

Trise, or Trise's son Iakob John (otherwise known as Ersun), who lives part of the time in Madolenihmw Municipality and part of the time in Net Municipality, and is not a party to this action. They appear to be in full agreement as to the use of the land and have requested no determination as between themselves.

3. This judgment shall not affect any rights of way there may be over the land in question.

4. No costs are assessed against either party.

INOSKE YAMADA, Plaintiff

v.

LUISA YAMADA, Defendant

Civil Action No. 140

Trial Division of the High Court

Ponape District

June 2, 1959

Petitioner brought action for divorce on grounds of cruel treatment, neglect, and personal indignities. The Trial Division of the High Court, Chief Justice E. P. Furber, held that divorce would be denied as both parties were at fault, and since fault of plaintiff was greater than that of defendant, plaintiff was not entitled to divorce.

1. Domestic Relations—Divorce—Custom

Although Trust Territory law recognizes divorce under local custom, courts should have nothing to do with original granting of customary divorce. (T.T.C., Sec. 714)

2. Domestic Relations—Divorce

Principles of law contained in Trust Territory decisions regarding divorce apply only to cases of divorce under Code.

3. Domestic Relations—Divorce—Custom

Trust Territory Code provisions regarding divorce indicate policy of making divorces available in accordance with liberal or tolerant modern view prevailing in some states in United States.

4. Domestic Relations—Divorce

Trust Territory Code provisions regarding divorce must be construed in accordance with general principles applied in states having similar statutory provisions.

5. Domestic Relations—Divorce

In granting divorce under Trust Territory Code, court is expected to exercise good judgment in determining in accordance with established legal principles whether divorce should be granted even if one of permitted causes is shown. (T.T.C., Sec. 698)

6. Domestic Relations—Divorce—Defenses

Older view in United States, that if both parties are guilty of offense constituting ground for divorce neither could obtain divorce, is not in accord with spirit of Trust Territory Code nor suitable to conditions here.

7. Domestic Relations—Divorce—Defenses

Proper rule as to granting of divorce under Trust Territory Code is that misconduct of plaintiff (recrimination) is discretionary or qualified defense, and if both parties are guilty of misconduct, court may grant divorce to one less at fault.

8. Domestic Relations—Divorce—Defenses

Trust Territory courts should refuse to grant divorce at request of party who is more seriously at fault, especially where reconciliation is prevented by that party's desire to continue misconduct.

9. Domestic Relations—Divorce—Defenses

Although principle of greater fault does not apply where ground for divorce is based on separation, where divorce is requested on grounds of cruel treatment, neglect or personal indignities, it does apply.

10. Domestic Relations—Divorce—Defenses

In action for divorce, where plaintiff's misconduct is serious and continuing and misconduct of defendant is largely provoked by plaintiff's conduct, court will find plaintiff is party most at fault and not entitled to divorce.

11. Domestic Relations—Divorce—Defenses

Court may choose not to grant divorce where repeated forgiveness of parties indicates possibility of reconciliation.

12. Domestic Relations—Divorce—Custody

In action for divorce, custody of children is controlled primarily by best interests of children. (T.T.C., Sec. 704)

13. Domestic Relations—Divorce—Custody

In action for divorce, custody of mother of children under twelve years of age usually is best where consistent with local culture. (T.T.C., Sec. 704)

FURBER, *Chief Justice*

FINDINGS OF FACT

1. The defendant Luisa and the plaintiff Inoske have both been guilty towards each other of such cruel treatment, neglect or personal indignities as to constitute cause for divorce under Trust Territory Code, Section 698 (b).

2. The plaintiff Inoske has also been guilty of repeated adultery with a particular woman and has persistently associated with her, indicating a desire to live under conditions having almost the appearance of bigamy, which he indicates he thinks his wife should accept at least peacefully.

3. The cruelty and indignities of the defendant Luisa have been provoked by the conduct of the plaintiff Inoske, but she has carried them to an extent beyond that which the provocation would completely excuse.

4. While many of the above marital offenses were conditionally and repeatedly forgiven, the offenses have persisted on both sides after the forgiving, thereby revoking the forgiveness.

CONCLUSIONS OF LAW

[1, 2] 1. This is an action for divorce through the courts under Chapter 11 of the Trust Territory Code, Section 714 of the Code provides for the recognition of divorces under local custom as an entirely separate matter, but the Trust Territory courts should have nothing to do with the original granting of such divorces under local custom. The principles explained in the following conclusions of law in this action apply only to divorces sought from the courts under the Code.

[3-5] 2. The Code provisions concerning divorce contained in Sections 698 to 713 are quite obviously based on American precedents, and indicate a policy to make avail-

able in the Trust Territory a method of dissolving marriages in accordance with what may be termed the more liberal or tolerant modern view prevailing in some states in the United States. It is believed, therefore, that these provisions must be construed in accordance with the general principles applied in states having similar statutory provisions, so far as those principles are suitable to conditions in the Trust Territory. It should be particularly noted that Section 698, in listing grounds for divorce, commences as follows:—

“Divorces from marriage may be granted under this chapter for the following causes and no other:”

It does not say that a divorce must in all instances be granted if one of these causes is shown, but indicates that the court is given authority to grant such divorces but is expected to exercise good judgment in determining in accordance with established legal principles whether a divorce should or should not be granted, if one of these causes is shown.

[6-9] 3. Under the older view in the United States, if both parties had been guilty of an offense constituting ground for divorce, neither one of them could obtain a divorce. 17 Am. Jur., Divorce and Separation, § 263. The court considers, however, that that view is not in accord with the spirit of the Trust Territory Code, nor suitable to conditions here. It holds that the proper rule under the Code is that misconduct of the plaintiff, or what is called technically “recrimination”, is a discretionary or qualified defense, as is held today in several of the states in the United States, and that where both parties are guilty of misconduct for which a divorce might be granted, the courts may grant the divorce to the one who is less at fault. 17 Am. Jur., Divorce and Separation, §§ 264 and 265. The court holds, however, that at least where the ground on which the divorce is requested is one clearly implying

fault on the part of the other party, the courts, as a matter of common fairness, should refuse to grant a divorce at the request of the party who is himself or herself more seriously at fault, especially where it appears that reconciliation is now being prevented primarily by that party's desire to continue his or her misconduct. It is quite probable that this principle would not apply in cases where the ground for divorce does not necessarily imply fault on the part of one party rather than the other, as, for example, where it is based upon the ground that "the parties have lived apart for two consecutive years without cohabitation, whether or not by mutual consent". See 17 Am. Jur., Divorce and Separation, § 179. How the rule would work in cases where the ground for divorce is separation, however, is not involved in this action in which the divorce has been requested on the grounds of cruel treatment, neglect or personal indignities, under Trust Territory Code Section 698(b).

[10, 11] 4. In view of both the serious and continuing marital misconduct of the plaintiff Inoske, and the fact that the defendant Luisa's matrimonial offenses have been largely provoked by the plaintiff's conduct, the court holds that the plaintiff is the party most at fault and is therefore not entitled to divorce. It furthermore appears to the court, particularly in view of the repeated forgivenesses that have been granted by both parties for past serious offenses, that there is still a possibility of reconciliation, if both are willing to give more serious attention to their obligations and be less selfish in asserting their rights and in taking an exaggerated view of them. On the question of the extent to which provocation will excuse cruelty, attention is invited to 17 Am. Jur., Divorce and Separation, § 201.

[12, 13] 5. The question of custody of children in such a situation as this is controlled under Section 704 of the

Code primarily by the best interests of the children. For those under about 12 years of age, the court considers that custody by the mother will usually be best where that is consistent with the local culture, in the absence of a strong showing to the contrary, but there is no firm rule to that effect. Each child's situation must be considered on its own merits, and an order as to custody in these situations may be changed at any time, after reasonable notice, on the showing of good cause.

JUDGMENT

It is ordered, adjudged, and decreed as follows:—

1. The plaintiff Inoske's request for divorce is denied.
2. So much of the order of this court entered November 10, 1958, as relates to the custody of the children of the parties, rights to visit them, and support of the defendant Luisa and the four children placed in her custody, is continued in force until further order of the court, with the warning that both parties have an obligation to consider the best interests of their children and to make life as happy for them as is consistent with their wholesome bringing up, and that the defendant Luisa is to use the funds paid under this order to meet the needs and wholesome wants of the children in her custody, so far as these funds will permit, except for twenty dollars (\$20.00) per month which, in accordance with the stipulation of the parties, she may use or hold for herself.
3. On any substantial change in circumstances, either party may file a motion in this action requesting a change in the provisions of paragraph 2 of this judgment, and as each child reaches 12 years of age the court will consider any request that child wishes to make as to change in the terms of his or her custody.
4. No costs are assessed against either party.