

IN THE FAMILY AND JUVENILE COURT 'B', FORMER COMMERCIAL COURT BUILDING – ACCRA HELD ON WEDNESDAY, THE 4TH DAY OF JANUARY 2023. BEFORE HER HONOUR MRS. MATILDA RIBEIRO, CIRCUIT COURT JUDGE, SITTING AS AN ADITIONAL MAGISTRATE WITH MADAM GIFTY OKAI, AND MADAM REGINA TAGOE AS PANEL MEMBERS.

Suit No: A6/140/23

ABIGAIL AMANKWAA APPLICANT
OF LAPAZ-TABORA
ACCRA

VERSUS

JOSEPH ASUANDZE NYARKOH RESPONDENT
OF NIMA
ACCRA

Applicant: Present

Respondent: Present

Counsel for Respondent: David Haizel present.

No legal representation for Applicant.

JUDGMENT

Applicant per her maintenance and custody application filed on the 23rd day of September 2022 prayed for the understated reliefs:

1. An order by the Honourable Court granting custody of the child in issue to the Applicant, with reasonable access to the Respondent.

2. An order for Respondent to maintain the child and Applicant at GHC1,500.00
3. An order for the Defendant to enrol the child into school when due, pay school fees and other things connected to school.
4. An order directed at the Respondent to see to the medical needs of the child.
5. An order by the Honourable Court for the Respondent to renew accommodation rent when it expires.
6. Any other orders deemed fit by the Honourable Court.

According to Applicant, she and Respondent were married but currently separated. She alleged that Respondent is abusive both physically and verbally and he beats her up at the least provocation. That she reported his maltreatment to the Department of Social Welfare (DSW) and sought their assistance to move out of the matrimonial home with the child. She said upon deliberations, Respondent was asked to rent a decent accommodation for her and that the parties can decide on the custody of the child in issue when she settles down at the new place. Following which Respondent gave her GHC5,000.00 in lieu of rent and she topped up to rent a place.

She said that upon renting a place, she went to pack her things from the matrimonial home and to have access to the issue but Respondent did not allow her. She alleged further that when she went to Respondent's mother's place to have access to the issue, she was assaulted and threatened by her (respondent's mother's) neighbours not to set foot there again else they will beat her to death. She then reported the matter to the Nima Police Station where she was directed to DOVVSU and at DOVVSU, she was advised to seek redress at the Family and Juvenile Courts Accra hence the instant application.

Respondent, the father of the issue indicated his opposition to the grant of custody to Applicant in his Affidavit in Opposition filed on the 18th day of October 2022. The grounds of his opposition are that there will be a total breakdown in the training, discipline, and education of the child if custody is granted to Applicant. That Applicant's application for custody is for her to use the custody of the child as an income or revenue generating strategy by getting an order for the payment of maintenance to her for her enjoyment. According to

him, the issue has become used to the environment he presently lives in, to pluck him out of that environment into one that the Applicant by this instant application trying to avoid its inspection by the social welfare will not be in the best interest of the issue. He therefore prayed for Applicant's prayer for custody and maintenance order to be refused and for the issue to be allowed to stay with his mother (Respondent's mother) with access to Applicant. Respondent alleged in his Affidavit in Opposition that upon the dissolution of the parties' marriage in September 2022, the Department of Social Welfare granted custody of the issue to Respondent's mother after he narrated the behaviour of Applicant to them, and they directed Applicant to secure an accommodation which was to be inspected by the DSW to ascertain if it is suitable before any issue of custody will be discussed. That whilst the matter was still pending at the DSW, Applicant filed the instant application before this court without complying with the directives of the DSW.

When the parties appeared before the court on the 19th day of October 2022, they were referred to the Court Connected Alternative Dispute Resolution unit to explore amicable settlement of the matter, but they were unable to reach an agreement. Hence, a call on the court to determine the matter in the best interest of the child in issue.

As to whether the parties are separated or divorced is irrelevant to this panel. The fact is, they are currently not living together. And the custody and maintenance of their two-year-old child is in issue. That is what this Court has been called upon to determine. The main issue for determination by the court therefore is in which of the parties' custody will the best interest of the issue be ensured and for that matter, whether or not Applicant is entitled to her prayer for custody of the issue? Once that is out of the way, the court will then consider other ancillary issues like monthly maintenance, rent and others. In doing so, the court has to consider all the circumstances of the case and do what will inure to the **benefit or best interest of the child in issue** as provided for by **Article 28 of the 1992 Constitution** and **section 2 of The Children's Act, 1998 (Act 560)** which states that ““(1) *The best interest of the child shall be paramount in any matter concerning a child.*”

(2) 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”, and not the wishes of the parents per se. These provisions of law have been applied and highlighted in a number of judicial decisions including **Happee v. Happee [1974] 2 GLR 186**, **Beckley v. Beckley [1974] 1GLR 393**, and **Opoku-Owusu v. Opoku-Owusu [1973] 2 G.L.R 349**.

To assist the Court, determine the matter, the Court ordered for a social enquiry into the background and circumstances of parties and the issue since the parties could not agree on who to have custody. The Social Enquiry Report (hereinafter referred to as SER) confirmed that the parties had the child in issue before marrying in March 2021. They lived together at Nima for about two years and separated in September 2022 following several misunderstandings between them. When they separated, the issue was given to Respondent’s mother by the officers at the DSW for Applicant to look for a room to rent for the officer to later determine the custody of the child in issue. The Respondent then enrolled the issue in the St Kizito Primary School at Nima where his mother works. Applicant currently gets access to the issue between 3:00pm to 5:00pm on Sundays following an interim access order by the Court.

According to the SER, Applicant lives alone at Tabora in a single room self-contained apartment with basic amenities such as water, electricity, bathroom and a place of convenience. The house is gated and walled. She has a family member who lives close to her current residence who is willing to support her take care of the issue should she be granted custody. Applicant goes to work around 4:00pm and closes around 7:30pm. She is a Cashier for a National Lottery Agent at Alajo. Her boss indicated that he does not have a problem if Applicant brings the issue to work because when the child was about seven months old, Applicant used to take him along to work. The probation Officer confirmed that Applicant’s Office is very spacious, and the issue can have space to play.

Respondent is a military officer and lives alone in a chamber and hall self-contained facility with basic amenities at Nima, Accra about 150 metres away from his mother’s residence. The

house is a storey building and there are other tenants. The child in issue lives with Respondent's mother and three other grandchildren of hers.

Having considered the backgrounds of the parties, in whose custody will the best interest of the issue be ensured? The law prefers that a child lives with his parents except where his rights are persistently being abused by the parents (**see section 45(2)(b) of Act 560**). The parents in this case do not live together. So which of them is better placed to have custody of the issue bearing in mind, the best interest of the issue? **Section 45(1) of the Children's Act 1998 (Act 560)** emphasises the importance of a young child being with the mother when making an order for custody or access. The issue lived with both parties in the matrimonial home at Nima until the recent developments in September 2022 which led to he being placed in the care of Respondent's mother. Applicant did not have reasonable access to the issue and this led to the instant application on the 23rd day of September 2022. She now has visitation and vacation access following an interim order by this Court on the 2nd day of November, 2022 and 23rd November 2022 respectively. Respondent alleged that after their marriage, Applicant's attitude changed to his utter surprise, and she started exhibiting a drinking habit in May 2021 which affected her care and attention for the issue. That Applicant on several occasions went out and left the issue with him and returned late, drunk. That his mother who lives nearby assisted with the care of the issue.

Respondent's mother is also reported to have said that, she will never give the issue to Applicant because Applicant does not respect her. That she will only allow her weekend, holiday and vacation access to the issue. When it comes to rights and responsibilities to a child, that of biological parents take precedence over extended family so it does not lie in the mouth of Respondent's mother to decide the custody and access to the issue. The evidence also shows that Applicant and Respondent's mother are not in good terms so even when the issue had to be sent to her, Applicant left him with the landlord's son who runs a shop in the house for him to send the issue to Respondent's mother. So, leaving the issue with Respondent's mother will affect Applicant's unfettered access to her child as was happening before the matter came to Court.

It was stated in the case of **Happee v. Happee** supra, that not only does a parent have a right of access to a child but more importantly, the child to the parent. It was stated further that *“No court should deny a child of access to his parents unless there are strong reasons to the contrary.”* Again, in the case of **Braun v. Mallet [1975] 1GLR 81** Azu Crabbe C.J. emphasised the natural right of a mother of a young child to its custody as against a reputed father and strangers wherein he quoted the dictum of Lindsey L.J in **In Re McGrath (Infants) [1893] 1Ch. 143** at page 148 that *‘The affection of a mother for her child must be taken into account, and poverty per se was no reason for depriving a mother of custody when her character had in no way been impeached’*. Aside the misunderstandings between the parties herein which led to their separation, we have found no evidence on the record to impeach Applicant’s character when it comes to the care of the issue or that, the issue will be exposed to some form of risk or harm if placed in Applicant’s custody. Respondent’s allegation of Applicant taking to alcoholism and being drunk on several occasions to the extent that it affected her care and attention for the issues was not proven. He is reported to have stated during the social enquiry that he has seen Applicant on two occasions taking alcohol so he cannot entrust the care of the child to her. This is over the about 3 years period that they have known each other, and not that she was drunk. Also, the landlord’s son who manages a shop in the house denied ever seeing Applicant take alcohol although he confirmed quarrels between the parties and the fact that Applicant does not respect anyone in the house. It is not enough to make mere allegation as serious as drunkenness and not lead evidence in proof of same. In any case, his evidence during the social enquiry contradicted his averments in the Affidavit in opposition thus not credible. Respondent claims that Applicant cannot take care of the issue. Question is, who was taking care of the issue during the day until Applicant goes to work in the evening since the issue was not enrolled in school at the time? Respondent stated and is confirmed by the SER that Applicant took care of the child till about 4:00pm when she leaves for work then he Respondent will also take care of him till Applicant returned in the evening. It is the view of this tribunal that both parties executed their duty of care to the issue when they all lived together. It appears Applicant lost interest in the marriage when she realised Respondent

was having affairs with other ladies and was therefore not happy in the matrimonial home. This nevertheless did not affect her care and attention for her child in the view of this panel.

Just as Respondent's mother was helping the parties with the care for the issue as and when it was necessary, Applicant's cousin who lives near the new residence is willing to assist Applicant when necessary. Also, her employer with whom she has worked for about eight (8) years now is willing to allow her to bring the child to work just as she did when the issue was about seven (7) months old. The SER also confirmed that Applicant's office is spacious enough to accommodate the two-year-old boy.

It is provided under **Section 5 of Act 560** thus — **Right to Grow up with Parents.**

*“No person shall deny a child the right to live with his parents and family and grow up in a caring and peaceful environment unless **it is proved in court** that living with his parents would—*

(a) lead to significant harm to the child; or

(b) subject the child to serious abuse; or

(c) not be in the best interest of the child.” (emphasis supplied)

Whereas Applicant wants custody of the issue to take care of him, Respondent wants custody to be granted to his mother. It is obvious he will not be able to care for the issue himself. The parents of a child are his primary care givers. **In Aikins v. Aikins [1979] GLR 223, Sarkodee J.** (as he then was) opined that *‘I do not think I should give custody to a parent whose purpose is to deliver the children to another.’* He was of the view that depriving the three issues in that case of the love and attention of their mother would upset them emotionally. It was for similar reasons that this court granted the Applicant herein interim access to the issue pending the determination of this matter.

With the law as espoused above, this court is of the view that it will do little Benjamin Louis Nyarko more harm than good if we allow him to continue living under the care and custody of the maternal grandmother when the biological mother is willing and able to care for him.

There is no evidence to the effect that should the issue be placed in the custody of Applicant he will be subjected to serious abuse or significant harm such that will jeopardise the best interest of the issue.

Respondent contended further that he cannot give the issue to Applicant because he has been enrolled in school. In the considered view of this court, education is a basic right of a child but that is not the only ingredient needed for a child's holistic development and upbringing. In any case, the issue was not enrolled in school until September when he was placed in the care of Respondent's mother. At his tender age, he needs more of the tender love, care and affection of his parents and for that matter, the mother.

The court having heard the parties on their affidavits and having also considered the evidence on the record including the Social Enquiry Report and the legal authorities cited above, and in the exercise of its obligation **under section 2 of Act 560** to secure the best interest of the issue herein, holds that it will be in the best interest of the issue if he is placed in the care and custody of Applicant, the biological mother. We agree with Azu Crabbe CJ per his dictum in **Braun v. Mallet** (supra) and say *'In the circumstances,, it would be contrary to natural justice, equity and good conscience to deprive Applicant custody of her child and he should be returned to her forthwith.'* We have found no reason to deny Applicant and the issue this right and opportunity. Custody of little Benjamin Louis Nyarkoh is hereby granted to Applicant the biological mother with bi-weekly weekend and half of vacation period access to Respondent. Respondent shall go for the issue and return him to Applicant from 5pm on Fridays to 5pm on the Sunday following in the exercise of his right of access. Parties shall share equally, access to the issue on public holidays.

On the issue of maintenance and others, **section 47 of Act 560** makes the parents or any other person legally liable to maintain a child responsible for providing **necessaries of life, education, health, and reasonable shelter** for the child (emphasis supplied). This means that maintenance of a child is not only limited to 'chop money' but also extends to educational, medical, accommodation needs and all other necessaries of life. Being the parent with

custody of the issue, Applicant is entitled to receive maintenance support from Applicant as provided under **section 48 of Act 560**.

Applicant is claiming GHC1,500.00 as monthly maintenance for the issue. The evidence shows that Respondent used to maintain Applicant and the issue with GHC400.00 monthly and also provided them with groceries and diapers. Respondent added that whenever the money got finished, Applicant would request for more and he would give. Applicant is reported to be earning GHC1,000.00 monthly with a weekly transportation allowance of GHC150.00. She earns an additional GHC 500.00 to GHC1,500.00 per month working as a Beautician and Decorator. Respondent on the other hand is military officer stationed at Burma Camp, Accra. He earns about GHC3,000.00 monthly and an additional income of between GHC1,400.00 and GHC1,600 a month from an online business and by teaching cadet in some schools. Respondent contributed GHC5,000.00 to the rental of Applicant's current accommodation of GHC8,000.00 in September 2022. The issue is aged two years and is the parties' only child. There is no known impairment on the parties' earnings. Rather, an enhanced earning from other side business undertakings (see section 49 of Act 560). Having considered the cost of living in Accra and all the evidence on the record, it is hereby ordered that Respondent maintains the issue with Five Hundred Cedis (GHC500,00) monthly. This shall be paid into Court on the first day of each month for the month in issue effective January 2023. The parties shall identify a school of reasonable standard and cost near Applicant's residence and enrol the issue in at the beginning of the 2023 academic year. Respondent shall bear all educational expenses whilst Applicant takes care of school feeding and other necessities of life. On accommodation, both parties have a responsibility to provide adequate shelter for the child in issue. Since custody is with Applicant and both parties are gainfully employed, they shall be jointly responsible for the accommodation of the issue by sharing equally, the cost of accommodation for Applicant for the benefit of the issue. This shall apply to future rent reviews until Applicant remarries. The health needs of the issue not covered by the National Health Insurance Scheme (NHIS) and Respondent's employers medical package for their employees (that is the 37 Military Hospital) shall also be borne by Respondent whilst Applicant sees to the renewal of the NHIS subscription when it expires.

Applicant shall ensure that she takes the issue to the 37 Military Hospital for medical care except in cases of emergency. Parties are encouraged to relate cordially and communicate in good faith in the best interest of the child.

In summary, Custody of the issue is awarded to Applicant with bi-weekly weekend and half vacation access to Respondent. Respondent to maintain the issue with GHC500.00 on the first day of each month for the month in issue, effective, January 2022. Respondent to bear medical expenses not covered by NHIS and Respondent's employers (being 37 Military Hospital). The parties shall share equally, the cost of accommodation for Applicant for the benefit of the issue until Applicant re-marries. Parties to enrol the issue in school and Respondent shall bear all educational expenses whilst Applicant pays for school feeding fees and other necessities of life.

SGD.

H/H MATILDA RIBEIRO (MRS)

CIRCUIT COURT JUDGE