

IN THE FAMILY AND JUVENILE COURT B, FORMER COMMERCIAL COURT
BUILDING- ACCRA HELD ON THURSDAY, THE 2ND DAY OF MAY, 2023. BEFORE
HER HONOUR MRS. MATILDA RIBIERO, CIRCUIT COURT JUDGE, SITTING AS
AN ADDITIONAL MAGISTRATE WITH MADAM FELICIA COFIE AND MADAM
REGINA TAGOE AS PANEL MEMBERS

SUIT NO...A6/298/23

NATHAN ODAMETAY

GREEN ESTATE

.....

APPLICANT

KASOA

Versus

ESTHER INCOOM

.....

RESPONDENT

JOMA-ABLEKUMA

ACCRA

Applicant: Present

Respondent: Present

No legal representation for both parties.

JUDGMENT

The parties herein are the biological parents of the child in issue, OSWALD NII ABEKA ODAMETAY aged nine (9) years (hereinafter referred to as "the issue"). Applicant the father filed a Maintenance and Custody Application on the 16th day of January 2023 and prayed for:

1. Formal custody of the child with reasonable access to Respondent.

Applicant's case in support of his application before the Court is that at the age of seven, Respondent brought the issue to him but because his family lived in Takoradi, he sent him to his mother who was living in Takoradi with his younger siblings. That Respondent later travelled to Takoradi and nicodemously smuggled the child back to Accra without the knowledge of his parents. That this action by Respondent infuriated him so he was no longer involved in the life of the issue and Respondent until a social worker invited him and made him enroll the issue in school. He said he provides all the needs of the issue including his education and medical care as and when the need arises. According to him, the Respondent has remarried and has gone to live the issue with her mother who is not giving him the care as he would have done. He said that as the biological father, he wants to take responsibility for the upkeep and welfare of the issue and that his wife is ready and willing to take good care of the issue.

When Respondent appeared before the Court on the 31st day of January 2023, she indicated her opposition to Applicant's prayer for custody because Applicant does not have time for the issue. That Applicant is often out of town when she calls him. She said the issue is not the very strong type and falls sick easily. She admitted going for the child from Takoradi without notice to Applicant and his mother because she got to know that the issue was not in school for over a year that he was with her, so she went for him. She stated that Applicant has not been maintaining the issue adequately and that he has virtually left the maintenance of the issue on her. That Applicant only pays the issue's school fees. She ended by saying that if Respondent wants to take care of the child, then he should do so whilst the child is in her custody but if the only condition under which he will take care of the child is to have custody, then he should leave it, she will take care of the child as she has been doing all these years. She also stated in her response filed on the 14th day of April 2023 that she wants to care for the issue herself because of the issue's weak immune system, selective eating, bedwetting and constant change in school which affects his wellbeing. Respondent attached receipts of school fees allegedly paid by her to her response filed on the 14th day of April 2023. It was also captured in the Social

Enquiry report that Respondent would want Applicant to maintain the issue with GHC500.00 monthly, pay his school fees and cost of medical care.

The main issue for determination by the court based on the reliefs of the parties is, in which of the parties' custody will the best interest of the issue be ensured. After which we will consider other issues that are relevant to the welfare and best interest of the issue. In determining which of the parties is entitled to have custody of the child in issue, the law enjoins this Court to consider the best interest and welfare of the issues. **Section 2(2) of the Children's Act 1998 (Act 560)** 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"

This principle of law has been applied in cases like **Happee v Happee 1974 [2 GLR] 186, Attu v Attu [1984-86] 2 GLR 743, and Asem v. Asem [1969] CC 40, CA** by the courts in the determination of which of two parents should have custody of a child(ren) in issue.

How do we determine what is in the best interest of a child(ren)? **Section 45 of the Children's Act 1998 (Act 560)** which is the primary authority on the issue of child custody provides us with some guidelines. It states 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.

(2) Subject to subsection (1) a Family Tribunal shall also consider —

(a) the age of the child;

(b) that it is preferable for a child to be with his parents except if his rights are persistently being abused by his parents;

(c) the views of the child if the views have been independently given;

(d) that it is desirable to keep siblings together;

(e) the need for continuity in the care and control of the child; and

(f) any other matter that the Family Tribunal may consider relevant”(emphasis supplied)

Section 57 of Act 560 provides that “A non-custodian parent in respect of whom an application is made to a Family Tribunal for an order of parentage, custody, access or maintenance under this Part shall have access to the child who is the subject of the order”. It was also opined in the case of **Happee v. Happee [1974] 2 GLR 186** that “The idea of giving access to a parent in such matters seems to spring from the general notion that there is a basic right in a parent to the companionship of his child but I would prefer to call it a basic right in the child rather than in the parent. The significance of this is simply that no court should deprive a child of access to his parents unless there are strong reasons to the contrary”

On the 21st day of January 2023, an order was made for a Social Enquiry Report (SER) to assist the Court determine the matter in the best interest of the issues. This is because as held in the cases of **Braun v. Mallet [1975] 1GLR 81** and **Ansah v. Ansah [1982-83] GLR 1127**, the Court must consider all the circumstance of the parties and the issue herein, consider the facts from every angle, giving due weight to every relevant factor before determining the custody issue presented to the Court.

The Social Enquiry Report (SER) submitted on the 11th day of April 2023 reported that, the issue has been with Respondent from birth to date except for the period he went to live with Applicant and subsequently, Applicant’s mother in Takoradi. Applicant lives in his three-bedroom house at Kasoa with his wife whenever she is in Ghana or does not travel outside Kasoa in the Central Region. Whilst Respondent, her husband the issue and two of their children live in a rented chamber and hall self-contained facility at Ablekuma. Applicant’s wife is hardly at home because of the nature of her work. Respondent’s husband is ready and willing to support Respondent take care of the child as he has been doing.

Respondent sometime in 2012 reported a non-maintenance case against Applicant at DOVVSU and he was directed to enroll the issue in school and maintain him which he started doing but stopped along the way. Respondent sent the child to Applicant when he was about 6years old for Applicant to enroll him in school because he failed and or refused to support her enroll the issue in a school after she relocated with her current husband. Applicant then sent the issue to live with his mother in Takoradi and the issue did not attend school for the period that he was in Takoradi until Respondent went for him when he was about 7years old, brought him back to Accra and enrolled him in a school. The issue went to live with Respondent's mother from 2020 till 2022 when he returned back to Respondent because Applicant did not like the idea of, he staying with the maternal grandmother. Respondent started paying the issue's school fees when he was in class four to class six (6) but has not paid any fees for him this year. Respondent did not allow the issue to attend Applicant's wedding and his father's funeral because according to her, Applicant was not maintaining the issue. Applicant came to Court for custody because Respondent does not allow him reasonable access to the issue even after he had complained to Respondent's husband. In which of the parties' custody will the best interest of the issue be ensured based on the above findings of fact?

The issue is a male aged fourteen (14) years old so ordinarily, he should be able to stay with either parent. The SER however reported that he seems to have a medical condition which requires attention. The stepfather confirmed that the issue is the slow type. He stated that because the child is the slow type, it is only the biological mother who will have time for him. He therefore pleaded with the court to let the child remain with them whilst Applicant gets access and maintains him adequately. The mother, Respondent herein mentioned that the child has a weak immune system, bed wets, and is selective in his meals, he has a medical condition that makes him collapse at anytime and also eats frequently and that no stepmother would be able to tolerate this. Applicant's wife was not available to meet with the probation officer for interview.

Section 11 of Act 560 states that:

*“No person shall deprive a child capable of forming views the right to express an opinion, to be listened to and to participate in decisions which affect his well-being, the opinion of the **child being given due weight in accordance with the age and maturity of the child**” (emphasis supplied). **Section 45(2) (c) of Act 560** also provides that the court shall consider “the views of the child if the views have been independently given” when making an order for custody and access.*

This panel must therefore consider the views expressed by the adolescent boy in issue in the determination of this all-important matter affecting his life having given it due weight in accordance with his age. He is old enough to know what he wants and to some extent, what is best for him. He said he wants to remain in the custody of Respondent and visit Applicant during vacations because he does not want to change school again considering the effects that the frequent change in his school has had on his academics. He also confirmed not going to school when he was in Takoradi. The SER confirmed that the issue’s academic record is poor, and this could be attributed to the frequent changes in his school and he staying home for about a year without going to school.

It was opined by Azu Crabbe C.J. in the case of **Braun v. Mallet** that *“I think that other things being equal, it is far better to give the mother custody of young or sickly children or those who for some other reasons particularly need a mother’s care.”* (emphasis supplied). Following the dictum of Azu Crabbe C.J. in Braun v. Mallet, I say that “after considering all the evidence, I hold that Oswald needs the care and affection of his mother.

Though Respondent did not indicate any reliefs in her response filed on the 14th day of April 2023 she is reported to have stated during the social enquiry that she would want Applicant to maintain the issue with GHC500.00 monthly, pay the issue’s school fees and medical bills. The issue is Applicant’s only child, but Respondent has four other children. Applicant is into printing, he has a shop which he runs with his business partner and earns between GHC3,000.00 to GHC4,000.00 a month. Respondent is a hairdresser; her

shop is near her residence. She said she earns between GHC40.00 to GHC400.00 daily. Both parties could not produce any evidence in support of their earnings.

Section 2 of Act 560 empowers this court to make orders that are necessary to secure the welfare and best interest of the issue herein. It was also held in the case of **Opoku-Owusu v. Opoku Owusu [1973] 2 G.L.R. 349** that *“in an application for custody, the paramount consideration was the welfare of the children. The Court’s duty was to protect the children irrespective of the wishes of the parents”*. Also, in **Ofori v. Ofori [1981] GLR 745** it was held that *“The Court had power either on its own initiative or on application of either party, to make in respect of any child, any order which it thought reasonable and for the benefits of the child. The custody order might be awarded to any person, regulate the right of access of any person to the child and provide for the education and maintenance of the child out of the property or income of either or both.”*

Accordingly, this court upon considering the law on child custody and access as discussed above, the evidence on the record, the social enquiry report which provided a detailed report on the circumstances of the parties and the issue herein and having most importantly considered the welfare and best interest of the issue herein enters judgment as follows:

Custody: Custody of the issue herein Oswald Odametey shall remain with Respondent his biological mother. The Court is of the considered view that it is necessary to ensure continuity in the care and control of the issue (see **section 45(2)(e) of Act 560 and the cases of In Re Dankwa [1961] 1GLR 352 and Ofori v. Ofori [1981] GLR 745**). The issue herein has at all material times, been under the care and custody of Respondent and her husband. Also, considering his peculiar circumstances and the alleged medical condition, this panel is of the considered view that his interest will be better secured in the custody of Respondent the mother. A grant of custody to Applicant will mean another change in school of the child who is currently in JHS 1 and the court is again of the considered view

that this may have a negative impact on his already poor academics. For which reason he must continue to live with his mother and continue his education in the current school.

Access: Applicant being the biological father of the issue is entitled to have reasonable access to him in accordance with **sections 57 and 44 of Act 560**. Considering the distance between the parties' residences and the stage of the issue's school, it is hereby ordered that Applicant shall have access to the issue for half of his vacation periods. He may also visit him as and when necessary, upon notice to Respondent. Parties shall also share access to the issue on public holidays equally.

Education and Maintenance: Applicant shall maintain the issue with GHC400.00 monthly to support Respondent with the upkeep of the issue (effective April 2023). Because of the location of the parties and for convenience sake, the monthly maintenance, shall be paid through mobile money directly from Applicant's mobile money account to that of Respondent for record purposes. Applicant shall continue to be responsible for the issue's school fees and the cost of books. He shall pay it directly to the school. Respondent shall take care of other educational needs of the issue. Applicant shall reimburse Respondent with the issues school fees paid for this year (that is his JHS 1 fees paid by Respondent).

Medical Care: Applicant shall bear the cost of medical care for the issue not covered by the National Health Insurance Scheme (NHIS) whilst Respondent takes care of the renewal of the subscription whenever it expires.

SGD.

**H/H MRS. MATILDA RIBEIRO
CIRCUIT COURT JUDGE**