

IN THE FAMILY AND JUVENILE COURT 'C' AT THE FORMER
COMMERCIAL COURT BUILDING, ACCRA HELD ON WEDNESDAY THE
26TH DAY OF APRIL 2023 BEFORE HER HONOUR HALIMAH EL-ALAWA
ABDUL-BAASIT SITTING AS AN ADDITIONAL MAGISTRATE WITH
~~MADAM FELICIA COFIE AND MR. WISDOM ATIASE AS PANEL~~

MEMBERS.

SUIT NO. A6/337/2023

1. ISAAC OSEI

2. MRS. MARIAN FOFO OSEI

H/N 56 NORTH LABONE, CANTOMENTS
ACCRA

APPLICANTS

VS.

1. AMOOWA GYEMA EKYI

2. AUGUSTINE KAINYAH

H/N MP1, DR. KWAME NKRUMAH STREET
AMPAIN, WESTERN REGION

RESPONDENTS

2nd Applicant present

Defendants absent

Florence ... Esq. for the Applicants.

RULING

This is a Ruling on an Application by the Applicants herein filed on 3rd February
2023 for the Custody of the children in issue.

Applicants' Case

In their Affidavit in support, the Applicants deposed they are residents and domiciled in Ghana and are Husband and wife. They deposed they have their own biological children but love to provide care and support for children and that the children namely Mina Zoe Osei and Prince Charles Osei were into their care and possession in the year 2013 through Sister Monica Akumah and have been continuously in their care and possession till date. They deposed the children are female and male and were born on 8th day of September, 2006 and 10th of May 2010 respectively. They further deposed that, neither of them has made previous application for custody order in respect of the children and have not received any reward or payment for or in consideration of the custody of the children or for giving consent to the making of the custody order. They deposed the head of family of the children has given his consent to the making of a custody order in pursuance of their Application. They deposed that, they pray the court to dispense with the consent of the 1st Respondent on the ground that she is mentally unstable and that the biological mother of the children (1st Respondent herein) is not in the position to take care of the children. They deposed the biological father of the children is deceased and that the children being resident in Accra is a good reason for the Honourable court to assume jurisdiction over the case. They prayed that the Honourable court grants them legal custody in the best interest of the children.

Respondents' Case

The 2nd Respondent on the 15th of February 2023 filed her Affidavit of consent and deposed that she is the head of family of Amoowa Gyema Ekyi and a blood sister of the 1st Respondent. She deposed that her late mother, Mary Keleba Gyema Ekyi entrusted the care of Mina Zoe Osei and Prince Charles Osei being

the biological children of the 1st Respondent to the Applicants in the year 2013 through Sis Monica Akumah. She deposed that the children have been in their care and possession till date. She further deposed that the 1st Respondent is incapable of caring for the children since she is mentally unstable and that it will be in the best interest of the children if Applicants are granted custody of the children since the Applicants are in a better position to take care of them and have been doing so since the year 2013. She deposed that Applicants have their own biological children but love to care and provide care and support for children and that the Applicants have the family's blessings to apply for legal custody of the children. She deposed she have not received or given any reward or payment for, or in consideration of the custody of the children or for giving consent to the making of the custody order in favour of the Applicants. She deposed the children are residing with the Applicants in Accra so in the interest of the children the family has resolved that the Application be made in Accra.

DETERMINATION

In view of the processes before the court, the main issue for determination is whether custody of the children should remain with the Applicants. 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) of Act 560 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 parties and as such ordered for a Social Enquiry Report (SER).

THE SOCIAL ENQUIRY REPORT (SER)

The SER was prepared by Madam Nahaja Mumuni, a Social Worker in the Western Region and the information of the Report was obtained from interviews with the 1st Respondent and Four (4) of her relatives and a summary of the Report indicates that the 1st Respondent is indeed the biological mother of the children who has Five (5) Children in total. The 1st Respondent is currently unemployed and is living in Cote D'Ivoire with Three (3) of her children but depends on her elder sister who is a herbalist. The SER gathered that the 1st Respondent has consented to the Applicants having custody of the children but the Social Worker stated that although the family alleges that she is suffering from a mental illness, she looks and speaks well with the exception of probably being a drunkard, but she is recovering from that state. The conclusion of the SER was to the effect that relatives of the 1st Respondent have agreed and support the fact that the Applicants taking care of the children but vehemently resisted adoption of the children and insisted that the children be allowed to visit the family to ensure bonding.

A second SER was prepared in Accra by the Probation Officer attached to this court, and made her findings known to the court. It was revealed that the Applicants are a couple and have Four (4) biological children who are married and gainfully employed. The first Respondent is the biological mother of the children who is in Cote D'voire currently and is unemployed while the second Respondent is the maternal uncle of the children. The SER revealed further that the children have been staying with the Applicants since 2013 after they were rescued by one Sister Monica, a Catholic Nun who was formally residing in Nzema hospital and was engaging in Community Welfare Services and observed that the children were in need of care and protection. The Probation Officer

indicated that it appears the children have no relatives in Nzema to even pay visit to because their mother is living currently in Cote D'voire, their grandmother has died and their uncle also lives with his family in another town doing his Ministry work. It appears the children are not familiar with the other family members of their biological mother in Nzema. Although the children were enrolled in a school since 2013, they are not academically good but the first child is a member of girls' guild at Morning Star School and she has been registered by the Applicants to attend a program in South Korea in August 2023. The Probation Office further observed and concluded that the Applicants genuinely love and care for these children to the extent that they appear to be already serving the best interest of the children.

Analysis

In custody cases, there is no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness. 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 the instant case, the Applicants are not the biological parents of the children but have been responsible for the upkeep and maintenance of the children for the past Ten (10) years. The Applicants can therefore apply for custody of these children as Section 43 of Act 560 provides that ‘... *parent, family member or any person who is raising a child may apply to a Family Tribunal for custody of the child...*’ The evidence on record has shown that the Applicants have demonstrated that they seek the best interest of the children. The only hindrance in this case is that it appears the Applicants have cut the children off their roots to the extent that the children have no recollection of who their biological mother is nor their extended family. Similarly, the Applicants have proceeded to change the children’s name without legal justification and consent of the natural parents of the children. Changing the children’s name in the manner in which they have done have to a large extent changed the identity of the children completely and it becomes extremely difficult to link the children to their biological parents and/or their extended family. **Section 4 of Act 560** is on the **Right to Name and Nationality**, and provides that ‘...*no person shall deprive a child of the right from birth to a name, the right to acquire a nationality or the right as far as possible to know his natural parents and extended family...*’ Indeed, the evidence adduced before this court and as particularly incorporated in the SER shows that the 2nd Respondent as well as the other extended family relations are unhappy with the manner in which the Applicants are raising the children. There appears to have been some miscommunications of the true intentions of the Applicants as the family relations of the Respondents think otherwise and the Applicants never took steps to correct that notion prior to the instant Application for Custody.

Similarly, it is important to state that the Applicants in their Affidavit in Support prayed deposed to the fact that the 2nd Respondent was mentally unstable and as such her presence and views should be dispensed with. The evidence on record as well as off record is however to the contrary as the court is satisfied that 2nd Respondent is mentally sound, has no history or medical history of any psychiatric condition. It was however gathered that at a point in time, it appears the 2nd Respondent suffered from alcoholic psychosis. As such, the views of the 2nd Respondent cannot be dispensed with so that when some members of the Panel, although not properly constituted, had the opportunity to speak to the 2nd Respondent off the record, she showed no signs of mental incapacity. The 2nd Respondent was very much in favour of the Applicants having custody of the children but prayed for reasonable access.

Act 560 provides that no parent shall deprive a child his welfare and every child has the right to life, dignity, respect, leisure, liberty, health, education and shelter from his parents. Similarly, every parent has rights and responsibilities whether imposed by law or otherwise towards his child which include the duty to protect the child from neglect, discrimination, violence, abuse, exposure to physical and moral hazards and oppression; as well as provide good guidance, care, assistance and maintenance for the child and assurance of the child's survival and development. (**See Section 6 of Act 560**). It is however evidently clear that the biological parents especially the biological mother of the children is unable to meet up with her duties as a parent. The Applicants, on the other hand, have proved by clear and convincing evidence that the children's best interest are substantially and significantly served. Instances such as providing the children with food, shelter and clothing; enrolling them in some of the best, decent and expensive schools, having them psychologically assessed, preparing to send the

first child outside the country for a Girl's Guide program are enough to show that the Applicants have the best interest of the children at heart.

Additionally, it is important to note that the Probation Officer, who at best, is an Independent Investigator who 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 children will be served if custody of the children is granted to the Applicants with reasonable access to the Respondent and the court finds it extremely difficult to depart from the recommendations of the Probation Officer. However, in this particular instance, since the Applicants are more or else third parties in the lives of the children, the court will have to balance the natural parent's right to parenting time and the child's physical and emotional well-being.

DECISION:

Upon consideration of the Application, the evidence before the Court, the Social Enquiry Report and pursuant to the provisions of the Children's Act (1998) Act 560, the Court grants this instant Applicant in the best interest of the child orders as follows;

1. The Applicants shall have custody of the children and Registrar shall draft the necessary Orders.
2. The 2nd Respondent shall have reasonable access to the children as follows;
 - (i) The children must visit the 2nd Respondent during long school vacations and the children must be transported to their hometown to enable them associate with members of their extended family.

- (ii) She is at liberty to visit the children at any time she deems fit but must notify and inform the Applicants who shall not unreasonably withhold consent.
3. The Applicants shall discuss with the Respondents and their extended family members, specifically the 1st Respondent on how the children are to be known and called. The parties shall then take steps to ensure that the Birth Certificates of the children reflect the names agreed to by the 2nd Respondent.

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

I AGREE

I AGREE

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MADAM FELICIA COFFIE
PANEL MEMBER

.....
MR. WISDOM ATIASE
PANEL MEMBER