proceedings for divorce, custody of and access to children, and for ancillary relief.

Rule 4. Commencement of Proceedings

- (1) Proceedings for divorce shall be commenced by petition.
- (2) Every petition shall be substantially in the form set out in Form 1.
- (3) Every petition shall be signed by the petitioner personally, or if the petitioner is under disability, by a next friend who has been appointed under Rule 18.

(4) Where there is before the Court a petition which has not been dismissed or otherwise disposed of by a final order, another petition by the same petitioner in respect of the same marriage shall not be presented without leave of the Court.

(5) Where a petition discloses that there is a child of the family there shall be filed with the petition a statement ("the children statement") signed by the petitioner personally containing the information set out in Form 2.

(6) A petition shall be presented to the Court by filing:

- (i) the petition, together with as many copies as there are persons to be served;
- (ii) unless otherwise directed on an application made ex-parte, a certificate of the marriage to which the petition relates;
- (iii) if appropriate, the children statement together with a copy for service on the Respondent.

Rule 5. Parties

(1) Where a petition alleges that the Respondent has committed adultery, every person with whom the adultery is alleged to have been committed (if still alive) shall be made a Co-respondent in the cause unless

- (i) the person is not named and the petition states that his or her identity is not known to the petitioner, or
- (ii) the Court otherwise directs on an application made ex-parte before issue of the petition.

(2) Where a petition alleges unreasonable behaviour under section (3)(1)(g) of the Act on the ground that the Respondent has been guilty of an improper association (other than adultery) with a person named, the Petitioner shall apply to the Court at the time when the petition is issued for directions whether such person should be made a Co-respondent in the cause.

Rule 6. Service of Petition and other documents

(1) Subject to the provisions of this rule, and unless otherwise ordered by the Court, every petition or other document lodged in Court shall be served personally by delivering a sealed copy to every other party.

(2) Service may be effected by a service officer or by a lawyer or one of his employees. In no case shall the petitioner himself effect service.

(3) When a lawyer has notified the Court that he represents any party, service of any document (other than a petition) on that party shall be effected by delivering a copy thereof to his lawyer.

(4) The person serving any such document shall forthwith endorse the original document with details of the time, date, place and mode of service, and the server's means of knowledge of the identity of the person served. Such endorsement shall be evidence that such document was duly served as stated thereon.

(5) If it appears to the Registrar that it is impracticable for any reason to serve any document personally, he may grant leave to substitute some other form of service which it appears to him is likely to bring that document to the notice of the person to be served.

(6) If it appears to a Judge that it is impracticable to serve a party personally or by way of substituted service, or it is otherwise necessary or expedient to dispense with service of any document on any party, he may make an order dispensing with such service.

(7) Application for an order under paragraph (5) or (6) shall be made *ex parte* supported by an affidavit showing what steps have already been taken to effect service and stating the grounds of the application. The applicant may be required to attend on the application.

Rule 7. Supplemental and Amended Petition.

(1) A petition may be amended without leave before it is served but only with leave after it has been served.

(2) A supplemental petition may be filed only with leave.

(3) An application for leave under this rule shall be made.

(i) if every other party consents in writing to the proposed supplemental petition or amendment, *ex parte* by filing such written consents together with the proposed supplemental or amended petition; and

(ii) in any other case, on summons supported by affidavit to be served on every other party.

(4) An order granting leave shall fix the time within which any answer must be filed or amended.

(5) Unless otherwise directed, a copy of a supplemental or amended petition, together with a copy of any order made under this rule shall be served on every party to the original petition, and to the supplemental or amended petition.

Rule 8. Pleadings.

(1) Any party who wished to defend a petition or to dispute any facts alleged in it shall file an answer.

(2) A Respondent who wishes to seek a decree of divorce himself may do so in the same suit by way of cross-petition, which may be incorporated in the answer if the Respondent also wishes to defend the petition.

(3) An answer and/or cross-petition shall be filed within 28 days from the date of service of the petition on the party filing it.

(4) (i) A petitioner may file a reply to an answer and/or cross-petition within 14 days after he has been served with a copy of it.

(ii) If a petitioner does not file a reply to an answer he shall be deemed to deny every material allegation of fact in the answer.

(iii) If a petitioner does not file a reply to a cross-petition he shall be deemed to admit every material allegation of fact in the cross-petition.

(5) No pleading subsequent to a Reply shall be filed without leave.

(6) A party who files an answer, reply or other pleading shall file a copy for service on every other party.

Rule 9. Particulars.

(1) A party on whom a pleading has been served may request the party whose pleading it is to give particulars of any allegation or other matter pleaded and, if that party fails to give such particulars within a reasonable time, may apply for an order that the particulars be given.

(2) A party giving particulars, whether or not pursuant to an order, shall file a copy.

Rule 10. Directions for Trial.**(1) Undefended Petitions.**

(i) The Registrar may list an undefended petition for trial at any time after the time for filing an answer has expired.

(ii) Notice of the hearing date shall be served on all parties in such manner as the Registrar shall direct.

(2) Defended petitions.

- (i) After the time for filing a reply has expired, the Registrar shall list a defended case before a judge for directions.
- (ii) the judge may give directions as to
 - (a) the future conduct of the suit, and
 - (b) the date and place of trial of the suit, and
 - (c) any application made for ancillary relief or for an order relating to a child.

or may adjourn consideration of any such matter to a later date.

Rule 11. Trial.

(1) At the trial of a petition the Court may:

- (i) if satisfied that a party is entitled to the relief sought, grant that party a decree nisi of divorce; or
- (ii) if not so satisfied, dismiss the petition or adjourn the trial;
- (iii) if a decree nisi has been granted on the grounds of adultery, order a co-respondent to pay damages to the petitioner;
- (iv) whether or not a decree nisi has been granted, make any appropriate order for
 - (a) custody of or access to children of the family;
 - (b) costs.

(2) Any decree made at the trial shall be drawn up by the Court in Form 3 and shall be served on every party.

Rule 12. Certificate under Section 11(1) of the Act.

(1) If the Court has sufficient information at the trial of the petition, a certificate under section 11(1) of the Act may be granted immediately following the decree nisi.

(2) If the Court does not grant a certificate at the trial of the petition, the Petitioner shall apply to the Court for a certificate.

(3) The procedure for such application shall be the same as for ancillary relief.

(4) At the hearing of such application the Court may exercise any of its powers under sections 17, 18 and 19 of the Act.

(5) The Certificate shall be drawn up by the Court in Form 4 and shall be served on every party.

Rule 13. Intervention by Attorney-General.

(1) When the Attorney-General wishes to show cause against making a decree absolute he shall apply to the Court *ex parte* for leave to intervene.

(2) Such application shall be supported by an affidavit setting out the material facts alleged.

(3) If the Court grants leave to intervene the Attorney-General shall within 14 days after the grant of such leave file his plea setting out the grounds on which he seeks to show cause and shall deliver a copy thereof to the person in whose favour the decree was pronounced and to any other party affected by the decree.

(4) Subject to the following provisions of this Rule, these Rules shall apply to all subsequent pleadings and proceedings in respect of the plea as if it were a petition.

(5) If no answer to the plea is filed within the time limited, or an answer is filed but struck out or not pursued, the Attorney-General may apply forthwith by motion for an order rescinding the decree nisi and dismissing the petition.

Rule 14. Decree Absolute.

(1) After six weeks have expired from the grant of a decree nisi a party in whose favour it was made may apply to the Court for the decree to be made absolute.

(2) After three months have expired from the grant of a decree nisi, if the party in whose favour it was made has not applied to the Court to make the decree absolute, the party against whom the decree was made may do so.

(3) Application under paragraph (1) or (2) of this Rule shall be made by filing an affidavit in Form 5.

(4) On receipt of such application, if the Registrar is satisfied that

(i) there is not pending

(a) an application for rescission of the decree or for rehearing of the cause, or

(b) an appeal against the grant of a decree;

(ii) the time for appealing against the decree, and any extension thereof granted by the Court, has expired;

- (iii) no intervention has been made by the Attorney-General under section 11(2) of the Act;
- (iv) Where the decree was granted under section 3(1)(f) of the Act, the Court has granted a certificate under section 11(1) of the Act;

he shall issue a decree absolute in Form 6:

Provided that if the application is lodged more than 12 months after the decree nisi was made there shall also be lodged a further affidavit

- (a) giving reasons for the delay;
- (b) stating whether the parties have lived together since the decree nisi, and if so, between what dates;
- (c) stating whether the wife has given birth to any child since the decree nisi, and if so stating whether or not it is alleged that such child may be a child of the family;

and such application shall be referred to a judge who may

- (i) make the decree absolute;
- (ii) refer the matter to the Attorney-General to consider whether to intervene; or
- (iii) make such other order as he thinks fit.

Rule 15. Right to be Heard

(1) A Respondent may, without filing an answer, be heard on any question of

- (i) custody of, or access to, any child of the family;
- (ii) the grant of a certificate under Section 11(1) of the Act;
- (iii) Ancillary relief;
- (iv) costs

(2) A Co-Respondent may, without filing an answer, be heard on any question of

- (i) damages;
- (ii) costs.

Rule 16. Application for Custody, Access or Ancillary Relief.

(1) Application for

- (a) custody of, or access to a child, or
- (b) ancillary relief

shall be made by summons in Form 7, stating the precise nature of the relief sought.

(2) An application under this Rule shall be supported by an affidavit

(i) in the case of custody or access, setting out

(a) the present arrangements for custody or access in respect of each child in respect to whom the application relates;

(b) the grounds upon which any material change in those arrangements is proposed; and

(c) if custody is claimed, the proposed arrangements for the care of each such child if custody is granted to the applicant.

(ii) in the case of ancillary relief, setting out

(a) full details of the applicant's income and capital, and

(b) such details as are known of the respondent's income and capital.

(3) The summons and affidavit in support shall be filed together with as many copies as there are persons to be served.

(4) a respondent to an application under this Rule shall, within 14 days after service on him of the summons and affidavit, file an affidavit in reply giving the like information as is set out in paragraph 2 of this Rule, with as many copies as there are persons to be served.

(5) At the request of any party the Registrar shall list the application for directions by a judge, who may make such further directions as he thinks fit, or list the application for hearing.

(6) The application shall be heard in chambers.

Rule 17. Other Applications.

Any other application in the course of a suit shall be made to a judge on summons in Form 7, supported by an affidavit.

Rule 18. Disability.

(1) In this Rule "a person under disability" means

(i) a person who, by reason of mental disorder, is incapable of managing and administering his property and affairs, or

(ii) a person under the age of 21 years.

(2) A person under disability may commence and prosecute proceedings by his next friend and may defend proceedings by his guardian ad litem.

(3) No step shall be taken in any proceedings by a person under disability until his next friend or guardian ad litem (as the case may be) has filed the following documents with the Court:

- (i) a written consent to act by the proposed next friend or guardian ad litem;
- (ii) a certificate by the lawyer representing the person under disability
 - (a) that he knows or believes that the person to whom the certificate relates is a person under disability, stating the grounds for such knowledge or belief;
 - (b) that the person named in the certificate as next friend or guardian ad litem has no interest in the cause in question adverse to that of the person under disability, and that he is a proper person to be next friend or guardian ad litem.

(4) Where a petition, answer or summons has been served on a party who appears to be a person under disability, the party at whose instance the document was served shall, before taking any further step in the proceedings, apply by summons to a judge for directions as to whether a guardian ad litem should be appointed to act for that person.

(5) If, on the hearing of a summons issued under paragraph (4) of this Rule, the judge considers it necessary to protect the interests of the person served, he shall order that some proper person be appointed his guardian ad litem.

Rule 19. Time

(1) The Court may, on such terms as it thinks just, order that the time within which a person is required or authorised to do any act in any proceedings be extended or abridged.

(2) The time within which any person is required by these Rules, or by any order of the Court, to serve, file or amend any pleading may be extended by consent given in writing without an order of the Court.

(3) Unless otherwise ordered by the Court, when the time for doing any act expires on any day when the Court office is closed, the act shall be in time if done on the next day on which that office is open.

Rule 20. Repeal and Transitional.

(1) The Divorce Rules are repealed.

(2) Notwithstanding the repeal of the Divorce Rules, any act which was properly done in accordance with those Rules before they were repealed and which can be done under these rules, shall be deemed to have been validly done under these rules;

provided that:

- (a) a children statement, where required under these rules, shall be filed as soon as possible and no later than 7 days before the date set for hearing of a petition; and
- (b) a judge may order that these rules, or any of them, shall be complied with upon such terms as he thinks fit.

FORMS

Form 1 (Petition)

R. 4(2)

IN THE SUPREME COURT OF TONGA Case No DIVORCE
JURISDICTION

Registry [name of registry in which petition issued]

BETWEEN

A. B.

Petitioner

and

C. D.

Respondent

and

E. F.

Co-Respondent

To The Supreme Court of Tonga.

The Petition of [full name of petitioner] shows that:

1. On the _____ day of _____ 19____ the petitioner was lawfully married to the respondent [full name of respondent] at [state place of marriage].
2. After the said marriage the petitioner and the respondent lived together as husband and wife at [state last address at which the parties so lived].
3. The petitioner now lives at _____
and the respondent now lives at _____
4. The petitioner is domiciled in Tonga.

[or if it is alleged that the Court has jurisdiction by virtue of section 20 of the Act, stating the relevant circumstances].

5. There are _____ children of the family now living, namely: [list names of children, giving dates of birth].
6. There are and have been no previous proceedings in any court in Tonga or elsewhere with reference to the marriage and any children of the family except [give details of any such proceedings].
7. [State grounds on which a decree is sought]

The petitioner therefore prays:

[delete as appropriate]

- (i) that the said marriage be dissolved;
- (ii) that custody of the said child(ren) of the family be granted to the petitioner/respondent;
- (iii) that the co-respondent do pay to the petitioner damages in respect of the said adultery;
- (iv) that the respondent (and co-respondent) do pay the petitioner's cost of this suit.

Dated the _____ day of _____ 19 _____

Petitioner

NOTICE TO THE RESPONDENT (AND CO-RESPONDENT)

A respondent or co-respondent who wishes to defend this petition, or to dispute any facts alleged in it, or to cross petition, is required to file an answer and/or cross petition in the Supreme Court office within 28 days after service of this petition.

If no such step is taken within that period this petition may be listed for trial undefended.

Form 2 (Children Statement)

R. 4(5)

[Heading as in Form 1]

The proposed arrangements for the children of the family who are ordinarily dependent on the parties are as follows:

[State in respect of each child]

(1) Residence

[State where the child is to live with a description of the

accommodation, what other persons live there (naming them and their relationship to the child) and who will look after the child

(2) Education

[State the school or other establishment where the child will study, or other details of his training]

(3) Financial Provision.

[State who is at present supporting the child and whether any change is proposed or expected]

(4) Access.

[State what arrangements are agreed or proposed for the other parent to see the child]

(5) Health.

[State whether the child is suffering from any serious disability or illness]

Dated the _____ day of _____ 19____

Petitioner

Form 3 (Decree Nisi)

R 11(2)

[Heading as in Form 1]

UPON HEARING

IT IS ORDERED THAT

- *1. The marriage solemnised on the _____ day of _____ 19____ at _____ between the petitioner and the respondent be dissolved unless sufficient cause be shown to the Court within 6 weeks why this decree should not be made absolute.
- *2. Custody of the child(ren) of the family, [names and dates of birth] be granted to the petitioner/respondent
- *3. The co-respondent do pay to the petitioner \$ _____ damages for adultery.
- *4. The [party] _____ do pay the costs of the [party] _____
Dated _____

SEAL

(* delete as appropriate)

Form 4

(Certificate under section 11(1))

R. 12(5)

[Heading as in Form 1]

BEFORE Mr Justice (* in chambers)

UPON HEARING

AND UPON READING

In accordance with section 11(1) of the Divorce Act IT IS CERTIFIED that

- * proper financial provision has been made
- * no financial provision should be made

for the Petitioner/Respondent and for any children of the family AND that the decree nisi granted to the Petitioner on [date] may be made absolute upon expiry of 6 weeks from [date of decree nisi]

Dated

SEAL

(* Delete as appropriate)