

**IN THE DISTRICT COURT HELD AT WEIJA, ACCRA ON TUESDAY THE 4TH DAY
OF APRIL, 2023 BEFORE HER WORSHIP RUBY NTIRI OPOKU (MRS), DISTRICT
MAGISTRATE**

SUIT NO. G/WJ/DG/A4/81/21

MABEL AFRIYIE DUAH

PETITIONER

VRS

ERIC FOSU ADDO

RESPONDENT

PETITIONER IS PRESENT AND REPRESENTED BY ABENA ASANTE KISSI ESQ

RESPONDENT IS ABSENT

JUDGMENT

The petitioner filed a petition for divorce in the Registry of this court on 15th September, 2021 against the respondent for the following reliefs:

- a. That the marriage celebrated on 29th December 2012 between the parties be dissolved.
- b. That custody of the issues of the marriage be granted to petitioner with visitation rights to the respondent under supervision.
- c. That respondent be ordered to pay a lump sum of ten thousand Ghana cedis to the petitioner
- d. That the respondent be made to pay the school fees of the children as well as an amount of GHC900.00 per month for their upkeep.
- e. That the respondent be ordered to rent a comfortable place of abode for the children and the petitioner.

The respondent filed a notice of appointment of solicitor as well as his answer to the petition on 3rd February 2022. He cross petitioned for the dissolution of the marriage and an order directed at him to maintain the issues of the marriage with the sum of GHC400.00 monthly.

Petitioner filed a reply to Respondent's answer on 18th March 2022.

On 31st May 2022, the court granted petitioner's application for maintenance pending the determination of suit filed on 4th April 2022.

On 4th April, 2022, the solicitors for the respondent filed a notice of withdrawal as solicitors.

It is worthy of note that for unexplained reasons, respondent failed to file his witness statement pursuant to the orders of the court or attend court for trial in spite of proof of service of hearing notices served on him.

The court therefore proceeded without him pursuant to Order 25 Rule 1 (2) (a) of the District Court Rules, 2009 (C.I.59) which provides as follows;

"Where an action is called for trial and a party fails to attend the trial, the trial magistrate may where the plaintiff attends and the defendant fails to attend, dismiss the counterclaim if any and allow the plaintiff to prove his claim."

THE CASE OF THE PETITIONER

It is the case of the petitioner that parties got married on 29th December 2012 under the marriage ordinance (Cap 127) at the Accra Metropolitan Assembly in Accra. It is the further case of the petitioner that after the celebration of the marriage, parties cohabited at Alhaji-Israel near Tabora in Accra and VRA Sowutuom also in Accra and have two issues of the marriage namely Yaw Adom Fosu aged 8years and Tracy Asantewaa Fosu aged 6years.

According to Petitioner, although parties have been married for eight years, they have not properly cohabited for about six years and this is mainly due to the unreasonable behaviour of the respondent. She particularised the unreasonable behaviour of the respondent as follows;

- a. That the respondent stays out late and only comes home early when he runs out of money
- b. That respondent convinced petitioner when she was five months pregnant to move in with her mother on the expiration of their tenancy and rarely visited her.
- c. That when she moved back in with the respondent, he moved out without telling petitioner his whereabouts until she located him at Chabaa a suburb of Accra.
- d. That when the landlord increased the parties' rent, respondent moved out of the matrimonial home until petitioner was thrown out of the rented premises.
- e. That respondent was reluctant to pay rent at VRA Sowutuom until the landlord agreed to accept half payment of rent and it took him a long while before paying the balance.
- f. That after the full term of parties' tenancy expired, respondent moved in to live with another woman
- g. That respondent has four children, three of them having been born during the subsistence of the parties' marriage.
- h. That respondent seldom pays the school fees, maintenance and medical bills of the issues of the marriage.

Petitioner says that the marriage between the parties has broken down beyond reconciliation and prayed the court to grant her reliefs.

In support of her claim, petitioner tendered the marriage certificate with licence number AMA11349/2012 in evidence and same was admitted and marked as Exhibit A. She also tendered a referral letter from the Department of Social Welfare to Legal Aid Commission and same was admitted and marked as Exhibit B.

Respondent did not attend court to cross examine the petitioner.

ISSUES

The issues set down for determination by the court are as follows;

1. Whether or not the parties' marriage has broken down beyond reconciliation.
2. Whether or not custody of the issues of the marriage should be granted to the petitioner with reasonable access to the respondent
3. Whether or not petitioner is entitled to financial settlement

BURDEN OF PROOF

It is trite that in civil cases, proof is by a preponderance of probabilities.

In the case of *Ackah v Pergah Transport Ltd* [2010] SCGLR 728 at page 736, Sophia Adinyira JSC (as she then was) delivered herself as follows;

“It is a basic principle of law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail.”

This position of the law was re-echoed by Benin JSC in the case of *Aryee v Shell Ghana Ltd & Fraga Oil Ltd* [2017-2020] 1 SCGLR 721 at page 733 as follows;

“It must be pointed out that in every civil trial all what the law requires is proof by a preponderance of probabilities. See section 12 of the Evidence Act, 1975 (NRCD 323). The amount of evidence required to sustain the standard of proof would depend on the nature of the issue to be resolved.”

SHIFTING OF THE BURDEN OF PROOF

The burden of proof may shift from the party who bore the primary duty to the other.

Section 14 of the Evidence Act, 1975 (NRCD 323) provides as follows;

Except as otherwise provided, unless and until it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting.

In the case of *Re Ashalley Botwe Lands; Adjetey Agbosu v Kotey* [2003-2004] SCGLR 420, it was held as follows;

“It is trite learning that by the statutory provisions of the Evidence Decree 1975 (NRCD 323) the burden of producing evidence in a given case is not fixed but shifts from party to party at various stages of the trial depending on the issue(s) asserted.

THE COURT’S ANALYSIS AND OPINION

Issue one: whether or not the marriage between the parties has broken down beyond reconciliation.

Section 1(2) of the Matrimonial Causes Act, 1971 (Act 367) provides that the sole ground for granting a petition for divorce shall be that the marriage has broken down beyond reconciliation.

Section 2 (1) of Act 367 explains 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:

- (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 provided that the consent shall not be unreasonably withheld and where the court is satisfied that it has been withheld the court may grant a petition for divorce under this paragraph despite the refusal
- (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
- (f) That the parties after a diligent effort been unable to reconcile their differences.

Section 2(2) of Act 367 imposes a duty on the court to enquire into the facts alleged by the petitioner and the respondent. Section 2(3) also provides that although the court finds the existence of one or more of the facts specified in subsection (1), the court shall not grant a petition for divorce unless it is satisfied, on all the evidence that the marriage has broken down beyond reconciliation.

His Lordship Dennis Adjei J.A stated this position of the law in **CHARLES AKPENE AMEKO V SAPHIRA KYEREMA AGBENU (2015) 99 GMJ 202**, thus;

“The combined effect of sections 1 and 2 of the Matrimonial Causes Act, 1971 (Act 367) is that for a court to dissolve a marriage, the court shall satisfy itself that it has been proven on the preponderance of probabilities that the marriage has broken down beyond reconciliation. That could be achieved after one or more of the grounds in Section 2 of the Act has been proved.”

From the evidence, the Petitioner based her allegations for the breakdown of the marriage on the unreasonable behaviour of the Respondent.

To succeed under the fact of unreasonable behaviour, the petitioner must first establish unreasonable conduct on the part of the Respondent and secondly, she must establish that as a result of the bad conduct, she cannot reasonably be expected to live with him.

At page 123 of the book, "At a glance! The Marriages Act and the Matrimonial Causes Act Dissected by Mrs Frederica Ahwireng-Obeng, the learned writer on unreasonable behaviour stated;

"Unreasonable behaviour has been defined in English law as conduct that gives rise to life, limb or health or conduct that gives rise to a reasonable apprehension of such danger". The above statement reiterated the position of the law in GOLLINS V GOLLINS [1964] A.C 644

She added that the principle of law is that, the bad conduct complained of must be grave and weighty and must make living together impossible. It must also be serious and higher than the normal wear and tear of married life.

The absence of the respondent in court to refute the allegations made against him by the petitioner enhanced petitioner's chances. This is premised on the principle that the failure to deny an assertion made against a person amounted to an admission. In the case of In Re Presidential Election Petition; Akuffo-Addo, Bawumia & Obetsebi-Lampsey (No 4) vrs. Mahama, Electoral Commission & National Democratic Congress (No 4) [2013] SCGLR (Special Edition) 73 at page 425, Anin Yeboah JSC as he then was held;

"I accept the proposition of law that when evidence led against a party is left unchallenged under cross examination, the court is bound to accept that evidence:"

See Ayiwa v Badu [1963] 1GLR 86, SC, Nartey-Tokoli v Volta Aluminium Co Ltd (No 2) [1989-90] 2 GLR 341, SC and Takoradi Flour Mills v. Samir Faris [2005-2006] SCGLR 882 at page 890

I find from the totality of the evidence before this court that the parties' marriage has broken down beyond reconciliation by the unreasonable behaviour of the respondent. I therefore proceed under Section 47 (1) (f) of the Courts Act 1993, (Act 459) to decree that the Ordinance Marriage between Mabel Afriyie Duah and Eric Fosu Addo celebrated at the Accra Metropolitan Assembly in Accra on 29th December, 2012 is hereby dissolved.

I hereby order the cancellation of the marriage certificate issued. A certificate of divorce is to be issued accordingly.

Issue two: whether or not custody of the two issues of the marriage should be granted to the petitioner with reasonable access to the respondent

The courts have consistently held that on the award of custody of a child, the welfare of the child must be the paramount determining factor. This principle has been given statutory force by section 2 of the Children's Act, 1998 (Act 560) which states:

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

The considerations for custody or access have been provided in section 45 of Act 560 as follows;

A family tribunal shall consider the best interest of a child and the importance of a young child being with his mother when making an order for custody or access. Subject to subsection (1), the tribunal shall consider

- (a) the age of the child
- (b) that it is preferable for the child to be with his parents except where his rights are persistently abused by his parents

- (c) the views of the child if the views have been independently given
- (d) that it is desirable to keep siblings together
- (e) the need for continuity in the care and control of the child
- (f) Any other matter that the Family tribunal finds relevant.

In **OPOKU-OWUSU V OPOKU-OWUSU [1973] 2 GLR 349-354**, it was held 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.”

From the evidence, the two issues of the marriage have been living with the Petitioner since the separation of the parties accordingly for continuity in their care and control, custody is awarded to the petitioner with reasonable access to the respondent.

With respect to maintenance of the children, section 47 of Act 560 provides that a parent or any other person who is legally liable to maintain a child or contribute towards the maintenance of the child is under a duty to supply the necessities of health, life, education and reasonable shelter for the child.

Section 49 of Act 560 provides amongst others that in considering the maintenance order, a family tribunal shall consider the income and wealth of both parents of the child or of the person legally liable to maintain the child and the cost of living in the area where the child is resident.

I have considered the affidavit of means of the parties and I have also considered the cost of living in Accra where the children are currently resident and hold and hereby orders that the interim orders directed at the respondent by this court is made final. Accordingly, respondent

is ordered to pay the sum of GHC700.00 per month to the petitioner for maintenance of the two children.

The Respondent is ordered to pay the school fees and every item related to the education of the children when payment falls due. Respondent is ordered to enroll the children on the National Insurance Health Scheme (NHIS) and pay all medical bills including those not catered for by the NHIS when payments fall due.

The Respondent is ordered to provide a chamber and hall accommodation for the petitioner and the two issues of the marriage until they attain the ages of majority or the petitioner remarries whichever event occurs first.

The Petitioner shall be responsible for the provision of casual and ceremonial clothing at home for the children.

Issue three: whether or not the petitioner is entitled to an order for financial settlement from the Respondent

Considering the issue of financial settlement, Section 20 of Act 367 allows the court to grant financial settlement to a party upon the dissolution of a marriage. The court in doing that has to take into consideration certain factors such as the economic conditions of the parties.

In the case of **BARAKE V BARAKE [1993-1994] 1 GLR 635**, the court held as follows;

“Under section 20(1) of Act 367, the court had power to grant financial provision where married couples are divorced. The basic consideration was not based on proof of ownership or contribution towards acquisition of properties to be owned but on the needs of the parties.”

The court can order a lump sum payment to be made to a spouse in addition to property settlement depending on the circumstances of the case. See *Ribeiro v Ribeiro* [1989-1990] GLR 109 at 115 to 116.

Having considered the affidavit of means of both parties, I do hereby order the respondent to pay financial settlement of GHC10, 000.00 to the petitioner.

DECISION

I find that the marriage between the parties has broken down beyond reconciliation due to the unreasonable behaviour of the respondent. The petition for divorce is granted. A certificate of divorce is to be issued accordingly.

Custody of the two issues of the marriage is awarded to the Petitioner with reasonable access to the Respondent.

I award financial settlement of GHC10, 000.00 in favour of the petitioner against the respondent.

Costs of GHC3, 000.00 is awarded in favour of the petitioner against the respondent.

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H/W RUBY NTIRI OPOKU (MRS)
(DISTRICT MAGISTRATE)

