CORAM: HER HONOUR BERTHA ANIAGYEI (MS) SITTING AT
THE CIRCUIT COURT 'B' OF GHANA HELD AT TEMA
ON THURSDAY, 20TH OCTOBER, 2022

SUIT NO. C5/118/21

ROSE ASOMANING - PETITIONER

VRS

FREDERICK AGBASI - RESPONDENT

JUDGMENT

On the 27th day of July, 2012, at the Tema Metropolitan Assembly, the parties to this action, convinced that they wanted to live the rest of their days on this earth in each other's love and companionship, celebrated their marriage under the ordinance to announce their union to all and sundry. On the 27th day of August, 2021, almost a year shy of a decade since they celebrated their union and having had two issues, the petitioner presented a petition to this court for a dissolution of their marriage. She contends that their marriage has broken down beyond reconciliation. The respondent in his answer and cross petition admits that their marriage has indeed broken down beyond reconciliation. Both of them assign different reasons for the breakdown of their marriage.

The petitioner seeks for a dissolution of the ordinance marriage celebrated between them, custody of the issues of the marriage with reasonable access to the respondent, that the respondent be compelled to maintain the issues of the marriage including but not limited to the payment of school fees and medical bills as and when due. Finally

that the petitioner be ordered to freely and without any obstruction or hindrance, to allow the petitioner to retrieve all her personal belongings in the matrimonial home.

The respondent on his part cross petitioned for a dissolution of the marriage and for custody of the first issue of the marriage. He contended that the maintenance of the children is a shared responsibility of the parents and not only the husband. That the petitioner can come for her remaining belongings in the house.

The lines of dispute having clearly been drawn, the issues for the court to determine are;

1. Whether or not the marriage between the parties has broken down beyond reconciliation
2. Whether or not custody of the two issues should be granted to the petitioner
3. Whether or not custody of the first issue should be granted to the respondent
4. Whether or not the respondent should be ordered to maintain the children as well as pay for the school and medical bills when due.

THE CASE OF PETITIONER

In her evidence in chief, petitioner says that their marriage has broken down beyond reconciliation due to the unreasonable behavior of the respondent. That although the

respondent quit his job prior to their marriage, he had different jobs after their marriage. However, she was mainly responsible for the maintenance and running of the matrimonial home without any contribution whatsoever from the respondent and she became financially burdened.

That after their first issue, the respondent would always get angry when she became pregnant again. That they had various arguments and this led her to suffer two miscarriages. That the respondent maltreated her when she took seed again and this led her to suffer depression throughout the pregnancy. She finally had the second issue of the marriage. The child suffers from cerebral palsy. That their relationship was so strained and acrimonious as at the time that she had the second issue that she moved to live with her parents.

That she lived with her family for over a year. She returned to the matrimonial home after their families settled their issues but the situation between she and the respondent became worse. Respondent still refused to contribute towards the running of the matrimonial home with the excuse that she had not been paid. That the respondent would continuously return home late without any reasonable explanation and she became convinced that he was having an affair. She thus informed him that she wanted to be protected anytime they had sex but he flatly refused and forcibly had sex with her on a number of occasions.

That she became fed up with respondent's attitude and left the matrimonial home in November, 2020. A week thereafter, she returned the drinks signifying the end of their

union. Since then, the respondent has only given her the sum of one hundred Ghana cedis (Ghs 1,000), some diapers and clothes as maintenance for the children.

THE CASE OF THE RESPONDENT

According to the respondent, he and the petitioner had an agreement prior to their marriage that they would have two children, share the responsibilities of maintaining the home equally, build a house and move into same before having their second child and they were also going to save together. That prior to the celebration of their marriage, he lost his job and the petitioner was well aware of that. However, he later gained employment with a company in Liberia. He was away when the petitioner had their first child.

That he was given a two week leave to return to Ghana to see his child but he suffered an accident the very weekend he came. That during his treatment at the hospital, he borrowed money from the petitioner but later paid back. That when it was time for the petitioner to return to work, he decided to take care of the baby even though he was not well. That this decision did not sit well with the petitioner who had wanted her mother to continue taking care of the baby and the petitioner began to put up a bad attitude towards him.

Further that although he was not enthused about the petitioner's second pregnancy and said some harsh words to her, it was because it was contrary to their agreement. That he later played his role as a good husband and assisted her throughout the pregnancy. The

petitioner chose to start a course during the pregnancy whilst still working and that took a toll on her during the pregnancy.

He denied being absent from the home without reason but admitted that he had sex with the petitioner against her will. According to him, as his wife, he felt bad that he had to use a condom when having intercourse with her. That it was the petitioner herself who left for her parent's place. However, they were able to patch up their differences and she returned. That they have sought various forms of assistance particularly, spiritual assistance for the recovery of their last child who has cerebral palsy and in all these, they have been advised to stay together for the sake of their marriage.

However, the petitioner decided to leave again for her parents. That she and her grandmother returned the drinks signifying the dissolution of the marriage and he accepted same. He refused to allow the petitioner to pick her personal items on the basis that since their marriage was not just customary, she should get him the divorce papers to sign before she can take anything away. His testimony is that he has always provided for the family save for when he decided to start his own business. He admits that since then, he has not had the means to make any provision for the children. He however sent some foodstuff to the petitioner and she refused to accept same. That he later sent her money, clothing, medicine and diapers for the children after he had completed a project.

CONSIDERATION BY COURT

Divorce is by means of enquiry and a court must satisfy itself by way of evidence that indeed the marriage has broken down beyond reconciliation. In the case of ***Ameko v. Agbenu [2015] 91 G.M.J.*** the court of Appeal relying on the Supreme Court decision in the case of ***Elaine Dorothy Ampiah v. Mr. Joseph Alex Ampiah (Civil Motion No J5/39/2011)*** granted a certiorari to quash a decree of dissolution on the basis that same was not "**warranted by statutory rules of procedure**" as the trial judge had failed to take any evidence and granted the decree based upon the consent of the parties.

The court of Appeal in the **Ameko case (Supra)** held that "from the record of appeal, it is clear that no evidence was taken before the dissolution of the marriage in question. The judge did not make any enquiry and satisfy itself as required by ***Section 2(2) and (3) of the Matrimonial Causes Act***.

Blacks' law dictionary, (8th edition, 2004 p. 1449) defines divorce as "***the legal dissolution of a marriage by a Court***." In Ghana, when a couple decide to marry under the Ordinance, then they can only obtain a divorce through the Courts. 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; 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.

It is he who asserts who bears the burden of proof and so the burden of persuasion lies on petitioner to lead cogent and positive evidence to establish the existence of her claim in the mind of the court. See the case of ***Takoradi Flour Mills v. Samir Paris [2005-6] SCGLR 882*** *and* ***Ackah v. Pergah Transport Ltd (2010) SCGLR 728.*** As the respondent has counterclaimed, he bears the same burden of proof in establishing his claim. See the case of ***Messrs Van Kirksey & Associates v. Adjeso & Others [2013-2015] 1 GLR 24.***

The petitioner's basis for presenting this petition is that the respondent has behaved in such an unreasonable manner that she cannot continue to live with him as husband and wife. The respondent in his cross petition says it is rather the petitioner who has behaved unreasonably towards him. They both admit that they had not lived together for almost a year prior to the presentation of the petition and also that the customary marriage has been dissolved. In their evidence before the court, both parties testified that their marriage has broken down beyond reconciliation and prayed the court to dissolve the said marriage.

In the course of the trial, the respondent indicated that prior to their marriage, they had had an agreement as to how to conduct their business as a married couple. The petitioner says it was only a discussion. Be it an agreement or discussion, it entailed the number of children they would have, when they would have them, how to conduct their finances and share their responsibilities and when to acquire their own home. It appears that whereas the respondent regarded this as a binding agreement prior to their

marriage for which reason they had to live according to it, the petitioner as she indicates at page 7 of the record of proceedings, regarded it as a mere discussion.

Q: Before marriage, did we enter into any agreement as to how we were going to live as husband and wife that is the number of children and how we were going to go forward.

A: Yes, my lord. It was a discussion and not an agreement.

Whereas the respondent expected the petitioner to not take seed a second time until they had built their own home as they had agreed, the petitioner regarding their agreement as a mere discussion, became pregnant twice after the first child, lost the pregnancies and finally had their second child when the parties were still living in respondent's family house and when from their own evidence, they had not even begun to put into operation the necessary steps to acquire their own home. Even though it takes a man and a woman to get pregnant, the respondent decided to heap the blame on the petitioner.

The respondent admits that he did not handle this well and took out his frustrations on the petitioner. This second pregnancy and the involvement of the petitioner's mother in assisting to take care of their first child set off a string of misunderstandings that the parties could not assuage.

This indicates that even before the inception of their marriage, they had different expectations as to what was required of each of them. Their quarrels and disagreements have emanated largely from these unmet expectations. From their evidence, their

marriage has had more quarrels and disagreements than the harmony that is expected of a marriage. Even before the petitioner vacated the matrimonial home in 2020, the parties had lived apart for almost three years immediately after the birth of their second child. They resumed cohabitation and could not salvage their union.

In this court, on the first date of mention, they made it crystal clear to the court that there was no possibility of reconciliation. As it stands now, they have dissolved the traditional marriage. 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. As both parties agree that their families have dissolved their traditional marriage, it stands to say that their marriage has proverbially hit the rocks and there is no hope of a salvage.

In the circumstances, it is appropriate to free them of the legal yoke that continues to bind them on paper. To borrow the words of ***Sarkodee J (as he then was)*** in the case of ***Addo v. Addo [1973] 2 GLR 103***, which he himself quoted from ***The Law Commission Report; Reform of the Grounds of Divorce. The Field of Choice, para. 15. (Cmd. 3123)*** "For it is better: "When regrettably, a marriage has irretrievably broken down to enable the empty legal shell to be destroyed with the maximum fairness, and the minimum bitterness, distress and humiliation."

That is why ***Section 2 (1) (f) of the Matrimonial Causes Act, 1971 (Act 367) provides that;***

"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; that the parties to the marriage have, after diligent effort, been unable to reconcile their differences''.

On the basis that the parties have after diligent effort, failed to reconcile their differences, I find that their marriage has broken down beyond reconciliation and accordingly, issue a decree to dissolve the said union. Their marriage which was celebrated on the 27th day of July, 2012 is hereby dissolved. Their marriage certificate is accordingly cancelled. The Registrar of the Court is to notify the Marriage Registrar of the cancellation for their records to be amended accordingly.

2. ***Whether or not custody of the two issues should be granted to the petitioner***
3. ***Whether or not custody of the first issue should be granted to the respondent***

I would consider issues two and three together.

On the issue of custody, there are two issues of the marriage, a boy and a girl who are 8 and 4 years old. Whereas the petitioner is praying for custody of both children, the respondent is praying for custody of the first child. The evidence on record is that the second child suffers from cerebral palsy.

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.

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 need for continuity in the care and control of the child.

From the evidence on record, the issues have been in the care of the petitioner since she left the matrimonial home in November, 2020 with them. According to the respondent, the petitioner does not take proper care of the children. That this has come to his knowledge in the course of his visiting the children. Save for his assertion, the respondent failed to provide any evidence in proof of his claim.

Indeed, the respondent indicated that the parents of the petitioner, particularly the mother once rejected the child and he had evidence of this by way of a video recording. He failed to produce the said video recording even though the court gave him an opportunity to.

The law is that if a party makes reference to a document, but fails to tender it in evidence, the inference is that such a document never existed or if it did, it contained not the averments it was supposed to contain. See the case of ***Bousiako Co. Ltd. v. Cocoa Marketing Board [1982-83] 2 GLR 824 @ 829***.

The petitioner works as a procurement officer and is in full time employment. When she is at work, the children are left in the care of her mother and father; i.e their grandparents. The respondent says he has just established a company and works as an

uber driver, particularly at night to earn a living. He indicated in his evidence that his coming home late was due to this.

The second child has cerebral palsy. That classifies her as a special needs child who would need care and attention at all times of the day. The respondent gave evidence of numerous spiritual consultations from the length of breadth of this country with regard to finding a cure for the second child. He also testified about how the parties are blaming each other's family and family members for the condition of the child.

They had also been applying various items and brewing various concoctions for the child to drink; all in the name of finding a cure for the child. Their actions were not in the best interest of the child. In deciding on who to award custody to, I take note that since the petitioner vacated the matrimonial home with the children, those acts have ceased and in this court, the petitioner indicated that the child is currently on medication prescribed by qualified doctors.

The first child is also still a minor and would require the attention of an adult. It is best to keep both issues together to ensure continuity in their care and also to enable them grow together as siblings. Dividing them between the parents would not ensure to their best interest. Thus although both parties are fully employed, the petitioner has persons by way of her parents who are available and able to assist in the care of the children. The respondent did not lead any evidence as to how as an uber driver and someone who has just set up his own company, he intends to take care of the children; particularly the second child.

After a careful consideration of the facts, I find that is in the best interest of the children that custody be granted to the petitioner; their mother. The respondent has reasonable access.

4. ***Whether or not the respondent should be ordered to maintain the children as well as pay for the school and medical bills when due.***

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".

The respondent's case in this court is that he is currently not in gainful employment and so he does not provide for the children. At pages 12 and 13 of the record of proceedings, under cross examination by learned counsel for the petitioner, he answered;

Q: When was the last time you paid maintenance to the petitioner and how much?

A: I cannot give an exact date but it is over a year now and that was the beginning of my new registration of my company when I started.

Q: How much did you give her?

A: One thousand Ghana Cedis (GHC 10,000)

Q: And that is how many months today?

A: Over twelve months.

Q: So the children have not eaten for a year and you have defied to provide them with the necessities of health and life.

A: Your honor, both of us knew our condition before we got married and we agreed on how to take care of the children.

Q: Whatever the reason you described about your conditions, it did not include putting the health and the very lives of the children in danger and I put it to you that you have fallen short of doing the right thing to sustain the life of the children.

A: Your honor, we knew our condition before we got married. As petitioner rightly said, I had resigned and was out of a job even before we got married. I believe that she was well aware that there were going to be challenges before she agreed to marry me.

The respondent decided to set up his own company knowing very well that he had children including a special needs child to provide for. As a father, he was under an obligation to ensure that whatever personal decisions he took did not have an adverse effect on his children. To expect the petitioner to provide for the children for as long as it would take him to get his company running is most unfair to the petitioner and the children. Aside the medication that the second child is on, according to the petitioner, she also needs a special diet. The financial needs of the second child alone would be too much for only one parent to bear.

On the basis that it is the primary duty of parents to provide the necessaries of health and life of their children, I hereby make the following orders;

1. The respondent is to pay monthly maintenance of eight hundred Ghana cedis (Ghs 800) towards the maintenance of the children. The amount is payable at the end of every month commencing from the 31st day of October, 2022.

2. The petitioner is to augment this with whatever is necessary to ensure that the children are well maintained.

3. Both parties are to pay equally for the school fees and all other school related bills of the children. In this regard, the petitioner is to ensure that the respondent has all copies of school bills within reasonable time to enable him pay his share.

4. The respondent is to pay for the medical needs of the children. As the petitioner has custody, she is also to notify the respondent on time whenever any of the issues are ill and require medical care.

5. The medical needs of the second particularly, the constant purchase of drugs are to be borne equally by the parties.

6. The petitioner is to provide for the clothing and accommodation needs of the children as well as accompanying utility bills

In the course of the trial, the respondent admitted that he was in arrears of maintenance as he had only maintained the children with an amount of one thousand Ghana cedis (Ghs 1,000) since November, 2020. He admitted that since then, the petitioner has been responsible for all needs of the children. At page 18 of the record of proceedings, under cross examination by learned counsel for the petitioner, the respondent had answered;

Q: You have confirmed already to this honorable court that for more than twelve months, you have not maintained the children of the marriage. I put it to you that it is not less than eighteen months you maintained the children.

A: Yes, that is true.

Q: Now you have caused hardship to these children of the marriage. What are you going to do to rectify that?

A: I am still struggling to get even a lawyer for my case because of financial constraints. I am still trying to work things out. If things work out, I will do my duties as a father.

To offset the financial burden on the petitioner, the respondent agreed to hand her the vehicle which they jointly acquired and which was in his possession. An evaluation of the value of the vehicle was provided. I hereby hold that the amount of the vehicle be considered as the full sum in arrears of maintenance owed to the petitioner by the respondent.

The petitioner was able to provide receipts for bills totaling nine thousand Ghana cedis (Ghs 9,000) as arears of school fees. As they are equally responsible for the provision of all necessaries of health and life including school fees for the children, they are to share the amount equally. He is to refund to the respondent the sum of four thousand five hundred Ghana cedis (Ghs4,500) within one month from the date of judgment.

Although the petitioner had petitioned the court to order the respondent to permit her to pack out her personal belongings, that relief became moot because in the course of

the trial, the respondent granted her access to her personal belongings and she has been able to convey same.

Each party is to bear their own cost in suit.

(SGD)

H/H BERTHA ANIAGYEI (MS)

(CIRCUIT COURT JUDGE)

PAULINA FLETCHER FOR THE PETITIONER