

SUIT NO. C5/06/23

VRS

JOHN KOBINA ANTWI ----- **RESPONDENT/RESPONDENT**
GP 1637 774
ACHIMOTA, ACCRA

PARTIES: PRESENT

COUNSEL: ALEXANDER QUARTEY, ESQ. FOR PETITIONER/APPLICANT
PRESENT

CHARLES BREW-HAMMOND, ESQ. FOR
RESPONDENT/RESPONDENT
PRESENT

**RULING ON MOTION ON NOTICE FOR INTERIM ORDERS FOR
PETITIONER TO HAVE CUSTODY OF THE ONLY ISSUE OF THE
MARRIAGE PENDING THE DETERMINATION OF THE PETITION**

On the 9th day of May 2023, the Petitioner herein filed a Divorce Petition in the registry of this Court praying for the following reliefs:

- a) That the said marriage be dissolved.

- b) That the custody of the child be settled on the Petitioner with reasonable access to the Respondent.
- c) A lump sum of 50,000.00 be settled on the Petitioner.

On 18th May 2023, counsel for the respondent entered appearance on behalf of the respondent. He subsequently filed an answer to the divorce petition on 1st June 2023 and cross petitioned as follows:

- i. The dissolution of the marriage.
- ii. That he should be granted custody of the only child of the marriage with reasonable access to the Petitioner.
- iii. An order for the Petitioner to pay compensatory damages to the Respondent for causing Respondent grief, distress and embarrassment.
- iv. That the Petitioner be made to pay costs and legal costs of this instant suit.

This ruling is in respect of an application by counsel for the Petitioner/Applicant (hereinafter referred to as the Applicant), for custody of the only issue of the marriage pending the determination of the petition.

In her affidavit in support of the application, the Applicant stated that she left the matrimonial home so as to avoid constant maltreatment the Respondent subjected her to. That the Respondent did not allow her to leave with the child knowing very well that same is a minor and he will not be in the best position to take care of the said child. That the Respondent on most occasions relies on his friends and other individuals she believes the Respondent has amorous relationship with, to take care of the child and this does not serve the interest of the child as compared to that of his mother. She concluded that per the age of the

child it will serve his interest if his care is temporarily put in the hands of the Petitioner pending the determination of the petition. She prayed that the Court grants her interim custody of the child.

Counsel for the Applicant in his submission relied on the depositions in the affidavit in support of the motion. He argued that the child in question is a minor who is five (5) years old so the Petitioner will be in the best position to understand the said child and take care of his needs. He continued that the Court should disregard exhibit 'A' as it does not support the deposition in paragraph 10 of the affidavit in opposition.

The Respondent/Respondent (hereinafter referred to as the Respondent), in his affidavit in opposition vehemently denied the allegations of the Applicant in the affidavit in support. He further stated *inter alia* that the Applicant left the matrimonial home for about two weeks without telling him where she went leaving the child in question in his care. That on 27th August 2022 when he had left to the construction site close to their matrimonial home the Applicant left home to an unknown place leaving their four year old son alone and locked him up in the bedroom. That he reported the matter to DOVVSU of the Ghana Police Service at Tesano, Accra around midday when he came home and realized the child was at home alone. He attached exhibit 'A' being a copy of the DOVVSU report to that effect. The Respondent further stated that on a number of occasions, he solely catered and nursed the said child whilst the Applicant neglected her motherly duties for social engagements with her associates and concubines. That the Applicant has ungoverned temper who habitually uses abusive, violent and obscene language and threats on the only child of the marriage. He concluded that he is better entitled to have custody of the child in

question without limited access to the Applicant and prayed custody be granted to him in the interest of the said child.

Counsel for the Respondent contended that their affidavit in opposition is very relevant to the issue being discussed. That for now they have custody of the child and they are taking good care of him so they think they are in a better position to take care of the child of the marriage.

Upon a careful examination of both the affidavit in support of the motion as well as the affidavit in opposition to same together with the exhibit attached; and the earlier processes filed by the parties in this case, it is not in doubt that there is an existing marriage between the parties herein to which the divorce petition is related. It is also undisputed that the Applicant herein has moved out of the matrimonial home and the Respondent at the moment has custody of the subject matter child of the instant application. The Court in the hearing of the instant application interviewed the said child who is five years old and a boy.

Section 22 of the Matrimonial Causes Act, 1971 (Act 367) provides that:

“(1) In proceedings under this Act, the Court shall inquire whether there are any children of the household.

(2) The Court may, either on its own initiative or on application by a party to proceedings under this Act, make an order concerning a child of the household which it thinks reasonable and for the benefit of the child.

(3) Without prejudice to the generality of subsection (2), an order under that subsection may (a) award custody of the child to any person; (b) regulate the right of access of any person to the child; (c) provide for the education and maintenance

of the child out of the property or income of either or both of the parties to the marriage.”

From the above provision of Act 367, a Court in any proceedings under the Act, on its own motion or an application by a party, may make an order concerning an award of custody of a child to any person, regulate the right of access of any person to the child, provide for the education and maintenance of the child out of the property or income of either or both of the parties to the marriage.

However, the Act does not specify the factors a Court must consider in awarding custody or access to a child. *The Children's Act, 1998 (Act 560)*, provides useful guidance. The primary consideration is the welfare of the child as stated in *section 2 of Act 560* as follows:

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

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

Under *section 45(1) of Act 560*, a Family Tribunal making a custody order shall consider the best interest of the child, and the importance of a young child being with the mother when making an order for custody and access to a child. Among the factors to consider are; the age of the child, the importance of a child to be with the parents unless the child is persistently abused, the need for continuity in the care and control of the child, the views of the child if independently given, the need to keep siblings together, and any other relevant matter.

In the case of *Opoku-Owusu v. Opoku-Owusu (1973) 2 GLR 349*, the Court held at page 354 as follows:

“In such an application the paramount consideration is the welfare of the children. The Court’s duty is to protect the children irrespective of the wishes of the parents. In the normal course, the mother should have the care and control of very young children, particularly girls or those who for some special reason need a mother’s care; and older boys to have the influence of their father... there is no principle in custody cases that a boy of eight should other things being equal, be with his father; in all cases the paramount consideration is the welfare of the infant and the Court must look at the whole background of the infant’s life and at all the circumstances of the case.”

In *In re McGrath (Infants)* [1893] 1 Ch. 143, C.A. Lindley L.J. said at p. 148 what the Courts consider in determining the welfare of the child in the following terms:

“The duty of the Court is, in our judgment, to leave the child alone, unless the Court is satisfied that it is for the welfare of the child that some other course should be taken. The dominant matter for the consideration of the Court is the welfare of the child. But the welfare of a child is not to be measured by money only, nor by physical comfort only. The word welfare must be taken in its widest sense. The moral and religious welfare of the child must be considered as well as its physical well-being. Nor can the ties of affection be disregarded.”

In the instant application, the Applicant prayed for the custody of the only child of the marriage pending the determination of the substantive suit; and the Respondent has vehemently opposed to same. The Respondent’s argument is that the Applicant has a habit of leaving the child alone and also using abusive, violent, threats and obscure language on the child. That on a number of

occasions he solely catered for the child whilst the Applicant neglected her duties as a mother.

From the contention of the Respondent, he believes the child is safe and comfortable under his care, and he does not trust the Applicant can guarantee the safety of the said child. According to him, the Applicant visits the child at the matrimonial home regularly and at her free will without any inhibition. In establishing his allegations in the affidavit in opposition, the Respondent attached exhibit 'A'.

Exhibit 'A' indicates that on 16th August 2022 at about 5:30pm, the Respondent herein made a report at the Tesano DOVVSU that on same day, the Applicant herein left home unceremoniously and failed to return; and all efforts to trace or locate her were unsuccessful.

Exhibit 'A' does not specify that the Respondent reported to DOVVSU that the Applicant herein left home leaving the said child alone and locked him up in the bedroom; as stated by the Respondent in his affidavit in opposition. If indeed that was the case, the question any reasonable person will ask is, why did the Respondent herein not add that aspect to his complaint to the police or why is the said aspect that the child was left alone and locked up in the bedroom by the Applicant, not included in exhibit 'A'? Although the heading of exhibit 'A' which is a police report reads *"Exposing Child To Danger And Abortion Reported On 16th Of August 2022 By John Kobina Antwi Against His Wife Linda Frimpomaa Opoku"*, the facts are not specific that the Applicant left the said child alone at home and locked him up in the bedroom. Therefore the Court is unable to attach any probative value to exhibit 'A' as evidence to support the assertion that the Applicant left the matrimonial home leaving the said child alone and locked him up in the bedroom.

The Court relying on *section 45(2)(c) of Act 560* interviewed the five year old child and sought his independent views as to the issue of custody between the parties. The Court prior to that also made some enquiries from the parties as to the child in question. The Court has considered the views of the five year old boy child as well as the proceedings in hearing of this application.

From the processes and proceedings of the instant matter and the affidavit evidence before the Court including the views of the subject matter child, it can be gleaned that the Applicant has been away from the five year old boy child for about a year now but it has not had any adverse effect on the child.

Thus, in the absence of any report from any relevant institution that the Respondent having custody of the child in question has had adverse effect on the said child particularly as to his academic performance or to his overall behavior as a child; and having regard to the need for continuity in the care and control of the said child as well as the view of the child as sought by the Court, in light of *section 45(2)(c) and (e) of Act 560*, the status quo shall be maintained pending the determination of the substantive petition before the Court.

From the foregoing reasons and relying on the above authorities, the instant application is hereby dismissed. In the circumstances the Applicant is hereby granted reasonable access to the said child pending the final determination of the substantive suit. Reasonable access in the instant case shall mean that the Respondent shall release the said child to the Applicant every other weekend thus two weekends in a month; from Fridays at 5pm to Sundays before 5pm, every other holiday and half of his vacations.

The Respondent shall be fully responsible for the school fees, all educational and medical expenses of the child as and when the need arises. Clothing for the said child shall be provided by both parties.

There shall be no order as to costs.

H/H AKOSUA A. ADJEPONG (MRS)
(CIRCUIT COURT JUDGE)