

IN THE FAMILY AND JUVENILE COURT B, FORMER COMMERCIAL COURT BUILDING - ACCRA HELD ON THURSDAY THE 20<sup>TH</sup> DAY OF JULY, 2023, BEFORE HER WORSHIP MAAME YAA A. KUSI-MENSAH ESQ. MAGISTRATE, SITTING WITH MADAM FELICIA COFIE AND MR. JOSEPH ATTIGAH AS PANEL MEMBERS

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SUIT NO.:A6/345/2023

MICHAEL ARYEE AYITEY - PLAINTIFF  
DEVTRACO  
ACCRA

VRS.

VIDA KLU - DEFENDANT  
OYARIFA  
ACCRA

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Plaintiff: present

Defendant: present

Freeman Kwame Ndur Esq for Defendant : present

No legal representation for Plaintiff

## JUDGMENT

### BACKGROUND

Plaintiff is the biological father of the child in issue, namely; Child R (female aged 7 years) while Defendant is the maternal aunt of the issue. The record shows that Plaintiff per Plaintiff's application shows that he lives at Devtraco, Accra whilst Defendant lives at Oyarifa also a suburb of Accra.

The undisputed facts of this case are that Child R was born to Plaintiff and his wife during the subsistence of their marriage, however Plaintiff's wife passed away while Child R was still a baby and subsequently Defendant took up care

of the issue from her infancy until this present time. It is also an undisputed fact that in addition to Child R, Plaintiff had two other girls (aged 18 years and 13 years) with his deceased wife, and Plaintiff has custody of the 13-year-old girl while the older child has moved to join Defendant herein. Furthermore, Plaintiff has a fifteen-year-old son and a ten month old daughter from a previous relationship in addition.

On 9<sup>th</sup> February, 2022, Plaintiff invoked the jurisdiction of this Court by mounting a maintenance and custody application under Order 32 rule 2 of the District Court Rules, 2009 (C.I 59). In his application, the only two reliefs stated by Plaintiff were:

1. Custody of Child R.
2. Any other Order(s) the Court deems fit.

In her response filed on 2<sup>nd</sup> March, 2023, Defendant objected to the grant of Applicant's reliefs, and prayed that "*the Plaintiff's application for Maintenance and Custody be dismissed*".

After an unsuccessful attempt at amicable resolution at Court-connected ADR, the matter was referred back to this Court for determination.

### **PLAINTIFF'S CASE**

The Plaintiff's case is that Child R was born to himself and his late wife, who passed on shortly after giving birth. According to Plaintiff, due to the tender age of the issue when his wife died, Defendant suggested that since the nanny who was taking care of the issue at the time was not related to the family, she (Defendant) would like to help take care of the infant.

Plaintiff stated that he agreed to this request with the view that when he felt that he needed her then he would take Child R back and continue caring for her himself. He also indicated that he enrolled the issue in nursery when she reached school-going age and then moved her to Morning Star Preparatory school at Cantonments to join her older sister (Plaintiff's second child) to continue her education. Plaintiff added that he has been responsible for the school fees, maintenance and anything related to Child R's upbringing all this while.

Plaintiff goes on to state that shortly before he instituted this action, Defendant's husband informed him that he would be relocating as he had been transferred. He then avers that in light of this change he informed them that would be coming for Child R before they left for their new station, however Defendant refused his request and left with the child to the new station at Oyarifa. Plaintiff stated that the original plan was for the child to be with him during the weekdays because of her schooling and then spend weekends with Defendant after which Plaintiff would pick Child R up to return her to him for school on Monday. He also added that about two years prior to this new development he made an earlier demand for Child R, however Defendant made up a lot of stories so he decided to let it go and let the matter rest for the time being. Plaintiff further states that he later received a letter from Child R's school informing him that she had been absent from school for about three weeks and therefore enquired from his second child (i.e. Child R's older sister) who also confirmed that her little sister had not been coming to school. Plaintiff lamented the fact that Defendant withdrew his child from her school without his consent even though he had paid fees for her at the school at almost Five Thousand Ghana Cedis (GHC 5,000.00).

He concluded that since December 2022 he had not seen Child R and affirmed that all efforts he made to obtain custody so Child R could continue her schooling had proven futile hence his presence in Court.

## DEFENDANT'S CASE

Defendant is opposed to the reliefs being sought by Plaintiff and outlines her case in her affidavit filed on 2<sup>nd</sup> March, 2023. Plaintiff states that she is the cousin of Plaintiff's late wife. She alleges that prior to her cousin's death, she was the one taking care of her while she was on admission at the La General Hospital. She adds that she was with Plaintiff's wife at the hospital on the day she passed and thereafter called Plaintiff to immediately inform him of the passing away of his wife. According to her, it was Plaintiff who brought Child R to her and her husband the day after the demise of her late cousin (i.e. Plaintiff's wife) and Defendant has catered for the child since then. Defendant also stated that she together with Plaintiff undertook the joint responsibility of taking care of and maintaining the child in issue and they both enrolled her in school when she was of school-going age.

In regards to the transfer, Defendant avers that she and her husband informed Plaintiff of the incoming transfer and therefore indicated to Plaintiff the need to change Child R's school because of the distance from the school to their new station. She stated further that Plaintiff in response told them that he needed time to think about it but they did not hear from him again concerning the matter.

Defendant goes on to allege that Plaintiff has a short temper and is verbally and physically abusive of his other two daughters. She indicates that Plaintiff threw the oldest daughter out of the house after he physically assaulted her and the oldest child has been staying with her and her husband since being driven out by Plaintiff. She affirms that Child R has been staying with her for the past six years while the oldest daughter has been staying with her for about a year now.

Defendant goes on to deny that there was any plan or agreement for the child to be with Plaintiff during the weekdays because of her schooling and then

come to spend weekends with Defendant. She adds that Plaintiff has not remarried and there is therefore no woman or female living with him who can help cater for the young child in issue. She admits that Plaintiff was at a point in time cohabiting with a lady but indicates that the lady is no longer staying with him.

Defendant also avers that Child R completed the 2022 academic year at her previous school before enrolling her in her current school and added that Plaintiff was aware that Child R had been withdrawn from her previous school and enrolled in her current school. She declared that she had never prevented or denied Plaintiff access to Child R and he visits and sees her anytime he desires. She further added that Plaintiff even brought the second child to her house at Oyarifa to spend the Christmas with her two siblings who are with her.

Defendant stressed that Child R had been raised by her from a very tender age and had been well catered for in a good and peaceful environment by her husband and herself. She affirmed that the best interest and welfare of the child is in her custody and care and prayed that Child R continues to stay with her with reasonable access to Plaintiff. Ultimately, Defendant's prayer was that the application be dismissed.

## **ISSUES**

**Custody**: The main issue of contention is the custody of Child R. Once that is out of the way, the court will then consider other ancillary issues like access, monthly maintenance and any other supplementary issues.

In all matters concerning children, the best interest of the child is to be the primary consideration as mandated by **section 2** of the **Children's Act, 1998 (Act 560)**. This Court therefore has to determine in which of the parties' custody will the best interest of the issue be ensured? To assist the Court in this

determination, a social enquiry report (SER) was ordered on 30<sup>th</sup> March, 2023 to investigate the background and home conditions of both parties. The SER stated that the parties herein, the mother of Plaintiff's children from a previous relationship, Defendant's husband, the older children of Plaintiff, the current and former class teachers of Child R, Child R herself, and the former house help of Plaintiff were all interviewed.

From the SER, affidavits filed, and enquiries made by this Court, the Court found the following as fact: that Plaintiff is a businessman who is into estate development. He leaves home for work between 9 and 10 am and returns between 3-6 pm. He lives at Teshie Agblezaah and occupies three apartments (each apartment has a room, hall, kitchen, toilet and bath facilities) within an eighteen-bedroom apartment building which is still under construction. The building is walled and gated and has basic amenities such as water and electricity. Currently, Plaintiff lives with his second daughter from his marriage and his fifteen-year-old son from a previous relationship. It was also found that the mother of Plaintiff's fifteen-year-old son also has a ten-month-old daughter for Plaintiff.

Defendant on the other hand lives in a four-bedroom house fitted with basic amenities at Oyarifa near Adenta. Defendant lives with her husband, the first daughter of Plaintiff and the child in issue and also has two adult sons aged thirty-one and twenty-two who sometimes visit. She is a hairdresser at Medie near Nsawam and leaves home to work at 7 am and returns between 4 and 7 pm. She however does not go to work every day because she has a worker who works at the shop in her absence.

It is an incontrovertible fact that the law gives priority to parents when it comes to custody. The general position of the law is that a child ought to be placed in the care and custody of their biological parents who are presumed to have a natural disposition to provide and take care of their children. The exception to

this is where the child's rights are persistently being abused by the parents or the parents have effectively surrendered their natural rights and responsibilities in accordance with law (see **Article 28 of the 1992 Constitution** and **section 45(2)(b) of the Children's Act, 1998 (Act 560)**).

The above notwithstanding, the wording of **section 43** of the Children's Act, 1998 shows that another person can go to court and ask for custody. Per **section 43**, "*A parent, family member or a person who is raising a child may apply to a family tribunal for custody of the child*" (emphasis mine). That third person who wants custody must however show that the award of custody to them is in the best interests of the child for which reason the Court ought to override the natural right of a parent to custody. This is not an easy thing to do because as indicated previously, the presumption is that it is the parent who is often in the best position to ensure the well-being of their own children.

It is evident from the facts and evidence presented before this Court that Plaintiff is a person of stable and robust financial means. It was stated by Plaintiff and admitted to by Defendant that he adequately provided for all his children and this Court believes same to be true looking amongst other things at the schools the children are attending. It is also clear that although Defendant is not of the same financial means as Plaintiff, she is comfortable and makes a decent living.

It is also well established from the facts and evidence that Child R has lived with Defendant for the greater part of her young life but has regularly visited Plaintiff and her other siblings. It is evident that Child R identifies Defendant as her mother. When interviewed by the panel Child R was asked if she knew her dad and she stated that she has two fathers; Michael (i.e. Plaintiff) and Rev. Seth (i.e. Defendant's husband). From all indications she is a well-adjusted and happy child and was confirmed by neutral third parties (the current and former class teachers) to be doing well in terms of outward appearance, regularity at school and academic performance.

A matter of grave concern to this Court is the allegations of abuse raised by Defendant in her affidavit (see paragraphs 21 and 22). The SER reveals that Plaintiff may indeed have a problem with the control of his temper. From the interviews conducted, all parties to a large extent indicated that Plaintiff often let his anger get the better of him and resorted to beating the children excessively in exercising his parental right of discipline. Plaintiff himself admitted to an incident where he beat his son from another relationship to the point where the son developed a cut on his palm which had to be sutured. Furthermore, from the SER as well as the interviews conducted by the panel the impression formed by the Court is that although the children are very well-provided for financially by Plaintiff, his approach in taking care of their emotional and psychological well-being is sorely lacking. It is difficult to say whether this is simply a matter of a poor parenting style/ approach or is one of graver concern perhaps bordering on some mental health issues of the Plaintiff for which reason the Court should make some recommendations in terms of counseling or evaluation. The Court will however refrain from making any recommendations since in the absence of a certified medical report, it is unable to make a pronouncement on this.

The Court is however also mindful of **Section 45** of Act 560 which outlines the considerations a court must bear in mind when determining an application for custody or access. The said section states:

- (1) *“A family tribunal shall consider the best interest of the child and the importance of a young child being with the mother when making an order for custody or access.*
  
- (2) *In addition to subsection (1), a family tribunal shall consider*
  - (a) *the age of the child,*



- (b) *that it is preferable for a child to be with the parents except where the rights of the child are persistently being abused by the 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 mine)

Keeping in mind the above-mentioned considerations, and given all the relevant circumstances herein, including the wishes expressed by the child in issue and the views and observations stated by the other children, this Court is of the view that this is an instance where custody should be given to a person other than the parent. In this regard, custody of Child R is hereby granted to Defendant. Uprooting Child R from the environment she has been accustomed to for most part of her life will not be in her best interest particularly where from all indications Child R has grown up in a good and stable environment and there are no allegations to impeach Defendant.

Although custody has been awarded to Defendant, this Court will state emphatically that any and all legal and important decisions concerning the Child should be jointly decided by parties.

**Access:** On access, it was stated in the case of **Happee vs. Happee** [1974] 2 GLR 186 that: *"No court should deny a child of access to his parents unless there are strong reasons to the contrary."* The court in **Happee vs. Happee** (supra) further noted emphatically that not only does a parent have a right of access to a child but more importantly, it is the basic right of the child to have access to their parent. Thus, access to Child R is to be granted to Plaintiff in the following manner: Plaintiff shall have bi-weekly weekend access to the issue (i.e. from Friday after school to 5pm on Sunday) plus half of her school vacation periods is to be spent

in the home of Plaintiff to enable her continue to bond and spend time together with her father.

**Maintenance:** As already stated, the Court has had to consider all the circumstances of the case to make a determination based on what will inure to the benefit or best interest of the child. More particularly, **section 47 of Act 560** makes the parents or any other person legally liable to maintain a child responsible for providing necessities of life, education, health and reasonable shelter for the child. **Section 49 of Act 560** further outlines the considerations a court must bear in mind when making these maintenance orders. These include, inter alia, a) the income and wealth of both parents of the child or of the person legally liable to maintain the child; b) the financial responsibility of that person with respect to the maintenance of other children; and c) any other matter which the family tribunal considers relevant.

Based therefore on the facts and evidence before the Court, the Court is of the view that a maintenance of Two Thousand Ghana Cedis (GHC 2000) a month should be remitted by Plaintiff to Defendant. In coming to this amount, the Tribunal took into consideration the age of the child in issue, the rising costs of living in Accra, the current income and earning capacity of the parties, the pattern of life set up for the child by the parties, the fact that Plaintiff until this action had already been maintaining the child with One Thousand, πFive Hundred Ghana Cedis (GHC 1,500), and the fact that Respondent has three other children to take care of, the oldest of which is also currently living with Defendant and is in attendance at the University of Ghana. The monthly maintenance stated is subject to periodic review upon application in line with section 55 of Act 560. The maintenance of GHC 2,000.00 should be paid directly from Plaintiff's mobile money or bank account to that of Defendant's, or into court by the 5<sup>th</sup> of each month effective from August, 2023. Defendant shall provide all other necessities of life of the issue.

Accommodation did not seem to be in contention as Defendant did not express any dissatisfaction with her living arrangements nor was there any indication of inadequacy of same. The Court will therefore not make any determination on a contribution by Plaintiff to the accommodation needs of the child.

**Education:** The facts and evidence show that Plaintiff bears the primary responsibility of the educational expenses of the child in issue. The Court will therefore hold that Plaintiff is to be responsible for the educational expenses of Child R by way of school fees and extra classes where necessary, while Defendant shall be responsible for all other expenses including the issue's daily school feeding fee, uniforms, transportation to and from school, text books, exercise books and other stationery in line with the principle of joint parental responsibility.

**Medicals:** In line with section 2(2) of Act 560, it is hereby ordered that the cost of medical care for the issue not covered by the National Health Insurance Scheme (NHIS) shall be shared equally between the parties. Defendant shall see to the renewal of the NHIS subscription when it expires.

### **CONCLUSION**

The parties are to note that the above orders affecting the child are subject to variations depending on a change in circumstances at any point in time in order to secure the best interest of the child in issue. They are both advised to cooperate with each other and prioritize the welfare and best interest of not only Child R which this application concerns but also that of all the other the issues at all times.

There will be no order as to costs.

**MAAME YAA A. KUSI-MENSAH ESQ (MS.)**

**(Presiding District Magistrate)**

**MR. JOSEPH ATTIGAH**

**(Panel Member)**

**MADAM FELICIA COFIE**

**(Panel Member)**