

IN THE FAMILY AND JUVENILE COURT 'C' AT THE FORMER COMMERCIAL COURT BUILDING, ACCRA, HELD ON WEDESDAY THE 14TH DAY OF DECEMBER 2022 BEFORE HER HONOUR HALIMAH EL-ALAWA ABDUL-BAASIT SITTING AS AN ADDITIONAL MAGISTRATE WITH MADAM FELICIA COFFIE AND MR. WISDOM ATIASE AS PANEL MEMBERS.

SUIT NO.: A6/84/2022

PATIENCE AHO
MAMPROBI, ACCRA

APPLICANT

VS.

MAWUNYA AKONGLOE
LATERBIOKORSHIE, ACCRA
RESPONDENT

Parties Present

No Legal Representation for both Parties.

RULING

This is a Ruling on a Motion for Variation of Custody filed on the 25th of September 2021 for Access of the child in issue.

Applicant's Case

The Applicant in her Affidavit in Support deposed that she had Three (3) children with the Respondent and she instituted as action on the 13th of September 2018 for custody and access of the children. On the 24th of October 2018, the Court granted her custody of the last child being the only girl and

granted custody of the boys to the Respondent. She indicated that on the 24th of September 2022, the eldest son came to stay in her house and refused to go back to his father, and on the 26th of September 2022, the second son also left his father's house to her house with the explanation that he does not want to go back to the father's house because of his maltreatment. The Applicant deposed further that upon seeing the children in her house, she called to inform the Respondent but he subsequently informed the children not to step foot in his house again. She therefore prayed for the court to grant her custody of all the Three (3) children and to compel the Respondent to maintain the children with an amount of Ghc1, 000.00 a month, pay their school fees and anything connected to a school, their medical bills and register them with the National Health Insurance Scheme (NHIS).

The Respondent's Case

The Respondent failed to file an Affidavit in Opposition to the Motion for Variation of the Custody Orders.

DETERMINATION:

The Applicant on the 13th of September 2018 filed an Applicant for custody of the female child and reasonable access to the Two (2) male children of the parties, of which the court on the 24th of October 2018 granted and made the following orders;

- a) Custody of the last child aged Five (5) years is granted to the Applicant due to her age and being an only girl among males.
- b) Custody of the first and second children is granted to the Respondent.
- c) Access of the children is granted to parties' fortnightly respectively.

d) Respondent is ordered to maintain the third child with Ghc150.00 monthly effective October 2018 and pay school fees as well when due.

It is against the above mentioned Orders that the Applicant files the instant Application for a variation of the custody Order, and as such, the issues for determination are as follows;

1. Whether or not the court can vary its Orders.
2. Whether or not the Applicant ought to be granted custody of the Two (2) male children of the marriage.

In arriving at a conclusion on the above mentioned issues, the court required an investigation into the background of all parties and therefore ordered for a Social Enquiry Report (SER).

The Social Enquiry Report (SER)

The SER as submitted by the Probation Officer, Madam Irene Abra Aidoo on the 23rd of November 2022 made certain findings as follows; both parties live at Mamprobi Sempe of which the Applicant lives in a single room with Three (3) relatives as well as the children in issue, whilst the Respondent lives in a wooden structure which serves as his workshop and his place of abode. The Applicant trades in food stuffs and earns about Ghc2, 000.00 a month whilst the Respondent is a welder and earns about Ghc200.00 whenever he gets a contract. The SER gathered that the Respondent does not allow the children to visit their mother and made them believe that they do not have a mother until the people in the community informed the children that the Applicant is their mother. The SER also gathered that although the Respondent was granted the custody of the Two (2) children in 2018, the children themselves willingly left their father's

custody for their mother's house. The Probation Officer indicated that it appears the children run away from the Respondent to the Applicant because of the maltreatment they suffer in the hands of their father as well as the fact that he prevents them from bonding with their biological mother. The SER again gathered that the Respondent failed to maintain the third child living with the Applicant contrary to the court's order and cited spiritual reasons why he does not allow the first and second children to visit the Applicant.

Analysis

The first issue which is **whether the court can vary the orders made on the 24th of October 2018**. The Applicant in her Affidavit in Support to the Motion for Variation, among others, deposed to facts that suggest that circumstances in the lives of the children and the parties themselves have change. The SER also revealed changes in the lives of all the parties hence the need to vary or discharge its orders. In the Supreme Court case of the **Republic Vs High Court** (Commercial Division) Tamale; (J5 6 of 2015 [2015] GHASC 127 (04 June 2015) the court stated that '*...the inherent jurisdiction to vary its interim or interlocutory orders is vested in every court...*' The court's Ruling which has necessitated this instant Application was as far back as 2018 and the court is of the opinion that there has been some substantial change in circumstances of both parties as well as the children in issue which necessitates some form of variation in the best interest of the children.

The second issue is **whether or not the Applicant ought to be granted custody of the Two (2) male children of the marriage**. 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 parent is for the best interest of the child, and what will best promote its welfare and happiness. At common law the father was generally entitled as a matter of right to custody of his minor children, but later the law generally gave the mother preference. Today, the law recognizes the child's best interest as the determinative factor and this is also referred to as the Welfare Principle as posited by Act 560 stated supra. The Welfare Principle implies that the Court determines what would be best for the child despite both parents' good intentions and competing wishes and the word "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."*

Thus, Section 2 (1) of the Children's Act, 1998 (Act 560) 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 evidence on record shows that the Two (2) children have been in the custody of the Respondent since 2018 until 2022 when they willingly and without informing the Respondent returned to their mother's place of abode although the Respondent had severally warned the children not to go near the Applicant. It therefore seems to suggest that the children have been unhappy being in the custody of the Respondent who is their biological father. 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”.

The evidence on record again shows that the children themselves have indicated their preference as far as both parents are concerned. However, for this instant court to determine which of the parents was better suited to have custody of the children, the court sought to speak to both children to again ascertain their preference. The Court had the opportunity to speak to the children in the absence of their parents and these children did not mince words with respect to their preference and adduced reasons to the extent the court finds it extremely difficult to go contrary to their preference. In the case of **Edwards vs. Edwards** 270 Wis. 48, 70 N.W. 2d 22 (1955) the court held that *‘the personal preference of the child is very important, although not controlling, it should be followed if the child gives substantial reasons why it would be against her best interest to award custody contrary to such expressed preference’.*

Additionally, 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 children will be served if custody of the children is granted to the Applicant with reasonable access to the Respondent and the court finds it extremely difficult to depart from the recommendation of the Probation Officer.

DECISION:

Upon consideration of the Application, the evidence before the Court, the testimony of both parties/parents, the Social Enquiry Report and most

importantly, the views independently expressed by the children in issue, the Court is satisfied that it will be in the best interest of the children to grant this instant Application and orders as follows;

1. The Applicant shall have custody of the all the children and the Respondent shall have reasonable access during the weekends every fortnight and during half of school vacations.
2. The Respondent shall maintain the children with an amount of **Six Hundred Ghana Cedis (Ghc600.00)** monthly and same is to be paid into court within the last week of every month with effect from January 2023.
3. The Respondent shall pay all the incidental school expenses and the Applicant shall be responsible for school uniforms, bags and sandals of the children.
4. The Applicant shall register the children under the National Health Insurance Scheme (NHIS) and renew same when it expires. The Respondent shall be responsible for all the bills not covered under the NHIS.

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

I AGREE

I AGREE

.....
MADAM FELICIA COFFIE
PANEL MEMBER

.....
MR. WISDOM ATIASE
PANEL MEMBER