

2. An order for the grant of custody of Gloria Bempah aged sixteen (16) years and Favour Bempah aged fourteen (14) years to Applicant.
3. Any other reliefs the Court may deem fit.

Applicant's case as contained in the affidavit in support of her custody application is that in 2019, Respondent unlawfully took away their four children to live with him and has denied her access to them despite numerous attempts by her to visit and spend time with them. According to her, Respondent lives alone with the issues and he is mostly busy with church activities, so he does not have time to cater for the needs of the growing children. She alleged further that Respondent makes the issues work in his herbal clinic at the expense of their education. Applicant annexed Exhibits 1 and Exhibit 2 being a copy of a domestic violence complaint she lodged against Respondent with the Ghana Police Service in respect of the issues and a police report respectively in support of her case. She said she has acquired a comfortable place of abode to accommodate the issues and is gainfully employed. She therefore wants to be given legal custody of the issues so she can have full control over their affairs. She is of the view that, should the minors be left in the care of Respondent, it will have adverse effect on them both psychologically and emotionally. Wherefore she prayed the court to exercise its discretion in her favour.

Respondent on the other hand denied almost all the averments by Applicant in his Affidavit in Opposition filed on the 2nd day of November 2022. He denied denying Applicant access to the issues and that the issues went to live with him based on agreements between the parties. He said despite his work as a pastor, he makes time for the issues and supervises their schoolwork. That he has other pastors and professionals who help at the church and the herbal clinic respectively. According to him, the issues only help at the clinic when they are free. He asserted that the issues are very happy in his custody and therefore prayed the Court to dismiss the instant application by Applicant with costs. He also annexed Exhibit 'JB1' series being pictures of his church organization and some activities, Exhibit 'JB2' Series being the issues' school records, Exhibit 'JB3' being pictures of his clinic and some workers and Exhibit 'JB4' series being pictures of the issues in support of his case.

Applicant's prayer for a social enquiry report is a matter of course for this Court once custody is in issue. Applicant seeks for custody of the last two children (the issues herein) because the first two boys do not fall within the meaning of a child under **section 1 of the Children's Act** by virtue of their ages and Respondent is opposed to same. The main issue for determination therefore is whether Applicant is entitled to have custody of the two female issues. To effectively do this, the court has to consider all the circumstances and background of the parties and the issues in order to make a determination that will enhance the welfare and best interest of the issues (see **section 2 (2) of the Children's Act 1998 (Act 560)**). It was held in the case of **Attu v. Attu [1984-86] 2GLR 743** per Brobbey J (as he then was) that "*The principle that in determining whether to grant custody to an applicant or respondent the welfare of the child or children should be the fundamental or paramount consideration had been given statutory backing by Act 372, s 16 (2) which however provided that the welfare of the infant should be the "primary" consideration. Whether "primary" meant "paramount" or whether the two were used synonymously, both words connoted a situation which admitted of the existence of other factors to be considered in resolving issues of custody.*" Though Act 372 referred to in the dictum of Justice Brobbey supra is the old Courts Act, a similar provision can be found under section 2 of Act 560 which provides 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."*

So, whether primary or paramount, it connotes the existence of other factors. **Section 45(2) of Act 560** enumerates some factors to be considered by this Court in the determination of custody cases, but this is not exhaustive as it makes room for other relevant factors. A social enquiry was therefore ordered into the lives and background of the parties and the issues to assist the court determine the matter in the best interest of the issues.

According to the Social Enquiry Report (SER) submitted on the 25th day of November 2022, the parties have been separated for about fifteen (15) years now and there is no cordial relationship between them. They have four (4) children aged twenty (20), eighteen (18)

sixteen (16) and fifteen (15) years old. The first two are males and the last two, females. It is the last two children who are the subject matter of the instant Application. The first issue is in the Senior High School Form 1 (boarding) and the last, Junior High School Form 2 at the time of the social enquiry. Respondent left the matrimonial home about ten (10) years before the marriage was dissolved in 2017 due to some misunderstandings between the parties. Applicant lived with the issues until sometime January 2019 when they went into the custody of Respondent upon agreement between the parties. Applicant confirmed that before the issues went into the custody of Respondent, the parties agreed that she will have access to the issues on weekends and vacations, but Respondent has since failed on his part to allow her access to the issues as he stopped answering her calls. Applicant has not had reasonable access to the issues since they went into Respondent's custody but when they were with Applicant, Respondent used to have reasonable access. It is the considered view of the Court that Applicant would not have applied for custody of the issues if she had reasonable access to them because she in the first place agreed with Respondent for the children to live with him whilst she gets weekend access to them. Respondent's assertion that Applicant never requested for access to the issues is not tenable. Assuming indeed she did not request for same as he alleges, what prevented him from following up to ensure that she gets access to the issues as agreed between them? According to Applicant, he stopped answering her calls after the issues went into his custody. The Court knowing how important it is for parents and children to bond and seeing that Applicant and the issues have been denied this privilege for about four years, granted Applicant interim access to the issues pending the determination of the substantive matter.

Applicant lives alone in a three-bedroom house with basic amenities at East Legon Hills. The facility is walled and gated. She is a Cashier for a group of companies that is into assorted beverages and real estates. She leaves home for work at 8:00am and returns around 7:30pm. She said she earns about GHC4,000.00 monthly. Respondent on the other hand is a Pastor and also owns an Herbal Clinic. He said he earns an average of about GHC12,000.00 monthly. Both parties did not produce any evidence in support of their earnings.

It was reported that Respondent occupies a three-bedroom facility with basic amenities at Awoshie with his four children including the two in issue and a nephew. The house is gated and walled. He occupies one room, the nephew also occupies one room, and all four siblings occupy one room. The four siblings sleep on mattresses in the room though there are two (2) beds in the room occupied by Respondent's nephew. This Court finds this arrangement unhealthy considering the ages and sexes of the children. Respondent was therefore directed during proceedings to separate the boys from the girls.

It was also observed that the house Applicant occupies was given to her by her boss in April 2022 for free and it is one of those put up for sale by the company (Applicant's employers) so she may have to relocate should they get a buyer for that house or should she be out of the current employment. It was again observed that the domestic violence complaint by Applicant was lodged in May 2022, followed by the instant application in September 2022. Is it a mere coincidence that it was after she had this accommodation that she started taking steps to assert her rights to the issues? What if the said accommodation is no longer available for her? Why did she wait for so long before seeking redress? It is the considered view of this Court that the Applicant waited for too long for the issues to settle down and adjust to their current environment before taking steps to assert her rights and the delays may not inure in her favour at this time (see **In Re Dankwa [1961] GLR 352**).

There is also the need to ensure continuity in the care and control of the issues (see **section 45 (2) (e) of Act 560**). The Court deems it unnecessary and not in the best interest of the issues to remove them from the environment they have been accustomed to in the last four years. Also because, a change in custody is likely to lead to a change in the last issue's school considering the distance between East Legon Hills and Awoshie where her current school is. Especially when she is in JHS 2 (at the time of the enquiry in November 2022) with only a few months to write the Basic Education Certificate Examination (BECE). Any change in her custody at the moment is likely to affect her preparation for the BECE.

Applicant's allegations of abuse of the children by Respondent were also not proven. According to the children, respondent provides all their needs and that he does not make

them work for long hours such as would affect their studies. They said they sometimes help with the bottling and labelling of the herbal medicines. And that the last time they did so was in April 2022. All the children including the two in issue expressed their desire to share custody, holidays, weekends, vacation, and other reasonable access to the parties equally because they want to enjoy or receive love and care from both parents, so it does not appear as if they prefer one over the other. The views expressed by these children must be given credence by this Court considering their ages (see **sections 11 and 45(2) (c) of Act 560**). The probation Officer observed that the issues have become comfortable in Respondent's home over the period they have been with him so it may be difficult relocating them to a new environment. Moreso, when they have lived with their two brothers all their lives. **Section 45 (2) (d) of Act 560** states that *"it is desirable for siblings to live together."* It was also held in the case of **Opoku Owusu v. Opoku Owusu [1973] 2GLR 349-354** that, *"It is desirable to keep brothers and sisters together and not to split them up. A separation may disturb their progress and may affect them emotionally"* Also that, *"in such an application the paramount consideration is the welfare of the children. The Court's duty is to protect the children irrespective of the wishes of the parents"* This was a case where Applicant the father claimed custody of all four children whereas Respondent the mother, prayed for custody of the only girl aged about ten (10) years and the youngest child aged four years. The Court after considering all the circumstances of the parties and issues therein vis a vis the need to protect the issues, granted custody of all four children to Applicant the father.

Although 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"* (emphasis supplied), it must be noted here that the issues herein are not that young, and so that presumption will not inure to the benefit of Applicant.

This Court having considered the parties respective affidavits, the SER, the record of the parties' responses to enquiries made by the panel, the authorities cited above and the circumstances of the parties and the issues, orders that custody of the two issues Gloria Bempah and Favour Bempah shall remain with Respondent, their father. Being a non-custodial parent, Applicant shall have bi-weekly weekend and half vacation access to the two

issues. The parties shall also share access to the issues on public holidays and festivities equally (see **section 57 of Act 560**). As previously directed, Respondent shall ensure that the girls occupy a room separate from the boys in order to ensure some level of privacy for them considering their ages.

The evidence also shows that when all the children lived with Applicant, Respondent provided all their needs and has continued to do so since they came into his custody. He shall continue to do so. It is however only fair and reasonable that Applicant being a parent with responsibility towards the issues and being gainfully employed, supports with the maintenance and upkeep of the issues. She shall therefore support Respondent by providing the necessities of life for the issues as and when necessary to secure their best interest (see **section 47 of the Children's Act**).

It was also observed that both parties harbour some form of pain and resentment towards each other, and this is not healthy for the children. Parties are therefore advised to put the past behind them and pursue the welfare of the children through their joint efforts.

SGD.

H/H MATILDA RIBEIRO (MRS)
CIRCUIT COURT JUDGE