

IN THE FAMILY AND JUVENILE COURT 'C' AT THE FORMER COMMERCIAL COURT BUILDING, ACCRA HELD ON MONDAY THE 28TH DAY OF NOVEMBER 2022 BEFORE HER HONOUR HALIMAH EL-ALAWA ABDUL-BAASIT SITTING AS AN ADDITIONAL MAGISTRATE WITH MADAM PHILOMINA SACEY AND MADAM LOVEGRACE AHLIJAH AS PANEL MEMBERS.

SUIT NO. A6/72 /23

OCRAN KOJO BENYI
DANSOMAN-LAST STOP
ACCRA

APPLICANT

VS.

DORCAS MENSAH
AGBOBLOSHIE
ACCRA

RESPONDENT

Parties Present

No Legal Representations for Parties.

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RULING

This is a Ruling on an Application filed on 8th August 2022 for Custody of the children in issue.

Applicant's Case

The Applicant in his Affidavit deposed that he was in an amorous relationship with the Respondent for about Thirteen (13) years which resulted in the birth of Two (2) children aged Eight (8) years and Twelve (12) years respectively. He further deposed that after they separated, the Respondent relocated to Agboghloshie market and sent the children

to live with her mother at Ajumako Kyebi in the Central Region. He continued that he reported the matter to the Respondent's family and based on his report, he was fined One Thousand Two Hundred Ghana Cedis (Ghc1, 200.00) for not performing the traditional marriage rites and having Two (2) children with the Respondent, the family took an additional Forty Ghana Cedis (Ghc40.00) to signify the recognition of the Respondent as the father of the children. The Applicant further deposed that the children were not schooling during their stay in Ajumako of which he lodged a complaint at the Commission of Human Rights and Administrative Justice (CHRAJ) where he was granted custody of the children and he relocated them to Dansoman where they schooled. The Respondent however came for the children during vacation and has since refused to return them to his custody hence his prayer before the court for the following reliefs;

1. An Order awarding custody of the children to the Applicant with reasonable access to the Respondent.
2. Any other Order(s) this Honorable Court may deem fit.

The Respondent was ordered to file her Affidavit in Opposition but failed to do so and the court will proceed to make a determination in the best interest of the children.

DETERMINATION:

The issue before the court for determination is whether or not the Applicant ought to be granted custody of the children with reasonable access to the Respondent. In making a determination on the issue, the court is guided by Section 2 (1) of Act 560 (supra) which states that *'the best interest of the child shall be paramount in any matter concerning a child'* and Section 2 (2) also provides that *'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'. The onus therefore lies on the court to determine whether granting custody to the Applicant will be in the best interest of the children. In arriving at a conclusion, the court ought to conduct an investigation into the background of all parties, hence the Order for a Social Enquiry Report (SER).

The Social Enquiry Report (SER)

The SER as submitted by the Probation Officer, Mr. Joseph Attoh on the 24th of October 2022 made certain findings and observation including the fact that the Applicant lives alone at Dansoman and is a trader in men's shoes at Kantamanto, Accra where he earns between GHC30.00 to GHC 250.00 a day. The Respondent lives at Agbogbloshie Market in wooden structure with her boyfriend and the Two (2) children in question. The structure lacks basic amenities such as water, electricity and a place of convenience. She is a trader and hawks watermelon at Agbogbloshie Market and earns between GHC25.00 to GHC40.00 on a daily basis. The Probation Officer indicated that the first child expressed her desire to stay with the Respondent but the second child could not say anything meaningful. It was also discovered that the Applicant does not maintain the children after the parties separated about Three (3) years ago, although the Respondent is willing to grant him access to the children in issue. The Probation Officer observed that where the Respondent currently stays with the children is not conducive and hygienic as she has used the boxes used in packing tomatoes to make the structure.

Analysis

The main issue for determination is **whether or not the Applicant ought to be granted custody of the children with reasonable access to the Respondent**. The evidence before this Court is that both parties insists on having custody of these children and the

court has to determine which of the parents should have custody of the children. Section 2 (1) of Act 560 (supra) states that *'the best interest of the child shall be paramount in any matter concerning a child'* and Section 2 (2) also provides that *'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'*. It was held in **Asem vs. Asem** [1968] GLR 1146 that *"the court was obliged by statute in deciding a question of custody to have regard to the welfare of the infant as its first and paramount consideration. The crucial question for decision in the instant case was therefore which of the parents was better suited to be entrusted with the upbringing of the child"*. Thus the onus of lies on the court to determine whether granting custody to the Applicant will be in the best interest of the children.

It is trite that in custody cases, there is no prima facie right to the custody of the child in either parent, but the court shall determine solely which is for the best interest of the child, and what will best promote its welfare and happiness. The court observes from the contents of the SER as well as the testimony of both parties that they both appear to be incapable of having custody of the child. This is because the Applicant is alcoholic, stays alone and spends most of his time at where he plies his trade. The Respondent on the other hand lives in a wooden structure in an uncondusive and unhygienic environment with the children which is not ideal for the children. The court therefore considered the option of placing these children in the custody of either parties' relatives and therefore ordered the parties to come along with their respective mothers to court to deliberate on how to deal with the children.

The Applicant brought his elder sister to court who expressed her willingness to assist the parties to take care of the children by having custody of them so that the parties can visit at any time they wish to do so. The Respondent also came along with her uncle on the next adjourned date who also insisted on having custody of the children as his wife will be available to take care of the children. It therefore appeared to the court that

because the Applicant's sister was willing to have custody of the children, the Respondent and her family members discussed having custody of the children. The court therefore had to abandon that pursuit and make a determination on which of the parents will have custody of the children.

The next option for the Court was to proceed to ascertain the children's preference as to which of their parents should have custody. The court is however guided by the fact that the consideration given a child's preference in awarding custody depends upon several factors: (i) the age and maturity of the child; (ii) the strength of the preference; and (iii) whether or not all of the children in the family express the same preference. In the case of **Edwards v. Edwards** 27. 270 Wis. 48, 70 N.W.2d 22 (1955) the court held that *'the personal preference of the child is very important, and although not controlling on the issue of custody, should be followed if the child "gives substantial reasons why it would be against his or her best interest to award custody contrary to such expressed preference'*.

The court was able to speak to the children both of them did not mince words about their preference and were able to adduce reasons for their preference although the SER indicated that it was only the first child who informed the Probation Officer of her preferred parent. The court is however mindful of the fact that the child's preference rule is only an aspect of the child's best interest test. Nevertheless, in most cases, it will be in the child's best interest to be with the parent preferred. Irrespective of the wishes of these children, the court is mindful of the 'Welfare Principle' as posited by Act 560 stated supra and the "welfare" which is said to be paramount or primary has been given various interpretations. In **Re McGrath (Infants)** [1893] 1 Ch 143 at 148, CA it was held that *'... the word "welfare" of the child must be considered "in its widest sense."* In **R v Gyngall** [1893] 2 QB 232 at 243, CA the Court of Appeal per Lord Esher MR stated further: *"The Court has to consider, therefore, the whole of the circumstances of the case, the position of the parent, the position of the child, the age of the child, . . . and the happiness of the*

child." Also in the case of **Attu vs. Attu** [1984-86] 2 GLR 743, the learned Judge was of the opinion that *'...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'*.

The evidence on record shows that the children have been living with their mother for some time now and the court opines that changing the status quo is likely to disrupt their care and control. The court relies on Section 45 (2) (e) of Act 560 which states that *'...the Family Tribunal ... when making an order for custody or access shall also consider the need for continuity in the care and control of the child'*. Yet, the court in considering the welfare of the children observes that current place of abode of the Respondent and the children is not conducive for the upbringing of the children. Section 6(2) of Act 560 provides that *'...every child has the right to life, dignity, respect, leisure, liberty, health, education and shelter from his parents...'* So that, irrespective of the wishes of the parties, the fact that they are not married as well as the fact that they no longer live together as parents of these children, there is the need for the children's place of abode to be one that is dignifying as well as promote their welfare and growth. Ultimately, the Probation Officer indicated that the best interest of the children would be served if the custody of the children is granted to the Respondent because she has been taking care of the children since their birth. It is important to note that the Probation Officer, who at best, is an Independent Investigator obtained all the necessary information needed to make a determination and the evidence so obtained by the Independent Investigator is often viewed with great authority by the Court. In this instant case, the Probation Officer, recommended that the best interest of the child will be served if custody of the child is granted to the Respondent with reasonable access to the Applicant and the court finds it extremely difficult to depart from the recommendation of the Probation Officer.

DECISION

Upon consideration of the Application, the testimony of the parties, the testimony of the children, the Social Enquiry Report (SER) and pursuant to the provisions of The Children’s Act, 1998 (Act 560), the court dismisses the instant Application and in the best interest of the children orders as follows;

1. The Respondent shall have custody of the children and the Applicant shall have reasonable access during weekends but upon due communication with the Respondent.
2. The Respondent is to secure a decent accommodation on or before and both parties are to share the cost of accommodation equally. The Respondent has up till the 28th day of February 2023 to pay off his portion of the rent.
3. The Applicant shall maintain the children monthly with a sum of Four Hundred Ghana Cedis (Ghc400.00) and same is to be paid into court within the first week of every month with effect from December 2022.
4. The Applicant shall bear all the cost of the children’s education and the Respondent shall pay for the school uniforms, bags and sandals.
5. The Respondent shall register the children under National Health Insurance Scheme (NHIS) and renew same when it expires. The Applicant shall pay for all medical bills not covered by NHIS.

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H/H HALIMAH EL-ALAWA ABDUL-BAASIT.
PRESIDING JUDGE

I AGREE

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MADAM FELICIA COFFIE
PANEL MEMBER

I AGREE

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MR. WISDOM ATIASE
PANEL MEMBER