

IN THE FAMILY AND JUVENILE COURT 'C' AT THE FORMER COMMERCIAL COURT BUILDING, ACCRA, HELD ON TUESDAY, 17TH DAY OF JANUARY 2023 BEFORE HER HONOUR HALIMAH EL-ALAWA ABDUL-BAASIT SITTING AS AN ADDITIONAL MAGISTRATE WITH MADAM VIDA DANQUAH AND MADAM PHILOMENA SACKY AS PANEL MEMBERS.

SUIT NO. A6/58/23

LORDINAH AMA AMPONSAH
SUNYANI, BRONG-AHAFO REGION

APPLICANT

VS.

ELLIOT YEBOA-OFORI
SPINTEX, ACCRA

RESPONDENT

Parties present

Francis Mensah Wendle Esq. for Yvonne Amegashie Esq. for the Applicant.

RULING

This is a Ruling on an Application filed on the 11th of October, 2022 for the maintenance of the Two (3) children of the parties.

The Applicant's Case

The Applicant deposed in her Affidavit in support that she is married to the Respondent and they have Three (3) children aged Eight (8), Five (5) and Two (2) years respectively. The couple were living in Accra but due to some misunderstanding she moved out of the matrimonial home with all the children and is currently staying in Sunyani with them. She deposed further that the

Respondent refused to let the matter be resolved until she dragged him to the Domestic Violence and Victims Support Unit (DOVVSU) of the Ghana Police Service at Sunyani where the Applicant was compelled to maintain the children with Four Hundred Ghana Cedis (Ghc400.00) but he refused to pay school fees. The Applicant then reported the matter at DOVVSU, Airport Branch but the Respondent refused to allow the matter be resolved amicably hence the instant Application where she prays for the following;

1. An Order directed at the Respondent to maintain the issues with an amount of Ghc600.00 a month.
2. An Order directed at the Defendant to pay their school fees, medical bills and other necessities of life as and when it falls due.
3. Any other order(s) as the court may deem fit.

On the 23rd of August 2022, the Applicant filed a Supplementary Affidavit in Support and deposed further that the Respondent is not financially stable to take care of the children as she has been the one taking care of the Respondent, the children as well as the Respondent's relatives. She concluded by stating that the school environment at the University of Ghana Basic School is very insecure for the children but the school the children are currently attending is one of the best schools in the Sunyani Municipality with conducive and safe environment for academic progress.

The Respondent's Case

The Respondent in his Affidavit in Opposition filed on the 16th of August 2022 confirmed the marriage with the Applicant and the birth of the children. He stated that he never asked the Applicant to move out of the house with the

children. He denied being directed by DOVVSU to pay Ghc400.00 as maintenance but when the matter ended up at DOVVSU, at East Legon, they were referred to this instant court. He deposed further that he feels the children are not being properly catered for in Sunyani and therefore pleaded with the court to grant him custody so that they are brought back to Accra to continue with their schooling. He again pleaded with the court to direct the Applicant to return to her marital home with the children to continue with their marriage. He informed the court that the children were already at the University of Ghana Basic School and because he is a staff of the University of Ghana, their fees are highly subsidized to the extent he pays as little as Ghc280.00 per child and he is also entitled to flexible terms of payment as well as free medical care.

DETERMINATION

In view of the processes before the court, the main issue for determination is which of the parents should have custody of the Three (3) children. 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 (SER)

In view of the fact that the Applicant was based in Sunyani, there was the need for the Social Welfare Department in Sunyani to conduct the SER on the Applicant in Sunyani whilst that of the Respondent is done by the court assigned Probation Officer. As such, there are Two (2) SERs; one submitted by Madam Mavis Gbate and the other by Emefa Abra Annor-Amevor, the Senior Social Development Officer in Sunyani. The SER submitted by Madam Gbate made some findings, observations and conclusions as follows; that the Respondent occupies a Two (2) bedroom self-contained at the University of Ghana South Legon Chalet where he lives with other tenants. The Respondent works as an I.T Assistant and earns about GHc1,240.08 a month. The parties had the children out of ordinance marriage but separated since March 2022 and it appeared the parties used to quarrel a lot when they were together. The SER further gathered from the children is the fact that the Applicant leaves the children in the care of their uncle and travels most of the time thereby leaving the upkeep of the children in the hands of the said uncle. The Probation Officer concluded by stating that the first and second child expressed their desire to be in the custody of the Respondent and continue their education in Accra but the third child was not interviewed because she is too young to understand the procedure. The SER presented by Madam Annor-Amevor concluded by stating that the relationship between the Applicant, the Respondent and the children does not seem to be that bad though there were difficulties relating to finances pertaining to the care and maintenance of the children. She stated further that what seemed to have brought the desire of Applicant wanting to take custody of the children is that the Respondent is not married and is very busy with work coupled with the fact that the children are very young and all girls. She continued that the children have lived with their mother for a long period and are not only used to her, they

are well catered for per the information gathered even in the absence of their father providing money for their upkeep.

Analysis

The main issue for determination is **which of the parents should have custody 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. 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'. 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?”*

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 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 will then determine what sort of arrangement is in the children’s best interests. Ultimately, the court will give custody of the children 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 determining which of the parents is best suited to have custody of the children, the court relies on the case of **Attu vs. Attu** [1984-86] 2 GLR 743, where 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 the case of **Opoku-Owusu vs. Opoku-Owusu** [1973] 2 GLR 349, Sarkodee J held that *‘the Court’s duty is to protect the children irrespective of the wishes of the parents. Section 45(1) of Act 560 which 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’*.

The children in issue are aged Eight (8), Five (5) and Two (2) years respectively and it may be argued that they are still young and ought to be in the custody of their mother. These children are girls and it is again argued that it will be in the best interest of children who are still young and are girls to be with their mothers. Indeed, in the case of **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... Normally the mother should have the care and control of young or sickly children (particularly girls) or those who for some other reason need a mother's care'*. However, in determining which of the parents should have custody of the children, **Section 45 (2) (c) of Act 560** also provides that with matters of access or custody, the Family Tribunal shall consider *'the views of the child if the views have been independently given'*. 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'*.

The Court had the opportunity to speak to the first and second children in the absence of their parents and these children did not mince words with respect to their preference. The court observed the intelligence, eloquence, independence and maturity with which they expressed their views. The very much exuded adequate mental development as well as intelligence and the court finds it extremely difficult to go contrary to their preference. The court takes cognizance of the fact that these children are girls and as such it is preferable that they live with their mother. However, these children prefer to be in the custody of their father and were able to convince the court that they would rather be in the custody of their father than their mother and adduced convincing as well as cogent reasons for their preference. It therefore baffles the court why children will prefer to be with their father, having been with their mother for a couple of months prior to this decision. In as much as Act 560 posits that young children should be in the custody of their mothers, in juxtaposing that with the overall

welfare principle, the court is of the opinion that it will be in the best interest of the first and second children to be with their father. This is because the children themselves made such preference and not abiding by the children's decision is likely to cause them emotional upset and unhappiness. Additionally, by virtue of the Respondent working at the University of Ghana, these children can be enrolled in arguably one of the best basic school in Ghana as well as the fact that they can benefit from the University of Ghana Medical Centre in terms of their health care. More so, the University of Ghana environment where the Respondent stays is considered an ideal environment for the academic and personal growth of these children as compared to the Applicant's place of abode as captured by the SER.

It is for the above reasons that the court is of the opinion that the Respondent should have custody of the Two (2) children as stated above. It must be stressed that although Act 560 posits that young children ought to be with their mothers, such decisions are left to the discretion of the court as what the court actually guided by is the Welfare Principle, that is to say that decisions concerning children must be tailored towards the best interest of the child. It must however be emphasized that the notion that mothers should always have custody of young children have changed with changing times. Mothers are now also income earners whilst fathers have also taken on more of the child-rearing duties. Additionally, today's judges have also changed with the times. They have different perspectives on parenting roles than their predecessors. Laws giving women preferential custody rights really do not really exist any longer because Judges have guidelines used to determine what is in the best interest of the children and the gender of the parent plays no part in their decision. Today's

“knowledge” that courts prefer mothers stems from past generations and media sensationalism.

In spite of the above, 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.”*

DECISION:

Upon consideration of the Application, the evidence before the Court, the submissions of Counsel for the Applicant, 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 it will be in the best interest of the children to dismiss this Application and orders as follows;

1. The Respondent shall have custody of the first and second children whilst the Applicant shall have custody of the last child. The parties shall share the children’s school vacations equally. The Applicant shall have access to the children during the first half of the vacations whilst the Respondent has access to all the children during the remaining half of the school

vacations. The Applicant is however at liberty to visit the children as and when she desires to but must inform the Respondent prior to the visitation but the Respondent must not withhold his consent unreasonably.

2. The Respondent shall pay the maintenance sum of Two Hundred and Fifty Ghana Cedis (Ghc250.00) monthly towards the maintenance of the last child and same is to be paid via the Respondent's Mobile Money Account within the first week of every month with effect from February 2023.
3. The Respondent shall pay for the school fees of the last child together with all the incidental expenses whilst the Applicant pays for school uniforms and school sandals.
4. The Respondent shall be responsible for the medical expenses of all the children and has the option of using the National Health Insurance Scheme or the University of Ghana Medical Centre. The Applicant shall therefore register the children under the National Health Insurance Scheme (NHIS) and renew same when it expires. The Respondent shall pay all medical expenses not covered by the NHIS.

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

I AGREE

I AGREE

.....
**MADAM PHILOMENA SACKY
DANQUAH
PANEL MEMBER**

.....
**MADAM VIDA
PANEL MEMBER**