

IN THE FAMILY AND JUVENILE COURT 'C' AT THE FORMER COMMERCIAL COURT BUILDING, ACCRA, HELD ON WEDNESDAY THE 7TH DAY OF NOVEMBER 2022 BEFORE HER HONOUR HALIMAH EL-ALAWA ABDUL-BAASIT SITTING AS AN ADDITIONAL MAGISTRATE WITH MADAM PHILOMENA SACKEY AND MADAM LOVEGRACE AHLIJAH AS PANEL MEMBERS

SUIT NO. A6/341/21

VIDA NARH
ODORKOR-ACCRA

APPLICANT

VS

DENNIS DONKOR
NORTH KANESHI - ACCRA
RESPONDENT

Parties present.

No Legal Representation for both parties.

RULING

This is a Ruling on an Application by the Applicant/Respondent (hereinafter referred to as 'Respondent') filed on the 15th of September 2022 for Variation of Custody Orders.

The Respondent's Case

In his Affidavit in Support, the Respondent among others, informed the court that this court had ruled in favour of the Applicant herein by ordering him to maintain the Three (3) children as well enrolling them in a public school system.

He deposed further that the Applicant objected to enrolling the children in a public school of which he had to oblige to her request, enrolled them into a private school and paid all their fees. The Respondent further stated that regular visits to the school revealed that the children had not been attending school regularly and when he queried the Applicant, the excuse she gave was that she does not have money although he has been paying school fees and remitting the Applicant regularly. He concluded by praying for the court to vary the custody order in his favour so that he can adequately take care of the children since they are now in their formative years.

The Applicant's Case

The Applicant opposed the Application and in her Affidavit in Opposition filed on the 22nd of September 2022 deposed among others that the Respondent pays her through the bank as against the Court Orders which deducts charges and at the end of the month she receives Ghc280.00 as monthly maintenance. She indicated that they opted for the current school because the public school was very far from their place of abode which will not be ideal for the children. She deposed further that apart from the maintenance fees, the Respondent has not been consistent with other payments as far as the children are concerned, including but not limited to school feeding fees where she spends about Ghc34.00 daily. She therefore concluded by praying for the court to review the maintenance fees from Ghc300.00 to Ghc1, 000.00 a month so that the children can be adequately catered for.

DETERMINATION

The Applicant on the 24th of May 2021 filed an Application for custody and maintenance of the Three (3) children in issue of which the court ruled in her favour on the 28th of June 2021 by making the following orders;

- a) Custody of the children is granted to the Applicant with access to the Respondent every other weekend and half of school vacations.
- b) Respondent is ordered to maintain the children with Ghc300.00 monthly within the first week of every month with effect from July 2021 and payment is to be made to court.
- c) Respondent is further ordered to bear costs of all educational needs of the children and also pay their school fees.
- d) Respondent shall also pay medical bills of children not covered by NHIS when due.
- e) No orders as to accommodation made.

It is against the above mentioned Orders that the Respondent files the instant Application for a variation of the custody Order, and the Applicant prays for a review of the maintenance sum. Thus, the issues for determination are as follows;

1. Whether or not the court can vary its Orders.
2. Whether or not the Respondent ought to be granted custody of the children with reasonable access to the Applicant.
3. Whether or not the maintenance sum of Three Hundred Ghana Cedis (Ghc300.00) should be reviewed.

In making a determination on the issues before the court, the court is guided by 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...'. In arriving at a conclusion, the court was of the opinion that there is the need to independently investigate the claims of both parties and as such ordered for a Social Enquiry Report (SER).

The Social Enquiry Report

The SER as submitted by the Probation Officer, Mr. Joseph Attoh on the 7th of July 2022 made certain findings and conclusions including the fact that the Respondent lives alone at North Kaneshie in a single room at his family house. He works as a driver at the Prudential Bank Head Office where he earns about One Thousand Ghana Cedis (Ghc1, 000.00) monthly. The Applicant lives at Odorkor in a Chamber and Hall with her mother and the children. She is currently unemployed but helps her mother in the running of a 'chop bar' business where she is given Ghc15.00 daily by her mother for upkeep.

The SER further gathered that the children are currently out of school because the Respondent has not paid their school fees. The Headmistress of the school has informed the parties that the children will not be allowed to come back to school unless the Respondent pays the school fees. The SER again gathered that the Respondent claims he cannot afford the school fees and will therefore want the children to attend a government school which the Applicant has been able to secure the admission and has even started sewing school uniforms.

Analysis

The first issue is **whether or not the court can vary the orders made on the 28th of June 2021**. 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 in 2021 and the court is of the opinion that there is likely to have 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 for determination **whether or not the Respondent ought to be granted custody of the children with reasonable access to the Applicant**. It was held in case of **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 onus therefore lies on the court to determine whether granting custody to the Respondent will be in the best interest of the children. It must be stated 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 parent is for the best interest of the child, and what will best promote its welfare and happiness. The Respondent insists on having custody of the children but it must be stated that 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."* The learned Judge, Edmund Davies L.J. in Re C. (A) (an Infant); C. v. C. [1970] 1 All E.R. 309 at p. 313, C.A. said that in all cases the paramount consideration is the welfare of the infant and the court must look at the whole background of the infant's life and at all the circumstances of the case. The evidence on record shows that the respondent lives alone and wants custody of the children so that he can hand them over to his relative for their upkeep. The court is guided by the opinion of the learned Judge in the case of Aikins vs. Aikins [1979] GLR 223 as follows; *'... I do not think I should give custody to a parent whose purpose is to deliver the children to another.'*

The next issue for determination is **whether or not the maintenance sum of Three Hundred Ghana Cedis (Ghc300.00) should be reviewed.** The duty of the court is to get the Respondent to adequately maintain his children. Section 47 of Act 560 states 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 necessaries of health, life, education and reasonable shelter for the child'*. Section 49 (a) of Act 560 provides among others that *'the Family Tribunal shall consider the income and wealth of both parents of the child or the person legally liable to maintain the child'*. It is trite that in making Maintenance Orders, the court must consider the family

member from whom maintenance is claimed and he or she should be able to afford the maintenance that is claimed. Thus, that person must have the means to pay and the means test is such that the person who is liable to pay maintenance must have the MEANS and the maintenance so claimed must be REASONABLE.

The record shows that the Respondent was ordered to pay Ghc300.00 monthly towards the upkeep of the children, however, the Applicant wants the sum reviewed upward to Ghc1, 000.00 for her to be able to adequately maintain the children. The record shows that the Applicant is unemployed but the Respondent's Pay slip for October 2022 reveals that he earns an amount of Ghc848.02 as basic monthly salary but his Gross Pay stands at Ghc2,470.59 and his Net Pay is Ghc1,461.47. Thus, the amount of One Thousand Ghana Cedis (Ghc1, 000.00) being claimed by the Applicant as monthly maintenance of the children in issue appears unreasonable.

DECISION:

Upon consideration of the Application, the evidence before the Court, the testimony of both parties, the Social Enquiry Report and pursuant to the provisions of The Children's Act (1998) Act 560, the Court is satisfied that it will be in the best interest of the children to dismiss this instant Application and will not vary the custody Orders of the court of 28th June, 2021 but will make further orders as follows;

1. The Applicant shall have custody of the all the children and the Respondent shall have reasonable access to the children during weekends fortnightly. He is to pick the children up from the Applicant on Fridays by

4pm and return them back to the Respondent on Sundays by 3pm but upon due communication with the Applicant.

2. The children are to be enrolled in a public school with immediate effect and the Respondent is to pay up all the incidental school expenses and the Applicant shall pay for school uniforms, sandals and bags for the children. The Respondent is advised to clear up all his arrears with the children's former school.
3. The Respondent shall be responsible for the maintenance of the children with an amount of **Six Hundred Ghana Cedis (Ghc600.00)** monthly and same is to be paid into court within the first week of every month with effect from December 2022.
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 which the Respondent shall present to him within a week of having incurred the expenditure. **OR IN THE ALTERNATIVE;** the Applicant is to secure a Medical Insurance from his workplace for the children.

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

I AGREE

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**MADAM PHILOMENA SACKEY
AHLIJAH
PANEL MEMBER**

I AGREE

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**MADAM LOVEGRACE
PANEL MEMBER**