

IN THE HONOURABLE SUPREME COURT OF THE REPUBLIC OF LIBERIA,
SITTING IN ITS MARCH TERM, A.D. 2023

BEFORE HER HONOR: SIE-A-NYENE G. YUOH.....CHIEF JUSTICE
BEFORE HER HONOR: JAMESETTA H. WOLOKOLIE.....ASSOCIATE JUSTICE
BEFORE HIS HONOR: JOSEPH N. NAGBE.....ASSOCIATE JUSTICE
BEFORE HIS HONOR: YUSSIF D. KABA.....ASSOCIATE JUSTICE
BEFORE HIS HONOR: YAMIE QUIQUI GBEISAY.....ASSOCIATE JUSTICE

Mrs. Wartie Nancy Robinson-Bility of the City of)
Monrovia, Liberia.....Appellant)
)
Versus)
) APPEAL
)
Mr. Sidikie Musa Bility, also of the City of)
Monrovia, Liberia.....Appellee)
)
GROWING OUT OF THE CASE:)
)
Mr. Sidikie Musa Bility, also of the City of)
Monrovia, Liberia.....Informant)
)
Versus) BILL OF INFORMATION
)
Mrs. Wartie Nancy Robinson-Bility of the City of)
Monrovia, Liberia.....Respondent)
)
GROWING OUT OF THE CASE:)
)
Mr. Sidikie Musa Bility, also of the City of)
Monrovia, Liberia.....Plaintiff) ACTION OF DIVORCE
) FOR INCOMPATIBILITY
Versus) TEMPER
)
Mrs. Wartie Nancy Robinson-Bility of the City of)
Monrovia, Liberia.....Defendant)

Heard: November 30, 2021

Decided: August 11, 2023

MADAM JUSTICE WOLOKOLIE DELIVERED THE OPINION OF THE COURT

The appellee Sidike Musa Bility and the appellant Wartie Nancy Robinson-Bility were husband and wife, who during the pendency of their marital relationship begot two children; namely, Al-Hussein Bility and Sidike Bility, who are minors. On May 5, 2021, the Civil Law Court, Sixth Judicial Circuit, based on an Action of Divorce for Incompatibility of Temper filed by the appellee, entered a decree dissolving the marriage between the appellee and the appellant. The instant appeal emanates from the granting of permanent custody of the two minor children begotten out of the marriage to the appellee Sidike Musa Bility.

The certified records reveal that while the divorce proceedings between the parties was pending before the Civil Law Court, the appellee filed a motion for temporary custody, praying the court to grant unto him temporary custody of the two minor children pending the final disposition of the divorce proceedings. The appellee contended in his motion that his request for temporary custody over the children is premised on the fact that he is the primary caregiver to the children and that awarding him temporary custody would be in the best interest of the children. The appellee further alleged that the appellant lacks the ability to cater for and maintain the children because she does not have a job; that the appellant does not sleep home with the children which makes it dangerous for the wellbeing of the children. The appellee also alleged that he had received several emails from the administration of the American International School of Monrovia, the institution where the children are enrolled, informing him that the children were not coming to school on time and that the children had missed some school days.

The appellant filed resistance to the motion, contending that she has been the primary caregiver to the children; that the appellee has no idea of how to care for the children and is not capable of ensuring their wellbeing. The appellant argued that she is the rightful person to have custody over the children because it would be in their best interest.

On January 20, 2021, His Honor Peter W. Gbeneweleh, after listening to arguments on the motion, granted the motion, awarding temporary custody of the two minor children to the appellee. Judge Gbeneweleh held that in keeping with the Domestic Relations Law, Rev. Code 9:4.A.4.1, when parents [husband and wife] are living in a state of separation, the father shall be the custodian of their minor children, the appellee shall be given temporary custody of the minor children pending the disposition of the divorce proceedings. Judge Gbeneweleh concluded that the appellant shall however have access to the children during holidays and weekends.

The appellant excepted to the ruling on the motion for temporary custody and give notice that she would take advantage of the law controlling, including the remedial process. The record is however devoid of any subsequent step pursued by the appellant in challenging the ruling.

On March 18, 2021, while the divorce proceedings remain pending, the appellant filed a bill of information before the court, alleging therein that the appellee was disobeying the mandate of the court by deliberately refusing to surrender the children for weekends and holidays. The appellant averred

that despite the many emails sent to the appellee requesting that he surrenders the children to the appellant as mandated by the court, the appellee refused to do so and has responded to her requests with insults and threats against her. The appellant prayed the court to hold the appellee in contempt for his disobedience of the court mandate.

The appellee filed returns to the bill of information asserting that the allegations contained therein are self-serving, and false; that the appellant has been negligent in handling the affairs of the children as she would delay in picking up the children from school on Fridays and would bring them back to school on Mondays late; that the appellant has proven to be totally incapable, incompetent and very irresponsible in taking care of the children which is detrimental to their best interest. The appellee prayed the court to deny the bill of information.

The lower court conducted hearing into the bill of information and thereafter, on April 1, 2021, made a ruling in which it stipulated that the appellant shall be entitled to pick the children from school on Fridays and return them to school on Mondays; that the appellant will take the children before every holiday and return them after the holiday; that the children will spend their birthdays with the appellant the first year following the ruling and then the appellee the following year; that the children will spend the day with the appellant on her birthday and the appellee on his birthday. The court instructed the American International School of Monrovia to monitor the timely reporting of the children on campus. The court in essence affirmed the ruling earlier entered by it on the motion for temporary custody filed by the appellee.

Following the ruling on the appellant's bill of information, the court, on May 5, 2021, concluded the divorce proceedings between the parties, and entered a decree terminating their marriage. The records do not show that the issue of custody of the minor children was finally decided in the judgment of the divorce proceedings.

On July 1, 2021, almost two months after the marriage between the parties was dissolved, the appellee filed a bill of information before the court praying the court to grant him permanent custody of the children and provide visitation rights to the appellant. The appellee contended that the court-sanctioned arrangement for the sharing of custody of the children between the appellant and the appellee was not working in the best interest of the children because from the commencement of the sharing arrangement up to the filing of the bill of information, the appellant has consistently taken

the children to school very late or sometime not at all on every Monday; that the continued lateness and sometimes absence of the children from school has been brought to the appellee's attention by the school authorities through emails and text messages; that the appellant is totally incapable, incompetent and irresponsible to be entrusted with the custody of the children due to the fact that the appellant is currently pregnant which means that she conceived the pregnancy during the pendency of her marriage to the appellee; that the appellant's husband is violent as evidenced by her escape with the children as early as 3:0'clock A.M. to the home of the appellee in Lakpazee for safety on March 17, 2021. The appellee further alleged that the appellant constantly leaves the children at home alone without any adult supervision which poses serious risks and endangers the health, safety and security of the children; that the appellant does not have the financial capability to take care of the children because she does not have a job or other means of income and has never worked in her life and as such will be dependent on the appellee to support the children and the appellant's unborn child begotten to another man; that the education of the children will be impeded because the appellant has shown that she cannot get the children to school on time.

The appellant filed a twenty-count resistance to the bill of information contending in substance that she has remarried and her marital status places her in a higher category of capacity to care for, nurture, and give sound moral upbringing to the children than the appellee who is a single and unstable divorcee. The appellant stated that decisions on custody of children under the Domestic Relations Law and the question of children's right provided in the Children's Law and other statutes of the Republic as well as Opinions of the Supreme Court are predicated on the best interest of the children; that the appellee is morally unfit to perform the parental, legal, moral and natural duties for the proper wellbeing of the children; that the appellee's request for permanent custody of the minor children is ill-fated and counterproductive to the best interest, safety and future of the children. The appellant contended that she is engaged in business and has the financial capacity in lieu of external financial assistance to support her children; that she has a nurse that provides good caretaking to the children and at no time was the children home without supervision; that the children are more comfortable with her husband than the appellee due to his drunkenness, infidelity and brutality. The appellant prayed the court to grant her permanent custody over the children and grant the appellee visitation rights.

The Judge presiding by assignment over the June Term, 2021, of the Civil Law Court, heard and granted the bill of information, awarding permanent custody of the two children to the appellee. We reproduce below the substantive portion of the ruling entered on the bill of information:

"Obviously the court finds it difficult to believe either party without taking evidence. However, King Solomon did not need evidence to decide between the two prostitutes who denied the dead baby in the Holy Bible and claimed the living baby. All he needed was the wisdom of God. So, this court has over the weeks prayed for God's wisdom and direction. The court says the children in question are 5 & 8 years of age respectively. Ordinarily, both natural parents are emotionally and psychologically attached to such children, especially the mother.

However, the Domestic Relations Law, Rev. Code 9:4.A.4.1 says: "a married woman is a joint natural guardian with her husband of the minor children of their marriage while they are living together and maintain one household. Each such parent shall be equally charged with their care, nurture, welfare and education. When such parents are living in a state of separation, the father shall be the custodian of the minor children of the marriage as against the claim of any person whomever; but if he is unable or morally unfit to perform his parental, legal, moral and natural duties toward his children or for any other reasons he fails or neglects to perform such duties, upon petition to a circuit court for a writ of habeas corpus or other appropriate relief and a showing in the proceedings thereon of such inability, moral unfitness or failure on the part of the father, the minor children of the marriage shall be entrusted to the mother or some other person who is capable of performing such duties." In my opinion, the above quoted statute did not take into consideration the ages of the children and the maternal bond between the kids and the mother. Such law in my view is without sufficient wisdom. But bad or good law is none of the court business. The aforementioned statute places the burden of proof on the mother to establish and prove that the father is immoral and incapable to be granted custody, which in many instances maybe difficult to prove by preponderance of evidence which is the required standard in civil action.

In the instant case, the allegations from either party taken literally have no sufficient proof. Assuming all the other allegations of the informant [appellee] are not true but considering that the mother [appellant] now resides in Hotel Africa Community, while the children school is located in Congo Town; considering the school attendance records, and considering that Mrs. Bility, now Mrs. Clarke, is pregnant which pregnancy she must have conceived while she was yet married to Mr. Sidikie Bility, [and] in the mind of the court, such action may develop bad blood between the two men which has the potential to transfer Mr. Clarke aggression to the children.

In addition, there is no doubt that the father herein has better income as compared to the mother and as such the well-being and best interest of the children which is paramount to the court is likely to be best served in the care of their father.

Wherefore, and in view of the facts and circumstances, and the controlling section of the New Domestic Relations Law, the informant's information should be and same is granted as opposed to the respondent's resistance/returns, with the following proviso:

- 1. That the custody of the two kids are hereby permanently placed in the possession of Mr. Sidikie Musa Bility, the natural father;*
- 2. That the children will spend the first and third weekends of every month and all holidays with their mother;*
- 3. That the mother shall monitor the father's moral conduct, social behavior and interaction with the children and when enough proof of immorality or violence is established, she shall file information for the court's reconsideration of its decision;*
- 4. That the father being a Muslim and the mother a Christian, the children shall be allowed to worship in church and in the mosque until they reach their maturity and select their own religion; and*
- 5. That the custody of the children shall not be relinquished to any third party, including the grandparents. And It Is Hereby So Ordered."*

Not satisfied with the Judge's ruling and believing that the Judge was in error, the counsel for the appellant noted exceptions and announced an appeal to the Honorable Supreme Court. She filed her bill of exceptions and completed the jurisdictional steps mandated by the appeal statute which has allowed this Court to review the trial court's ruling.

In her bill of exceptions, the appellant principally alleged that the Judge erred when he ignored and disregarded the function of the office of bill of information and ruled based on mere assertions which were not squarely raised in the divorce proceedings between the parties; that the action of divorce was decided and finalized on May 5, 2021; hence, there was no more action of divorce for incompatibility of temper before the trial court out of which a bill of information could grow and lie; that the trial Judge did not take into consideration the intent of the framers of the Domestic Relations Law on custody of minor children which is squarely based upon the best interest of the children.

The issues presented for disposition of this appeal therefore are:

1. Whether a bill of information is legally tenable under the facts and circumstances of this case to resolve the issue of permanent custody of the minor children which was not decided in the main divorce proceedings between the parties in the court below?
2. Whether the trial judge applied the proper legal standard in awarding permanent custody of the minor children to the appellee?

We address the issues in the order presented, beginning with the propriety of a bill of information to resolve the issue of custody of the minor children.

The appellant argues that the lower court Judge ignored the function and office of bill of information and ruled based on mere assertions of issues which were not squarely raised and were not part of the court's previous ruling in the divorce and alimony proceedings between the parties; that the action of divorce was decided and finalized on May 5, 2021, and there was no more action of divorce for incompatibility of temper before the trial court out of which a bill of information could grow and lie; that there was no legal basis for the filing of a bill of information by the appellee to resolve an issue which was not delved into in the main case between the parties, as the granting of temporary custody to the appellee ended when the divorce action was finalized.

This Court agrees with the appellant's contention that the court having decided the divorce action between the parties and issue a decree of divorcement, the divorce proceedings terminated and there remained no matter before the trial court for which a bill of information could be filed. Also, the temporary custody awarded the appellee during the pendency of the divorce terminated when the divorce action was finalized. The parties therefore had this very important collateral issue of custody at bay which the appellee attempted to settle by filing a bill of information almost two months after entry of final ruling in the divorce action.

A bill of information praying the court to grant the appellee permanent custody of the two minor children is not the proper form of action to file for custody given that the divorce proceedings had already terminated. The averments in the bill of information filed by the appellee invoke a custody proceeding, seeking the court to grant him permanent custody of the minor children. This under our jurisdiction should have been filed as an independent action with prayer to the court for granting of permanent custody of the children.

The Court has held however that in its quest for speedy disposition of matters, if a court has obtained jurisdiction over the parties, an application

for relief shall not be dismissed because not brought as an action or special proceeding or motion, whichever may be proper, but the court shall make whatever order is required for its proper prosecution.” Civil Procedure Law, Rev. Code 1:2.2. *Intestate Estate of Shad Kaydea v. Varlee Trawally*, Supreme Court Opinion, March Term 2023.

The lower court Judge, having reviewed the averments in the bill of information filed before the court, noting that the Civil Law Court before which the bill of information was filed has jurisdiction to determine custody cases of minor children, should have entered the appropriate order to prosecute the case as a petition for custody and proceed to hear and take evidence for granting of custody rights. The trial judge, therefore, acted erroneously when he entertained the appellee’s bill of information without entering the appropriate order for prosecution of the averments in the bill of information as a petition for custody since the Civil Law Court has jurisdiction over the issue of custody raised in the bill of information.

This brings us to the final issue regarding the legal standard applied by the trial judge in awarding permanent custody of the minor children to the appellee.

In his ruling on the bill of information, the trial judge admits that the parties did not present evidence in support of their respective allegations of incapacity and unfitness asserted against each other. The Judge however relied on the provision of the Domestic Relations Law to award permanent custody of the minor children to the appellee. The Domestic Relations Law, Rev. Code 9:4.A.4.1 provides that “a married woman is a joint natural guardian with her husband of the minor children of their marriage while they are living together and maintain one household. Each such parent shall be equally charged with their care, nurture, welfare and education. When such parents are living in a state of separation, the father shall be the custodian of the minor children of the marriage as against the claim of any person whomever; but if he is unable or morally unfit to perform his parental, legal, moral and natural duties toward his children or for any other reasons he fails or neglects to perform such duties, upon petition to a circuit court for a writ of habeas corpus or other appropriate relief and a showing in the proceedings thereon of such inability, moral unfitness or failure on the part of the father, the minor children of the marriage shall be entrusted to the mother or some other person who is capable of performing such duties.”

While bemoaning the rationale of the law, the Judge held that the law places the burden of proof on the mother to establish and prove that the father is immoral and incapable to be granted custody, noting that in many instances this may be difficult to prove by the preponderance of evidence. The Judge also determined that the appellee has better income as compared to the appellant and as such the wellbeing and best interest of the children which is paramount to the court is likely to be best served in the care of the appellee.

We note from the records that in the bill of information and the returns filed thereto, the parties made grave allegations of incapacity and moral unfitness against each other to cater to the wellbeing of the two minor children. The appellee, for instance, alleged that the appellant is habitually absent from home and always leaves the children home with no one to supervise them; that the appellant is always derelict in ensuring that the children report to school on time on Mondays every time they spend the weekend with her; that the appellant is unemployed and has no alternative source of income to cater to the wellbeing of the children, but rather depends on the appellee for support. The appellant, on the other hand, alleged in her returns to the bill of information that the appellee is morally unfit to be entrusted with custody because he indulges in drunkenness and has violent proclivities towards the children; that the appellee is unmarried and unstable to care for the children. The appellant also contended that she is married to a man who is gainfully employed and that she is engaged in business that provides her income sufficient to enable her care for the children.

We are baffled that amidst the panoply of allegations raised in the bill of information and the returns, the trial judge neglected to require the parties to present evidence in support of their respective positions, and to weigh the credibility and truthfulness of the evidence in order to determine which of the parties is better situated to be entrusted with custody of the children.

This Court has espoused the evidentiary requirement that must be met in cases involving custody of minor children born in marital relationship. In the case *Okagbare v. Okagbare et al.*, 13 LLR 593 (1960), which predates the current Domestic Relations Law, the lower court awarded custody of a minor child to the father based on a habeas corpus proceeding instituted by the father against the child's mother. The court failed to take evidence to afford the husband and wife the opportunity to establish their respective allegations of moral unfitness to cater to the wellbeing of the child asserted against each other in their pleadings. The wife excepted to the ruling, and filed a petition for the writ of prohibition. The Chambers Justice issued the

alternative writ of prohibition, and after a hearing into the petition, affirmed the lower court ruling, quashed the alternative writ and denied the issuance of the peremptory writ prayed for. On appeal to the Supreme Court, the Court reversed the ruling entered by the Chambers Justice confirming the lower court's ruling. The Court mandated that the court below institutes an investigation into the allegations made by the husband and wife in their pleadings. The Court, speaking through Mr. Justice Wardsworth, stated as follows:

"It should be borne in mind and duly recognized that the guiding principle in these [custody] proceedings should not be whether either parent is economically more prepared to cater for the child than the other, or as a matter of right is more entitled to the custody thereof. The paramount issue with which the court should be deeply concerned, and which should influence its action, is the vital interest, moral and physical wellbeing of the infant child...hence, every scintilla of evidence tending to show the parent morally or otherwise unfit to retain or be awarded custody of the child, should be given judicial consideration.

Although, in the ordinary cases, the law makes the father custodian of his minor children, there are circumstances under which the father has been held to be incompetent and unfit for such custody. Law writers have held that moral fitness, financial ability, organized and exemplary home-life, humane treatment to children, respect for parental responsibility for the children's welfare, are among the qualifications required to justify the father's custody of his minor children."

Four years after the Domestic Relations Law enactment in 1973, this Court reaffirmed the principle espoused in *Okagbare v. Okagbare et al.*, regarding the priority of the interest of the child in custody proceedings and the requirement to thoroughly investigate the veracity of the allegations of unfitness typically made by parties in custody proceedings. In the case *Cox v Flama*, 25 LLR 459, 464-465 (1977), a case with similar fact pattern like the *Okagbare* case cited above, the Supreme Court held as follows:

"Where the father and mother are living together they are jointly entitled to the custody of their children. But the primary right to the custody of the children is in the father, and at common law, in case the parents are living apart and there is a dispute as to the custody, the right of the father is superior to that of the mother.

This common law rule, however, has been much modified by statutes under which the rights of the parents as against each other are equal, and the custody of the children is to be determined according to the exigencies of the particular case, and even in the absence of statute the father has only a primary and not an absolute right, which is subject to the general rule that the welfare of the child is the paramount consideration, in pursuance of which the mother may be given preference over the father where her custody appears most beneficial to the child.”

The cases cited above provide two essential guidance to the courts in this jurisdiction in disposing of custody cases involving minor children: The first point of guidance is that notwithstanding the language of the Domestic Relations Law, Rev Code 9:4.A.4.1, giving priority custody right to the husband over children born unto a marriage when the husband and wife are living in a state of separation, the primary, predominant and compelling consideration in all custody proceedings in this jurisdiction is the best interest of the child/children. It goes without saying that the priority right accorded to the father under the statute is subject to and must always yield to the best interest of the child/children in custody proceedings. The second guidance our precedent provide is that in determining the question of which of the parents serve the best interest of the child/children for custody, the courts must always conduct a thorough and searching factual inquiry into all the relevant factors bordering on the fitness of the parents. Factors to be weighed and upon which the court must demand the presentation of evidence include moral fitness, financial ability, organized and exemplary home-life, humane treatment to children, respect for parental responsibility for the children’s welfare among others.

In this case, the trial judge failed to conduct a thorough investigation into the allegations of moral unfitness and incapacity made by the parties in the bill of information and the returns. The court also impermissibly placed heavy reliance on the language of the provision of the Domestic Relations Law cited supra without recourse to the precedent of this Court interpreting that statute. Further, the court placed emphasis on the appellee’s financial capacity over the appellant without taking into consideration other factors that are more germane to the wellbeing of the children such as exemplary home-life, humane treatment to the children, and respect for parental responsibility among others.

In view of the above, we hold that in all cases involving custody of minor children, the primary, predominant and compelling consideration is the best interest of the child/children, and the court in granting custody must take evidence to prove moral fitness, financial ability, etc. for the children's welfare among others in order to grant custody. In the instant case, the Judge failed to take evidence to establish whether the appellee or the appellant is best suited to be awarded custody.

Accordingly, we reverse the decision of the lower court and remand the case with instruction that the lower court conducts a hearing and thoroughly investigates the allegations made by the parties in their pleadings and thereafter make a determination in awarding permanent custody to one of the parties based on the best interest of the children taking into consideration the factors enumerated above in this Opinion.

WHEREFORE AND IN VIEW OF THE FOREGOING, the decision of the lower court awarding custody of the minor children to the appellee is reversed and the case remanded with instruction that the court takes evidence on the competence of either party to be granted custody. The Clerk of this Court is ordered to send a Mandate to the judge presiding in the court below to resume jurisdiction and give priority to the disposition of this case consistent with the instruction contained in this Opinion. Costs to abide final determination of the case. AND IT IS HEREBY ORDERED.

WHEN THIS CASE FOR CALLED FOR HEARING, COUNSELLOR JALLAH A. BARBU APPEARED FOR THE APPELLANT. COUNSELLOR M. WILKINS WRIGHT APPEARED FOR THE APPELLEE.