

IN THE DISTRICT COURT HELD AT WAMFIE ON WEDNESDAY THE 22ND
DAY OF NOVEMBER, 2022. BEFORE HER WORSHIP DZIFA AZUMAH ESQ.
DISTRICT MAGISTRATE

SUIT NO. A4/01/2023

LYDIA POKUAA : : PETITIONER

VRS

EMMANUEL KWABENA DEI : RESPONDENT

JUDGMENT

Per a petition filed on 29/07/2022 the petitioner sought the following reliefs.

- (i) An order of the court dissolving the ordinance marriage contracted between the parties on 9th August,2005.
- (ii) An order for custody of the last child who is now four (4) years of age.

The Respondent also filed his answer and cross petition on 29/07/2022 the very day he was serviced and also sought the following reliefs.

- (i) An order for the dissolution of the ordinance marriage between the parties herein contracted on the 9th day of August,2005.
- (ii) An order for all the children to be in the respondent custody for them to live together.

The main issue for determination of this court is whether or not the marriage between the parties has broken down beyond reconciliation and if so, to whom custody of the children will be granted.

The court is also to consider if will be wise to separate the last child by giving custody of her to the petitioner.

This is a matrimonial cause, governed by the matrimonial causes Act, 1971 (Act 367) it is therefore in the nature of a civil claim. The onus therefore, of producing evidence of any particular fact, as in all civil cases, is on the party against whom a finding of fact would be made in the absence of further proof: See section 17(a) and (b) of NRCD 323. The authorities are also in harmony that matter that are capable of proof must be proved by producing sufficient evidence so, that, on all the evidence, a reasonable mind could conclude that the existence of a fact is more reasonable than its non-existence. This is the requirement of the law on evidence under section 10(1) and (2) and 11(1) and (4) of the evidence Act 1975 (NRCD 323).

Since this is a matrimonial matter, I will focus on the matrimonial cause Act in determining the issue at stake.

The matrimonial causes Act, 1971 (Act 367) governs divorces in this country. Under section 1 (2) of the Act, a court shall not grant a petition for divorce under the marriage is proven to have broken down beyond reconciliation. Under section 2 (1) of Act 367, for the purposes of showing that a petition for divorce shall satisfy the court of one or more of the following facts.

- (a) That the Respondent has committed adultery and that by reason of the adultery the petitioner finds it intolerable to live with the Respondent.
- (b) That the Respondent has behaved in a way that the petitioner cannot reasonably be expected to live with the respondent.
- (c) That the Respondent has deserted the petitioner for a continuous period of at least two years immediately preceding the presentation of the petition;
- (d) That the parties to the marriage have not lived as husband 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.

- (e) That the parties to the marriage have not lived as husband and wife for a continuous period of at least five years immediately preceding the presentation of the petition; or
- (f) That the parties to the marriage have after diligent effort, been unable to reconcile their differences.

It has been held in a line of cases including DONKOR V DONKOR [1982-82] GLR 1158 that the matrimonial Causes Act, 1971 (Act 367), did not permit spouses married under the Marriage Ordinance to come to court and pray for the dissolution of their marriage just for the sake of asking. And that the petitioner in such a case for dissolution of marriage must satisfy the court of any one or more of those facts set out in section 2 (1) of the Act as stated above not only by pleading them, but also by proof for the purpose of showing that the marriage had broken down beyond reconciliation. The court explained further that section 2 (3) of the Act, provided that even if the court found the existence of one or more of those facts it should not grant a petition for divorce unless it was satisfied that the marriage had broken down beyond reconciliation.

The petitioner led evidence through her witness statement which she tendered in on oath to establish her claim.

The petitioner averred that they were very happy as a couple during the initial part of the marriage until they had their last born who is four years old. Implying that the problems of the marriage intensified within the last four years. She alleged that the Respondent was easily provoked and subjected her to severe beatings with a little misunderstanding.

She alleged that another provocative misbehaviour of the respondent was that he normally came home late after close of work and always picked a quarrel with her

anytime she enquired why he was late. She stated further that he normally refused to eat her food for fear that she petitioner would poison him. "I at times taste the food to show that there is no poison or substance in the food, but still the respondent will refuse to eat my food," she stated.

She alleged that there had been about seven (7) attempts at settlement of their issues, all to no avail. After she tendered in her witness statement, the respondent refused to cross-examine her. Noting that he did not have any questions for her.

The reasons for seeking for divorce by the petitioner can be categorised into two part of section 2 (1) of Act 367, namely part (b) and (f).

(b) That the Respondent has behaved in a way that the petitioner cannot reasonably be expected to love with respondent.

The case of HAPPEE V HAPPEE and ANOTHER (1974) 2 GLR 186 and also the case of MENSAH V MENSAH [1972] 2 GLR 198 in which the court stated:

"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 the 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 weight and mere trivialities will not suffice for Act 367 is not a Casanovas charter. The test is objective".

The second part of the petitioner's ground is under part (f) which states;

That the parties to the marriage have after diligent effort, been unable to reconcile their differences.

To this the petitioner stated that there has been about seven (7) attempts at settlement but all to no avail.

She said upon unsuccessful attempts to reconcile their difference, she has moved out of the matrimonial home to have her piece of mind and had also returned the marriage drinks and same had been accepted by the respondent.

Upon these grounds, she prays that the marriage be dissolved.

The respondent on his part agrees that the marriage between himself and the petitioner be dissolved as he counter claimed that anytime he came home late, the petitioner became angry and rained insults on him for coming late. He however attributed his late home coming to the nature of the job he does.

He alleged that the petitioner had move out of the matrimonial home three times without notifying him.

He said the last time, he was at work when an informant told him that a certain KIA car was in his house packing goods into it. Unknown to him, it was the petitioner who without any provocation had decided to leave the matrimonial home without even leaving a dress indicating that she will never come back to the house.

The respondent alleged that the petitioner had denied him sexual intercourse, when she was in the matrimonial home, by moving out of their marital bedroom to another room of her choice.

He admitted that there had been several attempts at settlement, all to no avail. He put the number of settlement attempts at 10.

Respondent stated further that he was no longer interested in the marriage and that the marriage had broken beyond reconciliation. After the respondent tendered his witness statement on oath, the petitioner also refused to cross-examine the respondent, saying she did not have any questions for him.

Analysing the documents before the court in relation to this marriage, it can be gleaned that the marriage has broken down beyond reconciliation. The parties did not contest their properties in their statements. What is on record is on the issue of child custody.

The petitioner is seeking for an order for the children of the marriage, to remain in the custody of the Respondent with the exception of the last one, Doreen Dei Kyeremaa who is only four (4) years old and the only female to be given to her.

Meanwhile the Respondent is seeking an order for custody for all the children to enable them live together.

The court's will not spilt children when it will be desirable in the circumstances to keep them together.

In the case of *Opoku-Owusu V Opoku-Owusu* [1973] 2 GLR 349, the Judge expressed the following view before making the order.

“In such an application, the paramount consideration is the welfare of the child. 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. It is desirable to keep brothers and sisters together and not to split them up. A separation will disturb their progress and may affect them emotionally”.

It is on record that the petitioner has been away from the matrimonial home for the last 10 months and the children have all done well without her. Petitioner has also been in and out of the house for the last two years without taking the children.

According to section 45(1) of the children's Act 1998, Act 560, "It is desirable to keep siblings together".

So in order to build the bond between the children irrespective of sex or age, custody of the children is hereby awarded to the Respondent.

The marriage between the parties celebrated on 9th August, 2005, with licence No SYI/BA/DC/M81 at the District Magistrate Court Sunyani is dissolved, the parties could not provide the original certificate. A certified true copy was produced from the District Court Sunyani. The parties can from this day 22nd November, 2022 go their separate ways as bachelor and spinster.

The Court hereby grants that petitioner visiting rights to the children every weekend.

**H/W DZIFA AZUMAH ESQ
(MAGISTRATE)**