CHAPTER 72
DIVORCE, ANNULMENT, LEGAL SEPARATION
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matters concerning when they have separated or divided

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72.1. Purpose and Policy

72.1-1. *Purpose.* It is the purpose of this law to exercise the sovereign right of the Oneida Tribe to regulate the rights and responsibilities relating to divorce under Tribal law and in accordance with Tsi >niyukwaliho T^.[1]

72.1-2. *Policy.* Under certain circumstances when a person or persons united in marriage want to legally terminate the marital relationship, this law is written to give the parties the most equitable process for that termination.

72.2. Adoption, Amendment, Repeal

72.2-1. This law was adopted by the Oneida Business Committee by resolution BC-04-28-10-G, and amended by resolution BC-05-15-14-B.

72.2-2. This law may be amended or repealed by the Oneida Business Committee and/or the Oneida General Tribal Council pursuant to the procedures set out in the Legislative Procedures Act.

72.2-3. Should a provision of this law or the application thereof to any person or circumstances be held as invalid, such invalidity shall not affect other provisions of this law which are considered to have legal force without the invalid portions.

72.2-4. In the event of a conflict between a provision of this law and a provision of another law, including the Administrative Procedures Act, the provisions of this law shall control.

72.2-5. This law is adopted under authority of the Constitution of the Oneida Tribe of Indians of Wisconsin.

72.2-6. *Rules.* If rules addressing a certain area of this law have not been enacted in accordance with Tribal law and the Court is faced with a question, the Court may, in its discretion, refer to other Indian tribal law or state law for guidance, to the extent that such law is not inconsistent with this or any other Tribal law.

72.3. Definitions

72.3-1. This section shall govern the definitions of words and phrases used within this law. All words not defined herein shall be used in their ordinary and everyday sense.

(a) "Annul" means the act of declaring a marriage null and void.

(b) "Court" means the Family Court, which is a branch of the judicial arm of the Tribe.

(c) "Court of competent jurisdiction" shall mean a court that has the power and authority to affirm or annul a marriage, grant a legal separation, or dissolve a marriage.

(d) "Divorce" means the dissolution of a marriage other than by an annulment.

[1] "Tsi >niyukwaliho T^" means "our kind of ways." This refers to the way the Creator structured us politically, culturally, socially and economically with the understanding that how we carry out these four facets of life will not have a negative impact on the responsibility that we have as human beings in maintaining a respectful, reciprocal relationship with all of creation.

(e) "Indian" means a member of an Indian tribe, band, or community which is recognized by a State or the federal government.

(f) "Legal separation" means an order that acknowledges that a married couple is living separate lives and regulates the rights and responsibilities of each spouse.

(g) "Maintenance" means the allowance one spouse pays to the other for support when they are, or are in the process of becoming, legally separated or divorced.

(h) "Reservation" means all the land within the exterior boundaries of the Reservation of the Oneida Tribe of Indians of Wisconsin, as created pursuant to the 1838 Treaty with the Oneida, 7 Stat. 566, and any lands added thereto pursuant to federal law.

(i) "Tribe" or "Tribal" means the Oneida Tribe of Indians of Wisconsin.

72.4. Jurisdiction

72.4-1. *Affirmations and Annulments.* The Court may affirm or annul a marriage when the requirements of either (a) or (b) have been met:

(a) the party filing the action has been a resident of the Reservation for the thirty (30) days immediately preceding the date the action was filed and is:

(1) a Tribal member or other Indian; or

(2) married to a Tribal member; or

(3) married to an Indian who is a resident of the Reservation.

(b) the action is transferred to the Tribe by the discretion of a court of competent jurisdiction.

72.4-2. *Legal Separations and Divorces* The Court may grant a legal separation or dissolve a marriage by divorce when the requirements of either (a) or (b) have been met:

(a) the party filing the action has been a resident of the Reservation for the 60 (sixty) days immediately preceding the date the action was filed and is:

(1) a Tribal member or other Indian; or

(2) married to a Tribal member; or

(3) married to an Indian who is a resident of the Reservation.

(b) the action is transferred to the Tribe by the discretion of a court of competent jurisdiction.

72.5. Summons and Petition

72.5-1. Either or both parties to the marriage may initiate an action for an affirmation, annulment, legal separation, and/or divorce. If only one (1) party is initiating the action(s), the party initiating the action(s) or his or her attorney or advocate shall sign the summons(es) and petition(s). Both parties or their respective attorneys or advocates shall sign a joint petition(s) if the parties are filing together. Except as otherwise provided, each petition shall state:

(a) The name and birth date of the parties, the date and place of marriage, and the facts relating to the residence and tribal membership of both parties.

(b) The name and birth date of each minor child of the parties and whether the female spouse is pregnant.

(c) If applicable, that the validity of the marriage is in question.

(d) If applicable, that the requirements for an annulment have been met.

(e) If applicable, that the marriage is irretrievably broken or that the parties agree it is irretrievably broken.

(f) Whether or not an action for divorce or legal separation by either of the parties was or has been at any time commenced, or is pending in any other court or before any judge.

(g) Whether the parties have entered into any written agreement as to child support and/or maintenance, custody and placement of the children, or property division; and if so, the written agreement shall be attached.

72.5-2. When only one (1) party initiates the action, the summons and petition shall be filed with the Court and served upon the other party in the action no later than thirty (30) days after filing. A joint petition shall be filed with the Court, but is not required to be served upon either party.

(a) If a party cannot be located after a diligent attempt at personal service or service by mail, written notice of the hearing shall be published in the Kalihwisaks and another newspaper of general circulation in the area where the party was last known to have resided and shall be designated as a "Legal Notice." Written notice shall be published in two (2) consecutive issues of the Kalihwisaks and at least one (1) day per week for four (4) weeks in the other paper.

(b) *Fees.* The filing fee for a petition for an affirmation, annulment, legal separation, or divorce shall be set by the Court.

(c) If only one (1) party initiates the action(s), the other party may serve a response and/or counterclaim within thirty (30) days after the date of service.

72.5-3. *Prohibited Acts During the Pendency of an Affirmation, Annulment, Legal Separation, or Divorce.*

(a) In an action for an affirmation, annulment, legal separation, or divorce, the petitioner, upon filing the summons and petition, and the respondent, upon service of the summons and petition, are prohibited from doing any of the following:

(1) Harassing, intimidating, physically abusing, or imposing any restraint on the personal liberty of the other party or a minor child of either of the parties.

(2) Encumbering, concealing, damaging, destroying, transferring, or otherwise disposing of property owned by either or both of the parties, except in the usual course of business, in order to secure necessities, or in order to pay reasonable costs and expenses of the action, including attorney fees.

(3) Without the consent of the other party or an order of the court, violating any temporary or permanent custody order.

(b) The prohibitions listed in this section shall apply until the action is dismissed, until a final judgment in the action is entered, or until the Court orders otherwise.

(c) Any person violating the provisions of this section may be subject to penalties for contempt.

72.6. Peacemaking and Mediation

72.6-1. The Court may refer the parties to peacemaking or mediation if the parties agree to attend peacemaking or mediation. The Court shall not refer the parties to peacemaking or mediation if attending the session(s) will cause undue hardship or would endanger the health or safety of a party. The Court shall consider evidence of domestic abuse when determining if peacemaking or mediation would endanger the health or safety of a party. When the parties attend peacemaking or mediation based on a referral from the Court, the Court shall be responsible for the costs of the peacemaking or mediation.

72.6-2. *Peacemaking.* If the parties agree to attend peacemaking, peacemaking shall be provided to the parties by peacemakers recognized by the Cultural Heritage Department of the Tribe or the Court. The parties shall determine what type of peacemaking they will attend.

72.6-3. *Mediation.* If the parties agree to attend mediation, mediation shall be provided to the parties by any person or public or private entity contracted to conduct mediation. Every mediator shall have not less than twenty-five (25) hours of mediation training or not less than

three (3) years of experience in dispute resolution. Every mediator shall have training on domestic violence and the effects of domestic violence on victims and on children.

(a) Private Mediator. The parties may, at their own expense, receive mediation services from a mediator other than the mediator they are referred to by the Court. Parties who receive services from a private mediator shall be responsible for the cost and shall sign and file with the clerk a written notice stating the mediator's name and the date of the first meeting with the mediator.

(b) A mediator may:

(1) include the counsel of any party in the mediation.

(2) suspend mediation when necessary.

(3) terminate mediation if a party does not cooperate or if mediation is not appropriate.

72.6-4. *Agreement.* Any agreement that resolves issues of divorce, annulment, or legal separation, including maintenance or property division, between the parties and that is reached as a result of peacemaking or mediation shall be prepared in writing, reviewed by the attorney, if any, for each party and submitted to the Court to be included in the order as a stipulation. The peacemaker or mediator shall certify that the written agreement accurately reflects the agreement made between the parties.

72.6-5. If, after peacemaking or mediation, the parties do not reach an agreement on all the issues surrounding the divorce, annulment, or legal separation, the parties, the peacemaker, or the mediator shall so notify the Court. The parties may return to peacemaking or mediation at any time before any final hearing on the divorce, annulment, or legal separation is held.

72.7. Affirmation and Annulment

72.7-1. *Action to Affirm a Marriage.* The judgment in an action to affirm a marriage shall declare whether the marriage is valid, and is conclusive upon all persons concerned.

72.7-2. *Action to Annul a Marriage.* The Court may annul a marriage if any one (1) of the following circumstances exist:

(a) either party was less than eighteen (18) years old at the time of the marriage without a written notarized consent from the party's parent or guardian, or either party was under the age of sixteen (16) at the time of the marriage. The under-aged party or a parent or guardian may file a petition for an annulment at any time prior to the party reaching the age of eighteen (18), but a parent or guardian who wishes to file a petition for an annulment shall file the petition within one (1) year of obtaining knowledge of the marriage.

(b) at the time of the marriage, either party lacked the capacity to consent to the marriage because of age, mental incapacity, or the influence of drugs or alcohol, or was forced into the marriage or entered into the marriage by fraud or duress. Either party, or the legal representative of a party lacking the capacity to consent, may file a petition for an annulment no later than one (1) year after the petitioner obtained knowledge of the described condition.

(c) the marriage is between relatives who are:

(a) first cousins and at least one (1) of them is younger than fifty-five (55); or

(b) of a closer biological kinship than first cousins. Either party may file a petition for an annulment no later than ten (10) years after the marriage.

(d) one (1) or both of the parties was already married to another at the time of the marriage. Either party may file a petition for an annulment no later than ten (10) years after the second marriage ceremony is performed, unless a party's first spouse is still

living, in which case an annulment is prohibited. If a person who is already married gets married again, and lives with his or her second spouse as husband and wife, and the marriage was entered into by one of the parties in good faith, or with the belief that the former spouse was dead, or that the former marriage had been annulled or dissolved by divorce, the parties shall be held to have been legally married from and after the end of the former marriage, if they continue to live together as husband and wife in good faith on the part of one of them after the former marriage is ended.

(e) one (1) or both of the parties is physically unable or unwilling to consummate the marriage. Either party may file a petition no later than one (1) year after the petitioner obtained knowledge of the incapacity.

72.8. Legal Separation and Divorce

72.8-1. *Legal Separation.* When a party requests a legal separation rather than a divorce, the Court shall grant a judgment of legal separation unless the other party requests a divorce, in which case the Court may grant a divorce, if appropriate. A legal separation shall remain in effect indefinitely, unless one (1) of the following occurs:

(a) Within one (1) year after a legal separation is granted, both parties request to convert the legal separation into a divorce or both parties request the legal separation be revoked and the Court agrees.

(b) After a legal separation has been in place for over one (1) year:

(1) either party requests that a divorce be granted with or without the other party agreeing to a divorce, and the Court grants the divorce.

(2) both parties request the legal separation be revoked and the Court agrees.

72.8-2. *Divorce.*

(a) A party may file petitions for both a legal separation and a divorce, in which case the Court may grant the parties a judgment of legal separation, which shall remain in effect until a divorce is granted or both parties request the legal separation be revoked and the Court agrees.

(b) The Court shall grant a divorce if:

(1) the waiting period of one hundred twenty (120) days after the filing of the petition has occurred; and,

(2) the Court finds that the marriage is irretrievably broken under 72.8-3; and,

(3) the Court has made provisions as required or necessary under 72.8-4.

72.8-3. *Irretrievable Breakdown.*

(a) If both of the parties by petition, or otherwise, have stated under oath or affirmation that the marriage is irretrievably broken, or if the parties have voluntarily lived apart continuously for twelve (12) months or more immediately prior to commencement of the divorce action and one (1) party has so stated, the Court, after a hearing, shall find that the marriage is irretrievably broken.

(b) If the parties have not voluntarily lived apart for at least twelve (12) months immediately prior to commencement of the action and if only one (1) party has stated under oath or affirmation that the marriage is irretrievably broken, the Court shall consider all relevant factors, including the circumstances that gave rise to filing the petition and the prospect of reconciliation.

(1) If the Court finds no reasonable prospect of reconciliation, it shall make a finding that the marriage is irretrievably broken; or

(2) If the Court finds that there is a reasonable prospect of reconciliation, it shall continue the matter for further hearing, not fewer than thirty (30) nor more than

sixty (60) days later, and may suggest to the parties that they seek counseling. The Court, at the request of either party, may order counseling. At the adjourned hearing, if either party states under oath or affirmation that the marriage is irretrievably broken, the Court shall make a finding that the marriage is irretrievably broken.

72.8-4. If the Court has jurisdiction over the parties to issue orders for the custody and placement of any children, child support, property division, and/or maintenance, the following shall apply:

(a) After an action for an annulment, legal separation, or divorce is initiated, and unless a stipulated agreement has been approved, the Court shall make any necessary temporary order concerning custody and placement of any children, child support, property division, and maintenance.

(b) Final orders concerning custody and placement of any children, child support, maintenance, and property division shall be made at the time the annulment, legal separation or divorce is granted. The Court may also order one (1) or more of the following:

(1) the restraint of either spouse from, in any manner, interfering with the other or the children;

(2) the restraint and enjoining of either spouse or both from disposing of their individually or jointly owned property, except as approved by the Court; and

(3) the restoration of a former legal surname, if requested.

72.8-5. *Full Faith and Credit.* Full faith and credit shall be given to a properly issued ruling, document and/or judgment in any affirmation, annulment, legal separation, or divorce action from a court of competent jurisdiction. However, any part of a judgment that violates Oneida law shall not be enforced.

72.9. Property Division and Maintenance

72.9-1. The Court may issue a property division and/or maintenance order to the extent that the Court has jurisdiction over the parties to issue the order.

72.9-2. In an order for property division and/or maintenance, the Court, in addition to any other requirements under this law, shall consider the following:

(a) the length of the marriage.

(b) the age and physical and emotional health of the parties.

(c) the earning capacity of the parties, including educational background, training, employment skills, work experience, length of absence from the job market, custodial responsibilities for children, and the time and expense necessary to acquire sufficient education or training to enable a party to find appropriate employment.

(d) the feasibility that the parties can become self-supporting as a standard of living reasonably comparable to that enjoyed during the marriage, and, if so, the length of time necessary to achieve this goal.

(e) the tax consequences to each party.

(f) any written agreement made by the parties before or during the marriage, such as a pre or post nuptial agreement, concerning any arrangement for the financial support of a party or property distribution. These agreements shall be binding on the Court, except where the terms of the agreement are inequitable as to either party. The Court shall presume any such agreement to be equitable as to both parties. The Court may consider the following factors when determining whether an agreement is equitable:

(1) The agreement is in writing and signed by both spouses.

(2) Each spouse disclosed his or her assets and obligations or each spouse declares knowledge of the other spouse's assets and obligations.

(3) The agreement was not unconscionable when made.

(4) The agreement does not alter any child support obligation.

(5) Both spouses entered into the agreement voluntarily.

(6) The agreement does not result in a spouse having less than necessary and adequate support.

(7) whether the agreement violates or conflicts with any applicable Tribal law or policy or Federal law, in particular relating to the use, possession, transfer or disposition of individual or Tribal trust land.

(g) the contribution by one (1) party to the education, training, or increased earning power of the other.

(h) any other factors as the Court may in each individual case determine to be relevant.

72.9-3. *Property Division.*

(a) Except as otherwise provided for in this law, any property acquired by either party prior to the marriage shall remain the sole property of that party and is not subject to a property division under this law if:

(1) the party has kept the property separate from marital property and has records that prove it belongs solely to that party; or

(2) the party has not kept the property separate from marital property but has records to prove what portion of the mixed property is the sole property of the party.

(b) The Court may order the property division between the parties or recovery and delivery to each of the parties any of their personal property in the possession or control of the other. Any property acquired by either party prior to or during the course of the marriage in any of the following ways shall remain the property of that party, is not considered marital property and shall not be subject to a property division under this law:

(1) as a gift from a person other than the other party.

(2) by reason of the death of another, including, but not limited to life insurance proceeds, payments made under a deferred employment benefit plan, or an individual retirement account; property acquired by right of survivorship, trust distribution, personal injury settlement, bequest or inheritance; or a payable on death or transfer on death arrangement.

(3) with funds acquired in a manner under paragraphs (1) or (2).

(4) as a per capita payment from an Indian government or an Individual Indian Money (IIM) payment.

(c) An Indian's individual trust land or land assignment shall not be considered marital property and is not subject to property division.

(d) The Court shall presume that all property not described in (a), (b), or (c), shall be equally divided between the parties. This includes any applicable personal property, whether it is located on fee or trust land. The Court may alter this distribution without regard to marital misconduct after considering the factors in 72.9-2 and:

(1) the property brought to the marriage by each party, excluding the value of any Tribal fee or trust land, individual trust land or land assignments.

(2) whether one (1) party has substantial assets, excluding the value of any Tribal fee or trust land, individual trust land or land assignments, not subject to division by the Court.

(3) the contribution of each party to the marriage, giving appropriate economic value to each party's contribution in homemaking and child care services.

(4) the desirability of awarding the family home or the right to live therein for a reasonable period to the party having physical placement of the minor children for the greater period of time.

(e) The Court may even the distribution of marital property by requiring one party compensate the other. This may include compensating a party for his or her share of marital property that has gone into the other party's individual trust land or land assignment.

(f) Each spouse has a one-half (½) interest in all debts incurred during the marriage for the purchase of marital property or for the support of either or both spouses and/or their children.

(1) A debt incurred by a spouse that is attributable to an obligation arising before the marriage or to an act or omission occurring before the marriage may be satisfied only from property of that spouse that is not marital property and from that spouse's interest in marital property.

(2) A debt incurred by a spouse during marriage, resulting from a tort committed by the spouse during marriage, may be satisfied only from property of that spouse that is not marital property and from that spouse's interest in marital property.

72.9-4. *Maintenance Factors.* When determining whether maintenance should be ordered, the Court shall consider the factors under 72.9-2, the division of property made under 72.9-3; and the educational level of each party at the time of marriage and at the time the action is commenced. The maintenance order shall be in such amounts and for such periods of time as the Court deems just, without regard to marital misconduct.

(a) A maintenance order may be modified only upon a showing of changed circumstances that are substantial and continuing. The Court shall determine whether changed circumstances are substantial by re-considering the above factors in 72.9-2.

(b) Unless otherwise agreed to in writing, the obligation to pay future maintenance is terminated upon the death of either party or the re-marriage of the party receiving maintenance.

72.9-5. *Effect of Judgment.*

(a) If the Court orders property division and/or maintenance, the written judgment shall include a provision that disobedience of the Court order is punishable as contempt, until such judgment is complied with.

(b) The Court may vacate or modify the judgment for sufficient cause shown, at any time within six (6) months after the granting of such judgment. If the judgment is vacated, the parties shall be restored to the marital relation that existed before the granting of such judgment.

(c) When a judgment of divorce is granted it shall be effective immediately and the Court shall inform the parties that the judgment is effective immediately.

(d) Upon judgment of divorce, the parties may not remarry another until at least six (6) months have passed.

End.

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