CORAM: HER HONOUR BERTHA ANIAGYEI (MS) SITTING AT
THE CIRCUIT COURT 'B' OF GHANA HELD AT TEMA
ON THURSDAY, 24TH NOVEMBER, 2022

SUIT NO. C5/65/21

ADJOA ASABEA ADU AGYEI - PETITIONER

VRS

WILLIAM JEFFERSON EDDIE GRAHAM - RESPONDENT

JUDGMENT

The parties to this action celebrated their marriage on the 5th day of April, 2008 at the Tema Municipal Assembly. There are two issues of the marriage aged eleven (11) and nine (9) years. According to the petitioner, their marriage has broken down beyond reconciliation since the respondent has behaved in an unreasonable manner and she cannot live with him as husband and wife.

She contends that they have been separated for more than two years and have not had sexual intercourse. That there is no peace in their matrimonial home and all attempts by family members to reconcile them have failed. That the customary marriage has been dissolved.

She prays the court to dissolve their marriage, grant her custody of the two children with reasonable access to the respondent, monthly maintenance of one thousand Ghana cedis (Ghs 1,000) for the two issues of the marriage, an order that the respondent should pay the school fees, medical bills as well as provide accommodation for she and the children and for any other orders as the court may deem fit.

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The respondent was served personally with the petition, notice for trial and setting down and numerous hearing notices. He failed to appear in Court throughout the process. As it is the duty of a court to give a party to a case before it a hearing, the failure of the respondent to appear in court to be heard is taken to mean that he did not wish for the court to hear him before deciding on the matter.

Dotse JSC speaking for the Supreme Court in the case of ***Julius Sylvester Bortey Alabi v. Paresh & 2 Others [2018] 120 GMJ 1 at p. 11*** held: *"We are therefore of the view that, if a party voluntarily and deliberately fails and or refuses to attend a court of competent jurisdiction, (such as the High Court which determined this case) to prosecute a claim against him, he cannot complain that he was not given a fair hearing or that there was a breach of natural justice. The Defendants must be respected for making such a choice, but they must not be allowed to get away with it*".

The Court of Appeal also in the case of ***Ghana Consolidated Diamonds Ltd. v. Tantuo [2001-2002] 2 GLR 150*** held at holding 4: *"A party who was aware of the hearing of a case but chose to stay away out of his own decision could not, if the judgment went against him complain that he was not given a hearing*". See also the case of ***Accra Hearts of Oak Sporting Club v. Ghana Football Association [1982-83] GLR 111 at page 117***.

Order 36 rule 2 (a) of C.I.47 provides in unambiguous terms that the proceedings at a trial where the defendant fails to attend is for the court to strike out the counterclaim if any and allow the plaintiff to prove his claim. As this is a matrimonial matter, and proceedings are to be by enquiry, the Court set the matter down for the petitioner to prover her claim.

The relevant issues for the court to determine are;

1. ***Whether or not the marriage has broken down beyond reconciliation.***
2. ***Whether or not custody of the two issues of the marriage should be granted to the petitioner with reasonable access to the respondent***
3. ***Whether or not the respondent should be ordered to pay the the school fees, medical bills, accommodation and also provide a monthly maintenance of one thousand Ghana cedis (Ghs 1,000) for the children of the marriage.***

THE CASE OF THE PETITIONER

In her evidence in chief, the petitioner repeated most of the averments as contained in her petition. She tendered in evidence their marriage certificate as EXHIBIT A. That since the marriage, there has been constant quarrels and arguments between them at the least provocation. That the respondent has betrayed her trust and his attitude and behavior became unreasonable.

Further that they are generally incompatible and communication has totally broken down between them. They have also not shared any form of intimacy for the past three years and the respondent has constructively deserted her as they have led their separate lives for the past two years.

That they both consent to a dissolution of their marriage so that they can concentrate on raising their children. That all efforts made to reconcile them have failed and the customary marriage has been dissolved by their respective families. Petitioner did not call any witnesses and closed her case.

CONSIDERATION BY COURT

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1. ***Whether or not the marriage between the parties has broken down beyond reconciliation.***

In divorce just like in all civil cases, the degree of proof required by law is that of a balance or preponderance of probabilities. See ***Section 12 (1) and (2) of the Evidence Act, 1975 (Act 323).*** In the case of ***Adwubeng v. Domfeh [1996-97] SCGLR 660, the Supreme Court held that 'sections 11 (4) and 12 of the Evidence Decree, 1975 (NRCD 323)*** have clearly provided that the standard of proof in all civil actions was proof by a preponderance of probabilities – no exceptions were made''. It is he who asserts who bears the burden of proof and so the burden of persuasion lies on him/her to lead cogent and positive evidence to establish the existence of his/her claim in the mind of the court. See the case of ***Abbey & Ors v. Antwi [2010] SCGLR***.

In Ghana, when a couple decide to marry under the Ordinance, then they can only obtain a divorce through the Courts. The court must enquire as far as is reasonable into the reasons for the divorce and may either grant or refuse to decree a divorce after hearing. The ground upon which a divorce can be obtained from the Courts is clearly stated under the ***Matrimonial Causes Act, 1971 (Act 367).***

In ***Section 1 (2) of Act 367***, the sole ground for granting a petition for divorce shall be that the marriage has broken down beyond reconciliation. In proving that the marriage has broken down beyond reconciliation, a petitioner must establish one of six causes i.e. adultery which the offended party finds intolerable to live with; unreasonable behavior; desertion for a period of two years; consent of both parties where they have not lived together as husband and wife for a period of two years; not having lived together as husband and wife for a period of five years; and finally, inability to reconcile differences after diligent effort.

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The contention of petitioner is that the respondent has behaved in such an unreasonable manner that she cannot be expected to continue to live with him. As to whether that constitutes unreasonable behavior, in determining what constitutes unreasonable behavior, the test to be applied is an objective one.

Hayfron Benjamin J (as he then was) held in the case *of* ***Mensah v. Mensah (1972] 2 G.L.R. 198*** that "In determining whether a husband has behaved in such a way as to make it unreasonable to expect a wife to live with him, the court must consider all circumstances constituting such behaviour including the history of the marriage. It is always a question of fact. The conduct complained of must be grave and weighty and mere trivialities will not suffice for **Act 367** is not a Cassanova's Charter. The test is objective".

This test was relied on by the Court of Appeal in the case **of** ***Knusden v. Knusden [1976] 1 GLR 204-216*** where the court held that "The cross-petition was based on ***Act 367, Section 2 (1) (b)*** under which the test to be applied in determining whether a particular petitioner could or could not reasonably be expected to live with the particular respondent was an objective one, and not a subjective assessment of the conduct and the reaction of the petitioner.

In assessing such conduct, the court had to take into account the character, personality, disposition and behaviour of the petitioner as well as the behaviour of the respondent as alleged and established in the evidence. The conduct might consist of one act if of sufficient gravity or of a persistent course of conduct or series of acts of differing kinds, none of which by itself might be sufficient but the cumulative effect of all taken together would be so".

Although petitioner mentioned disagreements and arguments, and also said the attitude of the respondent had led her to lose trust in him, by way of evidence, she did not provide any specific act or various acts a combination of which may lead the court to conclude that the respondent had behaved unreasonably.

Petitioner however testified that for the past three (3) years, they had been separated and had not had any form of sexual intercourse. That communication has also broken down between them and they have both agreed to have their marriage dissolved so they can focus on the children. That all diligent efforts to reconcile them have failed and their families have dissolved the traditional marriage.

One of the grounds upon which a court can arrive at a conclusion that a marriage between parties has broken down beyond reconciliation is where the parties have not lived as husband and wife for a period of at least two years prior to the presentation of the petition for divorce and both of them agree to a dissolution of the marriage.

Section 2 (1) (d) of the Matrimonial Causes Act, 1971, (Act 367) provides that;

2. (1) For the purpose of showing that the marriage has broken down beyond reconciliation the petitioner shall satisfy the court of one or more of the following facts:

> (d) that the parties to the marriage have not lived as man and wife for a continuous period of at least two years immediately preceding the presentation of the petition and the respondent consents to the grant of a decree of divorce; provided that such consent shall not be unreasonably withheld, and where the Court is satisfied that it has been so withheld, the Court may grant a petition for divorce under this paragraph notwithstanding the refusal.

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In her petition presented to this court on the 4th of May, 2021, the petitioner averred that they had not lived together as husband and wife for two (2) years and six (6) months prior to her presentation of the petition. In her written evidence in chief which was filed on the 21st of April, 2022, she contended that they had not lived together as husband and wife for more than three (3) years. I have no reason to doubt her evidence as she presented herself in a credible manner to this court.

The respondent's refusal to appear in court despite being served with every process personally is an indication that he also places very little value if at all on their marriage. That their traditional marriage has been dissolved is a further indication that there is no going back. Although they converted their traditional marriage into ordinance, the relevance of the role the families play in the marriage cannot be underestimated. It is a legal known that in Ghana, a marriage is not just contracted between the parties, but between the parties and their families.

The family are called upon in times when the marriage boat is sinking to help keep it safe and on its marital journey. Thus when the traditional marriage is dissolved, it is an indication that the marriage has broken down beyond reconciliation as the very persons i.e the family whose consent aside that of the parties is necessary to sustain a union, by the dissolution had accepted that nothing could be done to salvage the union.

A return and acceptance of drinks is a means of severing the chord that exists between the parties and their families and is notification to the whole world that they no longer owe each other any obligations and have if at all, returned to a state of being mere friends; even strangers to each other. It also signifies the consent of the parties to a dissolution of their marriage under the Ordinance by the Court.

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Upon these considerations, I hereby find that for two years prior to the presentation of this petition, the parties had not lived together as husband and wife and both of them consent to a dissolution of the marriage. Accordingly, I hereby issue a decree to dissolve the marriage celebrated between them at the Tema Municipal Assembly on the 5th day of April, 2008. Their marriage certificate number ROM/0398/2008 is hereby cancelled.

2. ***Whether or not custody of the issues of the marriage should be granted to the petitioner with periodic access to the respondent***

On the issue of custody, according to **AZU CRABBE CJ** in the case of ***Braun v. Mallet [1975] 1 GLR 81-95*** "in questions of custody it was well-settled that the welfare and happiness of the infant was the paramount consideration. In considering matters affecting the welfare of the infant, the court must look at the facts from every angle and give due weight to every relevant material''. See also the case of ***Gray v. Gray [1971] 1 GLR 422.***

This provision is referred to as the welfare principle and it has been concretized by Statute in ***section 2 of the Children's Act, 2008 (Act 560).***

Section 2—Welfare Principle.

(1) The best interest of the child shall be paramount in any matter concerning a child.

(2) The best interest of the child shall be the primary consideration by any court, person, institution or other body in any matter concerned with a child.

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A court in arriving at decisions as to custody and access of a child is bound to consider the best interest of the child and the importance of a young child being with his mother. The court must also consider the age of the child; that it is preferable for a child to be with his parents except if his rights are persistently being abused by his parents; the views of the child if the views have been independently given; that it is desirable to keep siblings together and the the need for continuity in the care and control of the child.

In the case of ***Barake v. Barake [1993-94] 1 GLR 635 Brobbey J*** (as he then was) held that "the welfare of the child was the primary consideration for the determination of the custody of a child. The welfare of the child however had to be considered in its largest sense. Although some of the factors taken into account in deciding on the welfare of the child were the positions of the parents, the position of the child and the happiness of the child, the first consideration should be who his parents were and whether they were ready to do their duty''.

The issues were eleven (11) years and nine (9) years as at the date of the petition in May, 2021. The petitioner in her evidence is silent as to who the children currently live with. However, before this court, she is the one who is ready to do her duty by them as their biological mother. The respondent has not appeared to make any claim for them. As there is no evidence that the petitioner is an unfit mother who would in anyway endanger the life of her very children, I hereby find that it would be in the best interest of the children for them to live and grow together with the petitioner who is their biological mother.

I hereby grant custody of the children to the petitioner with reasonable access to the respondent.

3. ***Whether or not the respondent should be ordered to pay a montly maintenance of one hundred Ghana cedis (Ghs 1,000) as well as the school fees, medical bills and also provide accommodation for the children***

The duty to maintain a child according to ***Section 47 of the Children's Act, 1998 (Act 560)*** falls on the parents of that child. It is settled that it is the duty of parents, where they each earn an income to provide for their children. See ***Section 49 of Act 560*** and the decisi*on of* ***Dotse JA (as he then was) in the case of Donkor v. Ankrah [2003-2005] GLR 125*** where he stated "where both parents of a child are earning an income, it must be the joint responsibility of both parents to maintain the child. The tendency for women to look up to only men for the upkeep of children is gone".

Maintenance of children involves providing them with the necessaries of health and life; shelter by means of accommodation, food, clothing, education and medical care being the basic needs of every child.

The petitioner says she is a beautician whilst the respondent is businessman. Both of them are workers who in the ordinary scheme of affairs, should earn an income. In the circumstances, it behoves on both of them to ensure that their children, to the best of the financial abilities of both parties, are maintained.

Accordingly, on the basis that it is the primary duty of parents to provide the necessaries of health and life of their children, it is hereby ordered that:

a) commencing from the last working day of November, 2022 and every other month thereafter, the respondent is to pay the sum of one thousand Ghana cedis

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(Ghs 1,000) to petitioner as maintenance for the issues until they each turn twenty one (21) years or complete their education or skill training. The amount is to be increased by 20% each year to account for the economic fluctuations.

b) As these are growing children who would soon enter their teenage years, their food consumption is expected to be on the high side and so the petitioner is to top up the maintenance provided by the respondent with whatever amount would be necessary to ensure that the children are adequately maintained.

c) The respondent is also to provide accommodation for the children until the youngest turns twenty one (21) years or the petitioner remarries; whichever is earliest in time. As the children are two and of different gender, the accommodation should have at least two bedrooms.

d) The petitioner is to pay for the utility and general maintenance by way of repairs of any broken amenities in the said home in order to keep it in a tenantable condition.

e) Respondent is also to pay for the school fees and all other school related bills of the issues.

f) The petitioner is to provide for all the clothing needs of the children

g) The respondent is to pay for the medical bills of the issues as at when they fall due.

Cost of seven thousand Ghana cedis (Ghs 7,000) is hereby awarded to the petitioner against the respondent as costs incurred in prosecuting this action.

(SGD)
H/H BERTHA ANIAGYEI (MS)
(CIRCUIT COURT JUDGE)

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