

IN THE CIRCUIT COURT "A", TEMA, HELD ON FRIDAY THE 12TH DAY
OF MAY, 2023 BEFORE HER HONOUR AGNES OPOKU-BARNIEH,
CIRCUIT COURT JUDGE

SUIT NO.C11/72/23

IN THE MATTER OF THE CHILDREN'S ACT 1998, ACT 560,
IN THE MATTER OF SECTION 43 OF THE CHILDREN'S ACT, 1998,
(ACT 560)

AND

IN THE MATTER OF AN APPLICATION FOR THE SOLE CUSTODY OF
LETITIA ANSAH SAGU

JANET BOATENG - APPLICANT
Unnumbered House
GN-1025-6619
Afienva-Mateheko
Tema Akosombo Rd.

VRS:

MICHAEL ANSAH SAGU - RESPONDENT
Unknown Address
Tabora, Lapaz
Accra (Applicant to Direct Service)

APPLICANT PRESENT

RESPONDENT ABSENT

CHARLOTTE MENSAH, ESQ. HOLDING THE BRIEF OF RALPH POKU-
ADUSEI, ESQ. FOR THE APPLICANT PRESENT

JUDGMENT

FACTS:

On 22nd November, 2022, the Applicant, claiming to be the biological mother of the child, the subject matter of the instant application named Letitia Ansah Sagu, aged twelve(12) years, filed the instant Originating Motion on Notice pursuant to **Section 43** of the Children's Act, 1998 (Act 560), praying this court for an order granting custody of the child, Letitia Ansah Sagu aged 12 years and a further order to restrain the respondent from having access to the child until his mental state is determined.

The applicant, in the affidavit in support of the motion deposed that she is the biological mother of the child in issue and she is an Assistant Manager at Comet Ghana Limited, Tema and lives at Tema. The applicant deposed that the respondent holds himself out as a driver and claims to reside at Lapaz. According to the applicant, in June 2002, she and the respondent got married under Customary Law and the marriage was blessed with one child who is the subject matter of the instant application. The applicant further deposed that the said marriage was dissolved according to custom in April, 2017 and at the time of the dissolution of the marriage, the child was Seven (7) years old. The applicant further states that since the dissolution of their marriage, she has had the care and custody of the child due to her tender age and sex and has been fully responsible for her upkeep. However, the respondent has failed to maintain the child and refused to cater for her educational and medical expenses. The applicant further avers that she has remarried and has one child with her current husband who supports her in maintaining the child in issue and they have lived as one peaceful family since her remarriage.

The applicant further deposes that what has necessitated the instant application is the erratic behaviour of the respondent. According to her, the

respondent, without any provocation has been violent towards her and her new family. On countless occasions, she alleges, the respondent attempted to cause harm to the child, herself and other members of her household anytime he had the opportunity to have access to the child, a situation which caused her to report the respondent at the police station. Additionally, the respondent extended his acts of violence to the school of the child when he attempted to forcefully remove the child from the school. The applicant contends that the behaviour of the respondent puts the well-being of the child and her life in jeopardy. The respondent has also evinced an intention to take the child to his place of abode which is unknown to her. The applicant further deposes that attempts to amicably resolve the issue with the respondent have proved futile. According to her, she is in a better position to have custody of the child since she is gainfully employed and has adequate resources to cater for the child and the behaviour of the respondent exposes the child to danger and having regard to the age and sex of the child, she is better placed to have custody of the child.

Furthermore, the applicant alleges that the respondent has exhibited severe signs of mental instability which seem to suggest that he may be mentally impaired and for that reason, she prays the court to make a consequential order restraining respondent's access to the child until he is subjected to mental evaluation.

The application was duly served on the respondent but he failed to appear to participate in the proceedings.

LEGAL ISSUE

The issue for the consideration of the court is whether the applicant is entitled to the grant of custody of the only issue between the parties.

ANALYSIS

Section 43 of the Children Act, 1996(Act 560) provides that *“a parent, family member or a person who is raising a child may apply to a family tribunal for custody of the child.”* Although **section 43** makes reference to the family tribunal, **section 42 1(a)(iv)** of the Court’s Act, 1993(Act 459), confers jurisdiction on the Circuit Courts, to make orders regarding custody of infants. It is in the spirit of this provision that the applicant has filed the instant Originating Motion on Notice.

The primary consideration in the grant of custody whether as an ancillary relief in a matrimonial cause or out of wedlock is the welfare of the child as stated in **Section 2** of the Children’s (Act 560). Under **Section 45(1)**, a family tribunal shall consider the best interests of the child, and the importance of a young child being with the mother when making an order for custody and access to a child. Among the factors to consider are; the age of the child, the importance of a child to be with the parents unless the child is persistently abused, the need for continuity in the care and control of the child, the views of the child if independently given, the need to keep siblings together, and any other relevant matter.

There are authorities and they are legion that the paramount consideration in an application for maintenance is the welfare principle irrespective of the wishes of the parties to the application. In the case of **Opoku-Owusu v. Opoku-Owusu** (1973) 2 GLR 349, the Court held @ page 354 as 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...”*

Thus, in **Ansah v. Ansah** [982-83] GLR 1127 at page 1133, where the Court awarded custody of a child to her aunt who had the care and control of the child with reasonable access to the biological mother who applied for custody in a divorce case, the Court held that:

“the duty of the court with regard to custody of children is to make an order which is reasonable for the benefit of the children...Whilst the welfare of the children is the first and paramount consideration, the claims of justice cannot be overlooked.

In the instant case, the parties are divorced but they are permanently connected by virtue of the child between them. The applicant has deposed that after the dissolution of the marriage, she has re-married and with the help of her new husband, she has provided a loving home for the child and provided her with all her basic needs. The respondent, on the other hand, the applicant contends, has failed to maintain the child. The applicant deposed that the respondent is making life a living hell for herself and the child since he has a violent disposition and threatens to harm her and the child without any provocation. According to her, the respondent extends his erratic behaviour to the school of the child where he attempted to forcefully remove the child from the school. The applicant has further put the mental state of the respondent in issue to explain his behaviour but the respondent failed to appear to respond to the application. Consequently, the behaviour of the respondent deposed to by the applicant on record remains unchallenged.

The court also, in accordance with **Section 11** of Act 560 interviewed the child who by reason of her age is capable of expressing an opinion in making decisions regarding her well-being. The twelve-year-old appears well groomed and settled in her environment and based on the depositions

contained in the affidavit in support of the application and the views expressed by her, I find no justification in removing her from the care and control of the applicant. I accordingly grant custody of child to the applicant.

On the issue of access of the respondent to the child, from the affidavit evidence and the interview with the child, the unchallenged evidence on the violent behaviour exhibited by the respondent towards the applicant and the child is detrimental to the well-being of the child. The applicant has questioned the mental state of the respondent but he failed to appear for that to be determined for concrete findings of fact to be made. Assuming, *arguendo*, that the respondent has a mental capacity, I must state that a parent's mental illness *per se*, is not a basis for denying him or her custody or limiting access to a child, unless it impacts on his or her ability to provide nurturing care for the child. The underlying principle is the best interest of the child as opposed to the wishes of both parents. In the instant case, having considered the affidavit evidence and the views of the child independently given, I am of the considered opinion that it will be in the best interest of the child to limit the access of the respondent to her until such a time that a court of competent jurisdiction determines that his access to the child will in no way affect the well-being of the child.

CONCLUSION

In conclusion, I hereby grant custody of the child, Leticia Ansah Sagu to the applicant. The respondent is denied access until a court determines that his access to the child is not inimical to her well-being.

H/H AGNES OPOKU-BARNIEH
(CIRCUIT COURT JUDGE)