

IN THE FAMILY AND JUVENILE COURT 'C' AT THE FORMER COMMERCIAL COURT BUILDING, ACCRA, HELD ON FRIDAY, 20<sup>TH</sup> DAY OF JANUARY 2023 BEFORE HER HONOUR HALIMAH EL-ALAWA ABDUL-BAASIT SITTING AS AN ADDITIONAL MAGISTRATE WITH MADAM LOVEGRACE AHLIJAH AND MADAM REGINA TAGOE AS PANEL MEMBERS.

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SUIT NO.: A6/520/20

JULIET BEDIAKO  
DANSOMAN, ACCRA

APPLICANT

VS.

SGT. OSEI NYAME  
BURMA CAMP, ACCRA

RESPONDENT

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**Parties present**

**No legal representation for both parties.**

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## RULING

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This is a Ruling on an Application by the Applicant herein filed on the 19<sup>th</sup> of June 2020 for the custody and maintenance of the children in issue.

### *The Applicant's Case*

In her Affidavit in support, the Applicant deposed that she was married to the Respondent and birthed Two (2) children but was asked to leave the matrimonial home by the Respondent after some misunderstanding. The Respondent subsequently shirked all his responsibilities towards his children and placed that burden on the Applicant resulting in a strain in her finances as she had to also rent an alternative accommodation for her and the children. She concluded by

stating that the Respondent is gainfully employed and has the financial means to assist in maintaining the issues. She therefore prayed for the following;

1. Custody of the issues be granted to the Applicant with reasonable access to the Respondent.
2. An Order for the Respondent to maintain the issues with an amount of Ghc1, 000.00 every month.
3. An Order directed at the Respondent to provide a suitable accommodation for the Applicant in favour of the issues herein by renewing the rent of the Applicant.
4. An Order for the recovery of the sum of Ghc8, 580.00 being sums of money spent by the Applicant for the maintenance of the issues for the past one year.

### *The Respondent's Case*

The Respondent filed his Affidavit in Opposition on the 29<sup>th</sup> of December 2022 following a Motion to relist the Suit by the Applicant on the 22<sup>nd</sup> of November 2022. He admitted the marriage as well as to the subsequent separation but insisted that he never asked the Applicant to move out of the matrimonial home and stated further that it was rather the Applicant who packed out of the matrimonial home without his consent. He continued by stating that despite the separation, he continued to maintain the children but the Applicant denied him access to them. He deposed further that the Applicant enrolled the children in a school that is way beyond his means hence his decision to provide Ghc2, 000.00 every term as his contribution towards the school fees of the children. He concluded by pleading with the court to direct the Applicant to return to her

matrimonial home since he was not the one who asked her to leave. He again pleaded with the court to allow him enroll the children in a school he can afford not compromising quality.

## **DETERMINATION**

In view of the processes before the court, the issues for determination are;

1. Whether or not the Respondent should have custody of the children in issue.
2. Whether or not the Respondent should provide all necessities of life for the children in issue.

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...*'. To be able to make a determination on these issues, the court ordered an independent investigation into the claims of both parties and as such a Social Enquiry Report was presented to that effect.

### ***The Social Enquiry Report (SER)***

The SER as prepared and submitted by the Probation Officer, Mr. Emil Eli Laweh dated 20<sup>th</sup> of January, 2023 made certain findings and conclusions including the fact that the Applicant resides at Official Town, Kasoa with the children in a Two (2) bedroom self-contained house with amenities such as Kitchen, bathroom, place

of convenience, water and electricity. The Applicant is a beautician and she earns about One Thousand Ghana Cedis (GH¢1, 000) monthly. The Respondent lives alone at Burma Camp in an official chamber and a hall self-contain. He is a Warrant Officer II (WO II) and earns about Five Thousand Seven Hundred and Eighty Ghana Cedis, Forty-Six Pesewas (GH¢5,780.46) per month but he claimed he has contracted a loan that has reduced his salary to Four Thousand, Five Hundred and Sixty-Seven Ghana Cedis, Forty-Six Pesewas (GH¢4,567.46) per month.

The SER further gathered that the parties got married on the 17<sup>th</sup> September, 2009 and settled at Burma Camp where they had both children. The marriage however was full of petty quarrels, fights and sentiments and eventually had a misunderstanding that led to their separation on the 8<sup>th</sup> April, 2018. The Respondent left the matrimonial home with the children to Takoradi, stayed there for six months before coming back to Accra. The Probation Officer observed that when the parties were together at Burma Camp, the children were schooling at Divine Academy, a private school but after their separation, the children's school has been changed five times. The second child's performance at school is abysmal and may be attributed to either the manner in which the schools were changed many times or that he has a learning disorder – he is unable to read properly and he is slow. The Respondent confirmed that he maintains the children with GH¢500.00 each month and an amount of GH¢1,500.00 for school fees each term although the total school fees of both children stands at GH¢5, 313.00. The Probation Officer indicated that the children's present school is decent, fully equipped and has the right environment for academic work as it falls within one of the best schools in Kasoa. He stated further that it is not advisable to change the children's school at this point

considering the second child's poor performance coupled with the fact that they just did one academic year. The SER again gathered that the Applicant's rent has expired and the landlady is on the verge of taking possession of her property.

The Probation Officer further stated that the Applicant complained that the Respondent has been inserting his finger into the vagina of the first child when she was Four (4) years old till when she became Eight (8) years old, an allegation which was confirmed by the child in issue. Hence the observation of the Probation Officer that the Applicant appears to be overly protective of the children as she does not also leave the children in anyone's care.

### Analysis

The first issue for determination is **whether or not the Respondent should have custody of the children in issue**. 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. 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.”*

In considering which parent should have custody of the child, Section 45(1) of Act 560 provides that ‘*A Family Tribunal shall consider the best interest of the child and the importance of a young child being with his mother when making an order for custody or access*’. Similarly, in **Bentsi-Enchill vs. Bentsi-Enchill** [1976] 2 GLR, the court held that ‘*the primary concern of the court is to ensure that there are appropriate safeguards for a child’s general welfare, irrespective of the interests of the parents...*’. Again, 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*’. Thus, that the welfare of the infant is the first, primary or paramount consideration is therefore indisputable. But as Harman LJ put it in **In re O (An Infant)** [1965] 1 Ch 23 at 29, C.A. “*What you look at is the whole background of the child’s life and the first consideration you have to take into account when you are looking at his welfare is: who are his parents and are they ready to do their duty?*”

The evidence on record shows that the children have always been in the custody of the Applicant since their separation in 2018 and she has been responsible for the upkeep of the children even though the Respondent contributes towards the maintenance of the children. The evidence further shows that the Applicant is overly protective and clings to her children to the extent that she has denied the Respondent access to his children. There is therefore the need to be make orders as to custody and access to the children in issue as 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”.*

It appears the Applicant is not willing to let the Respondent have access to the children and it must be stressed that no one parent should feel or think that s/he has a higher right or responsibility of the child as against the other parent, both parents have equal rights and responsibilities over their children. The duty of the court is to make decisions using a case-by-case analysis of the facts surrounding custody and will then determine what sort of arrangement is in the children’s best interests. Ultimately, the court will give custody of the child to one parent based on the circumstances surrounding this case and because it is believed will promote their welfare and not because that parent’s right to their children is absolute. 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’.*

In this particular instance, the evidence on record, as revealed by the SER shows that upon the separation of parties, the Applicant is now stays with the children in Kasoia where they are currently schooling. It is again observed that the children have assimilated with their environment and seem to have established a pattern of life to the extent that changing the custody arrangement is likely to disrupt their schooling because the Applicant has changed the children’s school on a number of times. The court is therefore of the opinion that in lieu of what the SER has captured, changing the status quo is likely to upset the children emotionally and may not be in their best interest. 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’.*

The evidence on record again shows that the children themselves have indicated their preference as far as both parents are concerned. The SER reveals that 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’.*

Consequently, taking into account all the facts and weighing all the circumstances, the court will take a decision based on the best, primary and paramount interest as well as the welfare of the children in issue. The learned Judge, Azu Crabbe C.J., in the case of **Tackie vs. Baroudi** [1977] DLCA 1432 in granting custody expressed his reasons in the following passage of his judgment; *“In all the circumstances of this case, and bearing all the matters in mind [the children’s] best interest will be served... where I have a comfortable feeling that they will be well cared for.”* The learned Judge then continued, *“Let me hasten to add that the court can always be resorted to when things change. One can readily understand the wisdom and good sense of this approach.”* Additionally, 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 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.

The next issue is **whether or not the Respondent should provide all necessities of life for the children in issue**. It must be emphasized that child maintenance is one of the fundamental rights granted every Ghanaian child under the customary and statutory laws of Ghana. **Article 28 of the 1992 Constitution** which is specifically devoted to the rights of children enjoins Parliament to enact laws that ensure that natural parents provide every one of their children, from conception till age Eighteen (18) at least. **The Children's Act, 1998 (Act 560)** is also meant to reform and consolidate the laws relating to children and to provide for the rights of the child of which the Act sets out a number of rights to ensure the well-being of children. The duty of maintenance of children, which is specially dealt with in **Sections 47 – 60 of Act 560**, is a legal obligation, which is imposed on a parent and, in some instances, other persons who may be legally liable to maintain the child. Specifically, **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 necessities of health, life, education and reasonable shelter for the child'*.

In the case of **Abubakari vs Abubakari** (152 of 2005) [2005] GHACA 7 (18 May 2005); the Court held that; *'... the law is fairly well settled that it is the responsibility of both parents to cater for their infant children...'* and this position has been captured in Section 49 of Act 560 that *'a Family Tribunal shall consider the income and wealth of both parents of the child when making a maintenance order'*. The SER reveals that the Respondent earns Five Thousand Seven Hundred and Eighty Ghana Cedis, Forty-Six Pesewas (GH¢5,780.46) monthly as a Military Officer

whilst the Applicant earns about a Thousand Cedis (Ghc1, 000.00) a month. The onus then lies on the Court to determine the maintenance sum and it is trite that in making Maintenance Orders, the Court must consider the person from whom maintenance is claimed and whether he or she is able to afford the maintenance that is claimed. Thus, that person must have the means to pay the amount claimed 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. It is therefore the duty of the Court to order a reasonable sum as monthly maintenance but same should be within the means of the Respondent, yet such an amount must also be sound and in consonance with present day economic realities.

The next issue for determination is **whether or not the Respondent can have access to the children**. The Court observes that the parties have a severed relationship and when this happens, the parties are unable to see eye to eye on what is best for the children regarding regular contact by the father. The mother would either blatantly refuse the father access or would place strict measures on when and how the father can see the children. When such a situation arise, as in this instant case, the option left for the children's biological father is to approach the Court for relief. It is important to state to both parties/parents 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. Many people assume that mothers have greater child custody rights than fathers probably because mothers are perceived as the primary caretaker of children of the family whilst the father worked outside of the home and provided for the family. It must be emphasized there is no gender preference in custody and access laws and what the law recognizes is the child's best interest as the determinative

factor. According to Author Despert, in the book, **Children of Divorce** (1962) ‘... *the best interest of the child doctrine cannot be applied within its historical and present spirit and purpose unless the law places both parents on equal footing...*’ In fact, Article 18 of the United Nations Convention on the Rights of the Child (UNCRC), of which Ghana is a signatory, provides ‘... *that parents have a shared and core responsibility for the nurturing of their children...*’. The point being made is that no one parent should feel or think that s/he has a higher right or responsibility of the child as against the other parents, both parents have equal rights and responsibilities over their children. The duty of the court is to make decisions using a case-by-case analysis of the facts surrounding custody and/or access and will then determine what sort of arrangement is in the child’s best interests.

The Respondent, being the biological father of the children cannot, must not and should not be side-lined to the extent that it is the Applicant who solely takes decisions as far as the children are concerned. In fact, the Respondent informed the court that the Applicant solely changed the names of the children by adding names of her choice to the children’s names, a situation which obviously bothers the Respondent. The children have a right to grow up knowing their father and this is buttressed by **Section 5 of Act 560** which provides that ‘...*no person shall deny a child the right to live with his parents and family....*’ **Section 6(1) of Act 560** further provides that ‘...*no parent shall deprive a child his welfare whether –a) The parents of the child are married or not at the time of the child’s birth; or b) The parents of the child continue to live together or not...*’. The Court is therefore of the opinion that it will be in the children’s best interests to consider a time arrangement that provides for the children to have some substantial and significant time with the Respondent who is the biological father, so as to build a meaningful relationship with the children in accordance with their best interest.

## DECISION

In view of the Application, the testimony of the parties, the SER and pursuant to the provisions of The Children's Act, 1998 (Act 560), the court orders as follows;

1. The Applicant shall have custody of the children and the Respondent shall have reasonable access to the children as follows;
  - (i) He is to pick the children up from the Respondent on the last weekend of every month with effect from January 2023 and return the children back to the Respondent on Sundays by 4pm.
  - (ii) He is to have access to the children during half of the school vacations and he is to pick the children up immediately upon vacation and return the children back to the Applicant on the last Sunday of the half of the vacation.
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 first week of every month with effect from February 2023.
3. The parties are to bear the cost of the children's education equally with the Respondent paying 50% of the total cost per term and the Applicant paying the remaining 50% of the total cost per term.
4. The Applicant shall pay 60% of the current rent of Ghc650.00 and the Respondent shall pay the remaining 40% of the said rent of Ghc650.00 and same is to be paid by the Respondent on or before the 31<sup>st</sup> of March, 2023.

5. The Applicant shall register the child under National Health Insurance Scheme and renew same when it expires and Respondent shall be responsible for all medical bills not covered by National Health Insurance Scheme.

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

**I AGREE**

**I AGREE**

.....  
**MADAM LOVEGRACE AHLIJAH**  
**TAGOE**  
**PANEL MEMBER**

.....  
**MADAM REGINA**  
**PANEL MEMBER**