IN THE
SUPREME COURT OF THE REPUBLIC OF PALAU
APPELLATE DIVISION

VICTOR M. YANO, Appellant, v. JENNIFER SUGIYAMA YANO, Appellee.	CIVIL APPEAL NO. 11-011 (Civil Action No. 09-287) **OPINION**

Decided: June 10, 2013

Counsel for Appellants: John K. Rechucher, Jeffrey L. Beattie, Steven R. Marks
Counsel for Appellee: Siegfried Nakamura, Clara Kalscheur

BEFORE: ARTHUR NGIRAKLSONG, Chief Justice; KATHLEEN M. SALII, Associate Justice; and KATHERINE A. MARAMAN, Part-Time Associate Justice.

Appeal from the Supreme Court, Trial Division, the Honorable ALEXANDRA F. FOSTER, Associate Justice, presiding.

PER CURIAM:

This appeal stems from the separation and divorce of Dr. Victor Yano ("Yano") and Jennifer Sugiyama Yano ("Sugiyama"). Yano appeals several aspects of the Trial Division's order granting the parties a divorce and setting terms of custody, property division and child support. Oral argument in this matter was held on April 8, 2013. We

AFFIRM in part, but we **REVERSE** with respect to the Trial Division's child support award and distribution of property.

BACKGROUND[1]

Sugiyama and Yano's relationship began in the early nineties, and they began living together in 1997. At that time, Yano ended his first marriage through Palauan custom. He and Sugiyama were married according to Palauan custom on March 15, 2003, and a civil marriage in Hawaii on July 30, 2003. The couple have three children, J.Y. (born in 1999), N.Y. (born in 2003), and Y.Y. (born in 2004, adopted from Yano's extended family).

I. Relationship and Accumulation of Property

Yano is the head of Belau Medical Clinic ("BMC"), an entity he began with help from close family in 1981. In 1996 or 1997, while Yano was Minister of State, Sugiyama began keeping the books for and managing the business of BMC. By all accounts, she was a poor bookkeeper, and there was testimony that she caused the business to decline in value. Additionally, Sugiyama oversaw various cosmetic and substantive changes to the business, such as paving the parking lot and purchasing medical equipment. However, it remains unclear how much BMC was worth before, during, and after the marriage. Although BMC was started as a corporation, it failed to file annual reports with the proper authorities and has been dissolved by the Attorney General. Yano draws on BMC's accounts for personal expenses, and Sugiyama did so during the marriage.

[1] We recite the facts predominantly as the Trial Division found them. Those facts that remain subject to some dispute are discussed in more detail in the Analysis section of our Opinion.

In addition to BMC, Yano possessed several other properties prior to marrying Sugiyama. First, he held a land use right to a home on his grandmother's property called *Ngesekes*. Using money from the BMC bank account and their joint personal bank account, the parties renovated the home at *Ngesekes*. Sugiyama claimed to have overseen many of the improvements. She also maintained the home and garden. Yano, Sugiyama, and Sugiyama's children from a previous marriage stayed in the home during their relationship. By the time of the trial in this matter, one of Yano's employees was living on the premises.

Yano's grandmother also owned Sils, a commercial building, which she transferred to him in 1985. Together, Yano and Sugiyama renovated this space. Sugiyama collected rent from the commercial tenant and acted as a property manager. Today, Yano collects about $2,250 per month in rent from leases on the property.

In 1998, Sugiyama and Yano began to lease property in Steba from Koror State Public Lands Authority. Sugiyama negotiated the terms of the commercial and residential leases and secured permits to build on the land. She acquired gravel and dirt and hired laborers to fill in the boggy land on the premises. The couple ran an aquaculture business (Belau Aquaculture) and built barracks and a summer house which are still standing. Beginning in 2004 or 2005, they began construction on a house. Sugiyama oversaw the construction with some input from Yano. In 2006, the whole family moved into the home. The commercial and residential property at Steba is worth about $350,000.

The couple also acquired land in Ngaraard and Ngeremlengui. The parcel in Ngaeremlengui was used as collateral for a $10,000 personal loan that Sugiyama disbursed to a borrower from the BMC account. When the borrower could not repay the loan, he gave Sugiyama the land. The land in Ngaraard similarly was acquired as collateral on a defaulted $10,000 loan given by Yano. Yano indicated at trial that he was not interested in possessing these properties.

In addition to their land investments, Sugiyama and Yano had several bank accounts. They had two joint accounts, one at Bank of Hawaii and one at the now-defunct Pacific Savings Bank. J.Y. and N.Y. also had savings accounts. Sugiyama emptied those accounts after the action for divorce was commenced; she testified that Yano told her to take the money out of the savings accounts and to place it in a BMC account.

The couple also had a number of vehicles. Among the vehicles were a white flatbed truck (purchased by the parties), a BMW sports car (a gift from Yano to Sugiyama), a white Mitsubishi Pajero (driven by Yano), two Nissan Marches (driven by BMC employees), another Nissan March, three boats, and a motorcycle. Finally, the couple had several pieces of Palauan money, some earned by Sugiyama and some purchased by the couple, and a piece of Balinese money, purchased by Sugiyama. Sugiyama and Yano disputed the precise number of Palauan money beads.

II. The End of the Marriage

Sometime near the end of their marriage, Sugiyama began having an affair with Isley Singichi. Employees from the Carolines Resort testified to seeing Sugiyama and

Singichi at the resort together. Evidence was also presented that Sugiyama cooked and cleaned for Singichi. Yano began to suspect the affair, and he confronted Sugiyama about it.

On October 17, 2009, Yano and one of his senior family members met with John Sugiyama, Jennifer Sugiyama's father, in order to affect a customary divorce. Jennifer Sugiyama was not invited to the meeting. Although there is conflicting testimony as to whether a customary divorce was finalized during the meeting, in the fall of 2009 Yano stopped buying food for Sugiyama and the children, and he expected them to move out of the Steba house.

In November of 2009, Sugiyama took a trip with the children to the United States. When she returned she discovered that Yano had padlocked the Steba house. Yano testified that he expected Sugiyama to leave the home pursuant to the customary divorce. However, the Trial Division found that explanation untenable because when Yano padlocked the house, the children's clothing and personal items remained in the home.

III. Divorce Proceedings

Sugiyama filed a petition for divorce in the Trial Division and sought a temporary restraining order on December 22, 2009. In her petition, Sugiyama alleged that she was entitled to a divorce on the grounds of neglect. Yano counterclaimed for a divorce on the grounds of cruelty and neglect and adultery.

After denying a motion for partial summary judgment filed by Yano, the Trial Division set a trial date for July 2010. On the eve of trial, the parties entered into a stipulation, which stated:

> 1. There are grounds, pursuant to 21 PNC Section 331(b) [cruelty and neglect], to award a divorce to the parties. The Court may issue a judgment awarding a divorce to the parties pursuant to 21 PNC Section 331(b).
>
> 2. At any trial in this matter, to the extent relevant to the issue of property division, child custody, or child support, either party may present evidence as to the cause(s) of the breakdown of the marriage of the parties.

The parties further represented to the court that they wished to litigate solely the issue of ownership of *Ngerikiil*, a farm located in Airai State. The parties informed the court that they would be able to resolve outstanding issues following a decision on *Ngerikiil*.

Relying on the parties' representation, the Trial Division conducted a limited hearing from July 19-21, 2010. Approximately three weeks after the close of the hearing, the Trial Division entered an order finding *Ngerikiil* to be the separate property of Yano. In reaching this conclusion, the Trial Division recited the contents of the parties' stipulation, and noted that "[a]ccordingly, on the first day of the hearing, the Court found grounds for divorce under 21 PNC § 331(b)." Although the lower court did not specify specific grounds for this finding, it noted that "[s]uch grounds are true for both parties."

Notwithstanding the previous representation to the court, the parties were unable to resolve *any* outstanding issues and the case proceeded to a second trial to determine the distribution of property, the custody of the children, and child and spousal support. At the outset of the second trial, the trial judge explained her understanding that the grounds for divorce had already been established and that the trial would address "how things get subdivided." In turn, counsel for Yano expressed his belief that for

> the hearing regarding the status of the Ngerikiil farm, the Court would not issue a judgment regarding its status unless there is a divorce. So for that case, the Court reached the . . . decision based on the stipulation that

> there is a cause for divorce, but it doesn't prevent at a later time, any party who would present any evidence to show that one party was causes [sic] the termination of the marriage and therefore should not be entitled to this properties or she should be responsible for providing child support.

The trial judge responded that was not her understanding and then explained:

> on the eve of the [first] hearing the parties filed a stipulation that there are grounds [for divorce] pursuant to 21 section 331b [and] accordingly on the first day of the hearing the Court found grounds for divorce under 21, 331b . . . It seems to me [that] is res judicata . . . . So . . . to the extent that . . . you believe other grounds for divorce [exist] you get to get into [that] under the Palauan custom branch . . . . But . . . as for grounds for divorce . . . that's been decided.

Counsel for Yano concurred with the trial judge's description of the matter's procedural posture.

The Trial Division proceeded to take nine days of testimony to resolve the issues of property division, custody, and child support. Evidence presented included the cause of the divorce; the existence of customary laws governing divorce, custody and property distribution; and the value of some of the parties' properties. Testimony ended on January 17, 2011, and on February 25, 2011, the Trial Division issued its Judgment and Decision in this matter.

The court first considered whether Palauan custom required that Sugiyama, as an adulterer, leave the marriage with nothing. The court rejected this custom because the relevant expert testimony conflicted as to whether the custom could be applied where the adultery could only be proved through circumstantial evidence. The court also rejected adultery as a grounds for the parties' divorce because it had granted a divorce on the basis of the stipulated neglect and cruelty grounds.

Next, the court turned to custody of the children. It noted that, although Sugiyama was employed, Yano worked extremely long hours and was "too busy to properly care for his children full time, and . . . made no concessions to lighten his workload if awarded full custody." Relying on the best interests of the child standard, as well as the Palauan customary norm that children remain with their mother, the court awarded full custody of all three children to Sugiyama.

The court awarded child support in the amount of $2,100 per month to be paid by Yano. It reasoned that, after expenses, Yano had about $3,000 a month in disposable income.

With respect to the division of property, the court applied the doctrine of equitable distribution and found BMC, Sils, and *Ngesekes* to be Yano's separate property. The land in Ngaremlengui and Ngaraard was determined to be marital property and was awarded to Sugiyama because she brokered the loans and "maintain[ed] an interest in the properties."

The court then considered the Steba house. It noted that the "most lucrative properties—BMC, Sils, and *Ngesekes*—[were] awarded to" Yano. Although the court acknowledged that it had no authority to give the separate property to Sugiyama, it considered the high value of the separate property, which was improved in part by marital funds. Based on the high value of the separate property, and in light of the fact that the children saw the Steba house as their home, the court awarded the Steba house to Sugiyama.

Finally, the court divided the personal property. As to the bead money, the court determined that Sugiyama could retain the Palauan money that she and her family earned by performing custom and the Palauan and Balinese money that she purchased herself. The remaining money stayed with Yano. The BMW, one Nissan March, the motorcycle, and one of the boats were awarded to Sugiyama. The court awarded the remaining personal property to Yano.

Yano timely appealed.

STANDARDS OF REVIEW

Factual findings, including the existence and content of a customary practice, are reviewed for clear error. *Ngoriakl v. Gulibert*, 16 ROP 105, 106 (2008). We review legal conclusions de novo. *Id.* at 107.

Decisions concerning child custody, child support, and property division are reviewed for abuse of discretion. *Ngoriakl*, 16 ROP at 107. The Trial Division's broad discretion in such matters is based on 21 PNC § 302, which provides in relevant part:

> In granting or denying an annulment or a divorce, the court may make such orders for custody of minor children for their support, for support of either party, and for the disposition of either or both parties' interest in any property in which both have interests, as it deems just and the best interests of all concerned may require.

Under the abuse of discretion standard, "a trial court's decision will not be overturned on appeal unless the decision was arbitrary, capricious, or manifestly unreasonable, or because it stemmed from an improper motive." *Ngoriakl*, 16 ROP at 107 (quotation omitted). Similarly, although the divorce statute limits the grounds on which a divorce

may be granted, *see* 21 PNC § 331, a trial court has "broad discretion to determine the proper grounds for a divorce," 24 Am. Jur. *Divorce & Separation* § 19 (2008).

ANALYSIS

Yano contends that the Trial Division: (1) failed to make factual findings which would support a granting of divorce on the grounds of neglect and cruelty; (2) abused its discretion by refusing to grant a divorce to Yano on the grounds of adultery; (3) committed error by failing to apply Palauan custom regarding property distribution following adultery; (4) committed error in determining that adultery was irrelevant to property division, child custody, and child support; (5) abused its discretion in its division of the property; (6) abused its discretion by awarding custody of the children to Sugiyama; and (7) erred in its award of child support.

I. The Trial Division's Finding of Grounds for Divorce

Yano argues the Trial Division "erred in granting a divorce [for cruelty or neglect] based solely on the Stipulation and without even finding which party was at fault."

Palau's current divorce statute was adopted almost verbatim from the Trust Territory Code. *Compare* 21 PNC § 331 *with* 39 TTC § 201 (1970). The divorce statute strictly limits the grounds on which a divorce may be issued in the Republic, enumerating nine possible bases for the dissolution of marriage. It provides:

> **§ 331. Grounds.** Divorce from marriage may be granted under this chapter for the following causes and no other:
>
> (a) adultery.
>
> (b) 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.

(c) willful desertion continued for a period of not less than one year.

(d) habitual intemperance in the use of intoxicating liquor or drugs continued for a period of not less than one year.

(e) the sentencing of either party to imprisonment for life or for three years or more. After divorce for such cause, no pardon granted to the party so sentenced shall affect such divorce.

(f) the insanity of either party where the same has existed for three years or more.

(g) the contracting by either party of leprosy.

(h) the separation of the parties for two consecutive years without cohabitation, whether or not by mutual consent.

(i) willful 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.

While divorce *may* be granted to both parties in a divorce proceeding, it is axiomatic that statutory grounds must exist entitling each party to such relief. *See* 21 PNC § 331 ("divorces . . . may be granted . . . for the following causes *and no other*." (emphasis added)). "[A] trial court decision must contain sufficient findings supporting its conclusions to allow for appellate review." *Ngirutang v. Ngirutang*, 11 ROP 208, 211 (2004). Thus, in identifying the appropriate statutory grounds, if any, for divorce, a court must make findings of fact to support its conclusion that such grounds exist. *See Leary v. Leary*, 627 A.2d 30, 34 (Md. App. 1992) (Court erred in allowing agreement of the parties to control absent fact-finding to support grounds for divorce.).

At the outset of the first trial, the Trial Division granted divorce in favor of both parties on the grounds of cruelty or neglect. In the order memorializing the granting of divorce, the Trial Division cited only to the parties' stipulation that grounds for divorce existed under section 331(b).

"[P]rivate agreements between litigants . . . cannot relieve this Court of performance of its judicial function." *Garcia v. United States*, 469 U.S. 70, 79 (1985). Thus, "[w]hile parties may enter into stipulations of fact that are binding upon them . . . parties may not stipulate to the legal conclusions to be reached by the court." *Weston v. Washington Metropolitan Area Transit Authority*, 78 F.3d 682, 685 (D.C. Cir. 1996).

The Trial Division had a duty to find specific facts supporting its conclusion that both parties were entitled to divorce under section 331(b). By relying solely on a non-factual stipulation, the lower court failed to perform its fact finding duty. Thus, the finding that both sides were entitled to divorce under section 331(b) may not be sustained.

II. Adultery as Grounds for Divorce

Although the Trial Division found that there was "most damning" and "powerful circumstantial evidence" that Sugiyama was engaged in an affair, it declined to grant divorce on the grounds of adultery because it had "already granted a divorce on the grounds of cruelty, and finding any additional causes of divorce would have no effect on the Court's decision on the issues of property division, child custody or child support."

As explained above, we conclude the Trial Division erred by relying on the stipulation to find grounds for divorce based on cruelty or neglect. It follows that the

Trial Division also erred when it used its erroneous finding as a basis for declining to consider adultery as a grounds for divorce. Having found error, the question becomes whether Yano is entitled to the additional relief he seeks—a judgment that he is entitled to divorce on the grounds of adultery.

Adultery is the act of "entering into a personal, intimate sexual relationship with any other person, irrespective of the specific sexual acts performed, or the gender of the third party." 24 Am. Jur. 2d Divorce and Separation § 56. Where circumstantial evidence is used to prove adultery, the evidence "must be sufficiently strong to lead the guarded discretion of a reasonable and just mind to the conclusion of adultery as a necessary inference." *Fowler v. Fowler*, 636 So. 2d 433, 435 (Ala. Ct. App. 1994).

Although Sugiyama denies the affair, we conclude that the litany of circumstantial evidence cited by the Trial Division requires a finding that a reasonable person would view adultery as a necessary inference. Accordingly, we conclude Yano should be granted a divorce on the basis of adultery. *See Imeong v. Yobech*, 17 ROP 210, 219 (2010) (Appellate Division may make findings where "the evidence . . . require[s the specific] finding.").

III. Division of Marital Estate

Yano raises three objections to the Trial Division's apportionment of the marital estate: (1) the quantity of the apportionment was inequitable; (2) the Trial Division failed to consider relevant factors when apportioning the property; and (3) the Trial Division failed to make specific findings as to the value of the apportioned property.

The relevant statutory provision[2] provides that "[i]n granting or denying an annulment or a divorce, the court may make such orders . . . for the disposition of either or both parties' interest in any property in which both have interests, as it deems justice and the best interests of all concerned may require."[3] 21 PNC § 302. The Trial Division and the litigants both proceeded under the assumption that section 302 requires "equitable distribution" of the property in which both parties have interests.

The doctrine of equitable distribution is based on the general rule that in a divorce proceeding "the division of property must be equitable, but not necessarily equal." 24 Am. Jur. 2d Divorce and Separation § 530. Although we have never adopted expressly the use of equitable distribution in divorce proceedings, we note that American courts have applied the doctrine to statutes which like section 302 require division based on the concept of justice. *Skibinski v. Skibinski,* 964 A.2d 641, 643–44 (Me. 2009) (statute mandating "just" distribution requires "the division must be fair and just considering all of the circumstances of the parties." (internal quotation marks omitted)); *see also In re Marriage of Walker*, 899 N.E.2d 1097, 1104 (Ill. App. 2008) (invoking equitable distribution where statute required "just proportions considering all relevant factors").

---

[2] In cases filed before January 3, 2013, a party relying on custom must prove: (1) the existence of a purported custom; (2) the present viability of that custom; and (3) if the claimed custom is on a subject matter governed by an existing statute, that (a) there is no conflict between the custom and the statute or, (b) if there is a conflict, that the purported custom prevails over the statute pursuant to Article V, section 2 of the Palau Constitution. *Beouch v. Sasao*, Civ. App. 11-034, slip op. at 10-14 (Jan. 3, 2013).

[3] The same provision appears in the statutory framework of three of our neighbors. See 6 Micr. Code § 1622; 8 N. Mar. I. Code § 1311; 26 Marsh. Is. Revised Code § 110.

We believe section 302's reference to justice and the "best interests of all concerned" requires that property be distributed equitably. *Id.*

"Equitable distribution during a divorce involves three steps: first, identifying the property as marital or separate; second, valuing the property; and third, allocating it between spouses according to equitable factors." *Gottstein v. Kraft*, 274 P.3d 469, 476 n.26 (Alaska 2012).

A. Marital Property

"Generally, all property acquired during the marriage is marital property . . . while property owned by the parties prior to marriage, or acquired during the marriage by gift or inheritance, is separate property and thus not subject to division, as is property acquired in exchange for any separate property." 24 Am. Jur. 2d Divorce and Separation § 477. In its decision, the Trial Division found the following property to be marital property: (1) the lands in Ngaraard and Ngeremlengui; (2) the Steba home; (3) Palauan and Balinese money beads; (3) five boats; (4) nine cars/motorcycles; (5) fishing equipment located in a warehouse; and (6) rental chairs, tables and a tent located in a separate warehouse. Sils, *Ngesekes* and BMC were determined to be the separate property of Yano.

Appellant does not challenge the foregoing designations, and we affirm the Trial Division in this regard.

B. Valuation of Property

To effect an equitable distribution of marital property, a court must place a value on all non-nominal marital assets. *Guindon v. Guindon*, 256 N.W.2d 894, 897 (S.D.

1977) (court must place value on all assets); *see also In re Marriage of Patus*, 372 N.E. 2d 493, 496 (Ind. Ct. App. 1978) (nominal items need not be valued). An item is considered nominal when its value is insignificant compared to the total value of the marital estate. *Id.*

Here, with the exception of the Steba estate, the Trial Division failed to make any factual findings as to the value of marital property, including the boats and land vehicles. Absent such findings, it is impossible to determine to what extent, if any, the ultimate distribution was equitable. Thus, this matter must be remanded to allow the Trial Division an opportunity to assess the value of the marital property to be divided. *See Morrison v. Morrison,* 296 N.W.2d 919, 920 (S.D. 1980) (remanding for valuation of marital property).

C. Equitable Distribution

Yano submits that the ultimate distribution of the property was inequitable insofar as the Trial Division: (1) failed to account for Sugiyama's adultery; (2) considered Yano's separate property in distributing the marital property; and (3) ultimately awarded a disproportionate share of the estate to Sugiyama. Because we conclude this matter must be remanded for a proper valuation of the marital estate, there is no need to consider whether the Trial Division's distribution was equitable. However, given the dearth of Palauan authority on equitable distribution, we deem it prudent to provide the lower court guidance on the application of equitable distribution in Palau.

"Under the equitable distribution system, the marriage is viewed as a partnership with both spouses contributing to the marital estate in the manner which they have

chosen." *Ferguson v. Ferguson*, 639 So.2d 921, 927 n. 4 (Miss. 1994). Common law factors for insuring an equitable distribution of property include:

1. Substantial contribution to the accumulation of the property. Factors to be considered in determining contribution are as follows:

   a. Direct or indirect economic contribution to the acquisition of the property;
   b. Contribution to the stability and harmony of the marital and family relationships as measured by quality, quantity of time spent on family duties and duration of the marriage; and
   c. Contribution to the education, training or other accomplishment bearing on the earning power of the spouse accumulating the assets.

2. The degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets and any prior distribution of such assets by agreement, decree or otherwise.

3. The market value and the emotional value of the assets subject to distribution.

4. The value of assets not ordinarily, absent equitable factors to the contrary, subject to such distribution, such as property brought to the marriage by the parties and property acquired by inheritance or inter vivos gift by or to an individual spouse;

5. Tax and other economic consequences, and contractual or legal consequences to third parties, of the proposed distribution;

6. The extent to which property division may, with equity to both parties, be utilized to eliminate periodic payments and other potential sources of future friction between the parties;

7. The needs of the parties for financial security with due regard to the combination of assets, income and earning capacity; and,

8. Any other factor which in equity should be considered.

Ferguson, 639 So.2d at 928.

We find these factors to be consistent with section 302's statutory mandate and adopt them here. Of import to this matter, a party's infidelity is relevant to the distribution insofar as it relates to the contribution to the stability of the marriage and (in some cases) to the dissipation of assets. *See Bond v. Bond*, 69 So.3d 771, 773 (Miss. 2011) (discussing adultery in context of *Ferguson* factors). Likewise, separate property may be considered in reaching a fair and equitable distribution. *Ferguson*, 639 So.2d at 928 (factor four).

On remand, the Trial Division should apply the foregoing standards to the distribution of the parties' marital property.

IV. Custody

In its decision the Trial Division awarded custody of the three marital children to Sugiyama based on the finding that the custody award was "in the best interest of all concerned, especially the children." The lower court reached this conclusion based on: (1) Yano's busy schedule, (2) the fact that Sugiyama had been caring for the children full time since the separation, and (3) Yano's failure to attempt to spend time with the children in the previous year.

Yano asserts three enumerations of error with regard to the custody determination. First, he contends that Palau's child support statute, 21 PNC § 335, controls custody determinations. Second, Yano contends that the Trial Division abused its discretion in awarding Sugiyama custody based on Yano's lack of contact with the children after the separation and based on his long working hours. Third, he claims the Trial Division erred in failing to consider Sugiyama's adultery as a factor in the custody analysis.

A. The Custody Statute

21 PNC § 335 provides that a person "who causes [a] marriage to be terminated, either on his own initiative or for any of the reasons enumerated in section 331, subsections (a), (b), (c), (d) or (i) of this title shall provide support for each child of that marriage." 21 PNC § 335. Yano submits the statute requires that the party who "causes" the demise of the marriage on one of the enumerated grounds, including adultery, must have custody of the children because one cannot pay child support to oneself. We decline to follow this reading.

The only Trust Territory court to consider the issue held that relevant language did not preclude an award of custody. *C.f. Ngirararoro v. Martin*, 7 TTR 310, 313 (Tr. Div. 1970) ("Any interpretation of the section which results in the simple declaration that a spouse causing the termination of the marriage on one of the enumerated grounds is not entitled to child support, is erroneous."). Furthermore, Section 335(e) provides explicitly that "[n]othing in this section shall . . . contradict the provisions of section 302 of this title." Section 302, in turn, requires that orders for custody be based on consideration of "justice and [what] the best interests of all concerned may require." 21 PNC § 302. Thus, to the extent Yano contends section 331 creates a bright line rule for the awarding of custody in divorces, such position must be rejected.[4]

[4] Even in the absence of the limiting provision of section 335(e), we would reject Yano's contention that a child support obligation created under section 335 precludes an award of custody to the obligee. Section 335(b) provides that "[a]ny biological parent of a child under 18 years of age shall provide support for that child unless the child is adopted legally or in accordance with established custom." Under Yano's reading of the statute, no biological parent could obtain custody of their children. Clearly this is not the case.

B. Sugiyama's Adultery, Yano's Busy Schedule and Absence During the Separation

Yano argues that in awarding custody it was error for the Trial Division to: (1) consider his failure to reach out to the children during the period of separation because his absence was a direct result of a restraining order issued against him which forbade him from contacting Sugiyama and limited his access to the family home; (2) weigh his expected reliance on a caretaker against his custody claim; and (3) ignore Sugiyama's adultery.

1. Yano's Future Schedule and Absence From the Children's Lives

As explained above, custody decisions are reviewed for abuse of discretion. *Ngoriakl*, 16 ROP at 107. "An abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered, when an irrelevant or improper factor is considered and given significant weight, or when all proper and no improper factors are considered, but the court in weighing those factors commits a clear error of judgment." *Ngeremlengui State Pub. Lands Auth. v. Telungalk Ra Melilt*, 18 ROP 80, 83 (2011). Accordingly, resolution of Yano's enumeration of error depends on the proper factors for resolving questions of custody. *Id.*

As with the division of property, orders of custody must be made "as . . . justice and the best interests of all concerned may require." 21 PNC § 302. Trust Territory courts interpreting a provision with identical language to section 302 held that custody should be determined "primarily by the best interests of the children." *Yamada v.*

See Lin v. ROP, 13 ROP 55, 58 (2006) (court may discard even a plain reading of a statute to avoid an absurd result).

Yamada, 2 TTR 66, 70–71 (Tr. Div. 1959) (interpreting Section 704 of the Trust Territory Code). This approach is consistent with the general rule in American jurisdictions and with the approach of least one Trial Division decision. *See Kumangai v. Decherong*, 13 ROP 275, 279 (Tr. Div. 2006) (rejecting joint custody where it was "not in the best interest of the children."); *see also* 24A Am. Jur. 2d Divorce and Separation § 849 ("In divorce proceedings, the 'best interests' of the child is a proper and feasible criterion for making a decision as to which of the two parents will be accorded custody of the child."). We agree with the foregoing authority and hold that under section 302, the primary consideration for custody orders should be the best interests of the children. *Yamada*, 2 TTR at 70–71.

Normally the best-interest inquiry is based on statutorily prescribed factors. In the absence of such direction, "there are policies designed not to bind the courts, but to guide them in determining the best interests of the child." *Eschbach v. Eschbach*, 436 N.E.2d 1260, 1262 (N.Y. 1982). In this regard, "[p]rimary among the circumstances to be considered is the quality of the home environment and the parental guidance the custodial parent provides for the child [in particular] the financial status and the ability of each parent to provide for the child [and] the ability of each parent to provide for the child's emotional and intellectual development. *Eschbach*, 436 N.E.2d at 1263 (internal punctuation omitted). Because the ultimate determination is based on the totality of the circumstances, "the existence or absence of any one factor cannot be determinative on appellate review." *Id.* at 1264.

Here, the Trial Division determined that Yano's recent absence from the children's lives and his likely reliance on a caretaker weighed against granting him custody. We conclude both these facts relate to the "primary" considerations of home environment and parental guidance and thus hold that the Trial Division did not err in its custodial inquiry when it found that both facts weighed against Yano's claim of custody. *See Thompson v. Thompson*, 974 S.W.2d 494, 496–97 (Ark. Ct. App. 1998) ("Here, there was evidence that appellee was better positioned to be the child's primary caretaker at present than was the appellant: appellee testified that she had quit her job so as to be able to care for the child during the day, while appellant worked daytime hours and was not able to do so.").

2. Adultery as a Factor in Awarding Custody

Modern jurisdictions have largely abandoned consideration of marital misconduct in awarding custody of children. *See Roberts v. Roberts*, 835 P.2d 193, 197 (Utah 1993) ("[T]he concept of fault, unrelated to the children's best interests, is irrelevant to the custody decision."); *see also Price v. Price*, 541 A.2d 79, 81 (1987) (custody decisions must be made on basis of children's best interest and not on the fault of parties). Nevertheless, Yano submits that it was error for the Trial Division to fail to consider Sugiyama's adultery in the course of determining custody. In support of this assertion, he cites to three cases, all of which were decided prior to 1977, for the proposition that adultery is an important factor in the best interest inquiry. While acknowledging the antiquity of his authority, Yano argues "[t]he Palau divorce statute (which . . . was the Trust Territory statute) is based upon divorce statutes which then prevailed in the United

States." Thus, Yano urges us to look to interpretations of "statutes in the U.S. in the 1950's or earlier, before the advent of no-fault divorce."

"In earlier decisions, custodial law was used to punish and penalize spouses guilty of marital fault. The development of exceptions to the general rule evidenced a changing attitude. Generally, courts now consider the best interest rule, not marital fault, as the primary guide in custody determinations." *Carr v. Carr*, 480 So.2d 1120, 1122 (Miss. 1985). From its inception, the language of section 302 has been interpreted as requiring a best interest analysis. *Yamada*, 2 TTR at 70–71. Given this focus, we conclude adultery (and other marital fault) is relevant to awards of custody only so far as the adultery can be shown to impact the best interests of the children. *Carr*, 480 So.2d at 1122–23. In this regard, courts have held that acts of adultery are not per se relevant to a parent's ability to care for a child. *See In re Marriage of Slayton*, 103 Cal. Rptr. 2d 545, 552 (Cal. Ct. App. 2001) (Where "[m]other made no offer of proof that Father's alleged adulterous relationship would adversely affect the home environment he would provide for [child, the] court reasonably could conclude the evidence of adultery was not relevant to the custody determination."); *see also Cooper v. Cooper*, 579 So.2d 1159, 1163 (La. Ct. App. 1991) ("Acts of adultery with the same person do not, per se, render a parent morally unfit who is otherwise suited for custody.").

At the trial level, Yano failed to explain how or why Sugiyama's adultery rendered her an unfit parent. Because adultery alone is not a per se indication of unfitness, we

conclude the Trial Division did not err when it declined to consider Sugiyama's adultery in its custody determination.[5]

3. Failure to provide scheduled visitation.

Yano raised the issue of his ability to have custody of his children and although we did not find error in the trial division's order of sole custody we are mindful that Yano has a right to have regular contact with his children in order to maintain the parent child relationship. It is of grave concern to this Court that he went a lengthy time without being with his children. It is in the best of the children that they have a meaningful relationship with both parents. The trial division erred in not providing for regular visitation between Yano and his children. The issue of visitation is remanded with direction that the Trial Division order regular, meaningful visitation between Yano and his children.

V. Child Support

Yano raises two challenges to the Trial Division's award of child support: (1) he was not required to provide support for the children of the marriage (J.Y., N.Y., and Y.Y.); and (2) the Trial Division erred in calculating the support.

A. Child Support Obligation

Palau has two statutes concerning child support. Title 21, § 335 of the National Code states that one "who causes [a] marriage to terminate, either on his own initiative or

[5] Yano asserts in his opening brief that Singichi has a criminal record and is thus a negative influence on the children. Based on our review of the pleadings and argument by Yano, this does not appear to be a fact raised and considered below and, therefore, we may not consider it here. *See Rechucher*, 12 ROP at 54. However, Yano can always petition the trial court to amend its decision. *See* 21 PNC § 302.

for any of the reasons enumerated in section 331, subsections (a), (b), (c), (d) or (i) of this title shall provide support for each child of that marriage." Section 302 grants the Trial Division wide discretion to "make such orders for custody of minor children [and] for their support . . . as [the court] deems justice and the best interests of all concerned may require." The best interests of the child are paramount in making such custody and support decisions. *See Kumangai*, 13 ROP at 279; 24A Am. Jur. Divorce & Separation § 916 (2008).

On appeal, Yano contends:

> [T]he two statutes, when read together, provide that a court *must* order that child support be paid by a party who causes a divorce under any of the subsections of § 331 that are enumerated in § 335. Where a party causes a divorce under a different subsection, say insanity under subsection (f), the court is not obligated to order the party to pay child support, but it *may* do so under § 302 if justice and the best interests of concerned so require. Under this construction, the child support order here would be error because there is no finding –and no evidence that would support one—that Dr. Yano caused the marriage to terminate; but there is powerful evidence that Petitioner caused the termination of the marriage under § 331(a).

(emphasis in original)

Subsections (a) and (b) of section 335 operate to create two types of child support obligations: (1) an obligation of a party to a marriage who causes a marriage to terminate either on his own initiative or for any enumerated reason to provide support for children of the marriage; (2) an obligation of a person to provide support for all biological children who have not been adopted pursuant to law or custom.

We have never had occasion to consider how a person causes a marriage to terminate "on his own initiative." As a general matter, statutes are controlled by the plain

meaning of their words. *ROP v. Palau Museum*, 6 ROP Intrm. 277, 278–79 (1995). Plain meaning, in turn, is derived by recourse to both general and legal dictionaries. *Ngerul v. ROP*, 8 ROP Intrm. 295, 297 (2001)

In common usage, "one's own initiative" is defined to mean "at one's own discretion: independently of outside influence or control." Merriam-Webster's Online Dictionary, http://www.merriam-webster.com/dictionary/initiative (last accessed April 23, 2013). The phrase is undefined in Black's Legal Dictionary. We adopt the common meaning of the phrase and hold that a person causes a marriage to terminate on his own initiative when he knowingly and voluntarily causes the marriage to terminate.

Here, it is undisputed that in October of 2009, before the instant divorce petition was filed, Yano attempted to affect a customary divorce. Later, in response to Sugiyama's petition, he filed a counter-claim for divorce on the grounds of adultery. As explained above, the counterclaim proved to be meritorious and ultimately ended the marriage. Applying the foregoing standard to the instant facts, we conclude that Yano caused the marriage to terminate at his own discretion.

Because Yano caused the marriage to terminate on his own initiative, he is obligated to pay child support, and his contention to the contrary is without merit.[6]

B. Child Support Award

Unlike some jurisdictions, Palau has no formula for deriving the proper amount of child support due. Rather, section 302 provides that, where support is granted in a

[6] To the extent Yano contends Sugiyama's adultery precludes an award of child support in her favor, this argument has already been rejected.

divorce action, such support should be determined based on the now-familiar considerations of justice and the best interests of those concerned. This direction is consistent with the general rule that "[t]he ultimate objective in setting awards for child support is to secure support commensurate with the needs of the children and the ability of the obligor to meet those needs." 24A Am. Jur. 2d Divorce and Separation § 942.

The Trial Division properly identified the two of the most important variables as the children's needs and Yano's ability to pay. However, Yano submits the court erred in calculating the actual amounts of both.

1. Yano's Ability to Pay

On the issue of Yano's ability to pay, he submits the court counted as income the rent he is paid at the Sils property but neglected to acknowledge the costs of leasing out and maintaining the property. Yano also contends that the trial court erred by failing to consider his five-hundred dollar per month child support obligation to another child and his $350 per month payment of salary to an employee at Belau Aquaculture.

At common law, "with regard to a parent's ability to pay support, the net income after reasonable and justifiable business expenses should be the primary consideration." *In re Marriage of Crowley*, 663 P.2d 267, 268 (Colo. Ct. App. 1983). Net income necessarily excludes legal obligations and "necessary expense[s] of living." *See Klise v. Klise*, 678 S.W.2d 545, 546 (Tex. Ct. App. 1984) ("In testing a spouse's ability to pay the amount of child support ordered, the financial capability of the spouse is examined in light of all other liabilities the spouse has . . . ." (internal punctuation omitted)); *see also Sohocki v. Sohocki*, 730 S.W.2d 30, 32 (Tex Ct. App. 1987) ("The amount a parent is

required to pay should be commensurate with his or her ability to pay, but should not be great enough to deny that party the necessary expenses of living.").

We conclude the rental upkeep and payment of the salary of the Belau Aquaculture employee both were reasonable and justifiable business expenses that should have been considered in Yano's ability to pay child support. *In re Marriage of Crowley*, 663 P.2d at 268. Likewise, we conclude the child support obligation from a previous marriage should have been considered as a liability in the ability to pay inquiry. *Klise*, 678 S.W.2d at 546. However, such error was harmless.

In calculating Yano's ability to pay, the Trial Division took his gross income (approximately $5,283 per month) and subtracted the following monthly expenses: (1) $1,000 in loan servicing;[7] (2) $500 for food; (3) $200 for gas; (4) $200 for car repairs; (5) $500 for "entertainment," defined as "renting films, listening to music [and] going out;" and (6) $80 for laundry. The Trial Division found that after the foregoing expenses, Yano had slightly more than three thousand dollars to pay the $2,100 of child support.

In reviewing the Trial Division's findings, we begin by noting that renting films, listening to music and going out are not necessary living expenses. Furthermore, we observe the Trial Division failed to include in its calculation of gross income the approximately hundred dollars of income produced by Belau Aquaculture. These omissions account for a $600 error in Yano's favor. In contrast, the missed deductions advanced by Yano total $850 ($500 in child support, $350 in salary and $0 in rental

[7] Yano testified the loan would be paid off in January of 2013. It is unclear whether this has occurred.

upkeep).[8] With the proper deductions, Yano would have approximately $2,750 of disposable income to pay child support, still in excess of the $2,100 awarded amount. Thus, we conclude a proper calculation of his ability to pay would not have altered the ultimate amount awarded and that, therefore, any error in this regard was harmless. *See Ngiraiwet v. Telungalek Ra Emadaob*, 16 ROP 163, 165–66 (2009) ("Harmless errors are those that do not prejudice a particular party's case.").

2. Needs of the Children

As to the needs of the children, Yano argues that it was improper for the court to award costs of utilities and amenities, such as internet and cable, in child support costs because such costs benefit Sugiyama. Yano also contends that the total amount awarded exceeded the needs of the children, as found by the Trial Division.

As an initial matter, we note that child support awards often create a benefit for the custodial parent. Such a result is not error, but is a logical consequence of child support payments. *See generally Schabauer v. Schabauer*, 673 N.W.2d 274, 282 n. 2 (S.D. 2003) (Sabers, J., dissenting) (noting that "a child support award will always indirectly affect the custodial parent's standard of living . . . .").

Yano next contends that the Trial Division erred in setting the child support amount ($2,100 per month) at a number in excess of the amount it calculated to be the combined needs of the children of the marriage ($1,916.67 per month) without justification for the increase. Both parties agree that the $1916.67 monthly expenses

[8] Yano presented no evidence of the expenses associated with Sils. "[I]t is not the Court's job to develop the record or act as the claimant's advocate." *Arbedul v. Rengelekel A Kloulubak*, 8 ROP Intrm. 97, 98 (1999).

found by the lower court is an accurate estimate of the needs of the children. Because child support awards are based on the needs of the children, we conclude that it was error for the Trial Division to exceed the agreed needs of the children without justification. *See Reid v. Reid*, 998 So.2d 1032, 1039 (Miss. Ct. App. 2008) ("[C]hild support awards, even if comporting with the statutory guidelines, cannot exceed the needs of the children.").

In the absence of dispute as to the actual needs of the children, we find the needs of the children to be $1,916.67 per month until the court awards the marital property. The Trial Division may determine in dividing the marital property that it is appropriate to sell the family home or that the children should continue to reside in the family home with their mother until their majority. If the mother is not awarded the family home or is allowed to reside there with the children until they are of majority age the needs of the children may change.

The Trial Division failed to consider the mother's obligation to support her children. Some consideration should be given to each parent's financial obligation and ability to provide for the children. Evidence was received that the mother was previously employed and has the ability to provide support.

For the period of the pendency of the litigation until the marital property is divided child support is reduced to $1,916.67 per month. The issue of child support is remanded to the trial division to consider the needs of the children taking into consideration the division of marital assets and the mother's ability to provide financial support. However, in no event shall the amount of child support be greater than the needs of the children.

CONCLUSION

For the foregoing reasons, we AFFIRM in part. We REVERSE the Trial Division's order regarding the grounds for divorce, division of property, child support and visitation between the children and their father. We REMAND for proceedings consistent with this decision.

SO ORDERED this 10 day of June, 2013.

ARTHUR NGIRAKLSONG
Chief Justice

KATHLEEN M. SALII
Associate Justice

KATHERINE A. MARAMAN
Part Time Associate Justice

Yano vs. Yano
Civil Appeal 11-011
(Civil Action No. 09-287)